ous.[35] The owners may only recover compensation from the Crown for losses they suffer in rendering assistance if the action taken by the Director was not reasonably necessary to safeguard the environment or if the good expected from the action outweighs the damage suffered as a result of it.[36] It is an offence for the owners or master not to comply with the Director's instructions.[37] The only defences available to this charge are that the offending action was necessary to save life,[38] or was the promptest response available.[39] It is hoped that the Director will exercise this power with restraint when it comes into force with the rest of the marine pollution regime.

Conclusion

The Act has caused dramatic change to New Zealand's maritime law. The adoption of the Hague-Visby Rules was long overdue, in fact seven weeks overdue. The Act also provides for an efficient regime for the administration of the maritime industry. It is apparent, however, that many of the areas dealt with by the Act could be better dealt with in other legislation. Further, the focus of public debate on the liberalisation of coastal shipping, and the safety of pleasure craft, has left the Act with internal inconsistencies and seemingly incomplete.

*Charles Spillane**

*BA

35 Section 248(4)(a) and (b).
36 Section 251.
37 Section 253.
38 Section 253(2).
39 Section 253(3).

CASE NOTES

Martin v The District Court at Tauranga and Attorney-General (1995) 12 CRNZ 509. Court of Appeal. Cooke P, Richardson, Casey, Hardie Boys, and McKay JJ.

Martin v The District Court at Tauranga and Attorney-General[1] is a unanimous decision by the New Zealand Court of Appeal directing a stay of an indictment under s 25(b) of the New Zealand Bill of Rights Act 1990 ("the Act"). Section 25(b) provides for "[t]he right to be tried without undue delay". The case highlights the potential force of the Act in this area, but demonstrates that there are still many issues to be clarified.

Martin was charged with three counts of sexual violation in December 1992. He was in custody until January 1993, when he was granted bail subject to strict conditions. A jury trial was set for November 1993 in the Rotorua District Court. The case was relatively straightforward, and it was estimated that at most two days would be required for the trial. Four judges[2] stated that at this stage there had been no undue delay, with the total pre-trial period being less than a year.

A practice note had been issued by the Chief Justice and Chief District Court Judge, emphasising the importance of disposing promptly of charges of alleged sexual offending.[3] As outlined in the practice note, once a trial date has been set, any request for adjournment needs to be by way of application to the Court, and requires close scrutiny.

Despite this, the fixture was vacated unilaterally by the Crown Solicitor in Rotorua in late August 1993. No reason was given to counsel for the accused at the time. It was later revealed that the officer in charge of the case, who was to be a witness for the Crown, was planning an overseas trip in November. There was no suggestion that counsel for the accused consented to the vacation of the November fixture, or that Martin had waived his rights under s 25(b) of the Act.

In December 1993 Martin was arrested on an unrelated charge and was refused bail. The trial for the original charges was set for March 1994 in Hamilton, but did not eventuate because an earlier case took longer than expected. He remained in custody until May 1994.

Subsequently, an application was made in the Tauranga District Court[4] for an order under s 25(b) of the Act that no indictment should be presented and for a discharge or stay of proceedings. The application was dismissed. Judicial review of the decision was sought in the High Court,[5] but was also dismissed, resulting in an appeal to the Court of Appeal.

Background to the Decision – R v Morin[6]

President Cooke and McKay J accepted that the principles stated by the Supreme Court of Canada in *R v Morin* apply in New Zealand. That case

1 (1995) 12 CRNZ 509.
2 Cooke P, Richardson, Casey, and Hardie Boys JJ.
3 Published in Lawtalk 365, February 1992, 2.
4 *M v The Queen*, District Court, Tauranga, 3 June 1994 T 13/93 Judge Kearney.
5 [1995] 1 NZLR 491.
6 (1992) 12 CR (4th) 1.

concerned an application under s 11(b) of the Canadian Charter of Rights and Freedoms[7] which deals with the right to be tried within a reasonable time.

The majority in *Morin* held that the right was composed of three individual interests: the right to security, the right to liberty, and the right to a fair trial.

The approach taken in *Morin* involved balancing the following factors:[8]

1. The length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
   - (a) inherent time requirements of the case,
   - (b) actions of the accused,
   - (c) actions of the Crown,
   - (d) limits on institutional resources, and
   - (e) other reasons for delay; and
4. prejudice to the accused.

The case turned on the issue of prejudice to the accused. The majority held that prejudice can be actually proved in evidence, or inferred from evidence of a prolonged delay. The longer the delay, the more likely the inference will be drawn.

Lamer CJC strongly dissented.[9] He accepted the principles as outlined above, but differed with regard to proof of prejudice. Following the judgment of Cory J in the Supreme Court of Canada in *R v Askov*,[10] he argued that prejudice to the accused should be presumed by the very need to invoke the right. The Crown must rebut this presumption by showing that each of the three interests composing the right to trial without undue delay has not been affected.

The Judgments in Martin

Although the decision was unanimous, the judgments differed remarkably with respect to issues of prejudice and remedies for the breach of s 25(b).

President Cooke ignored the issue of prejudice, but stated that in deciding whether a delay is undue, a range of factors should be considered, including public or societal interest in the prosecution of crime.

He held that the standard remedy for undue delay should be a stay. He felt uneasy with the idea of continuing the trial and accompanying it with monetary compensation, preferring to prevent breaches of rights initially rather than allowing them to occur and then giving redress.

His Honour noted that the same result would not necessarily follow in other cases with a similar delay between charge and trial, and that each case needs consideration on its own facts. In this case, he placed significant weight on the fact

7 Part I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c.11.
8 Supra at note 6, at 12-13.
9 Ibid, 31-33.
10 (1990) 59 CCC (3d) 449.

that the overall delay was materially increased by the actions of the Crown Prosecutor, which accordingly tipped the balance.

President Cooke also commented on the delay in the court system, and noted that measures were being taken to reduce the backlog. He stated that a governmental failure to allocate adequate resources could not excuse clear breaches, but that ameliorating measures being taken by the Government are one factor to be considered, since any court would be reluctant to stay proceedings on the grounds of systematic delay only.

Justice Richardson took a narrow view of prejudice. He examined s 25(b) alongside s 25(a) which deals with the right to a fair hearing. He considered that issues of a fair trial would be irrelevant to a question of undue delay. This contrasts with the majority view in *Morin* that the fair trial aspect forms part of the evaluation of whether delay is unreasonable. It is the writer's view that to isolate the right to a fair trial from that of trial without undue delay is to make an artificial distinction. It is inherent in the nature of the rights that there is overlap, especially in cases when delay has resulted in unavailability of a witness or the dimming of memories which could prejudice an accused's defence.

As to remedy, Richardson J stated that where the delay has not affected the fairness of the trial, so as to attract consideration under s 25(a), it is arguable that vindication of the appellant's rights does not require the trial to be abandoned. Instead, the trial should be expedited and the breach redressed by an award of monetary compensation. He felt that compensation would also respect victims' rights, and the public interest in prosecuting alleged offenders. However, because there had been no argument as to alternative remedies, he also directed a stay.

His Honour did not mention the inevitable public outrage at the fact that a convicted criminal may be awarded damages while a victim gets nothing. However, in weighing it against the alternative of allowing an accused to go free without trial, it is submitted that compensation is the lesser of two evils.

Justice Casey interpreted prejudice to consist of prejudice both to the security and the liberty of the individual. The former encompasses vexations like stress, anxiety, and stigmatisation suffered by an accused awaiting trial for a long time. He accepted the view of Lamer CJC in *Morin*,[11] that the onus is on the Crown to prove absence of prejudice. Justice Casey also distanced s 25(a) from s 25(b), stating that s 25(b) is aimed at the perceived affront to human dignity caused by drawn-out legal process.

His Honour also expressed concern that by including prejudice in the determination of whether a delay is undue, too much weight could be attached to it, deflecting the purpose of the right which is to ensure the speedy disposal of charges.

Justice Hardie Boys stood in defence of the justice system, stating that in comparison to cases in other jurisdictions which can involve delays of many years, the delay in question was quite minor. In the writer's opinion, however, this is no justification for a system operating inefficiently, or struggling to cope with the resources allocated to it.

His Honour commented that an award of damages to a person who has been found guilty presents some difficulty. He also noted that in some circumstances delay can suit the accused, and thus the right under s 25(b) could be abused. He suggested that a person should not be entitled to plead undue delay unless earlier steps have been taken to protest, so that anticipatory remedies, such as a grant of

11 Supra at note 9 and accompanying text.

bail or an order for an early trial, can be provided.[12] A stay would only be acceptable if, despite these measures, the delay becomes undue. Therefore, while unconvinced that it should be the usual remedy for undue delay, his Honour directed a stay.

Justice McKay also found the delay to be clearly undue and directed a stay. He took the view that in assessing whether a delay is undue and in choosing an appropriate remedy, prejudice to the accused, whether in respect of a fair trial or other ways, is a relevant factor.

While he made no attempt to lay down a rule as to a reasonable period of delay, his Honour noted that in Scotland a trial must commence within twelve months of the original appearance for the offence.[13] He suggested that this rule indicated what is or should be attainable in New Zealand.

Conclusion

While the outcome may be deemed an appropriate one on its facts, the case is unsatisfactory in that it leaves many issues unresolved. The extraordinary circumstances involved meant that judgment could be given without having to answer the "hard" questions. The Court of Appeal explicitly declined to lay down any guidelines as to when delay could be considered "undue". Discussions of the issues of prejudice and appropriate remedies evidenced irreconcilable opinions.

The decision was a Bill of Rights triumph for Martin, but from the alleged victim's perspective, the result could be seen as a tragic failure of the justice system. There may however be benefits for society as a whole if, as a result of this decision, positive steps are taken to ensure situations such as this do not recur.

Jacqui Adams

Telecom Corporation of New Zealand Limited & Ors v Clear Communications Limited [1995] 1 NZLR 385. Privy Council. Lords Keith of Kinkel, Jauncey of Tullichettle, Browne-Wilkinson, Lloyd of Berwick and Nolan.

Telecom Corporation of New Zealand Ltd v Clear Communications Ltd[1] is the culmination of extensive negotiation and litigation between Telecom Corporation of New Zealand Limited ("Telecom"), which had enjoyed a virtual monopoly of the public telecommunications system in New Zealand, and Clear Communications Limited ("Clear"), which was seeking to enter two sectors of the system. In order to enter, Clear required access to the Public Service Telecommunications Network owned by Telecom. Negotiations between the parties as to the price and terms of interconnection broke down. Clear, alleging that Telecom had abused its dominant position in the market by refusing to provide access to it except on unacceptable terms, commenced proceedings under s 36 of the Commerce Act

12 The writer notes that requiring prior assertion in order to obtain relief may in itself raise many contentious issues. These did not necessitate consideration in *Martin* as defence counsel had made it clear that the accused was unhappy with the delay and was reserving his rights.

13 Section 101 of the Criminal Procedure (Scotland) Act 1975.

1 [1995] 1 NZLR 385 (PC).

1986 ("the Act").
Section 36(1) provides:

> No person who has a dominant position in a market shall use that position for the purpose of –
>
> (a) Restricting the entry of any person into that or any other market; or
>
> (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
>
> (c) Eliminating any person from that or any other market.

The History of the Case

In the High Court,[2] before Ellis J and Professor Maureen Brunt (an economist sitting as a lay member), Telecom propounded its "final position" for its access levy. This position priced the levy according to a rule based on the theories of three American economists, Professors Baumol and Willig and Dr Kahn. The Baumol-Willig rule ("the Rule"), as it became known, became the central issue of the litigation. It proposes that, in a perfectly contestable market (where there is ease of entry), a party selling to a competitor the facilities necessary to provide a service which that the seller firm could otherwise provide itself, must be permitted to charge a price equal to the revenues it would receive if it had in fact provided the service itself. The price will incorporate both the revenues which the seller forgoes in supplying to the other firm (the opportunity cost), and any other incremental cost entailed in the supply.

The High Court did not make a decision as to whether it considered a pricing regime based on the Rule to be a "use" of a dominant position, but preferred to decide on the ground that Telecom, in applying the Rule, did not have one of the anti-competitive purposes stated in s 36(1) of the Act. Therefore, in relation to this issue, Telecom had not breached s 36.[3]

In the Court of Appeal,[4] the Court focused its consideration on whether the Rule constitutes a proper basis for fixing an access levy, and decided it does not. Thus, the "use" requirement of s 36 was met. President Cooke stated that the correct principle applicable to the price of interconnection was:[5]

> [T]hat Telecom is entitled to a fair commercial return for granting Clear use of the network assets, without regard to the present monopoly. This means that opportunity cost should be ignored and the charge fixed on the basis of what a network owner not in competition for the custom of subscribers could reasonably charge for use of its facilities.

As to the requirement that Telecom had acted for one of the purposes set out in s 36(1), the Court found that the terms requested by Telecom could not have been justified in a fully competitive market, and were anti-competitive. Essentially Telecom, a monopoly, was asking Clear to indemnify it for any loss of custom.

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2 (1992) 5 TCLR 166.
3 The High Court did find s 36 breached on other grounds.
4 (1993) 4 NZBLC 103,340.
5 Ibid, 103,344.

Justice Gault also expressed concern that in basing its opportunity cost on its retail rental price to local business customers, Telecom could include monopoly rents in its interconnection price. His Honour was sceptical about a central feature of the Rule – that competition would eliminate these monopoly rents – because there would be a time lag inherent in Telecom revising its charges to Clear, which would give it the opportunity to exploit pricing margins.

The Decision

The Privy Council, in a single judgment delivered by Lord Browne-Wilkinson, overturned the decision of the Court of Appeal on this issue, but did not express the same view as the High Court.

Lord Browne-Wilkinson began by setting out the way in which s 36 was to be interpreted:[6]

> The issues are whether it has "used" that position and, if so, whether such use was "for the purpose of" producing results (a), (b) or (c) [of s 36(1)]. The use of a dominant position otherwise than for one of those purposes does not constitute a breach. Contrariwise, the fact that a person has acted in order to achieve one of the purposes (a), (b) or (c) does not constitute a breach unless he has used his dominant position to achieve those purposes.

His Lordship stated that Telecom's attempt to show that it did not have an anti-competitive purpose:[7]

> [W]as a hopeless task not only because it would be most improbable that Telecom lacked the purpose to deter its bitter rival, Clear, but also because its past conduct and certain of its internal memoranda show that in fact it did have that purpose.

Having established that the purpose requirement in s 36 was met, Lord Browne-Wilkinson went on to consider whether Telecom had used its dominant position. His Lordship accepted the Court of Appeal's view that the use and purpose requirements will not be separated easily. He stated that:[8]

> Although it is legitimate to infer "purpose" from use of a dominant position producing an anti-competitive effect, it may be dangerous to argue the converse ie that because the anti-competitive purpose was present, therefore there was use of a dominant position .... A monopolist is entitled, like everyone else, to compete with its competitors ...

The Court expressed reservations about the view of Gault J that, in deciding whether use has been made of a dominant position, it may be helpful to ask whether the defendant has acted reasonably or with justification.

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6 Supra at note 1, at 402.
7 Ibid, 403.
8 Ibid, 402.

> If this were, in itself, the test of "use" of a dominant position, then a monopolist firm would be placed in an impossible position. If asked by a competitor to provide an essential service the monopolist could have little idea what, in the future, a Court would find to be reasonable or justifiable. Different minds can easily reach different views on what is reasonable or justifiable .... In their Lordships' view, s 36 must be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful.[9]

In offering the Privy Council's view of the use requirement, Lord Browne-Wilkinson stated that:[10]

> It cannot be said that a person in a dominant market position "uses" that position for the purposes of s 36 [if] he acts in a way which a person not in a dominant position but otherwise in the same circumstances would have acted.[11]

The Court concluded that apart from the risk of monopoly rents, the Rule does reflect what a hypothetical supplier in a perfectly contestable market would charge, and thus would not constitute a use of a dominant position.

To determine whether the risk of monopoly rents had any effect on the use requirement, Lord Browne-Wilkinson examined the role of s 36 in the context of the Act as a whole. His Lordship considered that the prevention of monopoly rents is outside the application of s 36, and is within the province of Part IV of the Act, which provides for regulatory machinery to impose price restrictions on monopoly suppliers. He therefore accepted Telecom's submission that the existence of this machinery provides the necessary regulatory complement to the Rule. His Lordship opined that the Court of Appeal had given s 36 an interpretation which was too broad and which went beyond enforcing fair competition. He held it would be:[12]

> [W]rong to construe s 36 so as to extend its scope to produce a quasi-regulatory system which the Act expressly provides for, with all the necessary powers and safeguards, in another part of the Act.

The Court also held, in relation to Gault J's assertion that it would be unrealistic to leave the matter of monopoly profits to regulatory intervention because of the Government's policy of "light-handed regulation",[13] that government policy was irrelevant.

The Privy Council observed that the flaw in the Court of Appeal's analysis was that:[14]

> [A]ny monopolist faced with a request to supply a competitor would be forced to assess its whole financial structure with a view to putting a proper figure on the present value of capital investment and fixing a proper return on such a figure .... The position is made very much worse if, as is logically necessary, the monopolist must exclude not only monopoly profits but also excess charges due to monopoly inefficiency ie he must exclude monopoly rents as a whole.

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9 Ibid, 403.
10 Ibid.
11 The actual text uses the word "unless" instead of "if". It is clear from the context of the judgment that the Privy Council cannot have intended this meaning.
12 Supra at note 1, at 408.
13 Supra at note 4, at 103,359.
14 Supra at note 1, at 408.