IN THE COURT OF APPEAL OF NEW ZEALAND

CA12/2015
[2016] NZCA 525

BETWEEN	NEW ZEALAND BASING LIMITED Appellant
AND	DAVID BROWN First Respondent
AND	GLEN SYCAMORE Second Respondent

Hearing:	31 May 2016
Court:	Harrison, Miller and Winkelmann JJ
Counsel:	A H Waalkens QC and M G Lawlor for Appellant G M Pollak and HIK White for Respondents
Judgment:	4 November 2016 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The respondents must pay the appellant costs for a standard appeal on a 2B basis and usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

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Introduction

[1] Cathay Pacific is a Hong Kong-based international airline, employing about 3,000 pilots worldwide. Most pilots are based in Hong Kong but others are based in the United Kingdom, Germany, Canada, the United States of America, Australia and New Zealand. Through a wholly owned Hong Kong subsidiary, New Zealand Basing Ltd (NZBL), the airline entered into contracts of employment with a number of New Zealand-based pilots including Messrs David Brown and Glen Sycamore.

[2] Two terms of the contracts are particularly relevant. One obliged Messrs Brown and Sycamore to retire from service with Cathay Pacific on reaching the age of 55 years. The other provided for Hong Kong law to apply to the pilots' conditions of service.

[3] In determining an application for relief by Messrs Brown and Sycamore, the Employment Court declared that (a) the age discrimination provisions of New Zealand's Employment Relations Act 2000 (the ERA) apply to the pilots' employment by NZBL; and (b) it would be discriminatory under the Human Rights Act 1993 to require each of them to retire from employment on the ground of age.[1]

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1 *Brown v New Zealand Basing Ltd* [2014] NZEmpC 229, [2014] ERNZ 770 [EC judgment].

[4] NZBL appeals with leave on these two questions of law pursuant to s 214 of the ERA:[2]

(a) If the ERA applies, does it override the parties' agreement that the law of Hong Kong applies to their contract to employment?

(b) If the ERA does not apply, would the application of the law of Hong Kong to the contract of employment be contrary to public policy?

[5] The threshold issue underlying both questions is, as their terms recognise, whether the ERA applies to the contracts of employment. Our answer to that issue will largely determine the result of NZBL's appeal.

Background

[6] Messrs Brown and Sycamore joined Cathay Pacific as pilots in the early 1990s. They were based originally in Hong Kong but in the mid 1990s they relocated to the Australasian base in Sydney which allowed them to reside in Auckland. Following that change they were employed along with other New Zealand-based crew by Veta Ltd, a Cathay Pacific subsidiary incorporated in Hong Kong.

[7] In about 2001 Cathay Pacific formed NZBL to avoid a potential tax issue arising from Veta's participation in the airline's employment arrangements. The new structure separated New Zealand from the Australasian base and created Auckland as a permanent base. The pilots resigned from Veta and accepted formal offers from NZBL on the same terms of employment as those applying previously.

[8] With effect from 1 July 2002 and 1 September 2002 respectively, Messrs Brown and Sycamore entered into identical new contracts of employment with NZBL incorporating "NZB Conditions of Service 2002" (CoS02). Materially, the contracts were subject to and incorporated a letter of offer from NZBL to the pilots including this provision:

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2 *New Zealand Basing Ltd v Brown* [2015] NZCA 168.

> This employment contract is governed by and shall be construed in accordance with the laws of Hong Kong and the parties hereto shall submit to the non-exclusive jurisdiction of the courts of Hong Kong.

The contracts themselves provided:[3]

> **2. Application of Law**
>
> …
>
> 2.2. These Conditions of Service, which form part of the contract of employment between the Company and the Officer, will in all cases and in all respects be interpreted in accordance with the law as set out in the various applicable ordinances of the Hong Kong Special Administrative Region (Hong Kong SAR).
>
> …
>
> **35. Retirement**
>
> 35.1. The normal retirement age is fifty five (55) years of age. An officer will be deemed to have reached normal Retirement Age on the day on which the Officer reached his/her fifty fifth (55^{th}) birthday.

[9] Global legal developments provide a necessary backdrop to NZBL's present employment arrangements. In 2003 five London-based pilots employed by Veta and related entities filed originating applications against Cathay Pacific in the London South Employment Tribunal. The pilots complained that the airline had unfairly dismissed them on reaching the age of 55 years. At issue was the territorial scope of the Employment Relations Act 1996 (UK) (the UK Act).

[10] In a threefold decision delivered in 2006 — *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts v Veta Ltd* (*Crofts*) — the House of Lords upheld the pilots' claim that the UK Act applied to their employment contract with Veta including the right pursuant to s 94(1) not to be unfairly dismissed.[4] In reliance on factual findings made by the Employment Tribunal, the Lords were satisfied that London was the centre of Mr Croft's operations. Mr Croft was a peripatetic employee whose work as a pilot necessarily took him many different places. London

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[3] It was common ground before us that cl 2.2 of CoS02 took effect in all respects as an agreed choice of Hong Kong law; and that all conditions of service, including the obligation to retire at 55 years of age, are therefore governed by the relevant Hong Kong statutory provisions.

[4] *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts v Veta Ltd* [2006] UKHL 3, [2006] 1 All ER 823 [*Crofts*].

was his working base and the place of his employment for the purposes of the unlawful dismissal provisions of the UK Act.

[11] Also, from November 2004 the International Civil Aviation Organisation (ICAO) revised the age standard for retirement of pilots so that 65 years became the international norm subject to certain conditions.[5]

[12] As a consequence of *Crofts*, Cathay Pacific undertook a comprehensive review of all local laws where its basing companies operated. The airline decided to revise its contractual arrangements to recognise that they would be governed by the employment law of the base jurisdiction. In October 2007 NZBL sent Messrs Brown and Sycamore a document advising them of Cathay Pacific's "on-shoring" process and of its intention to revisit the age of retirement of pilots to reflect local labour laws. NZBL also advised Messrs Brown and Sycamore of its intention to implement new Conditions of Service 2008 (CoS08) for all pilots employed after 1 January 2008.

[13] In 2009 Cathay Pacific (and therefore NZBL) offered all of its pilots an election to enter into new contracts of employment incorporating CoS08, which materially departed from CoS02 in two related respects: the age of retirement was increased from 55 years to 65 years but a lower pay scale would apply in the interim. At that time Messrs Brown and Sycamore elected not to transfer to CoS08 because they said they understood that NZBL would soon increase the retirement age to 65 years under CoS02 — probably by the end of 2009 — and they were reluctant to lose the benefits otherwise available under their existing contracts. In Mr Brown's words, he did not see why he should "bargain [his] salary in order to work longer".

[14] In due course the on-shoring process was effected for pilots based in the United Kingdom, Canada and Australia, introducing express choices of local law and

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[5] The relevant standard now provides that a Contracting State to the Chicago Convention is permitted to issue a licence to a pilot in command of aircrafts engaged in international commercial air transport until their 60th birthday or, in the case of operations with more than one pilot where the other pilot is younger than 60 years of age, their 65th birthday: Convention on International Civil Aviation [Chicago Convention] 1175 UNTS 126 (opened for signature 7 December 1944, entered into force 4 April 1947), Annex 1 — Personnel Licensing, art 2.1.10.1.

lifting the age of retirement to 65 years. The same process did not occur for the 30 or so pilots based in New Zealand.

[15] In 2013 Mr Sycamore requested NZBL to change his conditions of service from CoS02 to CoS08. Mr Brown made a similar request in early 2014. Both were declined. Messrs Brown and Sycamore reached the age of 55 years on 4 March 2015 and 24 September 2015 respectively. Both face dismissal from NZBL, which has agreed to defer enforcement pending the result of this proceeding.

[16] The pilots are presently employed as senior captains flying A340 and A330 aircraft, and are generally rostered for flights between Auckland International Airport and Cathay Pacific's hub at Hong Kong International Airport.

The employment issues

[17] In 2014 the parties filed a joint statement of problem in the Employment Relations Authority which outlined the facts giving rise to what was called "the employment relationship issue" before addressing "the captains' position". The proceeding was then removed to the Employment Court.

[18] The pilots claimed that the law of New Zealand, in particular the ERA and the Human Rights Act, governs their contracts of employment with NZBL so that neither can be the subject of termination on account of age. In a case where an airline pilot was demoted from command of a plane by reason of reaching the age of 60 years, the Supreme Court held that s 104(1)(c) of the ERA is "a straight prohibition on any termination of employment by reason of age" which in particular abolishes compulsory retirement ages.[6] Alternatively, the pilots claimed that the choice of law provision, even if sustainable on settled principles, should not apply on the ground of public policy.

[19] NZBL filed a statement of defence and notice of protest to jurisdiction. The company independently asserted that the law of Hong Kong applies, which does not protect an employee from age discrimination. It objected to the Employment Court's

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6 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [26].

jurisdiction to hear and determine the merits of the pilots' claim except for the preliminary question as to which system of law must govern the employment relationship.

[20] We assume that NZBL's notice of protest was based on its residence in Hong Kong and the general principles that a court does not lightly exercise its discretion to assume jurisdiction over foreign parties;[7] New Zealand courts respect the principle of restraint relating to the extraterritorial application of domestic law, whether against a foreign party or relating to conduct occurring outside New Zealand;[8] and the ERA only applies to New Zealand subjects or to foreign entities which have made themselves subject to New Zealand's jurisdiction.[9]

[21] NZBL supported its protest to the Employment Court's jurisdiction on the grounds that the employment contracts have the closest and most real connection with Hong Kong employment law and that the ERA did not apply because the employment contracts were formed in Hong Kong; NZBL is a Hong Kong company which is not registered in New Zealand; the significant portion of the pilots' tax liabilities are incurred in Hong Kong; the pilots are licensed by the Hong Kong Civil Aviation Department; other than starting and finishing their duties, the majority of the pilots' work occurs outside of New Zealand airspace; the pilots' training, administration and management occurs in Hong Kong; and the form and substance of the employment contracts relates principally to Hong Kong.

[22] The parties jointly sought:

> (a) Declarations as to which country's laws apply and whether or not, *if New Zealand law applies*, the exception in s 24 [of the Human Rights Act] applies;[10]

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7 *Wing Hung Printing Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [27].

8 *Harris v Commerce Commission* [2009] NZCA 84, (2009) 12 TCLR 379 at [20], approved in *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [30]–[31].

9 *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 (HL) at 145. This principle informs the specific provisions for service out of New Zealand under subpt 4 of pt 6 to the High Court Rules.

10 In view of our conclusion that New Zealand law does not apply, it is unnecessary for us to consider whether the exceptions to its application listed in s 24 of the Human Rights Act 1993 apply.

(b) *If it is declared that New Zealand law applies*, declarations regarding *the lawfulness or otherwise of NZBL's intention to retire the applicants* upon reaching the age of 55.

(Our emphasis.)

[23] The pilots do not argue that NZBL has submitted to the Employment Court's jurisdiction by pleading to the merits of the claim or by participating in a joint application for declaratory relief.[11] We assume that, for the purpose of determining the questions of law underlying their joint application, the parties agreed the Employment Court had jurisdiction to hear the dispute.

Employment Court decision

[24] Judge Corkill's declared starting point for determining the conflict of laws question was with the proper law of the contracts. He correctly noted NZBL's position that the contracts must be read subject to New Zealand's principles of private international law; and that the parties had submitted to "the non-exclusive jurisdiction of the courts of Hong Kong".[12] He recited that the pilots' case was advanced on the sole ground that the Court should not give effect to the parties' choice of Hong Kong law on public policy grounds.[13]

[25] Nevertheless, the Judge undertook a substantive inquiry into whether the choice of law was limited by the prohibition against contracting out in s 238 of the ERA. The Judge found that the "base test" articulated by Lord Hoffman in *Crofts* provided appropriate guidance when peripatetic employees assert discrimination;[14] and that as a matter of fact the pilots were based in Auckland.[15] He was satisfied that s 104(1)(c) of the ERA — the provision proscribing premature retirement — would apply to the pilots if New Zealand law governed the relationship rather than Hong Kong law; under the domestic system they would be discriminated against on

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11 Compare *Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 (HL) at 443–444 per Lord Fraser.

12 EC judgment, above n 1, at [61].

13 At [90].

14 At [82].

15 At [83]–[84].

the grounds of age if they were required to retire or resign at 65 years of age.[16] The Judge found that s 238 overrode the parties' agreed choice of law.[17]

[26] The Judge then addressed in the alternative the pilots' primary submission that the choice of law provision should be excluded on the ground of public policy. He was satisfied that unless this exception was applied the age discrimination provisions of the ERA would be undermined, causing "an affront to basic principles of justice and fairness".[18]

[27] Judge Corkill dismissed NZBL's protest to jurisdiction on the grounds either that s 238 of the ERA applied or alternatively because of public policy.[19] It is unclear to us how the Judge's answers to the two agreed questions of law, which were limited to identifying the proper law of the contracts, allowed him to determine NZBL's challenge to the jurisdiction of a New Zealand court. The issues of the proper law of the contract and the appropriate forum for hearing a dispute are discrete, although the former is a relevant factor within the latter assessment.[20]

[28] Before us Mr Pollak supported the Judge's conclusion and reasoning on the base test. Nevertheless, and consistently with his approach in the Employment Court, he described the question of whether s 238 applied as "diversionary". The thrust of Mr Pollak's argument, which we shall address later, was that the public policy exception applied to negate the parties' choice of law.

[29] Before addressing the substance of NZBL's appeal, we note that it was clearly Cathay Pacific's intention in 2007 that its future contractual relationships with pilots based in Auckland under CoS08 would comply with the New Zealand anti-discrimination laws by increasing the retirement age to 65 years. However, Messrs Brown and Sycamore elected not to take advantage of the airline's offer and substitute their employment contract with CoS08. We must determine the present

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16 At [87].
17 At [100].
18 At [113].
19 At [130].
20 See *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL) at 843 and 844–855 per Lord Goff, applied in *Wing Hung Printing Ltd*, above n 7, at [45].

dispute on the basis that the parties' employment relationship continued to be regulated by CoS02.

Choice of law principles

[30] We shall address more fully the principles of private international law governing the validity of choice of law provisions. But for introductory purposes we set them out in summary form as follows:

(a) When a court confronts a private problem with a foreign element, it must look for what has been called the "seat" of the legal relationship — that is, the legal system to which in its proper nature the relationship belongs or is subject.[21] Following the old English common law, which has diverged since accession to the European Union, the courts of New Zealand apply a well-settled choice of law process to identify the system that will resolve the issue on its merits. This determination of what law should apply is distinct from the related question of whether a court has jurisdiction to hear and decide the case.[22]

(b) The issue must first be characterised.[23] If an issue is characterised as contractual in nature, the relevant connecting factor is the proper law of the contract. This is presumptively the parties' bona fide and legal choice of law or, if the written agreement is silent on this point, the system with the "closest and most real connection" to the contractual relationship.[24]

(c) If this process leads to a foreign system governing the contract, a court may then consider the law of the forum to decide whether there

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21 J G Collier *Conflict of Laws* (3rd ed, Cambridge University Press, Cambridge, 2001) at 387.

22 Lord Collins of Mapesbury (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) [*Dicey*] at [1-003].

23 See *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599 at [32]–[40], applying *Macmillan Inc v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 (CA) at 391–392.

24 See *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 (HL) at 61–63 per Lord Diplock.

is a mandatory rule or public policy ground for overriding the proper law. The domicile of a party in the forum, like the pilots in the present case, does not generate a presumption that statutory instruments of the forum will govern the private relationship. However, the domicile of both parties in the forum may well mean a foreign election is not bona fide.

(d) So, in the context of an employment agreement with a foreign element, a New Zealand court need not consider the domestic regime unless and until (i) the choice of law process reveals the law governing the matter is in fact the law of the forum, in which case a New Zealand court would deal with the case as an ordinary dispute under the ERA; or (ii) a party seeks to override the foreign proper law by reference to extraordinary concerns such as public policy or a mandatory rule.

First question: the Employment Relations Act 2000

Transnational employment

[31] Disputes over conflict of laws and jurisdiction have a long and complex history. The modern world of peripatetic employment has raised a new range of conceptual and practical difficulties for private international law. They are at their most acute where an employee based in one country works for an employer based in another country and the employment services are to be largely performed outside the territorial limits of both jurisdictions.

[32] Airline pilots and crew present special problems for employment law. In *Crofts* Lord Hoffman described their risk of being regarded as "the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress".[25] But this fear is unfounded where private arrangements connect the employment relationship to a specific system of law, such as Hong Kong in this case.

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[25] *Crofts*, above n 4, at [31]. Lord Hoffman attributed this "flying Dutchmen" outcome to the dissenting view of Lord Phillips of Worth Matravers MR in *Crofts v Veta Ltd* [2005] EWCA Civ 599, [2005] ICR 1436.

The Employment Court's approach

[33] Judge Corkill used *Crofts* as the foundation for his finding on the first question that the ERA applies to the employment contracts and overrides the parties' choice of Hong Kong law. His reasons can be summarised in these steps:

(a) The ERA has no express territorial limits.[26] The application of the *Crofts* base test would not amount to a conclusion that the statute has extraterritorial application but that because the New Zealand pilots are based in New Zealand they are therefore subject to the laws within its territory.[27]

(b) The base test is not concerned with determining the proper law of the contract but with what law would ordinarily apply in the absence of a choice of law.[28] The base test was the appropriate determinant of whether the ERA applied to the substantive right in issue — that is, the right not to be unfairly dismissed on the ground of age.[29] In this respect, *Crofts* had applied the base test "notwithstanding the connections which existed with Hong Kong law under that document".[30]

(c) The pilots were based in Auckland for the purposes of their employment such that New Zealand laws applied to their employment contracts "subject to any particular exemptions".[31] Section 104(1)(c) of the ERA is a direct prohibition on any termination of employment by reason of age and in particular abolishes compulsory retirement ages. Thus, a mandatory retiring provision is prima facie discriminatory for the purposes of New Zealand employment law.[32]

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26 EC judgment, above n 1, at [77].
27 At [80].
28 At [81].
29 At [82].
30 At [81(b)].
31 At [84].
32 At [85], applying *Air New Zealand Ltd v McAlister*, above n 6.

As a result, s 104 of the ERA would govern the pilots' right to claim unfair dismissal.[33]

(d) If the parties' agreed choice of Hong Kong law applied, the result would be contrary to the provisions of the ERA.[34] Section 238 overrode the parties' choice of law because otherwise the parliamentary intention to regulate minimum legislative standards for employment agreements falling within the ERA would be frustrated.[35]

The proper law of the contracts

[34] The correct starting point is with the parties' request to the Employment Court to determine which of two available legal systems applied to their employment relationships. The Court's function was to determine the proper law of the contracts. The answer would provide the governing principles of law and inform the jurisdictional assessment of whether there was the necessary connection between the alleged breach of contract for unlawful dismissal and the forum. We repeat that the focal point of the pilots' pleaded case was that the parties' choice was defeated by public policy, not that s 238 had overriding effect.

[35] This was a classic conflict of laws problem. The proper law of the contract is the law chosen by the parties unless one of the recognised exceptions applies. The Judge himself correctly recognised this principle, referring to the statement in *Dicey, Morris & Collins on the Conflict of Laws* (*Dicey*) that the parties' choice of law is to be applied providing its application is not contrary to public policy and the choice is bona fide and legal.[36] The Judge accepted that the parties had expressly agreed to be bound by Hong Kong law.[37] He found affirmatively that their agreement was bona fide and legal.[38] As the Supreme Court of the United Kingdom recently confirmed, such an agreement must be respected as reflecting the parties'

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33 At [87].
34 At [101].
35 At [100].
36 At [63], quoting *Dicey*, above n 22, at [32-009].
37 At [65].
38 At [128]–[129].

expectations about how all their rights and obligations would be governed, including the statutory protection which the employees would enjoy.[39]

Overriding statutes

[36] The Judge also correctly described the effect of an overriding statute in these terms:

> [92] The following extract from *Dicey, Morris & Collins on the Conflict of Laws* describes the concept of an overriding statute as follows:[40]
>
> > *Overriding statutes*. Statutes of the fifth class are those which must be applied regardless of the normal rules of the conflict of laws, because the statute says so. … Overriding statutes are an exception to the general rule that statutes only apply if they form part of the applicable law. One of the main reasons for the overriding character of such legislation is that otherwise the intention of the legislature to regulate certain contractual matters could be frustrated if it were open to the parties to choose some foreign law to govern their contract.
> >
> > Laws of this kind are referred to as "mandatory rules" or *lois de police* or *lois d'application immédiate*. Where such legislation is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Thus in contract cases, United Kingdom legislation will be applied to affect a contract governed by foreign law if on its true construction the legislation is intended to override the general principle that legislation relating to contracts is presumed to apply only to contracts governed by the law of a part of the United Kingdom.
> >
> > …
> >
> > [O]verriding statutes … might be described as crystallised rules of public policy, because they lay down mandatory rules which the parties cannot contract out of, directly or indirectly.
> >
> > (Footnotes omitted.)

[37] The Judge said this:

> [91] If a New Zealand statute, as properly interpreted, having regard to its text and purpose, applies to the case before a court, the statute must be applied even if it has the effect of overriding a relevant conflict of laws rule.[41]

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39 See *Duncombe v Secretary of State for Children, Schools and Families (No 2)* [2011] UKSC 36, [2011] 4 A11 ER 1020 at [16].

40 *Dicey*, above n 22, at [1-053]–[1-054] and [1-061].

41 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [8]. An example of this principle is *Elwin v O'Regan* [1971] NZLR 1124 (SC) at 1129.

[38] Overriding statutes fall into a category of enactments which must be applied regardless of the normal rules of the conflict of laws. Mr Waalkens QC cited the example of s 137 of the Credit Contracts and Consumer Finance Act 2003, which provides:

> **137 Conflict of laws**
>
> This Act applies to a credit contract, guarantee, lease, or buy-back transaction if the contract, guarantee, lease, or transaction—
>
> (a) is governed by the law of New Zealand; or
>
> (b) would be governed by the law of New Zealand but for a choice of law provision in the contract, guarantee, lease, or transaction.

Express statements of legislative intent of this nature are exceptions to the general rule that statutes only apply if they form part of the otherwise applicable foreign law. Indeed, New Zealand's legislative reforms to the common law of contract make it plain that the Acts do not apply to any part of any contract "that is governed by a law other than New Zealand law".[42]

[39] Section 238 of the ERA, which the Judge held to have an overriding effect on the parties choice of law, provides:

> **238 No contracting out**
>
> The provisions of this Act have effect despite any provision to the contrary in any contract or agreement

[40] However, in attributing an overriding effect to s 238, and therefore declaring that the ERA took effect as an overriding mandatory statute, Judge Corkill fell into two material errors. The first relates to his reversal of the proper conflicts methodology through undue reliance on Lord Hoffman's reasoning in *Crofts*; and the second to his misreading of parliamentary intent. We address these points in turn.

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[42] Contractual Remedies Act 1979, s 14A; Contractual Mistakes Act 1977, s 11A; Contracts (Privity) Act 1982, s 13A. See also s 3 of the Illegal Contracts Act 1970 and cls 19, 32 and 58 of the Contract and Commercial Law Bill 2016 (134-1).

Distinguishing Crofts

[41] The Judge was diverted by *Crofts* to a finding that because the pilots are based in Auckland the laws of New Zealand would apply "subject to any particular exemptions which Parliament has seen fit to impose".[43] In this way he inverted the settled approach to contracts in conflicts jurisprudence: the courts must proceed from an assumption that the choice of the parties will govern their rights and obligations. The Judge erred in treating the prohibition in s 238 on contracting out of the ERA as the starting point and deserving of a "broad interpretation" such that it precludes private bargaining parties from electing to govern their relationship by a connected foreign system.[44]

[42] We repeat that the exceptions to applying a choice of law provision are settled and narrow. The Judge applied what he treated as an overriding provision to contracts which he did not recognise as governed by Hong Kong law. He applied s 238 to override the parties' choice because not to do so would be contrary to the ERA, not because it violated one of the settled exceptions to recognition of that choice. He said:

> [101] Applying s 238 as construed to the present circumstances, Mr Brown and Mr Sycamore as peripatetic employees based in New Zealand fall within the ambit of the ERA. The choice of law clause, if applied to the present facts, would provide an outcome that is contrary to the provisions of the ERA. The effect of s 238 is that the choice of law clause does not apply.

[43] However, an overriding mandatory effect can be asserted only after a court has determined that the otherwise applicable law is of a foreign system. In the context of transnational contracting, a mandatory rule of the forum displaces the foreign proper law of the contract and the presumptive principle of party autonomy. So in this case an overriding mandatory rule could have come into play only if the Employment Court had determined that the law of Hong Kong was the otherwise applicable law.

[44] We think the Judge was led into error by *Crofts*. The three appeals were heard together on the application of s 94(1) of the UK Act which materially provided

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[43] EC judgment, above n 1, at [82].
[44] At [100]–[101].

that "an employee has the right not to be unfairly dismissed".[45] Mr Crofts was a pilot employed by Cathay Pacific who lived in England. The Employment Tribunal found he was based at Heathrow Airport, London. The airline is based in Hong Kong. The other appellants, Messrs Lawson and Botham, were expatriates employed to work abroad by, respectively, a security outsourcing company and the Ministry of Defence.

[45] The House of Lords decided *Crofts* against a distinctive statutory background. What was at issue was the territorial scope of s 94(1) in the light of this express provision:

> **204 Law governing employment**
>
> (a) For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or part of the United Kingdom, or not.

[46] Two statutory factors are material. First, the Rome Convention applied in the United Kingdom,[46] which governed choice of law in the European Union but from 17 December 2009 was superseded by the Rome I Regulation.[47] The Rome Convention recognised that the overriding provisions of English law can apply "irrespective of the law otherwise applicable to the contract".[48] Accordingly, English mandatory rules applied to a contract of employment even if it was expressly governed otherwise by foreign law.[49] Lord Hoffman did not refer to either s 204(1) or the Rome Convention. Nor did he refer to the parties' agreement that the law of Hong Kong applied to Mr Crofts' contract or to the features of that contract which connected it more closely to Hong Kong than the United Kingdom. We must assume that all parties proceeded on the common ground of acceptance that s 204(1) was of

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45 *Crofts*, above n 4.

46 Convention on the law applicable to contractual obligations [1980] OJ L266/1, as incorporated by art 17 in sch 1 to the Contracts (Applicable Law) Act 1990 (UK) [Rome Convention].

47 Regulation 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

48 Rome Convention, above n 46, art 7.2. This wording is preserved in art 9.2 of the Rome I Regulation: see *Halsbury's Laws of England* (5th ed, 2011, online ed) vol 19 Conflict of Laws at [638].

49 See *Lawson v Serco Ltd* [2004] EWCA Civ 12, [2004] ICR 204 at [18]–[19], reversed on appeal by the House of Lords in *Crofts* but not on this point.

overriding effect in mandating what would otherwise be a judicial assessment of the proper law of the contract.[50]

[47] Second, s 94(1) was enacted in 1999 following the repeal of what was previously s 196(2) of the UK Act, which had excluded the right not to be unfairly dismissed from employment "where under the employee's contract of employment he ordinarily works outside Great Britain". The amending provision was introduced with the ministerial explanation that the UK Act would apply where there was a "proper connection" with the United Kingdom.[51] But the law was in a state of uncertainty when *Crofts* fell for decision. In particular, following the repeal of s 196, what was the territorial extent of s 94(1) and how was the proper connection to be applied?

[48] Against this background Lord Hoffman introduced his judgment in *Crofts* by noting, with reference to s 94(1), that the UK Act contained no geographical limitations but some must necessarily be implied:[52]

> It is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain. The argument has been over what those limitations should be. Putting the question in the traditional terms of the *conflict of laws*, what *connection* between Great Britain and the employment relationship is required to make s 94(1) *the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair.* The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have jurisdiction to decide upon the fairness of the dismissal if (but only if) s 94(1) *is the appropriate choice of law*.
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> (Our emphasis.)

[49] Lord Hoffman described the issue as a question of law whether s 94(1) applied to the particular employment relationship notwithstanding its foreign elements.[53] His consideration of Mr Crofts' discrete appeal was relatively brief. In summary, he found that s 94(1) was not to be construed by formulating "an ancillary rule of territorial scope";[54] and that the question was whether Mr Crofts

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50 This had been made plain in the lower Court: *Crofts v Veta Ltd*, above n 25, at [33].
51 *Dicey*, above n 22, at [33-283].
52 *Crofts*, above n 4, at [1].
53 At [23]–[24].
54 At [23].

was working in the United Kingdom at the time of his dismissal.[55] The genesis for this test was Lord Hoffman's conclusion that Parliament had intended the employee's ordinary place of work to define the territorial scope of the UK Act now that s 196 has been repealed.[56]

[50] Lord Hoffman found that the only "sensible alternative" to an international airline pilot's condemnation to a life of flying without a jurisdiction of redress was to ask where he or she was based.[57] In reliance on the Employment Tribunal's findings of fact, he was satisfied that the pilots were based in England. The connection test was met by applying this criterion alone. Most of Lord Hoffman's judgment was devoted to the position of the two expatriate appellants.[58] He found their cases more difficult because the concept of a base, which is a useful means of locating the workplace of a peripatetic employee, is of no assistance in that different inquiry.[59]

[51] We note that two later decisions of the Supreme Court of the United Kingdom have signalled a move away from *Crofts*, confirming that the parties' agreed choice of law is a highly material factor when applying the connection test. In *Duncombe v Secretary of State for Children, Schools and Families (No 2)* the British Government had employed teachers to work in European schools established under an international convention principally for the children of officials and employees of European Union institutions.[60] The employment contract expressly provided that it was governed by English law and included an English jurisdiction clause. Mr Duncombe was seconded to a school in Germany. He claimed his dismissal from employment there was unfair.

[52] The Supreme Court found that the choice of law provision was decisive in bringing the claim within the jurisdiction of the UK Act when taken together with (a) the employer's close connection with the United Kingdom and (b) the employee's employment in an international enclave without connection to the country where he

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55 At [29].
56 At [30]–[31], applying *Todd v British Midland Airways Ltd* [1978] ICR 959 (CA) at 964 per Lord Denning MR.
57 At [31].
58 At [35]–[40].
59 At [35].
60 *Duncombe*, above n 39, at [16].

was located.[61] After noting that *Crofts* did not refer to the agreed choice of law, Lady Hale held that factor "must be relevant to the expectation of each party as to the protection which the employees would enjoy".[62] While noting that "[t]here is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples", the general principle which Lady Hale derived from *Crofts* was that "the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law".[63] We interpolate to note that this approach is better aligned with the orthodox assessment of connecting factors to determine the closest and most real connection when a contract is silent as to the governing law.

[53] A similar question arose in *Ravat v Halliburton Manufacturing and Services Ltd*: what was the employment status of those who lived in England and were employed by an English company but travelled to and from home to work overseas?[64] Lord Hope noted that "one has to search quite carefully through Lord Hoffman's speech [in *Crofts*] for statements of general principle".[65] He also agreed with *Duncombe* on the stronger connection test.[66] Lord Hope confirmed that the proper law of the parties' contract was directly relevant to the connection inquiry.[67]

[54] We regard *Crofts* as distinguishable in New Zealand's different statutory context.[68] By virtue of s 204(1), the UK Act is an example of overriding legislation which governs the employment relationship notwithstanding that the law of another country would otherwise apply. This is a recognised exception to the general principle of private international law that a domestic statute affecting a contract only applies to a contract governed by that system of law.[69] Without an overriding provision of this nature in New Zealand, the parties' choice of law must prevail.

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61 At [16].
62 At [16].
63 At [8].
64 *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] All ER 905 at [1].
65 At [14].
66 At [27].
67 At [32].
68 Indeed, at least one scholar has argued it is problematic authority in the English context: Uglješa Grušic "The Territorial Scope of Employment Legislation and Choice of Law" (2012) 75(5) Modern Law Review 722.
69 *Dicey*, above n 22, at [1-053], [1-057] and [33-278].

[55] Moreover, as noted, Lord Hoffman rationalised the base test in *Crofts* as the necessary means of providing redress in England to an international pilot who would otherwise be without a jurisdiction. This statement was based on the premise that Hong Kong law did not apply. But where the choice of law provision remains, the pilot has a right of redress in the jurisdiction of the Hong Kong Special Administrative Region of the People's Republic of China. The parties' choice of law provision must be of central if not determinative effect in interpreting the application of employment legislation. Contrary to Lord Hoffman's proposition, the pilots in this case were not without redress in a forum other than New Zealand: they had comprehensive rights of recourse under Hong Kong law.

Parliamentary intent

[56] The obvious purpose of s 238 is to ensure that employees do not surrender any of their rights of employment protection available under the ERA during the bargaining process.[70] It expresses Parliament's intent that employment contracts formed in New Zealand and performed here should comply with the minimum legislative standards prescribed by the ERA.[71] In a conflict of laws setting, s 238 applies where parties have purported to elect expressly as the proper law of their contract of employment a foreign system with little or no connection to the New Zealand contract.[72] There is no suggestion that these qualifying features apply to the pilots' contracts.

[57] We agree with Mr Waalkens that s 238 cannot be read as expressing Parliament's intention that it would apply to displace or override settled rules of private international law. If Judge Corkill were correct, all of the provisions of the ERA would apply to these contracts, thereby overriding all the agreed provisions. Section 238 does not of itself justify the wholesale replacement of carefully drafted transnational bargains with New Zealand's employment regime, even if a court considers the domestic protections more advanced or attractive than those under the foreign law of contract. There is nothing in the ERA's language to suggest that its

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70 Gordon Anderson and others *Mazengarb's Employment Law* (online looseleaf ed, LexisNexis) at [ERA238.2], quoted in EC judgment, above n 1, at [98].

71 *Musashi Pty Ltd v Moore* [2002] 1 ERNZ 203 (EmpC) at [55].

72 *Clifford v Rentokil Ltd* [1995] 1 ERNZ 407 (EmpC) at 434.

provisions were intended to apply irrespective of the parties' choice of law.[73] Our view complements this Court's conclusion in *Governor of Pitcairn and Associated Islands v Sutton*, which considered the relationship between the ERA's predecessor and the public international law doctrine of sovereign immunity.[74]

[58] The choice of law clause assumes decisive significance. In circumstances where the majority of the employees' services are performed outside the territorial limits of the competing jurisdictions, it reflects the parties' consensus that the laws of the foreign jurisdiction should govern all aspects of the employment relationship. We are not satisfied that Parliament intended the ERA should prevail in such a situation.

[59] In our view, Judge Corkill erred in finding that s 238 of the ERA overrode the parties' agreement that the law of Hong Kong applies to their contract of employment. The law of Hong Kong is the proper law of the contracts, which is not affected by New Zealand's employment legislation.

Second question: the public policy exception

The Employment Court's approach

[60] Judge Corkill decided that, even if s 238 of the ERA does not have overriding mandatory effect, the parties' agreed choice of law should not apply on public policy grounds: instead, the provisions of the ERA and the Human Rights Act apply.[75] He was satisfied that recognition of Hong Kong rather than New Zealand law would be unjust or unconscionable.[76] He relied on two factors. One was the significant importance to be attached to New Zealand's age discrimination legislation; otherwise there would be an affront to basic principles of justice and fairness.[77] The other was NZBL's misconduct in the particular circumstances by attempting to "bargain a fundamental human right".[78]

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73 Compare *Cox v Ergo Versicherung AG (formerly Victoria)* [2014] UKSC 22, [2014] AC 1379 at [29] per Lord Sumption.
74 *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 438.
75 EC judgment, above n 1, at [127].
76 At [126].
77 At [111]–[113] and [126].
78 At [114]–[126].

[61] In defence of the Judge's approach, Mr Pollak noted that Hong Kong does not yet have an age discrimination directive or law and it would be contrary to New Zealand's public policy that its citizens or residents could be discriminated against by a foreign corporation when operating in New Zealand. He characterised NZBL's intentions as outrageous. He emphasised the contradiction of the company's own stated intentions following the decision in *Crofts* to discontinue its practice of age discrimination and that the company does not suggest that either pilot is unsuited to continue flying until the age of 65 years. Mr Pollak also noted that Cathay Pacific only applies its age discrimination policy in Hong Kong and to those pilots still subject to CoS02 in New Zealand; in all other jurisdictions it has abandoned its discriminatory policies. In this respect, he submitted, the Judge gave proper weight to NZBL's failure to carry out its full on-shoring process, which would have stipulated that New Zealand law applied and thereby comply with local legislation against age discrimination.

[62] Mr Waalkens does not challenge the Judge's adoption of the test applied by this Court in *Reeves v OneWorld Challenge LLC* in determining whether enforcement in New Zealand of a foreign judgment would offend local public policy.[79] Mr Waalkens accepts that the same test is applicable to enforcement of a contractual provision. The question, he submitted, is whether enforcement would:[80]

> … "shock the conscience" of a reasonable New Zealander, or be contrary to New Zealand's view of basic morality or a violation of essential principles of justice or moral interests in New Zealand.

[63] Judge Corkill noted that it was indeed the pilots' primary submission "that public policy precludes application of the choice of law clause".[81] The Judge expressed his reasons in these terms:

> [111] Parliament has seen fit to include age as a prohibited ground of discrimination as one of a number of deeply held values that bear on the very essence of human identity. In the case of employment, that identity relates to the right to work, which may have a significant and inherent value of its own.

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79 *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA).
80 At [67].
81 EC judgment, above n 1, at [103].

> [112] Unlike New Zealand law, Hong Kong law does not provide for protections against age discrimination. Were the law of Hong Kong to apply, Mr Brown and Mr Sycamore would be treated differently on the basis of their age, and not on their merits as individuals. This is unjust given the many years of service each of them have given to Cathay Pacific and its subsidiaries, and to the high degree of expertise they have acquired, and undoubtedly have demonstrated, over that period. No evidence has been provided which suggests they are, on the grounds of age unsuited to continue their chosen occupations beyond age 55. They both wish to be able to continue in the current careers, and to work accordingly. The fact that the only reason they cannot is because, without any justification, a contractual terms says so is a violation of the essential principles of justice because it involves a very serious infringement of a basic human right.
>
> [113] The potential application of the age discrimination provisions of the ERA is a very significant factor in the present case. It suggests the public policy exception should indeed be applied, since otherwise there would be an affront to basic principles of justice and fairness. This finding alone is sufficient to establish the public policy exception.

Principles

[64] The principled rationale for the Judge's finding must be that it would be contrary to the public policy of New Zealand to give effect to the parties' choice of Hong Kong law because that law does not protect an employee against discrimination on the ground of age. The corollary is that if the parties had chosen New Zealand law, the only other available system of law, the Court would give full effect to that choice. That is because the ERA and the Human Rights Act protect an employee against unjust dismissal.

[65] While it is well settled that party autonomy is not absolute,[82] we note that a forum court's discretion to refuse recognition of an agreed choice of law is of an exceptional nature. There is a need for certainty and confidence in recognising and enforcing agreements which regulate transnational activities. A finding of a violation of domestic public policy impeaches the contract by condemning the foreign law which would otherwise apply.[83] Accordingly, the threshold is high. In the words of one United States court:[84]

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82 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC).

83 *Beals v Saldanha* [2003] 3 SCR 416 at [75], adopted in *Reeves*, above n 79, at [50]–[51].

84 *Tucker v R A Hanson Co* (1992) 956 F 2d 215 at 218, quoted in Alex Mills "The Dimensions of Public Policy in Private International Law" (2008) 4(2) Journal of Private International Law 201 at 205.

> Since every law is an expression of the public policy of the state, some higher threshold is needed to prevent the forum's law from being applied in every case. A strict construction of the public policy exception [is] necessary to prevent the whole field of conflicts of law from collapsing in on itself.

[66] Moreover, as the authors of *Dicey* note:[85]

> [I]t is the *application* of foreign law to the particular case, and not the foreign law in the abstract which must be incompatible with [New Zealand] public policy. This has two consequences. First, although there may be extreme cases of laws which represent such a serious infringement of human rights that they should not be recognised at all, in the normal case a foreign law should be excluded only when its application is contrary to public policy in the particular case. Secondly, the mere fact that a foreign contract contains a provision which would in a [New Zealand] contract be contrary to public policy will not necessarily makes its enforcement in [New Zealand] contrary to public policy.
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> (Emphasis in original; footnotes omitted.)

[67] The question is whether recognition of a foreign law which does not protect against age discrimination would shock the conscience of a reasonable New Zealander, be contrary to a New Zealander's view of basic morality or violate an essential principle of justice or moral interests.[86] The touchstone is whether the result of applying the foreign law would be wholly alien to the fundamental requirements of justice as administered by a New Zealand court: "differences do not in themselves furnish reason why the forum court should decline to apply the foreign law".[87]

[68] The frequently cited exemplar of this standard is a 1941 decree of the National Socialist Government of Germany. Jewish émigrés were deprived of their German nationality and confiscation of their property was allowed. A law of that nature would so gravely infringe human rights that courts of a civilised country

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85 *Dicey*, above n 22, at [32-185].

86 It is unnecessary for us to explore whether the test for applying the public policy exception to foreign law differs as between the recognition or enforcement of contracts and the enforcement of a judgment. A unitary standard appears to have been adopted in Canada: *Society of Lloyd's v Meinzer* (2001) 210 DLR (4th) 519 (Ont:CA) at [60] per Feldman JA, quoted in *Reeves*, above n 79, at [61]. While the requirement for comity is not as obvious when a private bargain remains to be transformed by the judicial process into an authoritative foreign judgment, it is logical to apply the same principle under the presumption of enforcement of the contract in the foreign forum.

87 *Kuwait Airways Corporation v Iraqi Airways Company & Ors* [2002] UKHL 19, [2002] 2 AC 883 at [15].

should not recognise it as law at all,[88] exemplifying the extraordinary threshold for exclusion of foreign law on public policy grounds. Of course, the morally repugnant lawmaking of the Third Reich represents a high watermark. But the example demonstrates that under the established test the policy infringement must be of a fundamental or universal value, not simply the result of a ranking within a spectrum of relative values which are recognised in one legal system but not the other.[89] Our courts must respect the freedom of sovereign states to allocate the legislative effect of these values when weighed against others without incurring the condemnation of its laws by the judicial arm of another state as being offensive to the fundamental requirements of justice.

[69] We do not preclude use of the public policy exception in employment contracts, which may be characterised by power imbalances and a risk of exploitation. Many New Zealanders are now employed — or engaged as independent contractors — to provide services within New Zealand for transnational operators on foreign terms and conditions. But in the absence of legislative intervention the same standard applies to them: the contract must produce an outcome that would shock the conscience of a reasonable New Zealander. This flexible test provides for the social evolution of moral expectations.

Our analysis

[70] Judge Corkill did not refer to these principles, quoting instead this statement from the *Laws of New Zealand*:[90]

> **14 Public policy**
>
> Exceptionally, New Zealand Courts will not enforce or recognise a right conferred or a duty imposed by a foreign law when, in the particular case, this would be contrary to a fundamental policy of New Zealand law. The Courts may therefore refuse in certain cases to apply foreign law if to do so would in the particular circumstances be contrary to New Zealand's interests,

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88 *Oppenheimer v Cattermole* [1976] AC 249 (HL) at 277–278.

89 Contrast the lower standard applied by William Young J in his dissenting view that "the rules of law which deny confidentiality to iniquity are grounded in principles of public policy on any conceivable approach to that concept": *Reeves*, above n 79, at [102]–[103]. The Judge was of the mind that, while the case concerned a judgment obtained in the United States, in reality the context of the dispute ought to engage the domestic policy of New Zealand.

90 *Laws of New Zealand* Conflict of Laws: Choice of Law (online ed) at [14] (footnotes omitted), cited in EC judgment, above n 1, at [104].

> or contrary to justice or morality. So in cases involving personal status, the New Zealand Courts will refuse to recognise a discriminatory status existing under a foreign law, or a discriminatory incapacity or disability imposed by a foreign law. The Court retains a residual discretion to refuse to recognise a foreign status when, on the facts of the particular case, recognition would be unjust or unconscionable. However this discretion should be exercised very sparingly.

However, we observe that the authorities cited in this passage for the scope of the discretion involving personal status were concerned with laws preventing a person from undertaking a course of conduct such as marriage, trade, dealing with one's proprietary affairs or appearing in court.[91] In each case the issue was a purported suspension of public law rights of otherwise general application due to a person's individual status. This case is very different — its focus is on termination of a private relationship in accordance with a clear contractual provision.

[71] Judge Corkill's application of the public policy exception had two significant consequences: it both defeated the private bargaining intentions of the parties and also excluded the application of foreign law. He justified this conclusion by elevating age discrimination as an affront to a fundamental human right. Age, the Judge said, is "one of a number of deeply held values that bear on the essence of human identity".[92] However, we agree with Mr Waalkens that this assertion is contestable: the right to be free from age discrimination is not absolute, as the statutory framework confirms.

[72] By s 102 of the ERA an employee may pursue a personal grievance against an employer. By virtue of s 103(1)(c) a personal grievance includes a claim "that the employee has been discriminated against in the employee's employment". For these purposes, s 104(1)(c) provides that an employee is discriminated against in that

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91 By way of example, these cases were cited by the editors of *Laws of New Zealand*: *Baindail v Baindail* [1946] 1 All ER 342 (CA) involved the English courts recognising a marriage valid in India as an effective bar to any subsequent marriage in England; *Regazzoni v KC Sethia* [1956] 2 All ER 487 (CA) where the English courts refused to enforce an agreement which required the importation of jute bags from India to South Africa contrary to a bilateral trade embargo imposed due to South Africa's discriminatory treatment of Indian migrants; and *Re Langley's Settlement Trusts* [1961] 3 All ER 803 (CA) where the issue was the capacity to revoke an English settlement after the settlor was declared of statutory incompetence in California due to multiple sclerosis, applying *Worms v De Valdor* (1880) 49 LJ Ch 261 in which Fry LJ held that a discriminatory provision of the Napoleonic Code — which prevented "prodigals" from suing, defending, borrowing, and various other things without the assistance of a court-appointed adviser — did not bind English courts.

92 EC judgment, above n 1, at [111].

context if the employer, by reason directly or indirectly of any of the prohibited grounds of discrimination, "retires that employee, or requires or causes that employee to notice or resign". Age is expressly provided as a prohibited ground of discrimination by s 105(1)(i). By s 105(2), age has the meaning provided by s 21(1)(i)(ii) of the Human Rights Act: any age commencing with the age of 16 years.

[73] But the broader framework for regulating discrimination in employment reveals the flexibility of New Zealand's statutory recognition of the right to freedom from age discrimination. In particular, under the Human Rights Act:

(a) discrimination in employment matters can be relaxed in relation to crews of ships and aircraft, work involving national security, work performed outside New Zealand, authenticity and privacy, for purposes of religion, in relation to disability, age, employment-related retirement benefits, employment of a political nature, and in relation to family status;[93] and

(b) for discrimination occurring before 31 December 1999, the upper limit to the category is the age at which a person would qualify for national superannuation under s 7 of the New Zealand Superannuation and Retirement Income Act 2001.[94]

[74] We are satisfied that the statutory prohibition against an enforced retirement provision below the age of 65 years does not reflect an absolute value that must trump transnational contracting. Compared to grounds such as gender and ethnicity, international human rights law is largely silent on age discrimination.[95] We infer this is because the treatment of ageing persons is linked to and reflects a range of fiscal, social and cultural factors. And, whatever force the ground of age discrimination may have, it is substantially lessened when these contracts are considered as a whole.

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93 Human Rights Act, ss 22–35.

94 Section 21(1)(i)(i).

95 We note, however, that the Open-Ended Working Group on Ageing was established by a resolution of the United Nations General Assembly in 2010 with its mandate extended in 2012 to consider the possibility of a new instrument to strengthen the human rights of older people: *Towards a comprehensive and integral international legal instrument to protect and promote the rights and dignity of older persons* GA Res 67/139, LXVII A/RES/67/139 (2012).

[75] Mr Waalkens highlighted a number of features which financially benefit the pilots. One is their employment by an international airline based in Hong Kong where the pilots pay 100 per cent of their income tax at a flat rate of 15 per cent compared to a higher graduated tax liability in New Zealand. The Judge distinguished the effect of this favourable provision as follows:

> [30] This was the position until the Double Tax Agreements (Hong Kong) Order 2011 (Double Tax Order) was made pursuant to s BH 1 of the Income Tax Act 2007 (NZ), being an agreement between the Governments of New Zealand and Hong Kong regulating tax deductions for a range of employees in both countries. Article 14(3) applied to the pilots. For present purposes, its effect was that New Zealand crew would have tax deductions from their income only in Hong Kong. However, the pilots remained liable for tax in New Zealand on their world-wide income including that obtained from NZBL.

[76] We agree with Mr Waalkens that the Judge has misconstrued the effect of the double tax agreement. Its effect is to relieve the pilots of the obligation to pay tax in New Zealand because it imposes an obligation on both contracting parties — Hong Kong and New Zealand — to allow only Hong Kong to collect the income tax. The pilots do not remain liable in New Zealand on their income earned from NZBL. The pilots could only be liable to tax in New Zealand for income unrelated to their employment by NZBL.

[77] We are satisfied that the pilots are seeking to retain the advantages of a favourable income tax rate available by virtue of their employment in Hong Kong and the application of its taxation legislation, while arguing that Hong Kong law should be disregarded for the purposes of a claim of unfair dismissal. Further, the contract entitled the pilots to receive personal accident insurance, statutory holidays and a sickness allowance under Hong Kong law.[96] This is not a case where the chosen law fails to provide adequate protections for employees.

[78] In our judgment the pilots are seeking to call in aid a selective notion of public policy. The Employment Court was required to consider the package of rights and obligations contained in the contracts as a whole. All the circumstances of the employment relationship could not be divorced from an inquiry into whether the

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[96] EC judgment, above n 1, at [27].

reliance on one aspect of Hong Kong law was so shocking or outrageous to justify the public policy exception.

[79] We are satisfied that the Judge erred in finding that it would be contrary to public policy to enforce the parties' choice of the proper law. The pilots' attempt to circumvent a bona fide and legal choice of law clashes with the fundamentals of private international law: "The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence."[97] The age discrimination alleged by the pilots does not approach the threshold required to find that the omission from Hong Kong law of a provision protecting against premature retirement offends public policy.

[80] We are not suggesting that there was true bargaining parity between the airline and the pilots; at the relevant time, in order to fly for Cathay Pacific, a prospective pilot offered employment would be compelled to accept a standard form governed by the law of Hong Kong. However, in the context of an inquiry into whether an element of that law offends public policy, it would be artificial to ignore the collateral benefits enjoyed by the pilots as a result of this choice.

[81] We add that the Judge based his conclusion on an alternative ground that "NZBL attempted to bargain a fundamental human right".[98] However, when examined, the finding was one of misrepresentation by Cathay Pacific in inducing the pilots not to enter into CoS08.[99] This was not part of the pleaded case or the agreed statement of facts. Mr Pollak did not explain why the pilots had decided not to bring a claim in Hong Kong based upon the airline's alleged misrepresentation or in a New Zealand court by establishing in evidence that the airline's conduct would be actionable according to common law principles of Hong Kong.

[82] Finally, while the threshold for the public policy exception is very high, an evasive election to be bound by a foreign system is unlikely to be upheld as "bona fide and legal" if there are minimal connections to the chosen system or

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97 *Dicey*, above n 22, at [1-005].
98 EC judgment, above n 1, at [114].
99 At [117]–[124].

negligible correlative benefits to the employee.[100] In the present case there were ample connections with Hong Kong law and, as mentioned, the pilots received an income tax advantage and other employment benefits.

[83] In summary, the public policy exception does not apply to these contracts:

(a) The forum court's discretion to refuse recognition of an agreed choice of law is of an exceptional nature because it impeaches the contract by condemning the foreign law which would otherwise apply.

(b) Applied to this case, the test is whether recognition of Hong Kong law, which does not protect against age discrimination, would shock the conscience of a reasonable New Zealander, be contrary to a New Zealander's view of basic morality or violate an essential principle of justice or moral interests. Alternatively, the question is whether the result of applying Hong Kong law would be wholly alien to the fundamental requirements of justice as administered by a New Zealand court.

(c) The pilots' case falls well short of satisfying these tests. The right to be free from age discrimination is not an absolute value, as is confirmed by New Zealand's statutory framework, but is a flexible concept linked to and reflecting a range of fiscal, social and cultural factors. And the absence of a protection under Hong Kong law against enforcement of a contractual obligation to retire at 55 years of age would not shock the conscience of a reasonable New Zealander or violate an essential principle of our justice or moral interests.

(d) Additionally, there was no proper foundation for applying the public policy exception to defeat the private bargaining intentions of the parties in circumstances where the contracts, when considered as a

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100 Since its inception in *Vita Food Products Inc*, above n 82, the "bona fide and legal" qualification has been variously construed as an anti-evasion measure, a public policy reservation and a doctrine of good faith reliance that accounts for *ex post* injustice or serious hardship: Tan Yock Lin "Good Faith Choice of a Law to Govern a Contract" [2014] Singapore Journal of Legal Studies 307.

whole, provided significant financial benefits to the pilots through the election of Hong Kong law.

Result

[84] The appeal is allowed.

[85] The respondents must pay the appellant costs for a standard appeal on a 2B basis and usual disbursements.

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