JUDICIARY

Why we need specialist judges on the Supreme Court

There is a case for co-opting specialist judges to the Supreme Court in circumstances where it lacks sufficient expertise

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The decision to abandon access to the Privy Council was a bold move. It meant we have had to rely for our judges on a very small group of people.

We could have done as Hong Kong did and appointed some of the most competent judges in the common law world on an *ad hoc* basis to our highest court, but that didn't happen.

It is very important to New Zealand as a country that we staff our highest court with judges who can be relied upon to produce decisions of international standard. Our ability to attract investment depends upon the existence of a legal system of international competence.

Although there has been an unfortunate refusal to promote judicial specialisation, the aversion to specialisation does not seem to have applied so much to the Supreme Court.

Our highest court requires a tax specialist and Susan Glazebrook, formerly a tax partner in Simpson Grierson, was appointed.

Practical commercial expertise is required and Peter Blanchard, formerly a commercial/property/insolvency partner at Simpson Grierson, was appointed. Subsequently, Mark O'Regan, a commercial partner at Chapman Tripp, has taken on the role.

The recent appointment of Court of Appeal President Stephen Kós to the Supreme Court is important not only because of the need to staff the court with lawyers of international competence but also, from a trusts and equity perspective, it is useful to have a judge with a serious interest in these areas of the law.

Justice Kós was the primary author of the chapter on undue influence in *Equity & Trusts in New Zealand*. He has delivered some interesting papers on equity, including one in 2018 on the foundations of fiduciary law, which he traced back to Aristotle.

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As a judge he has written some significant decisions on fiduciary duties and economic duress (*Dold v Murphy*), Beddoe orders (*McCallum v McCallum*) and applications to the court by trustees seeking directions (*NZ Māori Council v Foulkes*).

Commercial experience is very important for the judges of our highest court. Few barristers have credible commercial experience but Kós P is an exception. He was chair of the Russell McVeagh partnership between 2003 and 2005 and in that role he supervised and managed a business earning scores of millions of dollars.

Lord Mansfield used to supplement his deficient knowledge of commerce by organising dinners with business people so he could learn what mattered to them.

There is a case for co-opting specialist judges to the Supreme Court in circumstances where it lacks sufficient expertise. For example, when Sir Thomas Gault was on the Supreme Court we had an IP lawyer of international renown but there is no longer a specialist in this area on the court.

When an appropriate case arises, the court should be able to co-opt a person with the necessary level of expertise, whether from lawyers within New Zealand or lawyers from off-shore, and not as an unfortunate compromise but as a matter of sensible practicality.

The Hong Kong Court of Final Appeal showed how such a system could work successfully. Sir Tom, by the way, was co-opted to that court so Hong Kong could get the benefit of his expertise in IP law.

I am sure the profession would join me in wishing Justice Kós a rewarding time on the Supreme Court and hope he will feel free to contribute to the expansion of our jurisprudence on many aspects of the laws concerning trusts and equity. ■

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