the children's retention, stated to be September 2011, there was a wrongful retention. Germany, he held, could not be said to have been the children's state of habitual residence at that time. It was concluded on these facts that given the children's habitual residence had been New Zealand up until 2010, there was no settled parental purpose to change the children's residence, and no underlying connection between the children and Germany.

The Judge then proceeded to consider, obiter, whether the various defences raised by the mother might have succeeded, if there had been a wrongful retention. With reference to the defences of consent and acquiescence, the Judge concluded that the father's actions in handing over the passport would not, on the case-law, have amounted to 'consent' in relation to the son; but, on the other hand, the father could be said to have 'acquiesced' to the daughter staying in New Zealand. His Honour also considered whether the 'child objection' defence could potentially have been relevant. Here, though, Judge Boshier decided that the children's views fell short of amounting to an 'objection' to return. An "objection", the judge said, carries with it a "notion of clarity and force in the way it is expressed" (para [63]).

Finally, the Judge considered, obiter, how he would have exercised his residual discretion, upon the assumption that the acquiescence defence had been successfully made out. His Honour characterised the eight-year-old girl's views as "material" in the exercise of that discretion (at [70]). The girl had a preference to stay in New Zealand, he said, and she was of a sufficient age for the Court to exercise discretion in favour of not returning her. Seemingly, then, the articulation of an appropriately mature child's views might be weighted more heavily by the Court in the exercise of its residual discretion than the Convention principles of return. This would be entirely consistent with the weighting accorded to the child's best interests under the Supreme Court plurality's approach to the exercise of discretion in *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289, [2007] NZFLR 195.

INTELLECTUAL PROPERTY

Anna Kingsbury

National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd
[2012] FCAFC 59

This Australian case arises from the latest in a series of conflicts between the entertainment industry and the electronic equipment industry, and this time the entertainment industry has come out on top, at least until the High Court of Australia considers the issues.

The case involved home users requesting copies of free to air television programming for later viewing, using a service based on cloud computing technology. It required the Court to consider the application of the "time-shifting" exception to copyright infringement in Australia. The case has potential implications for cloud computing services more broadly, and for the time-shifting exception.

Optus was providing a new subscription service, "TV Now", that enabled a subscriber to have free to air television programmes recorded and then played back at a time or times the subscriber chose, on either a personal computer or mobile device. The requested programmes could be played as many times as the subscriber wanted, but would be automatically deleted within 30 days. The TV Now system required copying and storing of requested programmes at Optus' data centre or cloud, leading to allegations of copyright infringement. Optus sought clarification from the Federal Court. National Rugby League Investments (the NRL), the Australian Football League (AFL) and Telstra Corporation cross-claimed, alleging infringement of their copyright in live broadcasts. The NRL and AFL owned the copyright in broadcasts of their matches, and they had granted Telstra (Optus' main competitor), an exclusive licence to communicate the free to air broadcast matches to the public by means of internet or mobile phone. Telstra had reportedly paid A$153 million to the AFL for a licence and Rugby League were in negotiations as to price.

At first instance the Federal Court held that the subscriber and not Optus was the maker of the recordings, so that Optus was not infringing because it was not making copies. He likened the service to the use of a VCR or DVR where the user makes copies on a home machine.

The NRL, AFL and Telstra appealed to the Full Federal Court. The Full Federal Court allowed the appeal. The Court identified two issues:

1. when one of the AFL or NRL matches was recorded for a subscriber, who was the maker of that recording? Optus, the subscriber, or both of them jointly?
2. if Optus was the maker of the recording, did the time-shifting defence in s 111 of the Copyright Act 1968 (Cth) apply?

On the first issue of who made the recordings, the Full Court differed from the trial Judge, and held that either Optus was the maker of the recordings, or alternatively (the preferred view) that Optus and the subscriber were jointly makers of the recordings. The Court said that Optus' role in the making of a copy was so pervasive that, even though entirely automated, it could not be disregarded when the "person" who did the act of copying was to be identified. The system performed the functions for which it was created by Optus. Optus was not merely making available its system to another who used it to copy a broadcast, rather it captured, copied, stored and made available for reward, a programme for later viewing by another. Optus was therefore infringing by making a copy, unless it could come within an exception.

The Full Court then considered whether Optus could bring itself within the scope of the time-shifting exception in s 111. The trial Judge did not have to consider s 111 because he had found that Optus did not make the copies.

Section 111 of the Copyright Act 1968 (Cth) provides:

> **Recording broadcasts for replaying at more convenient time**
>
> (1) This section applies if a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.
>
> (2) The making of the film or recording does not infringe copyright in the broadcast or in any work or other subject-matter included in the broadcast.

The Court said that there was an issue as to whether s 111 applied only to the maker of the film or sound recording or whether it could extend to a person making a copy not for his own private of domestic use but for the private and domestic use of someone else. The Court reviewed the legislative history of s 111, and concluded that:

> There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1). Optus may well be said to have copied programmes so that *others* can use the recorded programme for the purpose envisaged by s 111. Optus, though, makes no use itself of the copies as it frankly concedes. It merely stores them for 30 days. And its purpose in providing its service — and, hence in making copies of programmes for subscribers — is to derive such market advantage in the digital TV industry as its commercial exploitation can provide. Optus cannot invoke the s 111 exception.

The Court concluded that if Optus alone was the maker of the copies, then it had infringed the copyright interests of the AFL, the NRL partners and Telstra. If both Optus and the subscriber were the makers of the copies, then but for the operation of s 111, they each would be jointly and *severally* liable for doing the acts comprised in the copyright of the respective owners, but the subscriber could rely on s 111. Optus could not rely on s 111.

The Court emphasised that this decision was limited to the particular service provider-subscriber relationship in the TV Now service and to the particular technology used. Different relationships and different technologies might well yield different results. The Court also said that if s 111 was to be modified to include the technology at issue in the case, it required a legislative rather than a judicial choice.

This decision has been welcomed by sporting organisations including the NRL and AFL, who were concerned about the value of broadcasting rights for major events. Optus has now suspended its TV Now service, and has applied for leave to appeal to the High Court, so the case is not necessarily resolved. There is also lobbying taking place on both sides in relation to possible legislative amendment, and the matter is likely to be considered as part of the current Australian Law Reform Commission Review of the Copyright Act.

The precise facts of this case are unlikely to be replicated in New Zealand, where there is much more limited free to air sports broadcasting than in Australia. Most major sport is televised by Sky TV, which also offers its own My Sky DVR service. However, the issues may arise in other contexts, and the implications of the Full Federal Court's reasoning for New Zealand copyright law are interesting. Section 84 of the New Zealand Copyright Act 1994 contains a time shifting exception for copying of communication works, inserted in 2008. It provides that:

> Section 84 would protect the subscriber to a service like TV Now from action for infringement. However, on the reasoning of the Full Federal Court, it would not protect a service provider like Optus, if the service provider was found to have copied in terms of ss 16 and 30, because the service provider would not be recording solely for personal use. If a New Zealand court applied the Full Federal Court reasoning, a service like TV Now based on cloud computing would be found to infringe in New Zealand also, so that this form of time-shifting would not be available to consumers.

CONFLICTS

Tony Angelo

875 Frankton Road Ltd v Brookes and Harrison
[2012] NZHC 78

This case involved an appearance to protest jurisdiction under r 5.49 of the High Court Rules. The defendants had agreed to buy a property in Queenstown. They first became interested in the property because the company selling the property had come to London to advertise to interested buyers. The necessary financing arrangements were made over the phone with a person based in New Zealand, and the final contract was signed by the parent of one of the defendants in New Zealand. The proper law was New Zealand law. The purchase was never settled for a range of reasons relating to a change in purpose of the property (from short stay accommodation to long term rental accommodation) and the related loss of a potential GST refund. The High Court decided after a full survey of the law on forum conveniens that England was the more appropriate forum. Of particular interest is the finding that (1) the Financial Services and Markets Act 2000 (UK) was a complex and relevant law better dealt with in an English court, despite the fact that New Zealand was the proper law of the contract and (2) the existence of other proceedings against English defendants in the same position as the defendants were irrelevant to the determination of the appropriate forum in this litigation.

Kuehne + Nagel International AG v Commerce Commission
[2012] NZCA 221

This was an appeal from the decision in *Commerce Commission v Deutsche* Bahn CIV-2010-404-005479. The appeal was dismissed. The Commerce Commission claimed that the defendants had engaged in anti-competitive conduct overseas in relation to seven cartel agreements in breach of ss 27 and 90 of the Commerce Act 1986 (NZ). Proceedings were served outside New Zealand without leave. Jurisdiction was protested under r 5.49 of the High Court Rules, so r 6.29(1) applied. The requirement that the Commission establish it had a good arguable case that the claim fell wholly within one or more of the paragraphs of r 6.27 was the primary matter in dispute. It does not require that the plaintiff establish a prima facie case, but a sufficiently plausible foundation that the claim falls under one of the headings. The Commission relied on r 6.27(2)(j) which provides for service outside New Zealand without leave where any act or omission to which the claim relates was done or occurred in NZ, or any loss or damage to which the claim relates was sustained in NZ.

The immediate difficulty in this case was that all the contracts were entered into outside New Zealand. There was therefore a question whether the defendants could be considered to be "carrying on business in New Zealand". The defendant had within its group of companies an entity operating in New Zealand. The defendant itself did not carry on business in New Zealand. However it was noted that international defendants do use their New Zealand subsidiaries as instruments to give effect to agreements settled overseas but designed to affect, inter alia, New Zealand markets. There was in this case the necessary linkage for potential liability of the defendant with its subsidiary through s 90. Section 27(2) did apply to the giving effect to the cartel arrangements.

South Pacific Industrial Ltd v United Telecoms Ltd
[2012] NZHC 688

This was the first of a series of five judgments of Heath J (between 13 April and 9 May 2012) in relation to a New Zealand company's application for an order to restrain the defendant, an Indian company that was the part of a multi-national group of companies, from transporting its New Zealand machinery assets to India, and remitting the proceeds of the sale of other assets to India. The application was opposed on the basis that the plaintiff had agreed to arbitration.

SPI contracted with UTL to dismantle the parts at the Marsden B power station, which UTL had bought for the express purpose of dismantling and sending back to India. The contract had allowed for the removal of some asbestos, but only a few days into the dismantling it became clear that there was asbestos present in much greater quantities than had been anticipated. This meant that there was a greater amount of work for SPI to complete than had been anticipated. The dispute was about the extra amount of compensation that should be given for that work. The power station had been dismantled and was ready for shipping to India. Some scrap had been sold and the profits remitted to an account in India.

The plaintiff's application was intended to protect the plaintiff's ability to enforce any arbitral award it might obtain. It was held that courts may make freezing orders even if the dispute is before arbitration. The factors that the Court looked to in deciding the case were whether SPI had a good arguable case on its substantive claim, whether there were assets of UTL within the jurisdiction to which any orders could apply and whether there was a risk for the plaintiff from dissipation of the defendant's assets.

The initial decision was to grant an interim injunction pending further argument on the question of freezing orders. Subsequently the facts were discovered to be different from those understood at the first hearing and the formal order was that the defendant should make a security payment into a trust account pending resolution of the dispute between the parties. Substantive proceedings were stayed pending arbitration by consent of the parties. The judgment referred extensively to *Shaw v Narain* [1992] 2 NZLR 544 (CA) and provides a good review of the cases relating to freezing orders. It is interesting to note that in concluding its judgment the Court referred for support of its approach to the inherent jurisdiction of the Court as provided in s 16 of the Judicature Act 1908. The case highlights the difficulties of finding the right balance between protecting the interests of the plaintiff as a possible judgment creditor and the property rights pre-judgment of a defendant. ❒