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PLANNING BLIGHT — WHO SHOULD BEAR THE COST?

"Blight": the condition which occurs when there is public knowledge of an acquisition proposal but not yet official willingness, or ability, to purchase the land. The landowner finds it impossible to sell the land at normal market value,. . ."

"Unless . . . an obligation [to acquire] is imposed the problem of Blight will remain, causing serious injustice to owners. The problem is extensive and serious, as the public hearings revealed. No one aspect of compulsory acquisition was more frequently or trenchantly attacked."

Australian Law Reform Commission report on Land Acquisition and Compensation.

This situation of planning blight arises in New Zealand when land is designated for some future public work. A landowner affected by the designation who suffers "a financial loss" or "serious financial hardship", though being unable to sell his land because of the designation, may seek to have the designation removed or the land taken. On a cursory reading of s 82 of the Town and Country Planning Act 1977 the impression is given that the landowner must carry the burden of the designation up to a certain definable point ("financial loss" etc) after which it will be assumed by the designating authority for the benefit of the wider community.

This procedure has generally been thought to be more effective than the compensation procedures in the Town and Country Planning Act and in recent years the Planning Tribunals have been influenced by that in expressing a decided preference for designation rather than zoning to protect public works (see [1979] NZLJ 241). That attitude may need to be revised following a recent decision of the No 3 Planning Tribunal in the case of *Rountree v Ministry of Works and Development* (to be reported).

Mr and Mrs Rountree owned and lived on a small farm of some 15.3 hectares. It was barely an economic unit. Mr Rountree wished to sell it and purchase a bigger farm and go into business with his son. The farm was placed on the market at Government valuation. There were some inquiries but no offers, the reason being that part of the land (approximately 20 percent) had, since 1971, been designated for motorway purposes.

The land would not be required for the motorway for at least 10 and more likely 20 years. Acquisition was resisted because "the National Roads Board is apparently short of funds, and is not prepared to authorise the acquisition of land which is not needed in the immediate future."

So Mr Rountree was placed in the position where, either he forced acquisition through the town planning procedures or renounced his farming ambitions and accepted that he would be stuck with the land until a date when, actuarially speaking, he would be dead.

Here is what happened.

Mr Rountree applied to the Planning Tribunal for various orders under s 82. Before exercising its powers under that section the Plan-

ning Tribunal must be satisfied on the four points set out in subs (3).

The first three (land offered for sale — no agreement at market price — designation was the cause) were established. Problems arose with the fourth point. Where there is a dwelling house on the land (as here) the owner must show "a financial loss". In other cases he must show "serious financial hardship". It was held that an owner could not choose which provision he would proceed under. If he is occupying a dwellinghouse on the land he is stuck with "financial loss". The circumstances (including matters not outlined above relating to missing out on the purchase of another farm which since then had substantially increased in value) did not involve "a financial loss". (Nor, it was held, did it amount to "serious financial hardship"). The farm remained an economic unit as it had been before, while on the loss of opportunity to purchase another the Tribunal had this to say:

> "Because the applicants have been unable to buy another property, it does not follow that they have suffered financial loss, or for that matter, serious financial hardship. What they have lost, if they have lost anything at all, is the *opportunity* to *increase* their capital at least on paper, and, of course, the opportunity to set up their son in a farming venture. These factors may well be seen as amounting to hardship but, in our opinion, it is not the kind of hardship which the section contemplates. If it were, it would have been easy enough for Parliament to have said so."

That was really the end of the matter but the Tribunal went on to point out that even had Mr Rountree overcome that hurdle it could do nothing effective to help him.

It could, under s 82 (3) give the designating authority the option of removing the designation or taking the land; and in the event of the designation not being removed it could, under subs (6), order that the whole of the land be taken. If the Ministry of Works wished to persist in resisting acquisition naturally it would simply remove the designation — and leave Mr Rountree in just as bad a position as before, because it would be obvious from the designations remaining on adjoining land that his property would be involved in the motorway. So those provisions would be no help.

However, in circumstances like that, the Planning Tribunal has power under s 82 (5) to order that the land be taken. Unfortunately an order under that provision is limited to the area that is subject to the designation. So the effect of an order under this subsection would be to leave Mr Rountree with an even less saleable, uneconomic and landlocked farm. Hardly a satisfactory result.

What all this means is that Mr and Mrs Rountree have, by the decision of the designating authority and the absence of adequate compensation or acquisition provisions in the Town Planning legislation, been denied the ability to choose where they will live and to order their lives and affairs as they reasonably desire. This denial is required of them for the benefit of the wider community which itself offers nothing in return. It is hardly reasonable, and indeed this case casts serious doubts on whether the tests of "financial loss" and "serious financial hardship" do fairly mark the balance between private right and public interest. In addition, it highlights the very limited powers the Planning Tribunal has to provide an effective remedy even when "financial loss" and "serious financial hardship" are established.

What happens from here will depend very much on the attitude of the Ministry of Works and Development which is the Department charged with administering the Town and Country Planning Act 1977. It will not have escaped notice that that Department is one and the same as the respondent in this case — a respondent that has had no qualms about applying the section as it stands to resist as meritorious a claim as is likely to be found. Obviously the section suits it very well.

However it does not suit the Rountrees of this world, who, when faced with the unsympathetic decision of an administrator should be entitled to turn to an impartial body for a fair adjudication of their case in accordance with fair laws. This they cannot do — for the fair laws are somewhat lacking.

This matter does not fall within the portfolio of the Minister of Justice so change is not within his control. It should be appreciated though that justice is not to be isolated in one ministry. It colours all dealings. So long as other Ministers do nothing, and so long as the present state of affairs, administratively and legally, continues, it will remain a black blot on the justice escutcheon of the Government of the day.

TONY BLACK

FAMILY LAW

LIFE POLICIES SEPARATE PROPERTY OR MATRIMONIAL?

By PROFESSOR P R H WEBB

There is a judicial firming-up of the view that where a life assurance policy is taken out before marriage and premiums paid during marriage it is matrimonial property and so far as its value is concerned it is to be dealt with no differently from other matrimonial property.

Matrimonial property lawyers will be particularly interested in the recent decision of Somers J in *Peterson v Peterson* (his judgment was given on 23 July last).

By order made under s 22(2) of the 1976 Act, this case was referred to the High Court, the point being whether certain policies of assurance or any, and if so, what part thereof, were matrimonial property. The spouses were married in 1968. They had three children. A separation order was made by consent in 1977.

One policy was with the AMP Society and it had been taken out by the husband on his own life and for his own benefit in 1958. In return for an annual premium a sum of $2,000 was payable on the husband's death. This policy had an unstated surrender value at the date of the marriage and, at the date of the separation the surrender value was $475.60. The Current value at date of trial was unstated.

The second policy was taken out by the husband with the National Mutual Life Association in 1964. It was on the husband's life and also for his own benefit. It was for $7,500 payable on the husband's death and annual premiums had to be paid. This policy, too, had an unstated value at the time of the marriage and a surrender value at the date of marriage. It had a surrender value of $1,972 at the date of the separation, but no later value was evidenced.

It was argued for the husband that, as the policies were taken out before marriage, they must be separate property and that the value of that separate property had increased during the marriage by the application of matrimonial property (ie, the payment of the premiums out of income) and that such increase, but no more than that increase, was matrimonial property under s 9(3). For the wife, it was submitted that the policies fell fair and square within s 8(g) and were matrimonial property.

Section 8(g) enacts that

> "Matrimonial property shall consist of . . .
>
> "(g) Any policy of assurance taken out by one spouse on his or her own life or the life of the other spouse, whether for his or her benefit or the benefit of the other spouse (not being a policy that was fully paid up at the time of the marriage and not being a policy to the proceeds of which a third person is beneficially entitled), whether the proceeds are payable on the death of the assured or on the occurrence of a specified event or otherwise."

Somers J considered that the true interpretation of s 8(g) depended on the natural meaning of the words used in their context and in the context of the object and purpose of the Act as a whole. In general terms, it was said, the Act was aimed at securing a division between the spouses of property which was the fruit of, or was acquired during, the marriage. But, as s 8(i) showed, matrimonial property was not confined to such interests, for rights under a superannuation scheme were matrimonial property if an entitlement was derived partly from post-marital contributions. In such cases, the whole was matrimonial property even if supported by the pre-marital contributions, though the latter might be relevant under ss 15 and 18.

His Honour continued as follows:

> "The reference in s 8(g) to a policy taken out by one 'spouse' and the mention of the 'other spouse' in two places were relied on as pointing to the legislative intent — for a person not married cannot properly be described as a spouse. The word in short points to a status which in turn predicates a point of time after the celebration of the

marriage. But effect must be given to the whole of the definition. And the policy referred to is further described as '(not being a policy that was fully paid up at the time "of the marriage . . .)'. In their natural meaning those words have reference to a policy then in existence. The words in parenthesis are words of exclusion. They except from the definition. But on the interpretation urged on behalf of the husband the exception or exclusion was unnecessary for their subject matter was never included. This difficulty was sought to be met by interpreting the words "at the marriage" as referring to a point of time closely contemporaneous with the marriage so that the excluded policy is a fully paid up policy taken out at the time of or immediately after the celebration of the marriage. I reject that construction as being strained and because of the inherent improbability that Parliament should have directed its attention to such an unusual combination of circumstances as that interpretation postulates. It is more likely that the word "spouse" has been used in the definition of the relevant policy as a convenient description accurate in the case of post-marriage policies and proleptic in the case of pre-marriage policies. On that view the matrimonial policies are those which whenever taken out are supported by premiums paid after the marriage and fully paid up policies taken out after marriage."

As Somers J said, life policies have figured in several cases, viz *Winter v Winter* (1977) 1 MPC 230, 231, *Griffiths v Griffiths* (1978) 2 MPC 75, 77, *Green v Green* (1978) 2 MPC 71, 72, *Henderson v Henderson* (1978) 2 MPC 90, 91 and *Nimmo v Nimmo* (1979) 2 MPC 135. Only in the *Griffiths* case was it clear that the policies were taken out pre-maritally, although the surrender values suggested the same might be said of the *Winter* and *Green* cases.

The present problem was, clearly, not concluded by authority. In *Pinching v Pinching* (1978) 1 MPC 161 it was held by Jeffries J that three life policies, taken out long before the parties' marriage, were matrimonial property because the clear intention of s 8(g) was to include all such policies taken out before, or after, marriage by either spouse if premiums were to be paid during the course of the marriage. This view is not shared by Chilwell J, as may be seen from *Harnett v Harnett* (1978) 1 MPC 102. (In *Jorna v Jorna* (1979) 2 MPC 104, Speight J was dealing with a life policy taken out during the marriage and held that it became matrimonial property in which the wife was entitled to share equally). Having considered these decisions, Somers J preferred the reasoning of Jeffries J.

His Honour then had to consider what value should be accorded to the policies. He considered s 30 of the Act and, following Richardson J in the *Winter* case, held that it was a provision giving ancillary powers which had no relevance to the ascertaining or fixing the value of a policy. Somers J thereupon turned to s 2(2) and *Meikle v Meikle* [1979] 2 NZLR 137. He observed that, taken at face value, the observations of Cooke and Richardson JJ, were capable of extending to the valuation of a life policy by making an allowance for its value as at the date of the marriage. Somers J went on to say that "those observations have to be considered subjectam materiam. They were all made in the context of expenditure by a spouse on the maintenance, improvement or sustenance of matrimonial property between the date of separation and the date of hearing."

Somers J then concluded that the general tenor of the subsection and a consideration of the stipulated nature of matrimonial property suggested that s 2(2) should not be used in respect of pre-marriage outlay. He had, he said, already mentioned that the object of the Act as a whole was "to bring in as matrimonial property, the fruits of the marriage partnership". But, his Honour added, "the catalogue of matrimonial property in s 8 shows that there are exceptions." They included not only policies of assurance but also rights under superannuation schemes, the definition of both of which, ex necessitate, brought to account entitlements or interests acquired pre-maritally. As his Honour noted, this can, indeed, also be the case in relation both to a matrimonial home and to family chattels where they have been acquired before marriage by one spouse, but not in contemplation of it, and where the items still existed at the time of separation. In his Honour's view, the distinction between, on the one hand, the matrimonial home and chattels and, on the other, life policies and superannuation rights was that, in the case of the former there was a user for matrimonial purposes, "which user qualifies the same as matrimonial property." If s 2(2) were to be applied in respect of pre-marriage worth or payment of premiums in respect of policies, then, said Somers J, "there could be no reason in logic or principle why it should not also be capable of

application to the case of a matrimonial home or family chattels owned by one spouse before marriage. To apply s 2(2) in such circumstances would in my view go beyond the proper use of the discretion and would be contrary to the aims and purposes of the Act as a whole."

This, it is respectfully submitted, is as nice a reductio ad absurdum as a purist could wish for. It may be protested by some that this cannot be fair. One must, therefore, carefully look at the final words of his Honour's judgment. It is pointed out that, in the case of life policies, the inclusion of the whole value of the property as at the hearing date, or other date, may recognise a commercial fact about policies carrying reversionary bonuses which experience suggests to be the most common type. Their increase in value reflects more than a passage of time and payment of premiums. This was not to say, Somers J noted, that the result might not, in a particular case, give rise to injustice. He instanced the case of one spouse having had a policy for 20 years followed by a marriage of but four or five years' duration. The bringing to account of the whole value of the policy might "be a good deal less than fair". Nevertheless, in the context of the Act, Somers J insisted, "such adjustment if any as is called for must be made under ss 15 and 18 of the Act."

As to post-separation premiums, the Court's view was that s 2(2) was "clearly capable of application" and in many cases it might be appropriate to value at the date of separation. That was done, as Somers J observed, in *Edwards v Edwards* (1977) 1 MPC 67 by Richardson J.

CASE AND COMMENT

An old friend (or foe?): Section 92 of the Property Law Act 1952

An important point in relation to s 92 of the Property law Act 1952 was settled by Barker J in *Deere v Marac Finance Ltd*, High Court, Auckland; 26 September 1980 (A989/80).

The defendant mortgagee gave notice under s 92 of the Propery Law Act 1952 to the person who was then the registered proprietor of the mortgaged land, alleging default under the mortgage, namely non-payment of the principal sum. After that notice had been given, the land was transferred to the plaintiff subject to the mortgage. The defendant subsequently applied to the Registrar of the High Court to conduct the sale of the mortgaged property, giving the plaintiff's name as that of the mortgagor as required by s 99(1A) of the Property Law Act 1952 (as inserted by s 3(1) of the Property Law Amendment Act 1975). The Registrar then gave written notice to the plaintiff of the impending sale in accordance with s 99(2)(b) (as substituted by s 3(2) of the Property Law Amendment Act 1975).

The plaintiff sought to restrain the mortgagee's sale on the ground that a notice under s 92 had not been served on the plaintiff. It was submitted that s 92(10) of the Property Law Act 1952 required notice to be given by the defendant to the plaintiff, being the new registered proprietor. That subsection provides that:

> "For the purposes of this section the term 'owner', in relation to any land subject to a mortgage, means the original mortgagor, or if it appears from any register kept under the Land Transfer Act 1952 . . . that his estate or interest has been transferred . . ., whether by operation of law or otherwise, means the person appearing from the register . . . to be entitled to that estate or interest."

Barker J rejected this submission and commented that:

> "As a matter of common sense, any person accepting a transfer of land subject to a mortgage, must be assumed to know that he or she will become personally liable under the mortgage in terms of s 104 [of the Property Law Act 1952]; moreover, such a person must be presumed to have made proper inquiry as to the state of accounts between the mortgagor and the mortgagee; he should have made inquires from the transferor or his solicitors as to

the position under the mortgage; and in particular, whether any default had been committed by the transferor such as would give rise to a s 92 notice. In the circumstances, one would have expected that inquiry could and should have been made of the defendant whether a s 92 notice had been given."

In the result the interim injunction which had been granted to restrain the mortgagee's sale was rescinded and it was held that the mortgagee's sale could proceed.

The case confirms that s 92(10) of the Property Law Act 1952 requires the mortgagee to give notice to the person who is registered as proprietor of the mortgaged land for the time being, i.e., at the time when the notice is given: the fact that some other person becomes registered as proprietor between the time when the notice is given and the time when application is made to the Registrar of the High Court to conduct the sale is immaterial. The case also illustrates the importance, when acting for a purchaser of land subject to an existing mortgage, of making prior to settlement all necessary inquiries to ascertain whether any default has been made under the mortgage, and whether a s 92 notice has been given by the mortgagee.

G W H

Matrimonial Property Act 1976, s 21 — Agreement to settle Property disputes — Validity

In *Williamson v Williamson*, High Court, Gisborne; 5 August 1980 (No M16/1979); Moller J the spouses entered into a separation agreement on 20 May 1977 by which they also settled their matrimonial property disputes. At the end of the document there were two certificates. One read: "I hereby certify before the [husband] signed the foregoing agreement, I explained to him the effect and implication of the Agreement." The other read: "I hereby certify before [the wife] signed the foregoing agreement I explained to her the effect and implication of the Agreement." Each was signed by a solicitor.

The most important problem that his Honour had to deal with was subss (5) and (6) of s 21. The former requires that each party to an agreement under s 21 must have independent legal advice before signing. The latter provides that, if an agreement is signed in this country, the signature of each party must be witnessed "by a solicitor of the [High] Court of New Zealand," who must "certify that before the party whose signature he has witnessed signed the agreement he has explained to that party the effect and implications" of it. (It will also be recalled that s 21(8) declares that an agreement shall be void where subss (4)-(6) have not been complied with or where the Court is satisfied that it would be unjust to give effect to the agreement).

What had apparently occurred was that the wife, having been told by her husband's solicitors that she must have independent legal advice in connection with the above-mentioned agreement, was taken by her husband to solicitors of her own choice. They had previously dealt with her mother's estate. The wife deposed that she there "saw a legal executive for a short while and then attended upon one of the solicitors for an even shorter time . . . who merely witnessed [her] signature to the agreement." On cross-examination, she stated that she spent about half-an-hour with the executive and then, in company with him, saw a solicitor for "five or ten minutes." She denied that the solicitor discussed the agreement with her and repeated quite firmly that he did no more than witness her signature.

Moller J accepted her evidence and held that the "independent legal advice" referred to in subs (5) must be given, in New Zealand, by a solicitor, and that advice from an unqualified legal executive does not meet the requirements of the Act. He also held, reading subss (5) and (6) together, that the certificate required by the latter must, in the case of an agreement signed in New Zealand, be that of the solicitor giving the independent legal advice.

Upon the evidence, therefore, his Honour was compelled to hold that any advice upon the "effect and implications" of the agreement in this case had been given by the legal executive and not by the solicitor, who had done no more than witness the wife's signature. Accordingly it had to follow that the agreement must be declared void, unless it could be saved by subs (9). "It is disturbing," remarked his Honour at this juncture, "to have to find that the certificate was given in this case in the way that it was, but at the same time, I think it fair to repeat, in substance, what [Barker J] said in *B v B* (Auckland Registry, No M 1473/77; 14 September 1979), namely that all practitioners and the Courts were, in May 1977, 'feeling their way' under the new Act, and many solicitors may not 'have realised the difficulties created by the legislation over a wide variety of situa-

tions.' At the same time, of course, this possibility makes still less acceptable any advice given by an unqualified legal executive so soon after the coming into force of the new Act." His Honour then turned to the question whether he could uphold the present agreement by deciding that the non-compliance with subss (5) and (6) had "not materially prejudiced the interests" of the wife. He considered the onus of proof lay on the husband and that the concept of an agreement being "materially prejudicial" set a less strict standard than the concept that it was "unjust". The word "unjust", stated his Honour, was used elsewhere in subs (8) and in subs (10) also, and, had the Legislature intended the higher standard to be the one to be applied to subs (9), it could have said so.

Having reviewed the facts, Moller J held that he could not be satisfied that the non-compliance with subss (5) and (6) had not materially prejudiced the wife's interests and held the agreement void. He also added that, had he found that these two subsections had been complied with, he would still have found, on the facts and under subs (8)(b), that it would be "unjust" to give effect to the agreement. His Honour then made appropriate orders with respect to the property in dispute.

Practising solicitors — please note!

P R H Webb

COURTS PRACTICE

"LEAP-FROGGING" TO THE PRIVY COUNCIL

By Dr A P MOLLOY, *Barrister.*

Under what circumstances should a Judge of the High Court exercise his discretion to allow an appeal direct to the Privy Council?

Order in Council

Regulation 2 of the British Order in Council providing for appeals to the Privy Council, enacted in New Zealand as SR 1973/181, provides that an appeal lies:

> "(a) as of right, from any final Judgment of the *Court of Appeal* where the matter in dispute on the Appeal amounts to or is of the value of five thousand New Zealand dollars or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of five thousand New Zealand dollars or upwards; and
>
> "(b) at the discretion of the *Court of Appeal* from any other Judgment of that Court, whether final or interlocutory, if, in the opinion of that Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His [sic] Majesty in Council for decision.
>
> "(c) at the discretion of the *Supreme Court* from any final Judgment of that Court if in the opinion of that Court the question involved in the Appeal is one which by reason of its great general or public importance or of the magnitude of the interests affected or for any other reason, ought to be submitted to His [sic] Majesty in Council for decision."

The last of these paragraphs recently was considered by Roper J in *Lowe et al v Commissioner of Inland Revenue* (1979) 3 TRNZ 317. Because the writer was counsel for the unsuccessful applicants, who are now obliged to proceed via the Court of Appeal, it is not appropriate that this article refer to the specific submissions made to the learned Judge or be an examination of his Honour's decision. However, because that decision does not in terms range over the relevant cases and principles, and because *Sim's Practice and Procedure* refers only

to a single case, it may be useful to canvass some of the factors underlying this, little used, "leap-frog" procedure.

Discretion not at large

While the matter is at the discretion of the Judge to whom the application is made, this discretion is not at large. Rather, it is one to be exercised with full regard to the spirit and purpose of the paragraph.

One of the most vexed questions in the field of revenue law is whether receipts and outgoings must be treated as capital or as income. The authorities are to the effect that any of a number of approaches can shed light on the difficulty if they are used in a common sense way. In this connection, in *Pitt v Castle Hill Warehousing Co Ltd* [1974] 3 All ER 146, Megarry J (as he was then) emphasised that the kind of common sense required is *judicial* common sense:

> ". . . the kind of common sense needed is one that is not at large but is guided and tutored by the authorities." (p 152)

The same principle should apply to Reg 2 (c).

In consequence, while some Judges do not like the idea of a "leap-frog" procedure [cf Lord Denning *The Discipline of Law* (1979) 300], such dislike is no ground for denying an application under Reg 2 (c). Parliament has provided the power, and, notwithstanding that its use has been left in the discretion of the Judges, it is nonetheless something which is intended to be used provided the appropriate circumstances for its application come to hand.

So, it is submitted, the discretion is to be exercised consistently with the principles which have been evolved in connection with appeals to the Privy Council from other jurisdictions; and consistently with the philosophy of other "leap-frog" provisions providing access to their Lordships: whether sitting as the House of Lords or the Privy Council.

Little used procedure

In his paper delivered to the 1972 New Zealand Law Conference, "The Judicial Committee — Past Influence and Future Relationships" [1972] NZLJ 542, Haslam J referred to the fact that in the 1870s

> ". . . despite the greater distance and the problems of overseas transport, it was reputed to be less costly for appellants to proceed by leave from the Supreme Court direct to the Privy Council. . . . This curious situation is unlikely to recur, and there is no available evidence of an attempt during the last 50 years to leap-frog an appeal from the Supreme Court to the Judicial Committee." (p 544)

[The learned author appears to have overlooked *National Mutual Life Association of Australasia Ltd v A-G for New Zealand* [1956] AC 369, and *AMP Society v CIR* [1962] NZLR 449: each of which was an appeal from the Supreme Court — presumably under Reg 2 (c) — in, respectively, [1954] NZLR 754 and [1961] NZLR 497. Because, in each of these cases, a Full Court of the Supreme Court heard the matter initially, they were not directly in point on the application before Roper J. It is worth observing in this connection that Reg 2 (c) refers to "any" final judgment of the Supreme Court, and is not confined to judgments of the Full Court.]

Cost factor

Even if conditions have changed greatly since the 1870s, cost and delay remain the most cogent reasons for the retention of the provision. Even if it is no longer more expensive to take an appeal to the Court of Appeal than it is to go to the Privy Council; there is still considerable additional expense for litigants who have to go to the Court of Appeal knowing that the decision given by that Court simply will not end the matter so far as the parties are concerned, so that the case will have to be thrashed out yet again in the Privy Council.

Cost was the chief consideration underlying the enactment in the United Kingdom of the Administration of Justice Act 1969, s 12, enabling litigants in the High Court to "leap-frog" the Court of Appeal and proceed direct to the House of Lords. The idea of the legislation was to secure the elimination of

> ". . . some of the inevitable and costly duplication which must occur in those (comparatively infrequent) cases which are manifestly destined for the House of Lords from the very outset of the litigation." (Drewry "'Leap-frogging' to the Lords" (1968) 118 New LJ 1084. See also Borrie and Pyke "Administration of Justice Act 1969" (1969) 119 New LJ 1012, 1013.)

The United Kingdom provision was enacted as a result of the recommendations in the Report [Cmnd 8878 (1953): Final Report of the Committee on Supreme Court Practice and Procedure] of a Committee chaired by Lord Evershed. The Committee made its recommendations on the basis of a suggestion made

to it by Lord Greene.

The Report was concerned with the situation where "the hapless litigant is faced with a rising crescendo of costs" (para 472).

It noted that "patent and revenue cases . . . are apt to have a certain primacy as qualifiers for hearing in the House of Lords; but apart from these it seemed [to the Committee] reasonably clear that by no means all [cases which had gone in recent years to the House of Lords] could or would have been recognised at the date of their respective trials as destined to go eventually to the House of Lords" (para 487).

In submissions to the Committee, the Law Lords raised the point that, under a "leap-frog" scheme, they would be deprived of the benefit of the judgments of the Court of Appeal (para 495).

Notwithstanding those difficulties, the Committee recommended the procedure. And it recommended also the leaving of the application to be dealt with by the trial Judge, rather than by the Court of Appeal, because the former would necessarily be fully seised of all the facts and circumstances of the case, thereby enabling the greatest saving in costs to be achieved (para 501).

Further:

> "We do not think it necessary that there should be a consent by both parties to the litigation, either before the trial or afterwards, at the time the application is made. As a matter of practice it would no doubt be very highly desirable that some intimation should be made to the Judge at an early stage that an application to 'leap-frog' would or might be made. If then the other conditions were apparently satisfied, the Judge — and we appreciate that the burden upon him would be thereby somewhat increased — would take such steps as he thought proper to see that the point or points invoked were fully argued and would frame his judgment appropriately.
>
> . . .
>
> "We think that in deciding whether or not to grant a certificate the Judge should bear in mind considerations such as the importance of the case and the relative position of the parties." (paras 502 (b), (d))

English procedure

While the British Legislature did not accept the point that consent of the parties should not be necessary, it otherwise adopted the suggestions of the Evershed Committee very closely in enacting the Administration of Justice Act 1969, s 12.

This section provides that, on the application of any party to an action in civil proceedings before a Judge of the High Court — where there is a sufficient case for leave to appeal and where the parties consent — the Judge, by subs (1), "may grant a certificate" that an appeal should be allowed direct to the House of Lords: provided the "relevant conditions" are satisfied. The latter are defined by subs (3) as being that a point of law of general public importance is involved in the decision, and that that point is one which either:

> "(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the Judge in the proceedings, or
>
> "(b) is one in respect of which the Judge is bound by the decision of the Court of Appeal or of the House of Lords in previous proceedings and was fully considered in the judgments given by the Court of Appeal or the House of Lords (as the case may be) in those previous proceedings."

In his recent book *The Discipline of Law* (1979) Lord Denning writes of this procedure that:

> "I know many law lords place great value on the views of the Court of Appeal. It was why Lord Simonds objected so strongly to the introduction of the 'leap-frog' procedure. It has always seemed to me a great pity that there was a 'leap-frog' in *Daymond v South-West Water Authority* [[1976] AC 609 (HL)]. It was a case with staggering financial and legislative consequences. I do not suppose many will have time to read it: but, when you find that Lord Wilberforce and Lord Diplock dissented you may think that the Court of Appeal might have been able to contribute something of value." (p 300)

However, there is nothing in the judgments of the Lords in that case, which was on appeal from Phillips J in the High Court, to suggest that they were upset at not having Court of Appeal judgments available to assist them in deciding the matter: which involved some £30 million and some difficult statutory interpretation.

Another case in which the certificate was

able to be given under s 12 was *Ealing London Borough Council v Race Relations Board* [1970] 1 WLR 1599. Again, none of the judgments of the Lords when the case came before them [[1972] AC 342] direct from Swanwick J, suggest that they felt aggrieved at not having the assistance of judgments by the Court of Appeal.

English principles

The ambit of s 12 was canvassed by Megarry J (as he was then) in his supplementary judgment in *IRC v Church Commissioners for England* [1975] 1 WLR 251, 270-272. The learned Judge held that while, in a sense, the case before him might be said to have related to the construction of a statute within s 12 (3) (a), it did so only in a very strained sense. Accordingly, he held it was not within the spirit of that enactment, and declined a certificate on that ground.

[It is interesting that when the case reached the Lords, [[1977] AC 329] after having to go through the Court of Appeal, the judgments refer more to the reasons given by Megarry J for his judgment than they do to the reasons for the judgment of the Court of Appeal.]

In the final paragraph of his judgment Megarry J assembled a number of the critical factors in such applications:

> "I would add this. I think that where the requirements of the section are satisfied, it is nevertheless within the judicial discretion of the Judge whether or not to grant the certificate: for section 12 (1) provides that where the requirements are satisfied the Judge 'may' grant the certificate, and I can see no grounds for saying that this is one of the limited class of cases in which 'may' in effect means 'must'. In the normal course of events, on an appeal, the House of Lords has before it the judgments both at first instance and in the Court of Appeal; and I can well imagine cases where on an application for a certificate the Judge might consider it desirable that members of the House of Lords should, in addition to having his own judgment before them, have the benefit of the decision in judgments in the Court of Appeal. This is especially so in cases where there have been disputed questions of fact, for then the case will have been argued before the facts have been found. Each side must argue before the Judge on the different bases of whatever facts the Judge may by possibility find, and so they may not be prepared with the full range of authorities and arguments which are appropriate to the facts as ultimately found. In such cases, the judgments in the Court of Appeal, given after the case has been argued on ascertained facts, can be expected to be of especial assistance to the House. This consideration, however, is less apposite to the revenue cases, where in the normal course the arguments and authorities put before the Judge are based on the facts found by the Commissioners. Nevertheless, there may be other circumstances in which even in revenue cases, the Judge may think it desirable that the case should not go to the House of Lords unless it has first gone to the Court of Appeal. One such instance, I think, is where the Judge considers that although the case is within the letter of section 12, he does not consider that it falls within the spirit. In the present case, or even if I am wrong in holding that the case fails to satisfy the second of the relevant conditions, I feel little doubt that it fails to fall within the spirit of that condition. Accordingly, I would in any event have refused to grant the certificate. The application accordingly fails." (p 272D)

Australian procedure

The Australian States provide as of right for an appeal to the Privy Council from judgments of the State Supreme Court, notwithstanding the availability of appeals both to the State Courts of Appeal and to the High Court of Australia.

In *Woolworths Ltd v Stirling Henry Ltd* [1968] 1 All ER 81, on appeal from Collins J in the Supreme Court of New South Wales, Viscount Dilhorne, reading the judgment of their Lordships, said:

> "While it is generally desirable that [appeal] procedures such as those contained in the Supreme Court Procedure Act should be followed before there is an appeal to the Privy Council, it is not a case that appeals from judgments based on findings of a Judge sitting alone without a jury will not be entertained unless it is done. In the *Wagon Mound (No 2) Overseas Tankship (UK) Ltd v Miller SS Co Pty Ltd* [[1967] 1 AC 617] and *Australia & New Zealand Bank Ltd v Ateliers de Constructions Electriques de Charleroi* [[1967] 1 AC 86] issues of fact were decided by the Board on appeal from a Judge sitting alone. In their Lordships' opinion it cannot be regarded as a

> condition precedent to the exercise of the unfettered right of appeal given by the Order in Council that the procedure followed in the Supreme Court Procedure Act should first be followed." (p 83H)

It is significant that their Lordships were saying only that it is generally desirable, rather than universally desirable, that appeals go through the Court of Appeal.

In recent years in Australia there appears to have developed a pattern of proceeding direct to their Lordships from single Judges, in the face of alternative avenues in the State Courts of Appeal and in the High Court of Australia. Not only do their Lordships not appear to have made reference to their "generally desirable" dictum in the *Woolworths* case; but neither do they appear to have expressed any regret at the absence of assistance from either the State Courts of Appeal [for example, by way of appeal under the Supreme Court Act 1970 (NSW), s 101] or from the High Court of Australia [by way of appeal under the Judiciary Act 1903 (Cth), s 35].

For example, the leading tort case of the *Wagon Mound (No 2) Overseas Tankship (UK) Ltd v The Miller SS Co Pty* [1967] AC 617, was an appeal from Walsh J, sitting as a single Judge in the Supreme Court of New South Wales. *ANZ Bank Ltd v Ateliers de Constructions Electriques de Charleroi* [1967] AC 86 was an appeal from a decision of Manning J in that Court on a factual question of the authority of an agent. *Schaefer v Schuhmann* [1972] AC 572 was a family protection appeal direct to the Privy Council from Street J. *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 was an appeal from Macfarlan J in the NSW Supreme Court, on a commercial letter of credit matter. The covenant in restraint of competition case of *Stenhouse Australia Ltd v Phillips* [1974] AC 391 was appeal from Mahoney J in that Court. *BP Australia Ltd v Nobalco Pty Ltd* (1977) 52 ALJR 412 was an appeal to the Privy Council against Scheppard J's construction of the terms of a contract. These are all recent examples taken from the list of cases on appeal which is to be found in each volume of the *New South Wales Law Reports*. To them can be added the taxation appeal from Waddell J in *Perpetual Trustee Co v CSD (NSW)* [1977] AC 525.

What the Australian pattern, and the English cases, appear to show, is that, while a "leap-frog" appeal undoubtedly is something not lightly to be undertaken, it is not, on the other hand, something to be treated with such undue deference and reverence as effectively to emasculate the express provision for it. Provided the right kind of case comes along, the power exists, and is available where the matter would not be accepted by the parties as finalised by a judgment of the Court of Appeal, and where, accordingly, the appellant desires to save the costs associated with that additional round of the case.

Where appeal will lie as of right

In *Gillies v Gane Milking Machine Co Ltd* (1914) 17 GLR 313, the sole case cited in *Sim's Practice and Procedure*, Stout CJ sitting with Hosking J, on an application to appeal from a Full Court comprising the Chief Justice, and Sim and Stringer JJ, granted leave under Reg 2 (c). The learned Chief Justice made no reference to the factor that the case had been heard before a Full Court, and the sole expressed basis for his decision was that, because the amount involved was sufficient to give an appeal to the Privy Council as of right once the matter had been to the Court of Appeal, the application to "leap-frog" may as well be granted to eliminate the extra round in case. [The Privy Council judgment is at (1916) NZPCC 490.]

Where leave likely to be granted

Even where the appellant has not sufficient at stake to enable him to proceed as of right under Reg 2 (a), once the matter has been to the Court of Appeal, the question involved in the case may well be one of such great general or public importance that discretionary leave under Reg 2 (b) almost certainly would be given once the matter had been to the Court of Appeal.

In *IRC v Church Commissioners for England* [1975] 1 WLR 251, 271D, Megarry J (as he was then) noted that the taxation question before him, involving the issue of the extent to which rent charges are capital or income, clearly was a question of "general public importance". Again, the Evershed Committee, referring to the difficulty in telling at the inception of a case whether it was destined for the House of Lords, mentioned that "patent and revenue cases . . . are apt to have a certain primacy as qualifiers for hearing in the House of Lords" (para 487). Further, in *New Zealand Insurance Company v Commissioner of Stamp Duties* [1954] NZLR 1011, Barrowclough CJ said:

> "The proper interpretation of a taxing statute is a matter in which every member of the public is interested. . . . It seems to me that there are few questions of greater public and general importance today than

questions relating to taxation. I conceive it to be a matter of great public importance that questions as to whether a tax has or has not been imposed or as to the nature and extent of any taxation should be authoritatively determined [sic] and that the parties to any dispute as to such matters should have the right to carry their dispute to the highest Court.

. . .

"Here we have a statute in which every member of the public is concerned. Every person in New Zealand is interested in seeing that all taxation which Parliament has authorised is, in fact, levied and collected." (pp 1018 lines 4-5, 13-19; 1019 lines 13-16.)

Fair J agreed with

". . . the grounds set out in the judgment of the learned Chief Justice for considering that a question as to the rights and powers conferred for the collection of taxation is a question of great public importance." (p 1021 lines 21-24.)

And Hutchinson J agreed with this part of Fair J's judgment: (at p 1022 lines 1-5.) [In this case the four-member Court split on the question whether to exercise the Reg 2 (b) discretion in favour of the Commissioner: two of them considering his claim to be unmeritorious. Accordingly they declined him leave to appeal, but this was later granted by the Privy Council itself, before which the substantive case then was argued: [1956] AC 284 (PC).]

The same principle has been expressed in Australia. For example, in *Wallaroo and Moonta Mining and Smelting Co Ltd v Commissioner of Taxes* [1914] SALR 388, the Full Court of the Supreme Court of South Australia, granting final leave against Crown opposition, under a provision similar to Reg 2 (c) save that the reference to discretion was omitted, said:

"If this were an appeal in the discretion of the Court I [Way CJ, delivering judgment for the Court] think it cannot be doubted that we should have a discretionary jurisdiction which ought to be exercised to grant leave to appeal, because the [taxation] questions involved in the case are of very great importance, and should be finally determined by the highest Court of Appeal." (p 392)

Principles underlying applications

In any event, the English and Australian cases show clearly that their Lordships, whether sitting as the House of Lords, or as the Privy Council, are well accustomed to adjudicating on important cases on appeal from judgments of single Judges. Where the matter would be appealable as of right under Reg 2 (a), or where it involves a matter of great general or public importance which would almost certainly ensure a grant of leave to appeal under Reg 2 (b), the discretion under Reg 2 (c) must always be seriously considered where it is clear that judgments of the Court of Appeal are unlikely to end the matter, and where it is desired to minimise the costs of the case.

The principles upon which that discretion should be invoked are essentially those enacted as the "relevant conditions" in the Administration of Justice Act 1969 (UK), S 12 (3).

That is, first, the question at issue ought to be one of public importance. As the Australian cases already cited show, this will not necessarily be a question of statutory construction. Secondly, the matter must have been fully argued at the trial. In this connection, as Megarry J mentioned in *The Church Commissioners* case, it is relevant whether there were any significant disputed questions of fact, which would have been detrimental to full and considered argument. Thirdly, the matter ought to have been fully considered in a reserved judgment.

Alternatively to all of these, of course, the case will be a Reg 2 (c) candidate if it is covered by a considered decision of the Court of Appeal, in previous proceedings, which it is desired to test in the Privy Council.

Use of Full Court desirable

The better to ensure the elimination of a costly additional hearing in a case stamped from the outset as a Privy Council case, the parties would be well advised, when seeking to have the matter set down for hearing in the Supreme Court, to seek that it be heard by a Full Court rather than by a single Judge. While Reg 2 (c) refers to "any" judgment of the Supreme Court, and thus cannot properly be confined to judgments of the Full Court, the necessary requirement of thorough consideration of all relevant factors in the judgments to go on appeal may be more readily demonstrable in such a case.

CONFLICT OF LAWS

JURISDICTION CLAUSES

By A A TARR, *Lecturer in Law, University of Canterbury.*

Parties to an international contract often agree that in the event of any dispute arising between them, a Court, or the Courts, of a particular country shall have exclusive jurisdiction to determine the dispute. The English Court's attitude to jurisdiction clauses is well summarised in the case of *The Chapparal (Unterweser Reederei G m b H v Zapata Offshore Co)* [1968] Lloyds Rep, 158. The plaintiffs, a German company, in a contract with the defendant American company, has agreed that the "London Court of Justice" should be the forum for litigation in the event of any dispute arising between them. Besides this jurisdiction clause the contract revealed no connection with England, but the Court of Appeal gave the plaintiffs leave to serve the writ on defendants out of jurisdiction.

Willmer L J observed (at 162):

> "Prima facie it is the policy of the Court to hold parties to the bargain into which they have entered . . . I approach the matter, therefore, in this way, that the Court has a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain."

Similarly in *The Eleftheria* [1970] P 24 where plaintiff cargo owners instituted an action in rem against the ship "Eleftheria" alleging breach of various contracts for the carriage of the plaintiff's goods, the defendant shipowners were successful in obtaining a stay of these proceedings, their main argument being based on the presence of a Greek jurisdiction clause in all the contracts of carriage. Brandon J stated (at 99-100) that a Court in deciding whether or not to grant a stay is guided by the following principles:

> ". . . (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion, the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

Dicey and Morris *The Conflict of Laws* 9th ed, 1973 at 222 explain the test in different terms ie, Rule 30 states:

> "Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal, the court will stay proceedings instituted in England in breach of such agreement, unless the plaintiff proves that it is just and proper to allow them to continue."

(see also *The Fehmarn* [1957] 2 All ER 333; *Mackender v Feldia A G* [1967] 2 QB 590; *Evans Marshall v Bertola S A* [1973] 1 All ER 992; *The Makefjell* [1976] 2 Lloyd's Rep 29; and *The*

Adolf Warski [1976] 2 Lloyd's Rep 241).

In the recent case of *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280 an English Court was again confronted with a jurisdiction clause. The defendant company, which was registered in England, carried on business in Angola through a group of subsidiaries. By a contract entered into in 1973 the plaintiff, who was then resident in Angola, agreed to sell all his shares in these subsidiaries for 76 million escudos, payable in four instalments. The contract contained the following clause:

> "In the case of litigation arising the District Court of Luanda should be considered the sole Court competent to adjudicate to the exclusion of all others."

At the time of contracting Angola was a province of Portugal and the law applied was Portuguese law with a final right of appeal on law to the Supreme Court in Lisbon.

Following a coup d' etat in Portugal in 1974 dramatic changes occurred in Angola. Civil war broke out in 1975 and the country became independent under a revolutionary government. Under the new Angolan constitution Portuguese law was to continue in force to the extent that it did not conflict with the "Revolutionary Process". Although there continued to be a District Court of Luanda, the right of appeal to Lisbon was abolished and Judges were appointed on a different basis to that formerly applying. The plaintiff, fearful for the future, left Angola in 1975 to settle permanently in Portugal. The defendants paid the first three instalments due under the contract but failed to pay the fourth instalment of 20 million escudos due in January 1976. In 1977 the plaintiff issued a writ in London claiming from the defendant company the sum due in escudos or its sterling equivalent, then about L300,000.

The defendants applied to have the English proceedings stayed, placing great reliance on the jurisdiction clause in the contract. Donaldson J dismissed their application and the defendants appealed. The Court of Appeal upheld Donaldson J pointing to the fact that the Court now functioning in Luanda was different to the Court contemplated by the parties when the contract was made. Although the Court continued to exist under the same name it was now an Angolan Court operating under the framework of the new Constitution and there was no longer a right of appeal to Lisbon. Referring to the new Constitution Geoffrey Lane L J observed (at 289) that

> ". . . those articles make it plain that the existing application of Portuguese law may be very short lived, and it is impossible to predict what effect those articles, when applied, may have on the present system of law in Angola and on the contents of Portuguese laws which are presently administered there."

Consequently both Geoffrey Lane L J and Browne L J decided that as a matter of construction the jurisdiction clause was inapplicable; on a true construction of that clause the Court of that name administering the law of an independent state was not the Court in the contemplation of the parties at the time of contracting.

In any event, both Judges would exercise their discretion and refuse the stay. Referring to the test enunciated by Brandon J in *The Eleftheria*, supra that a "strong cause" be shown before a Court will invoke its discretion, and to that propounded by Dicey and Morris, supra that plaintiff prove that it is "just and proper" for him to continue, Browne L J states that there is "no real difference between the two tests" (at 286G). Counsel for the defendants had argued that the test outlined by Brandon J in *The Eleftheria* was to be preferred and that the following factors pointed clearly to a stay: (1) The proper law of the contract was Angolan law and under this law the "economic hardship" suffered by defendant company as a result of the civil war would entitle them to a reduction or postponement of the fourth instalment. Angolan law differed considerably from English law in this regard; (2) Most of the evidence relating to the state of the Angolan economy and its effect on the defendant company, relevant to the defence of "economic hardship", would be found in Angola; (3) The plaintiff had no connection with England, whereas the defendant still carried on business in Angola, and; (4) The defendants genuinely desired trial in Angola and were not merely seeking procedural advantages.

Browne L J points out (at 287C) that Brandon J did not intend his list of factors to be exhaustive and that a Court is directed to look at all the circumstances of the particular case. Factors influencing theCourt against granting a stay were: (1) The changed political circumstances in Angola and, in particular, the new structure of the legal system since the time of contracting; (2) The plaintiff's assertion that he would be in fear of his life if he were to return to Angola, and; (3) The fact that the defence of economic hardship was not sufficiently raised for the Court to have to consider it. For these

reasons the Court of Appeal would exercise its discretion in favour of the plaintiff and allow the action to proceed in England.

A further matter arising out of this case is that of the proper law. Where there is no express choice of the proper law the Court is faced with the task of ascertaining by what law the parties' obligations are to be determined. Formerly, in accordance with the principle qui elegit judicem elegit jus, it was held that the selection of a particular Court as the only forum to which disputes arising out of a contract could be submitted, gave rise to a very strong presumption that the law administered by that Court should be the proper law of the contract (see *N V Kwik Hoo Tong Handel Mij v James Finlay and Co* [1927] AC 604; *Tzortsis v Monark Line A/B* [1968] 1 All ER 949). However in *Compagnie d'Armement Maritime S A v Compagnie Tunisienne de Navigation S A* [1971] AC 572 the House of Lords disposed of the notion that the contractual choice of forum for arbitration or litigation amounts almost irresistibly to a choice of the proper law of the contract. Such a clause is only an indication, albeit a strong one, that the parties intended that the proper law should be the law administered by the Court of the selected form. In the *Carvalho* case the plaintiff was not bound to litigate in Angola because as a matter of construction of the jurisdiction clause the Court of Appeal found that the District Court of Luanda as constituted under the Revolutionary Government was not the Court contemplated by the parties when the contract was made. However when the contract was made the selection of that Court carried with it a strong indication that the parties wished any dispute to be determined by the law then in force in Angola ie, Portuguese law. In any event, apart from choice of jurisdiction clauses there are a multitude of other factors from which it may be possible for a Court to infer the intentions of the parties. In the *Carvalho* case many of these factors are present, all pointing to an implied selection of Portuguese law as the proper law of the contract, eg, the contract was drafted in Portuguese (*Jacobs v Credit Lyonnaise* (1884) 12 QBD 589; *Keiner v Keiner* [1952] 1 All ER 643); the parties were both resident in Angola, then a province of Portugal, at the time of contracting (*Re Missouri Steamship Co* (1889) 42 Ch D 321 at 328); payment was to be made in escudos (*The Assunzione* [1954] P 150; *Coast Lines Ltd v Hudig and Veder Chartering N V* [1972] 2 QB 34 at 47; and, the place of performance originally contemplated by the parties was Angola (*The Assunzione*, supra).

Consequently the irresistible inference in the *Carvalho* case is that at the time of contracting the parties intended that the proper law of the contract should be law then in force in Angola. But as Nygh puts it, this is a selection of "a living system of law" (P E Nygh, *Conflict of Laws in Australia* 3rd ed, 1976 at 228). So the proper law of the contract in this context means the law as it exists from time to time and cognizance is taken of changes in the proper law since the time of contracting. Consequently if the proper law provides for the discharge or variation of any obligation originally validly created by it, the forum must give effect to it (see *Perry v Equitable Life Assurance Society of the United States* (1929) 45 TLR 468; *Wanganui-Rangitikei Electric Power Board v AMP Society* (1934) 50 CLR 483; *R v International Trustee for the Protection of Bondholders A/G* [1937] AC 500; *Re Claim by Helbert Wagg and Co Ltd* [1956] Ch 323 at 341). Thus the law to be applied in determining the substantive issues in the *Carvalho* case is the law in force in Angola at the time of the proceedings ie, Angolan law. This is subject to the qualification that the Courts of the forum retain an overriding power to refuse to enforce, or in exceptional circumstances, to recognise, rights acquired under a foreign law on grounds of public policy (*In the estate of Fuld (No 3)* [1968] P 675). However an English Court will not lightly intervene on grounds of public policy and under the proper law in the *Carvalho* case defendants may prove the defence of "economic hardship" in an attempt to postpone or reduce payment in respect of the fourth instalment.

In conclusion, if the parties have expressly chosen a forum in which to settle their disputes, an English or New Zealand Court will generally hold the parties to their bargain and will thus decline jurisdiction if the selected forum is a foreign Court, and accept jurisdiction if it is the local Court. In one case, however, the jurisdiction of New Zealand Courts cannot be excluded ie, s 11A of the Sea Carriage of Goods Act1940, as amended by the Sea Carriage of Goods Act 1968, provides that a stipulation or agreement which purports to oust or restrict the jurisdiction of New Zealand Courts in respect of a contract for the carriage of goods by sea from any place in New Zealand to any place outside New Zealand shall be of no effect. Furthermore, where it is "just and proper" or a "strong cause" is shown, an English or New Zealand Court will decline to stay proceedings brought in breach of a juris-

diction clause as the Court has an overriding discretion. The *Carvalho* case, when the overwhelmingly Angolan character of the contract is considered, along with the fact that the English company, although amenable to jurisdiction by virtue of its registration in England, had no assets in England and carried on all its business in Angola, demonstrates the width of this discretion which Courts may arrogate to themselves when a jurisdiction clause is pleaded.

THE ROLE OF AN APPELLATE JUDGE

The report of Mr Justice Richardson's AULSA Conference address ([1980] NZLJ 378) in so far as it dealt with **limiting discretion** *was a little more compressed than the importance of the topic warranted and did not really do full justice to the speakers. The opportunity of publishing his Honour's remarks on this point in full is therefore welcomed as is the opportunity to expand on (and correct any misleading impression of) Dr Orchard's remarks.*

Mr Justice Richardson

"Finally there is a further contributing factor. I refer there to the time increasingly taken in the consideration of directions given by trial Judges to juries and go on to note that the increasing complexity and refining of concepts in the criminal law, particularly those designed to protect the accused, have made the task of a trial Judge in instructing the jury very difficult. To that I should add that we may have become more conscious in recent years of the risks of taking certain kinds of evidence at face value. Perhaps the best example of this is identification evidence. We recognise that it is important for Judges to draw the attention of juries to the fallibility of identification based, for example, on a fleeting glimpse. Now that is as I think it should be because we tend in our daily lives to be over-confident of our own powers of observation and juries as members of the community are not likely, without such a warning from the Judge, as distinct from counsel for the defence, to appreciate the risks of relying on certain kinds of identification evidence.

However, one defect of case law in this field is that once a rule is made it tends to remain even if the social reasons that led to its adoption no longer exist. So, if we in New Zealand were to adopt *R v Turnbull* [1976] 3 All ER 549 and not leave any area of discretion to the trial Judge and the Court reviewing the case on appeal, we might live to regret that strait-jacket as community understanding of the problem increased. The same strait-jacket which now applies in respect of directions trial Judges are required to give in the case of accomplice-evidence and the evidence of complainants in sexual cases. We get many appeals on those grounds. No doubt those rules were desirable when they were laid down but surely the inherent weakness in such evidence is obvious to any modern jury without being reminded by the Judge as well as by counsel. It becomes something of a ceremonial routine. The trial Judge goes through the form of directing the jury that it is dangerous to rely on the evidence of a complainant in a sexual case or an accomplice unless corroborated; then he directs them as to corroboration and as to what evidence may be regarded as possibly corroborative — a minefield for the momentarily unwary — or that there is no corroboration in which case he adds that they may still convict if they are satisfied with the evidence of the complainant or accomplice but it is dangerous to do so. What all this is likely to achieve is a glazed look in the eyes of the jurors, as any trial Judge will tell you. Yet the rules are so rigid that if the Judge does not go through the formula there usually has to be a new trial. And the underlying question as to whether there is any need for the corroboration warning in today's society and, if so, what form it should take, is not likely to be raised in the Courts — certainly not by the defence — nor for obvious reasons of fairness to the particular accused, by the Crown."

Dr Orchard

A small but embarrassing error crept into your account of my remarks on the Courts and statutory discretions: [1980] NZLJ at 378. I did not suggest that *Reid v Reid* was a case where

the Court of Appeal was disinclined to enunciate principles. The problems with that case (if problems they be) probably arise from the statute conferring insufficient discretion. The case I did mention was *R v Tennant*, July 9, 1980 where the Court of Appeal said that "this Court is wary of attempting to lay down principles purporting to govern statutory discretions which are conferred in quite general terms." I did not seek to criticise the decision in that case, but did question whether such caution was generally desirable.

CORRESPONDENCE

Dear Sir,

Maryanne August v Police
C/A 38/40

The sentencing of a young 16 year old girl to borstal training for the heinous offence of indecent language, it appears, will be quietly pushed under the judicial rug. Nevertheless the decision of a Magistrate and later a Judge are patently obnoxious and require further and searching investigation.

The indecent language giving rise to this cruel sentence is not to be revealed. I for one, cannot imagine any language, nor any circumstances which could have led to the imposition of such a sentence. However, the fact remains that Maryanne served 5½ weeks of borstal training for this offence.

The question that surely must be asked is, how could this happen in this day and age? So called indecent language of every description is found readily in any novel and is overheard in every walk of life, and used by all ages. Certainly it can be shocking, but is it criminal? The charge carries a prison sentence as a possible penalty. As such the charge is useful to the police as it can be used to make an arrest (particularly as a last resort). Even they would not expect a prison sentence to be imposed. A "game" has developed between the police and the judiciary. Everyone knows that the "offence" is a useful aid to the police. No one who appreciates law and order is anxious to remove the police aid, even though the offence is committed constantly by all and sundry. But now we find there are judicial officers who don't play the game.

And so we have the spectacle of a young girl becoming a casualty. Imagine, if you will, her reaction. Presuming that she had been exposed to life in New Zealand, she uses colourful language herself regularly, she mixes with people who use it, she hears it from all sorts of people in authority, she reads it in her magazines and novels, she hears it at the movies and even hears it on television, and suddenly she is hauled before the Court for having the temerity to use it herself, presumably in the hearing of a policeman. Then she finds that she is sent to borstal; Now is that cricket? The Magistrate and Judge respectively concerned in this episode did not think so. The law provides a penalty of imprisonment. Unaware of what goes on in the real world, the Magistrate and Judge respectively made their concern for the public's welfare felt by imposing a deterrent sentence.

Where is the outcry from the public? Where is the concern for those who understand the "game"? Sadly the victim is only a 16 year old girl. She obviously does not warrant an outcry nor any concern. Surely, the time has come for the Law Society as a body to become concerned. Clearly the law requires urgent change to prevent a recurrence of this blunder. The time has come when the only prevention is to call a halt to the "game".

I am unaware of the particular indecent language used by Maryanne. One would think that the most awful language would rhyme with duck, muck or even ruck. Strange, is it not, that by the simple transfixing of one letter in these words that you can be eligible for a prison sentence? And yet, the law has it so. I believe that the law is a farce. I believe that the Law Society has sufficient authority as a body to ensure that this farce is stopped. I call on the Society to make a stand and call for at least the abolition of imprisonment as part of the penalty, though to be sure and to be consistent, the eventual aim should be for removal of the offence from the statute book.

Unless urgent and positive action is taken by someone in authority, there is always the risk of more Maryannes — at least while the particular judicial officers involved in this debacle remain fixed to their judicial seats.

Yours faithfully,

P J Lynch

INDUSTRIAL LAW

INDUSTRIAL JURISDICTION A COMPLEX HIERARCHY OF COURTS PART II

By PROFESSOR ALEXANDER SZAKATS

An examination of the role of the Arbitration Court and other tribunals in relation to the Industrial Jurisdiction of the Courts.

III SPECIAL INDUSTRIAL TRIBUNALS

1 Is there a need for specialised tribunals?

Although the Arbitration Court is the central industrial tribunal with jurisdiction extending from wage fixing to various purely judicial functions, the legislature considered it desirable to establish specific tribunals in respect of certain key industries. The most important ones are the Waterfront Industry Tribunal, the Aircrew Industrial Tribunal and the Agricultural Tribunal. The chief role of these bodies is the determination of wages and working conditions, though some of them have additional powers to adjudicate disputes of rights.

The special tribunals are interconnected with the Arbitration Court in that a Judge of that Court presides over them. The purpose of this arrangement, without doubt, is to ensure a common trend in wage settlement by preventing obvious inconsistencies while still giving due weight to relativity considerations. The presence of a Judge purports automatically to be a balancing factor.

In view of the interrelation the question can be posed: is it necessary to have special tribunals? The obvious argument against them is that they in effect already form an integral part of the Arbitration Court; they are merely divisions of that Court with members who have specialised knowledge in the industry concerned. If this is so the fact should be acknowledged by calling them particular divisions of the Court. Such an amendment, however, would not change anything but the name, and there seems to be no valid reason to destroy the tribunals' identity. Their particular functions significantly differ despite similarities in constitution and procedure. Furthermore, notwithstanding the presence of a Judge, the question whether they are subordinate to, or coordinate with, the Arbitration Court cannot be easily determined. It is not inconceivable that the industries affected would resist any attempt to abolish separate tribunals.

A common feature of all three Tribunals is that they are all commissions of inquiry under the Commissions of Inquiry Act 1908, but they refer disputed points of law to the Court of Appeal, and not to the High Court.[103]

A brief examination of each of the three Tribunals appears desirable and follows.

2 The Waterfront Industry Tribunal

In historical order the first special tribunal is the Waterfront Industry Tribunal. After the crippling stoppage on the waterfront in 1951 the Kennedy commission recommended the creation of separate agencies for the administration of the industry and settlement of disputes.[104]

Besides the Judge of the Arbitration Court as Chairman, the Tribunal consists of one employers' and one workers' representative. The chief function of the Tribunal is to make principal orders settling grades of wages and conditions of employment. In addition to general principal orders the Tribunal also makes suplementary principal orders for each port. Terms agreed by the parties can be incorporated in the order without hearing but the Tribunal may refer back any agreement to the

[103] Aircrew Industrial Tribunal Act 1971, s 13; Argricultural Workers Act 1977, s 25A; Waterfront Industry Act 1976, s 5.

[104] *Report of the Royal Commission of Inquiry into the Waterfront Industry*, Chairman, Sir Robert Kennedy, Govt Printer, Wellington, 1952.

parties with directions. The Tribunal also acts as an appeal and supervisory authority in matters concerning the waterfront industry. It takes appeals from decisions of port conciliation committees and of the Waterfront Industry Commission relating to amenities, the register of employers, or orders of the Commission imposing levies or charges. Its functions also include: deciding disputes within the waterfront industry; controlling and directing the activities of port conciliation committees; and investigating any matter which in its opinion is likely to cause delays to work within the industry. It also determines demarcation disputes on the waterfront.[105]

Principal orders fulfil the same role as awards in the industry at large, and they may be made either on the Tribunal's own motion or on the application of any association or employer. An order prescribes the conditions and terms of employment, including provisions for holidays, long service leave, sick leave, retirement, redundancy and a guaranteed minimum payment. It may fix remuneration on a tonnage, or unit, or other basis under an incentive contract system or in any other system of payment by results; it may prescribe the classes of work to be performed by a union or section of a union of workers and to be carried out by any employer or employers' organisation within the industry; in addition it may include any other matter that the Arbitration Court is empowered to insert in an award. The order binds all persons, employers and workers, regardless of whether or not they are members of their respective organisations.[106]

[105] Waterfront Industry Act 1976, ss 5-8, 14-24; in *Wilkins and Davies Const Co Ltd v New Zealand Labourers, etc IUW* (1978) Arb Ct 107, the Arbitration Court held that the appropriate Tribunal was the Waterfront Industry Tribunal and declined jurisdiction.

[106] Ibid, 15-17, 21; *Port Chalmers Waterfront Workers IUW v New Zealand Harbour Board Employees' IUW* [1973] 2 NZLR 504 (CA); *Auckland Maritime Cargo Workers IUW v Waterfront Industry Tribunal and Another* [1959] NZLR 1161.

INDEX

The Tribunal has power to interpret, amend, consolidate and enforce its principal orders and impose penalties for offences. In this respect it has the same power as the Arbitration Court and the relevant provisions of the IR Act apply with necessary modifications.[107]

Applications to the Tribunal for a principal or other order must be lodged with the Chairman of the Port Conciliation Committee, but if there is no such committee they may be lodged direct with the Tribunal.[108] A conciliation committee consists of equal representatives of employers and workers with an independent chairman appointed by the Minister of Labour and its function is assisting the parties to reach an agreement.[109] When no progress can be made, upon receipt of a report from the committee the Tribunal takes over the proceedings.

Exercising its power and functions the Tribunal must observe certain guidelines and have regard to the latest general order increasing or reducing rates of remuneration made by the Arbitration Court. In the present situation, after the repeal of the General Wage Orders Act, this provision must be interpreted as referring to the latest Government regulation adjusting wages. Lastly, the Tribunal must have regard to such other considerations as the Arbitration Court for the time being is required to take into account in making or amending an award and such other considerations as the Tribunal deems relevant.[110]

The nature of the Tribunal's jurisdiction can be described as primarily legislative by issuing principal orders but with some judicial element in it in interpreting and enforcing the orders.

3 The Aircrew Industrial Tribunal

The Aircrew Industrial Tribunal, as originally constituted in 1971, consisted of one person only, but in 1977 it was restructured into a three-person Tribunal under the chairmanship of an Arbitration Court Judge. The two members as usual represent the employers and aircrew officers respectively.[111]

The functions of the Tribunal are (a) to assist the prevention or settlement of industrial questions; (b) to consider and determine industrial questions so far as the conditions of employment concerned relate to the employment of aircrew officers by an airline employer; and (c) to prevent or settle by conciliation or arbitration industrial questions.[112]

"Industrial question" is a new concept, not the same as industrial matter or industrial dispute in the Industrial Relations Act. It means a dispute or question relating to conditions of employment of aircrew officers that cannot be resolved by informal proceedings and includes (a) a threatened or probable dispute; (b) part of a dispute; (c) a dispute so far as it relates to a matter in dispute; and (d) a question arising in relation to a dispute.[113]

The main function of the Tribunal is to set a salary scale for each occupational group which must (a) enable airline employers to recruit and retain efficient staff; (b) take account of special responsibilities and conditions applicable; and (c) be fair to employers and aircrew officers as well as users of passenger and freight services.[114]

The Tribunal may (a) direct a person to attend before it for the purpose of preventing or settling an industrial question; (b) appoint a conciliation council to discuss and negotiate a question; and (c) if conciliation is unsuccessful, to hear and determine the question.[115]

The conciliation council will be formed by the Tribunal and will consist of a chairman and an equal number of persons nominated by the parties. If there is a settlement it must be unanimous.[116]

The award of the Tribunal must specify (a) the parties on which it is binding; (b) the occupational group or groups of aircrew officers to which it relates; (c) its date of commencement and currency; and (d) any other matter required to be included. Its terms need not necessarily be restricted to the specific relief claimed or demands made but may include any matter which the Tribunal thinks necessary or expedient. It may not contain, however, provisions inconsistent with any statute, and has to clearly state what must be or must not be done by the parties. The award binds:

(a) The unions and persons specified in the award or to whom the Tribunal extends it;

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[107] Waterfront Industry Act 1976, ss 16, 17, 50 and 51.
[108] Ibid, s 18(1) and (2); *Union SS Co of NZ Ltd v Board of Commissioners and Another* (1961) 10 MCD 80.
[109] Ibid, 41-43, also ss 22-24.
[110] Ibid, s 14; see *Mazengarb*, paras 1300-1313.
[111] Aircrew Industrial Tribunal Act 1971 (as amended in 1977), ss 6-8.
[112] Ibid, s 19(1).
[113] Ibid, s 2.
[114] Ibid, s 19(2).
[115] Ibid, ss 24, 25-34.
[116] Ibid, ss 25, 26, 29 and 30.

(b) All members of the union bound by the award;
(c) Any successor to, assignee or transmittee of, the business of the employer including the corporation that has taken over the business of the airline employer that was bound by the award.

The award cannot be extended beyond the parties to the proceedings, except to a union, person or class of persons whose interests are substantially the same as those of the parties.[117]

The Tribunal may set aside or vary any terms of the award after consultation with the parties, and in order to remove ambiguity or uncertainty it has power of interpreting its own award.[118] Enforcement proceedings, however, must be referred to the Arbitration Court.[119]

4 The Agricultural Tribunal

Until 1977 wages and conditions of work for agricultural workers were determined by regulations issued under the Agricultural Workers Act 1962. The Agricultural Workers Act 1977 has replaced that method with a conciliation and arbitration procedure and for this purpose has set up the Agricultural Tribunal with a tripartite structure more complex than that of the Arbitration Court. The Tribunal comprises the President, who is a Judge of the Arbitration Court, one employers' and one workers' nominee.[120] As there are seven different classes of agricultural work represented by seven employers' organisations and three workers' organisations, in a dispute concerning a particular category of work, the nominees of the relevant organisations have to sit as members. The organisations must be registered under the Act to have the right of representation. Besides the recognised categories set out in the First Schedule to the Act the President, on the application of an organisation of employers or an organisation of workers may declare any further class of work to be a recognised category.[121] "Agriculture" has an extended meaning and it includes, besides agriculture in the strict sense, also the keeping and care of animals, horticultural, pastoral, silvicultural, flaxmilling, bushworking and sawmilling work.[122]

The usual three-stage procedure of settling a dispute of interest is to be followed. If the dispute is not settled any party may apply to the presiding Judge to set up a conciliation council. The council will comprise a conciliator as chairman and not more than four members on each side nominated by the agricultural organisations concerned. Where no settlement is reached the dispute may be referred to the Tribunal.[123] Both the Tribunal and a council when considering the dispute must have regard to the seasonal and climatic conditions and all the particular characteristics of the work carried out by the class of workers concerned.[124]

The Tribunal has full power to make awards in relation to different classes of agricultural work, and thereby it performs a specific delegated legislative function. Curiously, however, its judicial authority is very restricted. It has no power to interpret its own awards. If the construction of an award cannot be settled voluntarily through a dispute of rights procedure by a committee consisting of equal numbers of members representing the parties the matter must be referred to the Arbitration Court.[125] In view of the fact that the chairman of the Tribunal is a Judge of that Court it would be reasonable to presume that with the assistance of the members who have special knowledge in the particular category of agriculture to which the award relates a more satisfactory interpretation could be reached than by the Arbitration Court. The reason behind this strange arrangement obviously is that the provision as originally enacted referred to the Industrial Court and when the Arbitration Court was restructured nominating a Judge of it as chairman of the special tribunals, the word "Industrial" was simply changed, but further implications were overlooked.

Likewise, the Tribunal lacks power to deal with offences. In matters relating to discrimination on the ground of union membership or non-membership and contempt or obstruction of the Tribunal the Arbitration Court has penal jurisdiction as if it were dealing with them under the IR Act.[126] Offences in respect of accommodation, safety, health, welfare and not

[117] Ibid, ss 37-40.
[118] Ibid, s 43.
[119] Ibid, s 46; see *Mazengarb*, paras 1000-1004.
[120] Agricultural Workers Act 1977, s 17; see Judith Reid, "The Agricultural Workers Act 1977" (1978) 8 NZULR 85.
[121] Ibid, ss 10-16.
[122] Ibid, s 2.
[123] Ibid, ss 28-31.
[124] Ibid, s 33(3).
[125] Ibid, s 29(b) (ii) and (d).
[126] Ibid, ss 37, 41, 42 and 43.

keeping a wages and holiday book will be dealt with by District Courts in a summary way.[127] This distinction clearly follows the different provisions of the IR Act and the Factories Act 1946 respectively.

The Arbitration Court has also retained exclusive jurisdiction in proceedings arising from personal grievance, victimisation and recovery of wages. The relevant provisions of the Agricultural Workers Act on these matters are based on the corresponding sections of the IR Act.[128]

5 Various tribunals and authorities settling employment disputes

A number of further tribunals and authorities exist, mainly in the public sector, for the purpose of settling disputes connected with employment. They will receive a brief reference only.

The Public Sector Tribunal, the Government Service Tribunal, the Government Railways Industrial Tribunal, the Hospital Service Tribunal, the Post Office Staff Tribunal and Police Staff Tribunal[129] all have as their chairman a Judge of the Arbitration Court. An interconnection between the public and private sectors is intended to be maintained by this arrangement so that rates of remuneration and conditions of work may be kept in balance.

The Higher Salaries Commission is concerned with the salaries of members of Parliament, certain executive officers of statutory corporations, public bodies, local authorities, Hospital Boards and University teachers.[130]

At this juncture the Equal Opportunities Tribunal must be briefly mentioned.[131] It has nothing to do with collective wage settlement, but with proceedings brought by the Human Rights Commission on behalf of a person or class of persons who suffered discrimination in employment by reason of sex, marital status, religious or ethical belief, or colour, race or ethnic or national origin. Where the Commission is unable to arrange a settlement between the parties, the Equal Opportunities Tribunal will be the proper forum.[132]

The Tribunal, in contradistinction to wage fixing tribunals, functions as a judicial body, though it is deemed to be a Commission of Inquiry. It must act according to equity, good conscience and the substantial merit of the case as regard to technicalities. A case can be stated for the opinion of, and dissatisfied parties may appeal to, the High Court, the decision of which will be final.[133]

The jurisdiction of the Arbitration Court in complaints against trade unions when discrimination is alleged on other than statutory grounds, has already been referred to.[134]

IV DISTRICT COURTS

1 Magistrates' Courts reborn

As from 1 April 1980 the newly constituted District Courts[135] have taken over the functions of the former Magistrates' Courts. The restructuring is based on the recommendations of the Royal Commission on Courts and is implemented by the District Courts Amendment Act 1979 which has renamed and amended the Magistrates Courts Act 1947. The amending statute does not merely change the name into a more impressive one, but has generally raised the status of the Court and extended its jurisdiction.[136]

In industrial matters, or perhaps more correctly, in disputes touching or concerning matters connected with industry and employment, specific jurisdiction is granted partly by the IR Act itself and partly by other statutes which regulate certain aspects of industry. It goes without saying that District Courts as ordinary Courts of law exercise a purely judicial jurisdiction, as distinct from legislative, adjudicating civil or criminal actions between parties.

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[127] Ibid, ss 48, 56, 57 and 59.

[128] Ibid, ss 39, 40 and 44; see *Mazengarb*, paras 1100-1259.

[129] State Services Conditions of Employment Act 1977, ss 37-41 and 49-55; Post Office Act 1959, ss 199-202 and 205; the Police Act 1958, ss 67, 68 and 81.

[130] Higher Salaries Commission Act 1977.

[131] Human Rights Commission Act 1977, ss 45-66.

[132] Ibid, s 38; see also ss 15-22 and 34-44; Race Relations Act 1971, s 5.

[133] Ibid, ss 51, 53, 62 and 63.

[134] See Part II 4(5), ante.

[135] The term "District Court" will be used, except when reference is to an actual decision by the former Magistrates' Court.

[136] District Courts Amendment Act 1979, ss 9, 10 and 13; the monetary limit in civil actions in general is now $12,000.

2 Delegation from the Arbitration Court

Section 49 (1) of the IR Act provides that the Arbitration Court may delegate to a District Court any of its powers or functions by order under its seal or in such other manner as it thinks fit. The section refers to proceedings for breach of an award or collective agreement and expressly includes the power to deal with any offence within the Arbitration Court's jurisdiction under the Act. Functions in disputes of interest are not specifically excluded, but from the wording of the section it seems implicit that matters delegated should remain within the judicial function.

A District Judge acting on the delegated authority in any judgment will add to his signature the words "acting as a duly appointed delegate of the Arbitration Court" or words to that effect. Any such judgment should be filed with the Registrar of the Arbitration Court.[137]

Any person directly affected by any decision of the District Court acting under delegated authority may, within such time and in such manner as may be prescribed, appeal to the Arbitration Court. The Arbitration Court in such circumstances will deal with the matter as if an order of delegation had not been made.[138]

A District Court when acting under a delegation is not bound by the ordinary rules of evidence, but may take into consideration any matter which would have influenced the Arbitration Court in making awards or apprenticeship orders: *Re Northern Industrial District Furniture Trade Apprenticeship Order*.[139] In general when exercising delegated authority a District Court should follow relevant decisions of the Arbitration Court, but when it exercises independent jurisdiction, such as in a common law action for recovery of wages which may depend on the construction of the relevant award, it is not bound by existing judgments.[140] The Supreme Court added that in the case of an independent jurisdiction the Magistrate should treat previous decisions of the Arbitration Court as highly persuasive to preserve uniformity in the interpretation of any particular award or collective agreement.[141]

3 Civil penalties and criminal fines

As mentioned earlier the amended s 147 of the IR Act vests direct power in District Courts to act in certain penalty actions.[142] Where a section of the Act provides for summary conviction for an offence without reference to the Arbitration Court the District Courts have primary jurisdiction under the Summary Proceedings Act 1957, but where a penalty is prescribed for a breach they can proceed only on delegation. Non-compliance with prohibitions in respect of certain strikes and lockouts in essential industries, and specifically in export slaughterhouses as well as during conciliation or award proceedings was made a summary offence by an amendment to the IR Act in 1976 in order that District Courts could deal with the increasing number of unjustified industrial stoppages. The prosecution of hundreds of workers, however, turned out to be an embarrassing experience and the Labour Department decided to withdraw the charges.[143]

Following the recommendations of the Dunlop Report[144] all further prosecutions pending against striking workers were discontinued and the relevant sections amended by substituting the phrases "commits an offence", "charged with", "on summary conviction", and "fine" with "alleged to be in default", "breach of this section", and "penalty". The substance of the provisions has remained unchanged, and the original amounts of fines will now be imposed as penalties. One can doubt whether a worker who is ordered to pay a penalty would see much difference between criminal proceedings and a civil action for breach. To preserve the jurisdiction of District Courts in respect of the decriminalised breaches s 147 had to be amended.

It can be argued that a civil prosecution allows more flexibility and is easier to withdraw if political and social considerations so warrant. Furthermore, the absence of the criminal stigma may, though not necessarily, signify a difference to the persons subjected to the procedure.[145]

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[137] IR Act, s 49(4).

[138] Ibid, s 49(3) and (6).

[139] (1939) BA 95; it can be argued that the making of an apprenticeship order is delegation of legislative authority.

[140] *Scott v Empire Printing and Box Manufacturing Co Ltd* (1942) 2 MCD 307; *New Zealand Harbour Board Employees IUW v Lyttelton Harbour Board* (1942) 2 MCD 449.

[141] *Thomas Borthwick & Sons (Australasia) Ltd v Haeta* [1965] NZLR 957.

[142] See Part II 4(3), ante.

[143] IR Act, ss 81, 125 and 125A; the Ocean Beach Freezing Works prosecution in respect of 192 informations relating to offences under s 125A of the IR Act were withdrawn on 21 September 1978; see P R Craig, *Penalty Provisions in Industrial Relations*, LLB Hons thesis, University of Otago 1979, esp ch V.

[144] Sir William Dunlop, *The Applications of Penalty Provisions in the Industrial Relations Act*, 1978.

[145] On unjustified industrial actions in general see *Mazengarb*, paras 123-128E.

4 Sundry jurisdiction under other statutes

District Courts are given independent summary jurisdiction in respect of offences under the following industrial statutes:

Factories Act 1946
Shops and Offices Act 1955
Machinery Act 1950
Construction Act 1959
Bush Workers Act 1945
Boilers, Lifts and Cranes Act 1950
Minimum Wages Act 1945
Wages Protection Act 1964
Equal Pay Act 1972
Remuneration Act 1979
Fishing Industry (Union Coverage) Act 1979

Under the Annual Holidays Act 1944 penalties for offencs against the Act may be recovered by the Inspector of Factories in the same manner as a penalty for a breach of an award and the provisions of the IR Act will apply with the necessary modifications. This would indicate that primarily the Arbitration Court has jurisdiction.[146]

Specific civil jurisdiction has been conferred on District Courts by the Wages Protection Act 1964 for recovery of wages paid otherwise than in money,[147] and by the Annual Holidays Act for recovery of unpaid holiday pay.[148] Strictly speaking only the first mentioned statute names District Courts, the other one refers to "civil proceedings". As the jurisdiction of the District Courts in monetary civil actions has been raised to the limit of $12,000, from $3,000, there can be little doubt that most claims will be lodged with District Courts.[149]

When an equal pay claim is commenced in a District Court appeal lies not to the High Court but to the Arbitration Court.[150]

Pursuant to the Factories Act District Courts act in a kind of appeal capacity against safety requisitions and refusal or cancellation of factory registration by a Factory Inspector.[151]

Where an apprentice misconducts himself, the employer may suspend him and apply to the local apprenticeship committee for leave to discharge. Against the decision of the committee appeal lies to the District Court. If it finds in favour of the apprentice an amount may be granted to him as damages.[152]

In the case of its ordinary civil jurisdiction damages claims for wrongful dismissal have always been heard by District Courts. It is foreseeable that as a result of the increased monetary limit in the future only a small percentage of common law actions arising out of employment will be started in the High Court. The District Court, of course, must stay within the same narrow principles in granting damages which bind the High Court, and is not at liberty to take notice of the more generous compensation provisions of the IR Act. The unsatisfactory results of this gap developed between remedies for wrongful and for unjustified dismissal have already been mentioned and will be discussed in more detail later in this essay.[153]

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[146] Annual Holidays Act 1944, s 13.
[147] Wages Protection Act 1964, s 4(2).
[148] Annual Holidays Act 1944, s 14.
[149] See note 136, ante.
[150] Equal Pay Act 1972, s 14(3); see Part II 4(4), ante.
[151] Factories Act 1946, ss 83 and 84; *Thomas v Inspector of Factories* (1950) 7 MCD 48; *Charles Bailey and Sons Ltd v Inspector of Factories* (1950) 45 MCR 138.
[152] Apprentices Act 1948, s 38.
[153] Part II 4(4) and Part V 3.