The New Zealand LAW JOURNAL

18 December 1979 No 23

INTER ALIA

Environmental impact reporting

In an earlier editorial on the National Development Bill ([1979] NZLR 433) it was asked what would happen if the Commissioner for the Environment considered that an environmental impact report was inadequate or did not cover topics it should cover. The latest copy of Search (the Journal of the Australian and New Zealand Association for the Advancement of Science) mentions proposals put forward in the bulletin of the Ecological Society of Australia by Mark Westoby of McQuarrie University, the adoption of which could go some way towards meeting the position. While suggestions for improving environmental impact reporting generally are important, where National Development projects are concerned they are critical for the National Development Bill proposes that the date of filing of an environmental impact report is the date from which the time for carrying out the different procedures begins to run.

If a report is found to be inadequate then those relying on it for information, and especially members of the public, are at a disadvantage. It is suggested that:

> "When EISs are reviewed by a determining authority and found inadequate, some penalty either of delay or of money shold be imposed on the proponent." (Risk of a penalty might encourage the proponent — the organisation proposing a project — to devote adequate ecological staff time to preparation of the EIS.)

To ensure that quality of the report is adequate:

> "The responsibility for each section of an EIS should lie with the specified individuals. Each section should be signed by the professionals actually responsible. A professional need not sign unless he or she agrees with the section."

In effect, what is sought is a document prepared by a professional person who is prepared to put his or her reputation on the line. This proposal may also be seen as the start of a move towards the peer-revision procedure which governs the quality of scientific literature.

Access to information is touched on.

> "Data collected for an EIS should be public property in the sense that no party can prevent another from making it public." (This addresses the fact that EIS data is often collected by researchers employed by companies, which in other connections ordinarily regard their employees' result as proprietary.)

Proposals are also made relating to the ecological content of environmental impact reports. However the suggestions outlined above bear directly on the role to be played by environmental impact reporting procedures in the context of national development projects and as such deserve consideration right now.

As to the content and general approach to environmental impact reports regard would profitably be had to the "hard look" approach applied by the United States Supreme Court when reviewing administrative decisions. "The administrator through the record must be in a position to explain . . . 'the reasons why he chooses to follow one course rather than another.' Under the doctrine, assumptions must be spelled out, inconsistencies explained,

methodologies disclosed, contradictory evidence rebutted, record references solidly grounded, guesswork eliminated and conclusions supported in a "manner capable of judicial understanding."*

The reason a particular development proposal is favoured is central to most envirnomental issues. That explanations measuring up to the "hard-look" requirements are simply not given suggest a desire on the part of those proposing projects to limit debate to site-specific construction and operating implications. So perhaps a hard look should be given to including adequate reasons, not only as to why a project should be located in a particular area but also explaining why it should proceed at all. Forethought is better than after-thought and just might stop a repeat of the Ammonia-Urea plant debacle.

Fisheries

The Fisheries Amendment Act 1979 should not pass without comment. This Act gives fisheries officers extremely wide powers to enter and search premises — particularly those concerned with the fishing and catering industries. One of the reasons for the grant of the powers was the curtailment of a developing black market in salmon.

The reason the amendment is mentioned though, is to contrast the willingness of the Minister to pass *legislation* increasing the powers of fisheries officers and increasing penalities with his unwillingness to do something about a regulation that can be described as no less than a grossly unreasonable interference with the rights of sportsmen. This regulation (Regulation 42A) was mentioned in these pages in May ([1979] NZLJ 169) and is the regulation that effectively makes it an offence to hold an eel in one hand and a rifle in the other — or more practically to combine hunting and fishing in the one trip. An amendment has been awaited for two years now.

Compounding the delay is the excuse that the regulations are being rewritten. That the statute is also being reviewed has been no hindrance to amendment.

Many would disagree with the Minister's priorities. Stopping a black market is important. But is stopping a black market more important than continuing a provision that makes criminals out of reasonable sportsmen?

Tony Black

* A Hard Look at *Vermont Yankee*: Environmental Law under Close Scrutiny by William H Rodgers (1976) 67 Georgetown Law Journal 699.

CHRISTMAS MESSAGE TO THE PROFESSION FROM THE ATTORNEY-GENERAL

I am grateful for the opportunity to extend warm wishes to all members of the legal profession, their staff and families for the coming festive season.

This year has been an important one for lawyers — perhaps highlighted by the first steps towards implementing the recommendations of the Royal Commission on the Courts; it is appropriate that this should occur at almost the same time as the announcement of the appointment of the Commission's chairman, the Hon Mr Justice Beattie, as this country's next Governor-General.

The implementation of the Commission's recommendations together with other changes to the law, new methods of printing statutes, further important changes to matrimonial and company law will all have a profound influence on the future of the profession.

I want to express my particular appreciation to all of those lawyers who serve the community in areas beyond that of their own professional practice. Not only those who, as lawyers, work with the Law Society and sometimes with the Government on matters of great importance but also those who, on a voluntary basis, serve their communities. Lawyers and the District Law Societies have been seen to be representative of a vital and articulate sector of the community.

I hope, in 1980, to continue the close and happy association I have enjoyed with members of the profession.

J K McLay
Attorney-General

ENVIRONMENT

ENVIRONMENTAL IMPACT REPORTING IN NEW ZEALAND — PART III

By Stephen J Mills. *This is the final part. The earlier parts appeared at pp472 and 494.*

(15) Relationship with statutory procedures: It has already been stressed that the impact reporting Procedures ought, in general, to precede any applicable statutory planning procedures so that the information in the report can provide basic data for use by the parties to these hearings and also for the assistance of the decision making bodies themselves. This issue will most frequently arise in relation to the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967, but there are obviously other circumstances where it could be relevant *(em)*.

While neither the Procedures nor other available background material entirely clarify the issue, it seems likely that it was envisaged that impact reports would be able to be introduced as evidence in various planning hearings and other statutory procedures. If this was the hope then it has not been fulfilled — to date impact reports have been consistently rejected by the Appeal Boards [now retitled as Planning Tribunals under the Town and Country Planning Act 1977] as inadmissable evidence. In *Environmental Defence Society and Cheviot CC v the NWASCA and MOW (en)*, which involved an appeal against the grant of a water right under s 23 of the Water and Soil Conservation Act 1967, the North Canterbury Acclimatisation Society sought to introduce as evidence both the impact report and the audit on the proposed Waiau River Irrigation Scheme, for which the water right was now being sought. In ruling on the issue the Number Two Town and Country Planning Appeal Board made the following points:

(1) The environmental audit was inadmissible.

(2) The impact report was inadmissible and could not be produced except by the authors of the relevant parts.

(3) Parts of the report and the audit might be quoted by expert witnesses provided he or she is qualified to comment from his or her own knowledge on the passage or passages quoted *(eo)*.

The Appeal Board described an impact report as a collation of technical reports plus the views of other parties who may or may not have status to appear before the Board under s 23 of the Water and Soil Conservation Act 1967. The Board also noted that the report may be audited by the Commissioner for the Environment, an officer responsible to the executive government. It was particularly emphasised by the Board that audits consist of reasoning and conclusions and material and submissions presented to the Commission; the source materials are not listed and the staff employed by the Commission have no time to investigate the impact reports. In the Board's view there were three main purposes in the audit procedure: to enable the planners of a project to assess the need for environmental protection, to provide an opportunity for early public participation and to assist in the final implementation of a scheme for which a Government authority has the final responsibility.

In reaching its decision that impact reports and audits were inadmissable as evidence the Board seems to have been particularly influenced by one issue — if reports and audits were admitted this would mean that the views of all interested parties would be admitted. This would largely negate the more restricted function of the Board under s 23 of the Water and Soil Conservation Act, which involves adjudication between the Crown as "owner" of natural waters and persons who claim to be "detrimentally affected" by the exercise of these Crown rights of ownership. The wider views expressed in the impact report and audit were seen by the Board to be matters affecting Government policy, but not matters which must be taken into account when the use of natural water is being considered.

(em) For example, mining rights under the Mining Act 1971, dumping permits under the Marine Pollution Act 1974.

(en) 6 NZTPA 49.

(eo) Id, 51.

With respect, this seems to confuse the distinction between those who are entitled to be "a party to an action involving a Crown water right" [the question dealt with under s 23 of the Water and Soil Conservation Act] and the issue of those who can be heard and the matters of which the Board may take cognisance in reaching its decisions. The Planning Tribunals do have power to admit evidence which would be inadmissable under the normal rules of evidence, both under the 1953 Act and under the 1977 Act [see s 149] *(ep)*. Indeed the Board in *Cheviot* acknowledged this power [at p 52] but declined to exercise it for the reasons already set out. On the basis of the Board's reasoning in *Cheviot* it seems possible that in other circumstances an impact report and audit might be admitted. For example, in the case of a non-Crown water right, where status is essentially unrestricted under ss 21 and 25 of the Water and Soil Conservation Act *(eq)*. It does, however, seem suspect to base a decision to exclude reports as evidence on the ground that this would allow evidence to be received from persons or bodies who could not satisfy the standing requirement for parties. Quite apart from who has status to be heard as a party, the matters which the Boards must take into account in reaching a decision under the Water and Soil Conservation Act 1967 clearly include matters of broad public concern akin to those issues which are addressed under the impact reporting process *(er)*. Furthermore, in the *Mahuta* decision *(es)* the Board held that once status has been established an appellant could raise wider issues than those affecting him personally.

It is submitted that the better ground for excluding the impact reports and audits is the untested way in which they are prepared, a matter to which the Board in fact alluded. Arguably this should be seen as a matter going to weight rather than admissibility. At the present time, however, it is clear that the Tribunals are in no mood to take this approach and despite possibilities left open in the *Cheviot (et)* decision, reports and audits will be rigorously excluded for the foreseeable future. Indeed, in one recent case this attitude towards impact reports and audits seems to have been taken to quite extreme lengths. A witness for the appellant in a planning hearing was refused permission by the Board to refer to a map contained in the impact report, for the purpose of showing the geographical relationship between the Marsden Point Oil Refinery and a proposed PVC plant, on the ground that impact reports are inadmissable in evidence. Apparently the same witness was permitted to refer to the letter of an overseas expert outlining cancer hazards of PVC, which was also contained in the impact report. This approach is in stark contrast to the attitude of the Maori Land Court, referred to previously, which has actually called for the preparation of an impact report to help it in reaching a decision *(eu)*.

Whether the Tribunals would take a different view on admissibility if the impact reporting process included an opportunity for the content of the reports and audits to be tested in some sort of adversary context before an impartial decision making body, is a question to which no clear cut answer can be given. But the need for some changes in the impact reporting procedures, or to relevant statutes, to enable reports and audits to be formally used in the planning process, seems essential. As a recent editorial in the New Zealand Law Journal remarked:

> ". . . a system that sees Government decisions made after taking into account environmental impact reports and the Commission's audit or assessment, but planning decisions made without them because the reports are not admissable evidence has an element of unreality about it *(ev)*."

A start on bringing about such changes has been made in the May 1978 Cabinet directive which stated that in the future provision will be made for the Commission to make independent submissions to statutory planning authorities within the procedures for the submission of the Crown case. However, no changes in the law appear to be contemplated *(ew)* and as the same editorial commented:

". . . making a submission and giving evi-

(ep) Particularly section S 149 (2).

(eq) See the discussion of this in *Metekingi v Rangitikei-Wanganui Regional Water Board* 5 NZTPA 330, 336 per Cooke J.

(er) See, for example, s 20 (6).

(es) *Environmental Defence Society and Mahuta v NWASCA and the Minister of Electricity* 5 NZTPA 73.

(et) Supra fn (en).

(eu) *Environmental Defence Society v Whangarei County Council* (unrep). Hearing 6 April 1977.

(ev) Black, "Commission for the Environment" [1978] NZLJ 225. Note, in passing, s 6 (3) (b) of the Local Authorities (Members Interests) Act 1968, as inserted by s 3 (2) of the 1974 amendment referring to: ". . . the preparation, recommendation, approval or review of reports as to the effect or likely effect on the environment, of any public work or proposed public work within the meaning of the Public Works Act 1928".

(ew) This probably falls short of what the Commission itself wanted. See the Report of the Commission for the

dence are not the same. While the Minister (for the Environment) may encourage the Commission to make submissions to a statutory planning authority those authorities have their own rules of practice concerning evidence. The Minister says that these submissions will be made 'within the procedures for the submission of the Crown case'. It is doubtful whether that will be sufficient. If the Commission's submission is to have a sound evidential base, then, particularly where it disagrees with the Crown case, it needs independent standing *(ex)*."

(16) Publication of Environmental Impact Reports:

Upon completion the impact report goes to the Minister responsible for the department or body that is required to exercise the discretion that has brought the proposal within the scope of the Procedures in the first place *(ey)*. Paragraph 24 actually states: "On completion the environmental impact report is to be forwarded

(a) By a department to its Minister.
(b) By a statutory board, commission etc to the Minister administratively responsible for that Board, Commission etc.
(c) By organisations other than those covered in (a) and (b) above to the department responsible for exercising the discretion which has given rise to the requirement for a report, the department in question will in turn forward the report to its Minister."

Upon receipt of the report the Minister has two choices: to refer the report to the Commission for the Environment for auditing and public notification, or to refer the report back to the department for revision *(ez)*.

Twenty-five copies of the report must be sent to the Commission; upon receipt of these the Commission notifies this through the public notices columns of the major newspapers *(fa)*. The notice must state the nature of the report, where copies can be obtained, and that public submissions on the report must be made within 28 days *(fb)*. Paragraph 27 requires that the department responsible make available sufficient copies of reports to meet the likely public demand. A charge may be made for copies, but it is emphasised that costs should be kept as low as possible by using cheaper publication techniques *(fc)*. In fact many of the reports have been both glossy and expensive. For example the King's — Bledisloe impact report *(fd)* retailed to the public at $15. Copies of the reports, comments, submissions and audits are placed in the main New Zealand public libraries and in the university libraries.

Publication of the reports has been invariable. However, if the minister of the promoting department decides after consultation with the Minister for the Environment that the public interest requires that the report should not be published, the matter is referred to Cabinet for decision *(fe)*. The decision of Cabinet is final.

(17) Inadequate Impact Reports:

There do not appear to be any cases where the Commission for the Environment has rejected an impact report as inadequate and called for it to be resubmitted.

The Commission has on occasion been extremely critical of the quality of reports; some public submissions have even called for reports to be redone because they have not satisfied the requirements of the Procedures. But the Commission has never required this step. In other words, the reporting requirement is a once through process; on the basis of past practice it can be stated that if a document *described* as an impact report is presented, this will satisfy the Cabinet requirement that a report be prepared for certain proposals. An inadequate report may, of course, lead to a recommendation by the Commission that the proposal not proceed or in some other way lead to objections to the scheme.

Several audits serve to illustrate these points. In its audit on the Mangatotara Forestry Development Proposals *(ff)* the Commission concluded that:

(1) The impact report provided an inade-

Environment for the year ended 31 March 1977 at p 10 where reference is made to the difficulties resulting from the Commission's lack of legal status and to the advantage of the right to appear as a matter of law in proceedings such as those at Waiau Pa.

(ex) Supra, fn (ev), at p 225. The procedure adopted in the May 1978 directive is the same as that used by the Commission in making submissions to the Franklin County Council on the environmental impacts of locating the proposed Auckland Thermal No 1 Power Station at Waiau Pa. It was in response to this experience that the Commission made the statement referred to above, Id.

(ey) Procedures, para 24.

(ez) Id, para 25.

(fa) Id, para 26.

(fb) Id, para 27. See the discussion of extensions of time where the report-audit process falls over the Christmas period. Infra, para 52.

(fc) Id.

(fd) Gazetted 30 August 1973.

(fe) Procedures, para 28.

(ff) 25 October 1974.

quate justification for the proposal in terms of public needs.
(2) It gave inadequate thought to regional considerations.
(3) It failed to consider alternatives.
(4) It provided an inadequate assessment of educational and recreational potential in the area.
(5) There was a need for a more complete ecological evaluation.
(6) A need for a fuller understanding of the hydrological implications of conversion.
(7) And a need for a thorough investigation of the utilisation of indigenous timber species *(fg)*.

While the Commission recommended the deferment of the scheme, it did not call for the report to be redone as a prerequisite to scheme approval. In making the submissions on the impact report on the Kirk Patrick Reclamation-Napier Breakwater Harbour *(fh)* both the DSIR and the MOW complained about the quality of the impact report. The DSIR stated, "The report is rather a statement of intentions . . . than an environmental impact report" *(fi)*. The MOW complained that "Generally the report does not provide adequate information to enable a thorough assessment to be made *(fj)*". In the case of the Marsden B Power Station the Commission even accepted an impact report on a proposal which had changed since the report was prepared, without requiring the report to be updated. The two 125 megawatt boilers that had initially been proposed were to be replaced by a single 250 megawatt boiler; this significantly increased the size of the boiler building *(fk)*.

It needs to be pointed out, however, that there has been the odd case where the Commission has taken a much harder line on compliance with the Procedures.It declined, for instance, to prepare an audit on the Huntly Thermal Power Station proposal on the ground that:

> Because work is well under way on the station structure and the ability of the Commission to limit the impact is therefore limited, the Commission has prepared an "appraisal" rather than an audit *(fl)*.

While the New Zealand Electricity Department report had really been a statement describing the environmental protection methods incorporated in station design and operation, it had been described as an impact report.

(18) The Environmental Audit:

The final stage in the investigation of the impact of a proposal is the environmental audit. The purpose of the audit is to insure, as far as it is possible to insure this, that there has been an adequate evaluation of the impact of a proposal and that various alternatives have been adequately studied *(fm)*. Paragraph 30 actually states that the audit is to check on whether or not "*all* environmental implications of the proposal have been identified and evaluated . . . ." Obviously, however, an environmental impact report cannot practically meet that standard. Limits imposed by the nature of ecological systems, by time and by money preclude any such standard of perfection. Furthermore, it is not the standard the Commission demands; the term "adequate" is closer to the actual standard. As noted previously, the scope and detail required in the report is related to the likely significance of the impact *(fn)*.

It has already been noted that the question of alternatives is, in theory, at the heart of the environmental impact reporting process *(fo)*. The Commission's insistence on a careful analysis of alternatives has been very mixed. It is tentatively suggested that there is a trend to construe this requirement more rigorously for those proposals which are likely to have a highly significant impact and more narrowly for less important issues. This can be seen, for instance, in a comparison of the audit on the Clutha Hydro Scheme *(fp)* and the audit on the Featherston Rubbish Tip *(fq)*. This is the ap-

(fg) Id, 12.
(fh) Report gazetted 23 April 1975.
(fi) Id, 6-7.
(fj) Id.
(fk) Audit, 13 August 1974, p 14.
(fl) See the preface to the Appraisal.
(fm) Procedures, para 30. From the time of the publication of the impact report the Commission for the Environment withdraws from the proposer and acts independently to prepare its audit. (Page 5 of the paper presented by the Assistant-Commissioner for the Environment to the New Zealand Institute of Chemistry Symposium referred to supra fn (bn); fn (cw). But as the material discussed in these footnotes makes clear, there has often been very close contact between the Commission and the proponent of the scheme in question, prior to this time.

As of 1976 the approximate cost per audit was apparently $4,000. (Discussion with the Assistant-Commissioner for the Environment, W J Wendelken). It is not clear whether this is the direct cost to the Commission or whether it also includes the costs to other departments which on occasion lend their assistance to the research necessary to compile the audit.

(fn) Supra, para 10.
(fo) Supra, para 12 (c).
(fp) 1 September 1975.
(fq) 24 May 1976.

proach one would expect, but there are some notable exceptions. The Fergusson Wharf Proposal *(fr)* was seen by the Commission in the context of the need to provide a solution for the Auckland Harbour Board's problems of container management, not in a national context of moving seaborne goods. The totally different approach of the Commission in its audit on the proposed extension for Wellington Airport has already been noted *(fs)*.

The Commission is charged with ensuring that advice has been obtained from appropriately qualified sources, that careful attention has been given to avoiding or mitigating environmental harm and that all practicable environmental improvement has been sought *(ft)*.

The audit is prepared as a report to the department head responsible for preparing or commissioning the report, although it has no binding effect on that department *(fu)*. The public's submissions are taken into account in preparing the audit *(fv)*; as a matter of form audits usually begin with a summary of the various submissions that have been received, before the Commission draws its own conclusions and makes its recommendations.

The Commission is entitled to seek further advice in the preparation of the audit; any reports that are received at this stage are to be attached to the audit *(fw)*.

The completed audit forms part of the material which goes forward with any application for final project approval to the Cabinet or whatever other body it is that is charged with making the final decision *(fx)*.

(19) Timing and publication of the audit:
The Commission has 60 days from the receipt of the Environmental Impact Report to prepare the audit *(fy)*. This period can be extended by agreement between the department concerned and the Commission *(fz)*. All audits on published impact reports are themselves published, except on those occasions when, under para 28 of the Procedures, publication of the impact report is withheld. Availability is generally notified in the public notices columns of the major newspapers *(ga)*. Paragraph 32 of the Procedures actually states that "the availability of the report is to be made known by an appropriate press notice or statement."

Copies of the audit are sent: (1) to the parties responsible for preparing the impact report; (2) to those persons who made submissions to the Commission on the impact report; and (3) to those who have a bona fide interest and request a copy *(gb)*. Copies are always deposited with the main public and university libraries.

The Procedures actually state that copies of the audit are to be sent to these three groups *subsequent* to the notification of the availability of the report *(gc)*. Among the three categories of persons entitled to be sent copies of the audit, no variation in the time of release is suggested.

In fact, as with many aspects of the impact reporting process, the actual method of releasing the audit differs from that set out in the Procedures. The first release is to the parties responsible for preparing the impact report; in general this precedes public notification and release of the audit by at least seven days *(gd)*.

Where the period for making submissions and preparing the audit would, in the normal course of events, fall over the Christmas-New Year period, the Commission's practice has been to allow extensions of time on a case by case basis. The Commission advises proposing agencies that any impact report submitted for audit during October will not have an audit completed until after the Christmas period. In general the time for public submissions is extended accordingly *(ge)*.

(20) Effect of the audit:
The audit has no legally binding effect *(gf)*. It is merely one of the factors that is taken into account by the final decision-maker. If the decision is being made at the government level then political and economic factors, as well as en-

(fr) Audit 12 May 1976. Discussed supra, para 12 (f).
(fs) Supra, para 7.
(ft) Procedures, para 30.
(fu) Id.
(fv) Id.
(fw) Id.
(fx) Id.
(fy) Procedures, para 13. As noted infra, these dates may be altered where the Christmas period intervenes.
(fz) Id.
(ga) Procedures, para 32.
(gb) Id, para 32.
(gc) Id.
(gd) In his paper to the New Zealand Institute of Chemistry (referred to supra fn (cw) the Assistant-Commissioner for the Environment referred to this practice as "a courtesy to the proposer" (at p 5).
(ge) Letter to the author from J M K Hill, formerly Assistant Commissioner for the Environment, dated 8 September 1977. Copy on file with the author.
(gf) The Court of Appeal recently had cause to consider this point in *Devonport Borough Council v Robbins*, supra fn (e). Acting under empowering legislation the Council in 1971 had granted the respondent an investigation licence. This authorised the respondent to conduct various investigations into the feasibility of a residential

vironmental factors, will obviously receive weight.

A study of the audits suggests that the Commission is somewhat ambivalent about its precise role in this framework. On occasion it seems to have taken the view that its role is to set out the environmental issues as clearly and as accurately as possible, leaving it to the final decision-maker to weigh the environmental factors against other issues in reaching a decision. On other occasions it seems to have undertaken a balancing function itself, endeavouring to put forth a solution which is likely to be acceptable to the decision-maker. In so far as the role of the Commission is an educative one (a role which has been increasingly emphasised by the Commission — see for instance the Report of the Commission for the Environment for the year ending 31 March 1977) it seems that the former of the two approaches is likely to be the most useful in clarifying for the public the choices and the tradeoffs which are available. The issue is well illustrated in the controversy which erupted over the use of gas from the Maui Offshore Gas Field. The initial proposal was to use the bulk of the gas for generating electricity in large thermal power stations [of around 1400 MW capacity, using the gas at relatively low thermal efficiencies]. Both public and official sentiment has now largely turned against this and the Government now appears to favour smaller combined-cycle power stations. A vocal body of public opinion has maintained throughout the controversy that the bulk of the gas ought to be used direct as a premium fuel because of the much higher thermal efficiencies this achieves, or be used in the context of total energy systems. If the gas is to be used as an energy source the weight of evidence seems to support the proposition that from a thermodynamic and from an environmental viewpoint either of the latter two suggestions are far more desirable than the use of the gas to generate electricity in thermal power stations or combined-cycle plants *(g)*. Official sentiment has been largely unsympathetic to this viewpoint, however, and in its audit on the proposed Auckland Thermal No 1 Power Station [a 1400 megawatt electricity station using Maui gas] the Commission rather uncomfortably rode both horses by noting the higher efficiencies obtainable from direct use of the gas, while also approving a move away from the use of the gas for Auckland Thermal No 1 to its use in combined-cycle plants *(gi)*.

Where following an audit a proposal receives an unconditional approval, the body responsible for implementing the proposal still has an obligation to ensure that any environmental provisions which were included in the proposal, are actually observed. This applies equally to cases where the promoter promised to include such provisions *(gj)*.

Where any approval has specific conditions attached to it, the responsible department is required to discuss with the Commission, prior to commencing work, the means of observing these provisions *(gk)*.

What effect the Commission's audits have had on the various projects with which they have dealt is not known. The Commission has not compiled any records *(gl)*. Nor is it known whether promoters have observed any conditions that they have agreed to as a result of the

and marina development in Ngataringa Bay, a large tidal bay in the Waitemata Harbour. By cl 6 (1) of the licence it was agreed that if at any time during the currency of the investigation licence the respondent notified the Council of his wish to carry out a development in the Bay the Council would give its approval to this, subject to it being satisfied in relation to various matters specified in the licence.

In 1974 a Council was elected which was generally opposed to the type of development contemplated by the respondent. When an environmental impact report on a proposed development scheme (to which the previous Council had given approval in principle) received an audit from the Commission for the Environment which basically recommended against the approval of any residential development in the Bay, the new Council revoked the earlier approval. In its audit the Commission for the Environment had specifically refrained from expressing a view on whether the Council was entitled under its contract to give effect to the audit recommendations. It had also made various secondary recommendations in the audit suggesting modifications to the scheme in the event that it went ahead. The Council obviously believed that its discretion under the investigation licence was wide enough to allow it to give effect to the Commission for the Environment's primary audit recommendation.

As a result of the Council's action and its subsequent refusal to substantially modify its position, a repudiation of the contract was alleged by the respondent. The respondent succeeded in this cause of action in both the Supreme Court and the Court of Appeal.

In discussing the significance of the Commission for the Environment's audit the Court of Appeal in effect held that an audit could not be relied on as a defence to a breach of any contractual obligations. The Commission for the Environment was only an advisory body and it could not affect the private legal relationship between the Council and the plaintiff in the present case.

(gh) The economics of an existing distribution network might, of course, also have a significant bearing on the means of energy production and supply selected.

(gi) Auckland Thermal No 1 Power Station audit, supra fn (bo). At pp 24-26.

(gj) Procedures, para 35.

(gk) Id, para 36.

(gl) Letter from J M K Hill, referred to supra fn (et).

audit. Again, the Commission has no record of this *(gm)*.

(21) Future developments:

It is clear that the trend with environmental impact reporting in New Zealand is towards greater flexibility in the use of the system. The corollary of this is that considerable uncertainty about the operation of the Procedures will remain. It is possible that the Commission will establish greater certainty through a consistent approach in the future and by making clarifying statements from time to time. For those subject to the Procedures it would obviously be of great assistance if the Commission would redraft them in their entirety, carefully spelling out the exact relationship between the Environmental Protection and Enhancement Procedures, the 1978 Cabinet directive and its progeny and actual practice.

The major confusion continues to be the relationship between assessments and impact reports. Under the Procedures the relationship is clear. Subsequent practice, sanctified by the 1978 Cabinet directive, has resulted in a great deal of confusion.

As noted previously, the first official acknowledgement of a change in the use of assessments is to be found in proposals for a review of the Procedures that were produced in 1975 *(gn)*. At the time these draft procedures were intended to replace the 1973 Procedures. They were approved by the Officials Committee for the Environment and by the then Labour Government shortly before it went out of office.

The 1975 proposals were withheld by the incoming National Government pending the review of the 1973 Town and Country Planning Act, the Water and Soil Conservation Act 1967, and the completion of the Report of the Task Force on Economic and Social Planning. While the 1975 proposals have never been formally approved, a brief consideration of them may help to shed some light on developing practice and the changes in the impact reporting system dealt with by the 1978 Cabinet directive.

It is understood that many of the ideas contained in the proposals initially stemmed from recommendations made by the Commissioner for the Environment, Mr I Baumgart, after he returned from an extensive overseas trip in 1976. Apparently another strong influence was the feeling in a number of Government departments that the 1973 Procedures were treating them unfairly because they had no opportunity to respond to public comments. The annual report of the Commission for the Environment for the year ended March 31 1976 states *(go)*:

> ". . . the review of the guidelines [the term used here for the Procedures] was aimed at bringing about the earlier involvement of the Commission, greater consultation between the promoter and the public in the preparation of the report, a closer integration of the Environmental Impact Guidelines and relevant statutory procedures and a transfer from the Commission to the promoter of the responsibility for receiving and considering public submissions on projects."

The dominant feature of the 1975 proposals was a much greater degree of flexibility in their application. The strict line between assessment, report and audit was removed, to be replaced by new terminology and greater uncertainty. The term "environmental appraisal" appears for the first time. It is defined as:

> "A general term meaning the weighing up of the environmental consequences of a particular course of action extending from conception to implementation *(gp)*."

In the context of the 1975 proposals, the function of the appraisal seems very close to the notion of an assessment under the 1973 Procedures.

The first matter to be determined by an appraisal was whether this should be in writing. A written appraisal was to be mandatory for proposals which would have a significant environmental impact *(gq)*.

In some cases, an impact report would be required, in others the written appraisal would be sufficient. In deciding whether a report would be required, consideration was to be given to whether the public would have rights of participation under any relevant environmental legislation. The proposal stated that a report would only be prepared where "it is appropriate for the environmental impact to be considered by the public and independent experts *(gr)*".

A two-step approach to impact reporting was introduced — provisional and finalised *(gs)*. The provisional impact report was to be published first and any public comments were

(gm) Id. The Commission would like to compile this information, but to date it apparently has not had the resources to do so.

(gn) Referred to supra, para 5.

(go) At p 4.

(gp) At p 1, para 1.

(gq) At p 3, para 5.

(gr) At p 7, para 81.

(gs) At p 12, para 14.

to be sent to the person or body preparing the impact report. This, of course, is very different from the process under the 1973 Procedures where public submissions go directly to the Commission. Under the 1975 proposal, upon receipt of any comments the project proponent was given the opportunity to amend the impact report to take account of these. The completed report then became a finalised impact report. Following this, an audit would be prepared *(gt)*.

The approach suggested by the 1978 Cabinet directive bears considerable resemblance to these proposals. In particular, the presence of other avenues for public participation, either statutory or otherwise, is obviously to receive weight in the decision on whether a formal impact report should be required *(gu)*. Where an assessment is prepared instead of an impact report, it will closely resemble the role of the appraisal under the 1975 proposals. By analogy to the proposal for provisional and finalised impact reports, any comments which are invited on written assessments will go to the body proposing the activity in question.

(22) The Proposals of the Task Force on Economic and Social Planning:

The Task Force stated that:

> "[in] the legal context, the revised Town and Country Planning Act combined with a statutory provision for impact reporting procedures could become the main environmental instruments in New Zealand providing the means to planning and control of land use *(gv)*.

The Report apparently envisioned the impact reporting procedures in the role of background planning, setting out development options and alternatives and opening them for public debate *(gw)*. The report also recommended that the Commission for the Environment perform a narrower function than that which it is presently carrying out, essentially just the auditing function *(gx)*. Its wider activities would be assumed by the Environmental Council *(gy)*. Environmental assessments *(gz)* were to become a fundamental part of every preliminary plan so that there would be no need for them to be prepared separately *(ha)*. The Report envisioned that this could result in reports and audits being prepared less frequently, but they would be done within a proper legal framework. The Report expressed the hope that this would remove the apparent confusion between the Town and Country Planning appeal process and the environmental impact reporting procedures *(hb)*.

The Town and Country Planning Act of 1977 which followed the publication of the Task Force Report has not adopted this aspect of the proposals.

(23) Conclusion:

It is probably apparent to even a casual reader that I am critical of many aspects of the Environmental Protection and Enhancement Procedures. This article has not set out to make detailed proposals for reform. Rather the task has been to explore what has been happening

(gt) At p 14, para 15.

(gu) Supra, para 4.

(gv) At p 139.

(gw) At p 137. The Report notes that: ". . . [t]his is essential in a working democracy . . ." Id.

(gx) Id, 138.

(gy) Id.

(gz) The meaning to be attached to the term "assessment" in this context is not entirely clear. Presumably it carries the meaning given to this word in the Procedures. In the context it would be a written assessment.

(ha) The reference to a "plan" is apparently to the regional plan under the Town and Country Planning Act discussed in s 3, p 131 et seq of the Report.

(hb) Id, 137-138. In its Report for the year ending 31 March 1976 the Commission also recognised that all was not well with the Procedures. At p 3 of the Report the Commission for the Environment noted: "something of a crossroads has now been reached with the operation of the Environmental Protection and Enhancement Procedures . . . . some aspects of the Procedures require modification in the light of experience gained in their operation. There is also a need for reappraisal of the type of project for which the procedures for impact reporting and Commission auditing should be invoked . . . clearly, certain projects with far-reaching environmental implications should continue to be subject to the full reporting and auditing procedures . . . . It would seem that a limited number of projects per year, provided they were the most significant projects and led to the development of useful guidelines, would achieve the aim of ensuring that environmental effects were fully taken into account in Government development projects, and were considered constructively by interested and involved members of the public."

Unlike the Task Force Report, however, it seems clear that the Commission is continuing to think of the Procedures as guidelines only, without legal force. The Annual Report goes on to say that: "from these impact reports and audits, guidelines could be drawn for environmental protection to assist agencies concerned with particular sectors of development activity with the sound planning of their projects. The Commission, on the basis of the experience and information it has already gathered, is now well placed to initiate work on the preparation of such guidelines in collaboration with the statutory agencies and concerned organisations."

The outcome of this process is, of course, the May 1978 Cabinet Directive and the subsequent clarifying statements discussed supra, para 4.

during the past five and one half years. But much of the material that has been discussed in the course of doing this presents, I believe, a cogent case for some substantive changes to the system.

In particular I find myself in fundamental disagreement with the original decision in 1973 to proceed by Cabinet directive rather than by legislative enactment. Even accepting, arguendo, that this decision was initially justified as the best means for maintaining that degree of flexibility necessary to facilitate the process of learning how to use a new technique, I would suggest that this justification is long gone. The Commission for the Environment itself seems to acknowledge as much in its *Report for the year ending 31 March 1976*, referred to supra n *(hb)*. Indeed I believe that the difficulties entailed in introducing an environmental impact reporting system have been accentuated in the long term by the prolonged uncertainty to which the New Zealand process has given rise.

There is, as a colleague recently remarked to me, something surely to be said for being constituted on the firm foundation of a statute. This might be seen as nothing more than a lawyer's preference for the tools of his own craft. But I suggest that it goes deeper than this. While there may be room for argument about just how firm such a foundation is in a political system which has as few checks and balances to the legislative process as does New Zealand's, nonetheless as long as a statute is in force it does provide a substantial measure of certainty and security for the rights and duties it sets out. Changes in legislation must at least be openly acknowledged. If they are not, acknowledgement may in the end be compelled by the courts. A change to legislation also provides an opportunity for public lobbying and debate. When no change is even acknowledged, despite the fact that far-reaching changes have been effected — the reality, I would suggest, of the May 1978 Cabinet directive — any serious attempt to improve national environmental policy is effectively foreclosed. The very different approaches to making the changes contained in the May 1978 Cabinet directive and those introduced by the Council on Environmental Quality in its new NEPA regulations, referred to supra n *(x)*, (the process of implementation is described in greater detail in 8 ELR 10129) warrants serious reflection.

And legislation is certainly a firmer foundation than that on which the Commission for the Environment and the Environmental Protection and Enhancement Procedures are built at present. The parable of the house built upon sand may, with hindsight, turn out to be an unfortunately apt analogy.

To establish a system which is fundamentally premised upon an objective and public appraisal of the government's environment policies is to call for a high level of political maturity. It has to be candidly recognised that there will be times when the information that is generated by such a system will be strenuously resisted by the Government of the day. If improving environmental policy is a serious objective and in the abstract it is acknowledged that the environmental impact reporting system is a valuable component in this, then it is naive to expect a system generating such tensions to continue to survive in a context where it exists solely at the behest of the very Cabinet whose policies it will — at least by inference — be frequently criticising. It is also naive to expect the Commission for the Environment to maintain a rigorously independent stance when it must work with such a stacked deck.

Whether legislation should merely take the form of recognising the Commission for the Environment and its general environmental role, or go beyond this and detail the environmental impact reporting system, is a matter requiring further consideration. My own preference is for the latter course, but I would regard even the former as a significant step forward because it would likely strengthen the independence of the Commission. The Nature Conservation Council provides a concrete example of this approach and its performance would be worth careful study.

In dealing with the environmental impact reporting system, wider institutional issues are inevitably involved. In particular the relationship between the Commission for the Environment and the Environmental Council continues to cause confusion. With the reduced use of the environmental impact reporting system and the increased emphasis on the Commission for the Environment's educative and general investigative functions, the present potential for overlap is likely to increase. This is a matter about which the Holmes Committee expressed concern at p 138 of its Report — *New Zealand at the Turning Point*.

If the environmental impact reporting system is to operate effectively then some institution should be charged with the demanding audit and general supervisory role as a primary concern. The experience of the Commission for the Environment makes it the most appropriate body for this task. This should also include an independent right to give evidence on audit findings.

Wider issues of environmental regulation could then be dealt with elsewhere and the Environmental Council might well be the appropriate nucleus around which this reorganisation could take place. Such a reorganisation is well overdue in New Zealand.

It does not seem overly dramatic to agree with the Holmes Committee's view that New Zealand is at a turning point. In such circumstances the risks of short term expediency are obviously great; to some extent they may be unavoidable. But new knowledge calls for new responses; sometimes for new institutions. And if one thing is made overwhelmingly clear by the world's growing library of environmental studies, it is that short term political action, so often uninformed of its environmental consequences, must be balanced by the longer view. The proper use of the environmental impact reporting system provides one of the most promising means of achieving this. If all that the New Zealand system can offer is an amended Town and Country Planning Act, then for the New Zealand environment at least, this is indeed a turning point.

CORRESPONDENCE

Dear Sir,

Accident Compensation — Section 120 awards

A number of lawyers have asked what steps the Commission takes before making an assessment under Section 120 — which relates to compensation for pain and suffering, disfigurement, and loss of enjoyment of life.

Over 35,000 of these awards have been made since the scheme began. It is perhaps a small measure of their reasonableness that only about one per thousand of those awards has been overturned on appeal. Because of this high volume, it would be impossible for any administrative or judicial system to devote the highly detailed and painstaking scrutiny that lawyers were able to give to the more modest numbers of damages claims under the common law system; but the Commission goes to considerable lengths to try to find out everything it can relevant to the question to be decided.

Within the limitless variety of cases that arise, the highly-trained staff of the Commission making these assessments are able to attempt a consistency to a degree never before possible. They develop expertise in relating one case to another and the awards made in each. Their lines of approach must necessarily shift in the light of amended awards made by the Appeal Authority.

The inquiries made leading up to assessment have undergone refinement and improvement since the scheme began and may not yet be considered perfect.

If any practitioners feel that further steps should be taken, the Commission would welcome hearing their views.

Claimants represented by solicitors

Solicitors are invited to make submissions. This is not done if previous submissions have been lodged by the solicitor within the past three months.

If the Commission has supplied rehabilitation services of any substance, a report is obtained from a Liaison Officer, unless an adequate report has already been made within the previous three months.

Claimants not represented

(a) Where injuries appear severe, an interview is arranged with Permanent Disability staff or a Liaison Officer. Personal interviewing cannot always take place with claimants living in remote areas.

(b) If the Commission has supplied rehabilitation services of any substance, a report from a Liaison Officer is called for, unless already obtained within the previous three months.

(c) If personal interview is not possible, or a Liaison Officer cannot be assigned, attempts are made to speak to the claimant by telephone. Failing that, assessment will be based on medical reports, which are frequently specially commissioned for the purpose of the assessment.

(d) If injuries appear slight, and there has been no rehabilitation requirement, and reasonable information is available on file, some assessments can be made without special interview. These are confined to cases which, on the papers, appear to justify no award, or an award of a minimal amount.

In all cases, other than in (d) above, assessments will very rarely be made unless a recent medical report is on file.

Yours faithfully,

K L Sandford
Chairman
Accident Compensation Commission

INJUNCTION

INTERIM AND INTERLOCUTORY INJUNCTIONS: ASSESSMENT OF PROBABILITY OF SUCCESS

By B V HARRIS *Lecturer in Law, University of Otago.*

Interim and interlocutory injunctions are important private law and public law remedies. An "interim" injunction restrains the defendant until a specified date or a further order *(a)*. An "interlocutory" injunction issues to restrain the defendant until the final hearing or a further order *(b)*. The former usually issues where the remedy is sought before pleadings have been filed with respect to the full trial of the matter, whereas the latter usually issues where full pleadings have already been filed. The principles guiding the exercise of the Court's discretion with respect to the issue of both remedies are the same.

The New Zealand Supreme Court issues these discretionary equitable remedies to prevent irreparable unlawful interference with rights pending the final determination of an action in a full trial. The justification for this drastic action by the Court is that the interference or injury complained of will not be adequately compensated by an award of damages should the matter be resolved in the plaintiff's favour at the trial.

Applications for the remedies may be either ex parte (in exceptional circumstances) or inter partes, the remedies often being sought in circumstances of great urgency. The urgency associated with such applications and the common procedure of basing the preliminary hearing on affidavit evidence often means that the Courts are unable to determine the substantive issues, particularly the merits of the application, in the way a Court would at a normal full civil hearing. As Jeffries J recently commented: "The Court is acting in its emergency and accident capacity in which depth is surrendered to dispatch" *(c)*. It is because the Court cannot make a final determination of the merits of the case that there has to be a later full hearing. If the matter could be argued fully with a complete availability of relevant evidence at the first hearing then, obviously, there would be no need for the subsequent hearing. Since the Courts often cannot make this final determination of the merits of an application, which is the ultimate deciding factor as to whether relief should be granted, the Courts have been forced to develop principles to guide them to the best approximation to justice in the circumstances of incomplete evidence and argument.

The relevant principles as they exist in current New Zealand law are unclear and confused. The lack of clarity and confusion stems from differing judicial views as to the weight that should be given to probability of success in the final trial. Some Courts see establishment by the plaintiff of a "prima facie" case as a prerequisite to the issue of an interim remedy, probability of success being a vital component of such an assessment *(d)*. Other Courts have preferred to regard probability of success as a factor only to be considered as a last resort should all other considerations be equal *(e)*.

The conflict of judicial opinion as to the principles that should be applied is not confined to New Zealand. The New Zealand difficulties reflect the position in England. Prior to 1975 the establishment of a "prima facie" case, ". . . that is, a case which [the plaintiff] had a good chance of winning at the trial" *(f)* was usually a threshold requirement before the Court went on to determine the bal-

(a) See eg *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261.

(b) See I C F Spry, *Equitable Remedies* (1971) 454ff; H G Hanbury and R H Maudsley, *Modern Equity* (10th ed 1976) 78ff. Note that Rule 468B of the Code of Civil Procedure 1908 provides for "interlocutory" and "interim" orders.

(c) *Wairarapa Co-operative Dairy Co Ltd v Dalefield Co-operative Dairy Co Ltd* (Supreme Court, Masterton, 5 August 1977 (A6/77)).

(d) See eg *Collins v Akatarawa Sawmilling Co* (Supreme Court, Wellington, 11 March 1977 (A97/77). O'Regan J); *Wairarapa Co-operative Dairy Co Ltd v Dalefield Co-operative Dairy Co Ltd* (Supreme Court, Masterton, 5 August 1977 (A6/77). Jeffries J).

(e) See eg *Gallaher Ltd v International Brands Ltd* (Supreme Court, Auckland, 18 June 1976 (A408/76). Chilwell J); *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35 (White J).

(f) *Fellowes & Son v Fisher* [1976] 1 QB 122, 131 per Lord Denning MR.

ance of convenience *(g)*. Determining whether the plaintiff had made out a prima facie case inevitably involved the Court in assessing the probability of the plaintiff being successful at the full trial. The probability of a right existing and the probability of that right having been interfered with had to be demonstrated to the Court. What exactly is meant by "probability" has been subject to much judicial discussion *(h)*. However, it would appear ". . . that the [required] degree of probability or likelihood of success is simply that which the Court thinks sufficient, in the particular case, to warrant preservation of the status quo" *(i)*. In determining probability the Court should consider not only the strength of the plaintiff's case but also the strength of the arguments which may be put in defence to the application *(j)*.

Lord Diplock in the 1975 House of Lords decision *American Cyanamid Co v Ethicon Ltd (k)* strongly criticised the emphasis the Courts had placed on assessment of the plaintiff's probability of success at the full trial:

> "In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the Court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the Court evaluated the chances of the plaintiff's ultimate success in the action at 50 percent or less, but permitting its exercise if the court evaluated his chances at more than 50 percent. . . .
>
> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial . . ." *(l)*.

In *American Cyanamid* Lord Diplock attempted to reformulate general principles to guide Courts in the exercise of their discretion to issue interim and interlocutory injunctions. The plaintiffs owned a patent under which they made a particular type of sterile absorbable surgical suture. They alleged that the defendant's product infringed their patent rights. Donaldson J issued an interlocutory injunction at first instance. However the Court of Appeal reversed this decision as it was not satisfied that a prima facie case of infringement had been established. The decision at first instance was reinstated by the House of Lords on an application of the approach formulated by Lord Diplock. Lord Diplock's judgment was endorsed by the other members of the Court *(m)*.

Although rejecting the need to establish a prima facie case, Lord Diplock accepted as a threshold requirement the necessity that "the claim is not frivolous or vexatious; in other words that there is a serious question to be tried" *(n)*. A few lines further on in his judgment Lord Diplock rephrased the requirement: "So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider . . ." *(o)*. Although this second expression of the requirement appears to contain an element of probability of success, it has been held that it expresses the same test as stated in the earlier passage of the judgment *(p)*.

Once this first requirement is satisfied the

(g) See eg *J T Stratford & Son Ltd v Lindley* [1965] AC 269, 331 per Lord Pearce; 338 per Lord Upjohn; *Northern Drivers Union v Kawau Island Ferries Ltd* [1974] 2 NZLR 617, 621 per McCarthy P.

(h) See eg *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729.

(i) Ibid, 737 per Mahoney JA.

(j) See *Hubbard v Vosper* [1972] 2 QB 84, 96 per Lord Denning MR; *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729, 736 per Mahoney JA.

(k) [1975] AC 396.

(l) Ibid, 406-407.

(m) Ibid, 410 per Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies.

(n) Ibid, 407.

(o) Ibid, 408.

(p) See *Smith v Inner London Education Authority* [1978] 1 All ER 411, 419 per Browne LJ.

Court should go on to consider the "balance of convenience". The emphasis in Lord Diplock's approach was upon the balance of convenience:

> "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where 'the balance of convenience' lies" *(q)*.

In deciding whether the balance of convenience favours issue of the remedy, the Court will consider and weigh a variety of factors. Lord Diplock isolated possible major factors *(r)*:

1. Whether the plaintiff could be adequately compensated by damages for the continued infringement of his rights until the trial should the interim remedy not issue. If such damages would be adequate and the defendant would be capable of paying them then the principle is that an interlocutory injunction should not issue.
2. If an award of damages would not provide adequate compensation to the plaintiff then the Court should go on to consider whether, should the defendant succeed at the final trial, the plaintiff's undertaking to pay damages to cover the defendant's loss during the time his activities are regulated by the interim or interlocutory injunction would adequately compensate the defendant. Related to this is the question of whether the plaintiff would, in such an event, be in a position to pay the damages *(s)*.

Further the Court should consider all other matters relevant to the balance of convenience. If the uncompensatable disadvantage to each party remains evenly balanced then Lord Diplock suggested that "it is a counsel of prudence to take such measures as are calculated to preserve the status quo" *(t)*.

Should the balance of convenience still remain difficult to determine Lord Diplock stated: ". . . it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application" *(u)*. To maintain some consistency with the condemnation earlier in his judgment of relying on probability of success as a factor influencing interim injunction decisions, his Lordship qualified the employment of this factor by saying there must be "no credible dispute" as to the facts as disclosed by the evidence and "the strength of one party's case [must be] disproportionate to that of the other party". Further, "[t]he Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case" *(v)*.

To resort to probability of success (which assessment of "the relative strength of each party's case" must mean) when all other factors are balanced, is arguably an inconsistency on the part of Lord Diplock in the light of his condemnation of the "prima facie case" approach earlier in the judgment. To use his own criticisms, how can it be clear on affidavit evidence, without oral testimony and cross examination that "there is no credible dispute

(q) [1975] AC 396, 406.

(r) Ibid, 408.

(s) Usually, in the United Kingdom, in order to make the Court's function easier, the applicant for an interim or interlocutory injunction gives an undertaking that he will compensate the defendant in damages for the loss or injury he may suffer should it be found at the full trial that the interim or interlocutory remedy has been wrongly issued. See *Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295 and I C F Spry, *Equitable Remedies* (1971) 435ff. In New Zealand this matter is not left to the discretion of the Court. Rule 468B of the Code of Civil Procedure 1908 provides: "Every interlocutory or interim order made upon any such motion shall contain an undertaking by the plaintiff to abide by any order which the Court may make as to damages, in case the Court shall thereafter be of opinion that the defendant shall have sustained any by reason of the order which the plaintiff ought to pay."

(t) Ibid, 408. At what point in time does the "status quo" exist? In *Fellowes & Son v Fisher* [1976] QB 122, 141 Sir John Pennycuick stated: "By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked upon the activity sought to be restrained". Compare *Hubbard v Pitt* [1976] Ch 142, 190 per Orr LJ. See also *Gallaher Ltd v International Brands Ltd* (Supreme Court, Auckland, 18 June 1976 (A408/76). Chilwell J) and *Philp Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35, 38-39 per White J.

(u) Ibid, 409.

(v) Id.

that the strength of one party's case is disproportionate to that of the other party"? If such indisputable evidence does exist and probability of success can be accurately ascertained then the final determination should be made at the first hearing and the matter should not need to go to further trial.

Lord Diplock offered the caution that it is unwise to specify a definitive list of factors to be taken into account when determining the balance of convenience because the relevant factors will vary from case to case *(w)*. As his Lordship stated "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases" *(x)*.

The position in the United Kingdom after the American Cyanamid decision

The United Kingdom Courts have, on the whole, accepted the broad application of the principles enunciated by Lord Diplock in *American Cyanamid (y)*. However this acceptance has been due more to deference to the doctrine of stare decisis than to enthusiastic support for the purportedly universal principles *(z)*.

There has been speculation as to whether *American Cyanamid* can be reconciled with the earlier decision of the House of Lords in *J T Stratford & Son Ltd v Lindley (aa)* which clearly accepted the threshold requirement of the establishment of a prima facie case *(ab)*. In *Fellowes & Son v Fisher (ac)* Brown LJ commented that even though the two decisions appear inconsistent, the Court of Appeal was not faced with two decisions which were in direct confict. His Lordship saw the reconciliation in the fact that in the *Stratford* decision "the House adopted, without argument, what was common ground between counsel, while in the [*American Cyanamid* case] there was a direct decision". Sir John Pennycuick also reconciled the decisions on this ground, while noting that *J T Stratford & Son Ltd v Lindley* was apparently not cited in *American Cyanamid (ad)*.

However Lord Denning bluntly stated that he found the two approaches impossible to reconcile *(ae)*. In *Fellowes (af)* the Master of the Rolls spearheaded the criticism of Lord Diplock's approach, alleging that it reduced the effectiveness of the interlocutory injunction as an expeditious and inexpensive means of settling disputes. Such disputes would otherwise spread over a long period of time and be very expensive if they went to trial. Under the prima facie case approach, where a preliminary determination could be made of the merits of the application, the parties often accepted the issue or non-issue of the interlocutory remedy as a final determination, for their purposes, of the dispute. Lord Denning declared that with respect to covenants in restraint of trade, which was the subject of the injunction application in *Fellowes* case, "in 99 cases out of 100 it goes no further" *(ag)*. His Lordship gave other examples of cases where litigation commonly ceased at the interlocutory injunction stage: industrial disputes, breaches of confidence and passing-off cases *(ah)*.

In *Fellowes* Lord Denning MR seized upon Lord Diplock's statement that ". . . there may be many other special factors to be taken into consideration in the particular circumstances of individual cases" *(ai)*. To Lord Denning: "[t]hat sentence points the way" *(aj)*. His Lordship found such a "special factor" in the necessity for a quick determination of the merits in some cases. This special factor justified the Courts assessing and being influenced by the plaintiff's probability of success. In the words of Lord Denning:

> "They are all cases where it is urgent and imperative to come to a decision. The affidavits may be conflicting. The questions of law may be difficult and call for detailed consideration. Nevertheless, the need for immediate decision is such that the Court has to make an estimate of the relative strength of each party's case. If the plaintiff makes out a prima facie case, the

(w) Ibid, 408.

(x) Ibid, 409.

(y) The United Kingdom Courts have purported to apply the *American Cyanamid* principles in the following reported cases: *Fellowes & Son v Fisher* [1976] QB 122 (CA); *Hubbard v Pitt* [1976] QB 142 (CA); *Losinska v Civil and Public Services Assoc* [1976] ICR 473 (CA); *BBC v Hearn* [1977] 1 WLR 1004 (CA); *In re Lord Cable, deceased* [1977] 1 WLR (Ch D); *Roebuck v National Union of Mineworkers (Yorkshire Area)* [1977] 1 CR 573 (Ch D); *John Hayten Motor Underwriting Agencies Ltd v RBHS Agencies Ltd* [1977] 2 Lloyd's Rep 105 (CA); *Howe Richardson Seale Co Ltd v Polimex — Cekop* [1978] 1 Lloyd's Rep 161 (CA); *Smith v Inner London Education Authority* [1978] 1 All ER 411 (CA). Compare *Bryanston Finance Ltd v de Vries (No 2)* [1976] Ch 63 (CA).

(z) See eg *Fellowes & Son v Fisher* [1976] QB 122.

(aa) [1965] AC 269.

(ab) Eg ibid, 331 per Lord Pearce; 338 per Lord Upjohn.

(ac) [1976] QB 122, 138.

(ad) Ibid, 140-141.

(ae) Ibid, 132.

(af) Ibid, 127ff.

(ag) Ibid, 129.

(ah) Ibid, 133-134.

(ai) Ibid, 133.

(aj) Id.

> Court may grant an injunction. If it is a weak case, or is met by a strong defence, the Court may refuse an injunction. Sometimes it means that the Court virtually decides the case at that stage. At other times it gives the parties such good guidance that the case is settled. At any rate, in 99 cases out of 100, the matter goes no further" *(ak)*.

Stamp LJ in the later case *Hubbard v Pitt (al)* condemned Lord Denning's construction of Lord Diplock's statement with respect to "special factors", arguing that Lord Denning's interpretation allows, in relatively broad circumstances, reversion to the prima facie case approach with its inevitable assessment of probability of success. Stamp LJ argued that Lord Diplock intended such factors to be taken into account only when determining the balance of convenience; he did not contemplate that in some circumstances the party seeking an interlocutory injunction should still be required to make out a prima facie case. The third member of the Court of Appeal in *Hubbard v Pitt*, Orr LJ, supported the view expressed by Stamp LJ *(am)*.

In the *Fellowes* case Sir John Pennycuick also isolated what he called "difficulties" with respect to the *American Cyanamid* approach:

> "By far the most serious difficulty, to my mind, lies in the requirement that the prospects of success in the action have apparently to be disregarded except as a last resort when the balance of convenience is otherwise even. In many classes of case, in particular those depending in whole or in great part upon the construction of a written instrument, the prospect of success is a matter within the competence of the Judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief. Indeed many cases of this kind never get beyond the interlocutory stage, the parties being content to accept the Judge's decision as a sufficient indication of the probable upshot of the action. I venture to think that the House of Lords may not have had this class of case in mind in the patent action before them" *(an)*.

This view is obviously similar to that expressed by Lord Denning. Sir John Pennycuick also considered the application of Lord Diplock's suggested principles in the context of the "class of case where immediate judicial interference is essential" *(ao)*. His Lordship cited trespass and the internal affairs of a company as being two such areas" . . . in which the Court could not do justice without to some extent considering the probable upshot of the action if it ever came to be fought out, or in other words the merits" *(ap)*.

The English Court of Appeal has in fact considered probability of success in the circumstances of an interlocutory injunction being sought to restrain a minority shareholder from presenting a petition to wind up a company. In *Bryanston Finance Ltd v de Vries (No 2) (aq)* Buckley LJ considered that the action was designed to prevent the commencement of proceedings in limine and this brought the case within Lord Diplock's "special factors". Stephenson LJ *(ar)* and Sir John Pennycuick *(as)* distinguished *American Cyanamid* on the ground that the case in question involved seeking an interlocutory injunction to restrain a defendant from exercising his legal right to present a petition for the winding up of a company, whereas Lord Diplock's principles were, arguably, applicable only to "an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right . . . ." *(at)*. In the circumstances the order made upon the application would determine the matter with a degree of finality. In other words the defendant was either free to present his petition or he was prevented from doing so. Sir John Pennycuick exposed the contrast between this context and that in *American Cyanamid* where the decision concerned temporary relief pending a final determination. The Court accepted that Lord Diplock could not have intended his principles to be applied in a type of case where their application would be inappropriate *(au)*.

There is still uneasiness in the English Court of Appeal about the alleged universality of Lord Diplock's principles. The recent judgments of Geoffrey Lane LJ in the public law

(ak) Id. Lord Denning MR adopted a similar approach in *Hubbard v Pitt* [1976] QB 142 at 178.

(al) [1976] QB 142, 185.

(am) Ibid, 188.

(an) [1976] QB 122, 141.

(ao) Id.

(ap) Id.

(aq) [1976] 1 Ch 63, 76.

(ar) Ibid, 79-80.

(as) Ibid, 80-81.

(at) [1975] AC 396, 406.

(au) Vautier J in *Sheridan Park Ltd v AGH Finance Ltd* (Supreme Court, Auckland, 17 November 1978 (A876/78)) adopted a similar approach to that of the English Court of Appeal in *Bryanston Finance Ltd v de Vries (No 2)*.

cases *Smith v Inner London Education Authority (av)* and *Lewis v Heffer (aw)* illustrate this discomfort. In the former case Geoffrey Lane LJ distinguished *American Cyanamid* on the grounds that in the case at hand there was no material dispute about the facts; the parties had argued the issues in full and the Court had given the issues mature consideration. His Lordship concluded:

> "Consequently, to apply the rules laid down by Lord Diplock (which are designed to circumvent the necessity of deciding disputed facts or determining points of law without hearing sufficient argument) would in the circumstances seem to be inappropriate. The outcome of the full argument applied to the undisputed facts is to my mind clear. The authority succeeds and the injunction should be discharged" *(ax)*.

In these circumstances probability of success was a factor which should not be ignored by the Court in the exercise of its discretion.

The inappropriateness of Lord Diplock's approach to the public law situation in *Lewis v Heffer* was exposed colourfully by Geoffrey Lane LJ:

> "At the end of the day I have been driven to the conclusion that those *Cyanamid* rules are practically impossible to apply to the present circumstances. They were designed to cover a commercial situation where loss, hardship or misfortune could be compensated by payments of money. In the political context which exists in this case there can be no question of quantifying anyone's loss in terms of cash. Secondly, in the *Cyanamid* type of situation, it is possible if necessary to freeze the situation as it existed before the dispute between the parties arose, in order words to preserve the status quo, and indeed one is enjoined by the *Cyanamid* decision to do so if the balance of convenience is equal. Here, for reasons which have been explained already into which it is unnecessary for me to go, it would be impracticable to do such a thing, because the situation is in total state of flux of a kind which would have delighted Heracleitus himself" *(ay)*.

The position in New Zealand before American Cyanamid

The principles relating to the exercise of the Court's discretion to issue interim and interlocutory injunctions in New Zealand prior to *American Cyanamid* are set out in the judgment of the Court of Appeal delivered by McCarthy P in *Northern Drivers Union v Kawau Island Ferries Ltd (az)*. In the Supreme Court Mahon J had granted an interim injunction restraining the union from continuing a ban against the carrying of orders between a company supplying fuel oil and the plaintiff company. The substantive wrong alleged was the tort of interference with contractual relations without lawful justification.

McCarthy P enunciated the applicable principles clearly and succinctly:

> "The purpose of an interim injunction is to preserve the status quo until the dispute has been disposed of on a full hearing. That being the position, it is not necessary that the Court should have to find a case which would entitle the applicant to relief in all events: it is quite sufficient if it finds one which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until the essential dispute can be finally resolved" *(ba)*.

Lord Pearce's statement that: "The question . . . is whether the plaintiffs have made out a prima facie case" *(bb)* in *J T Stratford & Son Ltd v Lindley* was quoted authoritatively. McCarthy P qualified the quotation by emphasising the serious consequences that may follow from the issue of an interim injunction in the context of industrial disputes and commented that:

> ". . . the Court will usually require a strong prima facie case, but the mere fact that there may be a doubt about the law or the facts is not sufficient to prevent the Court from granting the application" *(bc)*.

His Honour specifically acknowledged that the remedy was discretionary and that the balance of convenience was to be taken into account in determining its issue. The Court of Appeal was satisfied, after a thorough consideration of the probability of the applicant's success at a full trial, that a prima facie case had been established and the Court found the balance of convenience to favour issue of the remedy.

When *American Cyanamid* was decided less than a year later the stage was set for the New Zealand Courts either to maintain the traditional prima facie case approach with its assessment of the parties' probability of success at the

(av) [1978] 1 All ER 411, 423ff.
(aw) [1978] 1 WLR 1061, 1077ff.
(ax) [1978] 1 All ER 411, 426.
(ay) [1978] 1 WLR 1061, 1078.
(az) [1974] 2 NZLR 617.
(ba) Ibid, 620.
(bb) [1965] AC 269, 331.
(bc) [1974] 2 NZLR 615, 621.

full trial, or to adopt the principles formulated by Lord Diplock.

The question has not, as yet, come before the New Zealand Court of Appeal. However the conflict has now been considered on many occasions by the New Zealand Supreme Court *(bd)*. Different Judges have shown different preferences and the question consequently remains for urgent authoritative determination by the New Zealand Court of Appeal.

In terms of the doctrine of stare decisis, the New Zealand Supreme Court and Court of Appeal are placed in an interesting position. These Courts are confronted with two apparently inconsistent decisions of the House of Lords, and a decision of the New Zealand Court of Appeal. The latter decision is sandwiched chronologically between the two decisions of the House of Lords, and follows the first of these decisions. Should the earlier decision of the Court of Appeal or the later decision of the House of Lords be followed by the New Zealand Courts?

The New Zealand Supreme Court is obliged in indistinguishable circumstances to follow the approach adopted by the Court of Appeal in *Kawai Island Ferries Ltd (be)*. The situation may be different should the decision be put before the New Zealand Court of Appeal. Recent obiter dicta clearly state that the New Zealand Court of Appeal is not bound by indistinguishable decisions of the House of Lords, although such decisions may be highly persuasive *(bf)*. Although not bound to follow *American Cyanamid* it is arguable that the New Zealand Court of Appeal is free to depart from its own previous decision and adopt Lord Diplock's approach should it so wish *(bg)*.

Over the last four years some Judges of the New Zealand Supreme Court have appreciated the Court's correct position from the point of view of the doctrine of stare decisis and shown deference to the doctrine. Others have not shown such reverence for the high principles of our common law system.

New Zealand decisions that have followed the Kawau Island Ferries Ltd case

O'Regan J made his deference to the doctrine of stare decisis clear in *Collins v Akatarawa Sawmilling Co*:

> "Despite temptation to the contrary to be fascinated by the light thrown by *Cyanamid* and to join in the controversy and debates it has engendered, I think it clear that, bound as I am by the decisions of the Court of Appeal, it is my simple duty to apply the principles and the approach it has expounded and given in *Northern Drivers Union v Kawau Island Ferries* . . . ." *(bh)*.

Despite this clear statement O'Regan J did not appear to specifically acknowledge that the plaintiff had established a "prima facie case" or his "probability of success" in the full trial. Nevertheless the plaintiff was held to be entitled to the remedy after O'Regan J considered the substantive issues raised by the application.

Without expressly deferring to the doctrine of precedent Jeffries J in *Wairarapa Co-operative Dairy Co Ltd v Dalefield Co-operative Dairy Co Ltd (bi)* quoted with approval from the judgment of McCarthy P in the *Kawau Island Ferries Ltd* case and assessed the parties' probability of success at the final trial. This was a motion for an order rescinding an interim injunction which had been granted after an ex parte application. The interim injunction stopped a farmer defying an order preventing him taking his milk supply from one dairy company to another. The "stay put" order had been made by the New Zealand Dairy Board. The ultimate question for the Court at the full trial was whether or not the Board had authority to make such a "stay put" order in the circums-

(bd) See eg *Gallaher Ltd v International Brands Ltd* (Supreme Court, Auckland, 18 June 1976 (A408/76) Chilwell J); *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35 (White J); *Collins v Akatarawa Sawmilling Co* (Supreme Court, Wellington, 11 March 1977 (Ak97/77) O'Regan J); *Harder v NZ Tramways and Public Passenger Transport Authorities Employees Industrial Union of Workers* [1977] 2 NZLR 162 (Chilwell); *Attorney-General, ex rel Dominion Fertiliser Co Ltd v Kempthorne Prosser & Co Ltd* (Supreme Court, Dunedin, 5 August 1977 (A64/77), Somers J); *Wairarapa Co-operative Dairy Co Ltd v Dalefield Co-operative Dairy Co Ltd* (Supreme Court, Masterton, 5 August 1977 (A6/77), Jeffries J); *Greenwich v Murray* (Supreme Court, Wellington, 19 December 1977 (A507/77), Barker J); *Sheridan Park Ltd v AGH Finance Ltd* (Supreme Court, Auckland, 17 November 1978 (A876/78) Vautier J); *The New Zealand Farmers' Co-operative Association of Canterbury Ltd v Farmers Trading Company Ltd* (Supreme Court, Christchurch, 15 February 1979 (A496/78), Chilwell J).

(be) See *Collins v Akatarawa Sawmilling Co*, supra fn (bd).

(bf) See eg *Ross v McCarthy* [1970] NZLR 449, 453 per North P; *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741, 757 per North P; 771 per Woodhouse J. See also *Corbett v Social Security Commission* [1962] NZLR 878.

(bg) See *In re Rayner (deceased), Daniell v Rayner* [1948] NZLR 455; *Smith v Wellington Woollen Manufacturing Co Ltd* [1956] NZLR 491; *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; *Davis v Johnson* [1978] 2 WLR 182 (CA) and 553 (HL).

(bh) Supra, fin (bd). (An action to stop a mortgagee exercising an alleged power of sale.)

(bi) Id.

tances.

Although Jeffries J referred to the different authorities and approaches, his Honour did not expressly acknowledge which approach he was following. However Jeffries J did quote from the judgment of McCarthy P and attempted to ascertain the probable outcome of the final trial:

> "The final decision in this case will be made on an interpretation of a fairly narrow point in the Regulations, and is therefore not complicated by disputed facts. That, in my opinion, throws a special burden on the plaintiff to satisfy the Court at this stage that the meaning contended for is at least plainly arguable and it has failed to do so. In my view the strength of the defendant's case is such that it would be unfair to it to have an injunction issue against it with all the consequences that would follow when it holds a strong hand. The plaintiff only finds itself with an advantage because it persuaded the Board to act in a manner which is analogous to the issue of an injunction. If [the Board] is to be held to have such power then it must stand out in the Regulations like a beacon, and, in my opinion, such power does not reside there."

Another case which may be argued to support the prima facie case approach is the decision of Barker J in *Greenwich v Murray (bj)*. An interim injunction was sought to prevent the defendants from acting in breach of a restraint of trade clause. Barker J embarked upon a relatively detailed discussion of the conflicting authorities. His Honour did not definitively state the approach which he thought the New Zealand Courts should, in general, take. However, Barker J did hold in the light of the judgments of Lord Denning *(bk)* and Sir John Pennycuick *(bl)* in *Fellowes* that the prima facie case approach should be maintained in respect of interim and interlocutory injunctions to prevent breaches of contracts in restraint of trade:

> "I think that I am justified from the approach of Sir John Pennycuick, taken in the full knowledge of both House of Lords decisions, that in a restraint of trade case such as the present, I can look at the clause in question to determine whether there is a *prima facie* case. I regard this as a necessary part of the inquiry as to whether it is just to grant the interlocutory injunction."

In *Fellowes* both Lord Denning and Sir John Pennycuick accepted *American Cyanamid* as being the law. However they argued that Lord Diplock did not have restraint of trade cases in mind when enunciating his principles. Thus it could be argued that Barker J is impliedly accepting the *American Cyanamid* approach as the general approach to interim and interlocutory injunctions. However contracts in restraint of trade raise exceptional circumstances in which the *American Cyanamid* approach is not appropriate. Barker J at the end of his judgment, did apply the *American Cyanamid* approach as an alternative and reached the same conclusion that the application for the interim relief should be declined.

New Zealand decisions which have followed the American Cyanamid approach

The majority of recent New Zealand Supreme Court decisions appear to support the *American Cyanamid* approach. The first case to support the approach in New Zealand would appear to be the decision of Chilwell J in *Gallaher Ltd v International Brands Ltd (bm)*, a passing off case. Without extensive discussion his Honour accepted that the New Zealand Courts should logically apply Lord Diplock's approach "for the reason that the decision of the Court of Appeal in the *Northern Drivers Union* case ante-dated the decision of the House of Lords in the *Cyanamid* case." Does the mere fact that the New Zealand decision preceded the House of Lords decision by seven months necessarily make it a less satisfactory approach? It is submitted that this attempted resolution of the conflicting authorities is arbitrary and in disregard of the doctrine of precedent.

Gallagher Ltd is not the only case in which Chilwell J has shown his preference for the *American Cyanamid* approach. His Honour gave approval to the approach in *Harder v New Zealand Tramways Employees Union (bn)* (alleged industrial action in contravention of statute) and *Cross v Peni (bo)* (passing off) without any elaboration. In the former case, although purporting to apply the *American Cyanamid* approach, it would appear that his Honour did consider the probability of the plaintiff's success in the final action. It is difficult to see how his Honour could give an interim declaration of rights (should such a legal remedy exist) without considering the probability of the plaintiff's

(bj) Id.

(bk) [1976] 1 QB 122, 133.

(bl) Ibid, 141.

(bm) Supra fn (bd).

(bn) [1977] 2 NZLR 162, 171.

(bo) Supreme Court, Auckland, 14 April 1978 (A1654/77).

success.

Chilwell J recently reiterated that the *American Cyanamid* approach was the one to be followed with respect to passing off cases in *New Zealand Farmers' Co-operative Association of Canterbury Ltd v Farmers Trading Co Ltd and Calder Mackay Co Ltd (bp)*. But once again, despite a clear endorsement that the *American Cyanamid* approach was appropriate, his Honour proceeded to consider the applicant's probability of success at the final trial and even expressly concluded "I find a strong prima facie case made out by the plaintiff". Probability of success obviously does play a part in the analysis of Chilwell J. This is contrary to the clear instructions of Lord Diplock *(bq)*.

The most express application of the *American Cyanamid* approach in New Zealand was enunciated by White J in *Philip Morris (New Zealand) Ltd v Liggett & Myers Tobacco Co (New Zealand) Ltd (br)*, a trade mark case. His Honour created the impression in the first few pages of his judgment that there was a consistency between Lord Diplock's judgment in *American Cyanamid* and McCarthy P's judgment in the *Kawau Island Ferries Ltd* case. This was done by selectively quoting from McCarthy P's judgment. White J did not, however, quote the statement that ". . . the Court will usually require a strong prima facie case" *(bs)* which was in conflict with his own statement that ". . . the plaintiff in claiming an interim injunction need not establish a prima facie case, and the relative strength of each party's case is '. . . only the last factor to be taken into consideration . . .' " *(bt)*. The Court applied Lord Diplock's approach and granted an interim injunction to maintain the status quo. Although this decision was affirmed by the Court of Appeal the principles with respect to the issue of interim and interlocutory injunctions were not the subject of the appeal *(bu)*.

Vautier J also impliedly gave approval to the Lord Diplock approach in *Sheridan Park Ltd v AGH Finance Ltd (bv)*. The case involved an application for an injunction to prevent action being taken to wind up a company. His Honour thought that the case was analogous to *Bryanston Finance Ltd v de Vries (No 2) (bw)* and was one of the "special factor" cases envisaged by Lord Diplock. Consequently the *Kawau Island Ferries Ltd* case approach was held to be appropriate in the circumstances.

The New Zealand Courts have not, as yet, attempted to comprehensively unravel the uncertain state of the law. While the majority of the Supreme Court decisions have favoured the *American Cyanamid* approach, that approach has been adopted without a full consideration of the relative merits of the respective approaches *(bx)*. As Barker J commented in *Greenwich v Murray (by)* after surveying differing approaches in recent New Zealand Supreme Court decisions:

> "It might be helpful to Judges in this country to have an up-to-date ruling of the Court of Appeal in the light of the *American Cyanamid* case."

It is hoped that the Court of Appeal will soon have an opportunity to make a comprehensive statement of the general principles to be applied in New Zealand with respect to the exercise of the Courts' discretion to issue interim and interlocutory injunctions *(bz)*.

(bp) Supra fn (bd).

(bq) See *American Cyanamid v Ethicon Ltd* [1975] AC 396, 407.

(br) [1977] 2 NZLR 35.

(bs) [1974] 2 NZLR 617, 621.

(bt) [1977] 2 NZLR 35, 38. See *Fellowes & Son v Fisher* [1976] QB 122, 138 per Browne LJ.

(bu) See [1977] 2 NZLR 41.

(bv) Supra fn (bd).

(bw) [1976] 1 Ch 63.

(bx) See eg *Budget Rent-A-Car Systems 1970 Ltd v Dominion Rentals 1976 Ltd* (Supreme Court, Auckland, 14 April 1978 (A1654/77), Barker J); *Gourlie v Dunedin City Council* (Supreme Court, Dunedin, 15 February 1979 (M15/79), Perry J); *Attorney-General, ex rel Dominion Fertiliser Co Ltd v Kempthorne Prosser & Co Ltd* (Supreme Court, Dunedin, 5 August 1977 (A64/77), Somers J).

(by) Supra fn (bd).

(bz) Section 12 of the Judicature Amendment Act 1977 gives the Supreme Court power to make interim orders before final determination of an Application to Review made pursuant to the Judicature Amendment Act 1972 as amended. Although such a remedy would appear to be similar, in some circumstances, to an interim or interlocutory injunction, two Judges of the Supreme Court have shown a reluctance to state which, if either, of the two approaches to interlocutory injunctions should be applied upon exercising the statutory discretion. See Barker J in *Young v County of Bay of Islands County Council* (Supreme Court, Whangarei, 13 December 1977 (A83/77)) and Perry J in *Gourlie v Dunedin City Council* (Supreme Court, Dunedin, 15 February 1979 (M15/79)). In the former decision Barker J said: "There are no binding criteria as to the occasions when this interim power ought to be used. I think it desirable that this procedure be left as flexible as possible. I do not think it desirable to import into applications for interim relief on motions for review under the Judicature Amendment Act, the authorities on interim injunctions. These authorities are in some disarray as the result of conflicting decisions in the House of Lords; I think that the chief inappropriateness of the interim injunction approach is the necessary consideration of damages as an appropriate remedy either to the applicant if successful, or to the defendant if the applicant is unsuc-

The Australian Courts appear to have been unpersuaded as to the merits of Lord Diplock's approach in *American Cyanamid*. They have maintained the traditional prima facie case approach applied by the High Court in *Beecham Group Ltd v Bristol Laboratories Pty Ltd (ca)*. The Canadian Courts, however, appear to be experiencing similar problems to those being experienced in New Zealand with some Courts accepting the new formulation of the principles and others being unsure as to whether the traditional prima facie case approach still prevails *(cb)*.

A suggested formulation of principles

The object of the interim or interlocutory injunction is to prevent the infliction of irreparable injury through unlawful interference with a person's rights pending the final determination of a legal action in a full trial. The interim remedy theoretically preserves the status quo until the matter is resolved in a forum which allows maximum access to relevant evidence and the presentation of full submissions.

Ideally the plaintiff's probabilty or likelihood of success in the final full trial should be a factor in the Courts deciding whether or not to issue an interim or interlocutory injunction. Assessing probability of success is a preliminary determination of the substantive merits of the plaintiff's case. The substantive merits of a case usually determine its ultimate outcome. Thus, probability of success should be an important, if not the most important, factor in the Courts' decision as to whether or not to grant relief. This ideal is subject to the qualification that the plaintiff's probability of success must be capable of being ascertained at the preliminary hearing.

The ability of the Court at the preliminary hearing to predict the final outcome must vary from case to case, depending on such factors as whether the application is ex parte or inter partes, the complexity and difficulty of the legal or factual issues involved, and the comprehensiveness of the submissions of counsel and the affidavit evidence. For example, probability of success will be more readily taken into account where the only issue is a relatively straightforward question of law, than where the dispute is of a complex factual nature and the evidence consists of conflicting affidavits *(cc)*.

Often the haste with which interlocutory injunction applications are heard causes the evidence before the Court to be incomplete. The Court must also bear in mind that the evidence and its presentation may not be able to be exposed to normal Court procedures which would test its truth or veracity. Such procedures, for example cross examination of witnesses, theoretically ensure a better approximation to factual truth. A modification of attitudes to evidential procedures at the preliminary hearing would allow fuller evidence to be put before the Court and thus the probability of the plaintiff's success would be able to be more accurately ascertained.

If the plaintiff has no realistic possibility of success in his allegation on the substantive merits, then he should not be able to use the machinery of justice to prevent the defendant from exercising his rights, even if the temporary denial to the defendant of the use of his rights is compensatible in damages. Conversely, if at the preliminary hearing it can be accurately ascertained to a high degree of probability that the plaintiff's rights are being unjustifiably interfered with, the defendant should not be permitted to continue such interference merely because the injury to the plaintiff can later be compensated for in damages.

Probability of success, *to the extent that the Court regards it as being capable of ascertant*, should be an important factor in the Court's deciding whether to grant interim or interlocutory relief *(cd)*. Rather than being a threshold factor as it inevitably is in the "prima facie" case approach, probability of success

cessful. Such considerations are usually inappropriate in administrative law matters such as the present." Compare *Wilson v Hughes and the NZ Racing Conference* (Supreme Court, Auckland. 15 September 1978 (A809/77)) where Casey J, as obiter dicta, stated: "It is accepted that whether this application is to be considered by the Court under s 12 of the Judicature Amendment Act 1977 . . . or under the general jurisdiction of the Supreme Court to grant an interim injunction, the principles are the same." Thus a related problem also waits to be resolved by the Court of Appeal.

(ca) (1968) 118 CLR 618. See eg *J D Barry Pty Ltd v M & E Constructions Pty Ltd* [1978] VR 185; *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729. Compare *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309. See note on interlocutory injunctions (1977) 51 ALJ 147.

(cb) See eg two recent decisions: *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1978) 87 DLR (3d) 342 and *Lambair Ltd v Aero Trades (Western) Ltd* (1978) 87 DLR (3d) 500.

(cc) For a recent example of where the legal issue was such that the Court felt competent to take probability of success into account see *Wairarapa Co-operative Dairy Co Ltd v Dalefield Co-operative Dairy Co Ltd* (Supreme Court, Masterton. 5 August 1977 (A6/77). Jeffries J).

(cd) See *Northern Drivers Union v Kawau Island Ferries Ltd* [1974] 2 NZLR 617, 622ff per McCarthy P as a good example of a Court attempting to determine the applicant's probability of success at the full trial.

should be regarded as a factor to be taken into account in the discretionary determination of the balance of convenience. Probability of success is another factor to be considered, along with the consequences of issue or non-issue of the remedy, in determining where the balance of convenience lies. It should be given a higher priority in determining the balance of convenience than Lord Diplock was willing to give it in *American Cyanamid (ce)*. In cases where the Court in the exercise of its discretion considers that probability of success can be ascertained, it should not be necessary to carry out Lord Diplock's threshold test of determining whether the application raises a "serious question" *(cf)*.

In taking account of the applicant's probability of success the Courts will inevitably consider the importance of the rights allegedly interfered with and the seriousness of that interference. Further the Courts should not confine themselves to a consideration of the strength of the plintiff's case they should also consider the merits of any defences the defendant may be able to raise *(cg)*.

As an aspect of the balance of convenience, the degree of probability required will inevitably vary according to the other factors taken into account, such as the relative abilities of the parties to compensate each other should they be wrong. Obviously the applicant would have to show a high probability of success should the defendant be likely to suffer extensive inry in the period between the preliminary and final hearings. Conversely a lesser probability may suffice should the likely injury to the defent during the interim period be slight. Where the legal context is such that the decision upon the application for the interim remedy will almost inevitably determine the ultimate outcome *(ch)*, the plaintiff's probability of success, in the sense of a definitive determination of the respective rights of the parties, will assume an overriding importance in assessing the balance of convenience.

Should the Court regard itself as *not being competent to determine the probability of the plaintiff's success* on the submission and evidence before it then Lord Diplock's approach in *American Cyanamid* should, with slight modification, be employed. Namely, it should be determined whether a "serious question has been raised by the plaintiff's application. If so, then the Court's discretionary determination of the balance of convenience should decide whether or not an interim or interlocutory injunction issues. The modification to Lord Diplock's approach is that the criterion of probability of success should be ignored, not even referred to as a last resort should all other factors be equal *(ci)*.

In the latter category of cases, where probability of success is not taken into account, the disputes will be more likely to go to final trial because the parties will not have had their respective rights in any way determined. Conversely cases where probability of success is taken into account will be more likely to be settled before the full trial. Thus the outstanding advantage of the prima facie case approach, as publicised by Lord Denning MR *(cj)*, will be preserved. The proceedings will allow an expeditious and relatively inexpensive pronouncement upon the merits in some cases.

The balance of convenience as it has been traditionally determined in the light of parties' abilities to compensate each other in damages should their arguments fail at the final trial, is reasonably well suited to the private law context. Such criteria will not always, however, be very applicable in the public law context where the interference is with the plaintiff's public rights rather than private rights *(ck)*. How would the Court assess a city council's ability to compensate in damages the citizens of a municipality for injury inflicted on the public through the refusal to issue an interlocutory injunction while a city council continues to exercise purported powers in excess of its statutory authority? Conversely, how could the Court assess the citizen's ability to compensate the city council should an interlocutory injunction issue to restrain the exercise of the purported authority and it is held at the full trial that the

(ce) [1975] AC 396, 409.

(cf) Ibid, 407-408.

(cg) See *Hubbard v Vosper* [1972] 2 QB 84, 96 per Lord Denning MR; 97 per Megaw LJ.

(ch) See eg *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 Ch 63. See also *Fellowes & Son v Fisher* [1976] 1 QB 122, 141 where Sir John Pennycuick suggested trespass and the internal affairs of a company as two random examples of classes of case where immediate judicial interference is essential and where "the court could not do justice without to some extent considering the probable upshot of the action if it ever came to be fought out, or in other words the merits".

(ci) Compare *American Cyanamid v Ethicon Ltd* [1975] AC 396, 409 per Lord Diplock.

(cj) *Fellowes & Son v Fisher* [1976] 1 QB 122, 133.

(ck) See eg *Lewis v Heffer* [1978] 1 WLR 1061, 1078 per Geoffrey Lane LJ (quoted in the text above).

(cl) See *Young v County of Bay of Islands County Council* (Supreme Court, Whangarei. 13 December 1977 (A83/77). Barker J). See fn (bz).

city council does have the statutory authority to do what it was purporting to do *(cl)*? The injuries suffered are not capable of economic assessment. The balancing is not of economic considerations but rather of competing public interests *(cm)*. The citizens' interest in being free from restrictions imposed by ultra vires official action has to be balanced against the local authority's interest in administrative efficiency and practicality. As Browne LJ said recently in the English Court of Appeal:

> ". . . where the defendant is a public authority performing duties to the public one must look at the balance of the convenience more widely, and take into account the interests of the public in general to whom these duties are owed" *(cn)*.

The fact that the determination of the balance of convenience is a balancing process, a discretionary exercise of a traditional equitable power by the Court, must be emphasised. Guidelines can be established as to how the Courts should approach the exercise of this discretion. This has been attempted above. However, the rigid specification of definitive lists of criteria and their relative importance should be conscientiously avoided. The applicable criteria and their relative importance must vary from case to case. As the Lord Chancellor observed as early as 1838, whether an interim or interlocutory injunction should issue to maintain the status quo "depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject, by which the discretion of the Court ought in all cases to be regulated" *(co)*. And as Megaw LJ said recently:

> "Each case must be decided on a basis of fairness, justice and common sense in relation to the whole of the issues of fact and law which are relevant to the particular case" *(cp)*

Conclusion

The object of this article has been to expose the uncertainty and confusion surrounding the principles guiding the New Zealand Courts in the exercise of their discretion to issue interim and interlocutory injunctions. The unsatisfactory nature of Lord Diplock's approach in *American Cyanamid* with its purportedly universal principles and condemnation of assessment of probability of success has been discussed. Finally an attempt has been made to formulate an approach which the New Zealand Courts should adopt to resolve the confusion.

The suggested approach emphasises the discretionary nature of the Court's function in issuing the remedy. If the Court considers that the plaintiff's probability of success can be ascertained then it should be considered along with any other factors which may be relevant to the determination of the balance of convenience. Should probability of success not be capable of being ascertained then this factor should be ignored and an approach similar to that suggested by Lord Diplock adopted. In all circumstances the Courts should be encouraged in determining the balance of convenience to consider all criteria which they consider relevant in the particular circumstances of each case and to give such criteria the relative importance which the particular circumstances demand.

(cm) The Courts are relatively experienced in assessing the relative importance of public interest. See for example the context of Crown privilege.

(cn) *Smith v Inner London Education Authority* [1978] 1 All ER 411, 422.

(co) *Saunders v Smith* (1838) 3 My & Cr 711, 728; 40 ER 1100, 1107.

(cp) *Hubbard v Vosper* [1972] 2 QB 84, 98.

RECENT ADMISSIONS

Barristers and Solicitors

Archibald, R J	Christchurch	16 October 1979
Brazier, R T	Hamilton	25 September 1979
Callanan, S J	Christchurch	4 October 1979
Dwyer, G P	Christchurch	19 October 1979
Garvan, J L	Christchurch	11 October 1979
Knowles, J J	Blenheim	8 October 1979
McConnell, P A	Hamilton	25 September 1979
Oomen, M P J	Hamilton	27 September 1979
Parshotam, S R	Auckland	19 October 1979
Vosper, A J	Hamilton	25 September 1979
Webb, J R G	Hamilton	2 October 1979