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RECENT BILLS

Matrimonial Property Amendment

This Bill, in the words of the explanatory note, "modifies the law as stated by the Court of Appeal in *Reid v Reid* [1979] 1 NZLR 572." It is intended to ensure that "subject to the qualifications set out in s 9(2) of the principle Act (as amended by clause 3 of this Bill), all property acquired out of separate property, and the proceeds of any disposition of separate property, is separate property for the purposes of the principle Act."

It is worth reviewing the existing provisions and background to this Bill.

Section 8(e) defines matrimonial property as including:

> "(e) Subject to subsections (3) to (6) of section 9 and to section 10 of this Act, all property acquired by either the husband or the wife after the marriage, including property acquired for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned; and"

Section 9(2) defines separate property as including:

> "(2) Subject to subsection (6) of this section and to sections 8(e) and 10 of this Act, all property acquired out of separate property, and the proceeds of any disposition of separate property, shall be separate property."

The Court of Appeal held that the words "all property acquired . . . after the marriage" meant just that and that the remaining words in s 8(e) did not limit the meaning but simply ensured that the category of property described (ie, property purchased from the proceeds of disposition of pre-marriage property) was included. It was acknowledged that this construction would leave s 9(2) with very limited scope. (Others have gone further and say its leaves no scope). One of the arguments supporting this construction was that s 9(2) was subject to s 8(e) while s 8(e) was not made subject to s 9(2). In other words the separate property definition was subject to the matrimonial property definition.

The amending Bill seeks to achieve the aim of preserving the character of separate pre-marriage property essentially by restructuring the sections in question. Thus s 8(e) will cover "all property acquired . . . after the marriage". It is made subject to s 9(2) so "property acquired out of separate property" will remain separate property so far as this provision is concerned.

Section 8(ee) is added and will cover property acquired after marriage out of pre-marriage property and as would be expected, it is made subject to s 9(2) so that where there is a "common use and benefit" element, property acquired out of separate property will become matrimonial property.

In effect the Bill sets out to achieve the intended result by circumscribing the otherwise wide meaning of the words "all property" in s 8(e). It should not be forgotten that one of the parties to the litigation, Mr A F Reid, argued compellingly that the key expression in s 8(e) was not "all property" but "acquired" and he suggested that instead of treating "acquired" as being synonymous with "got" or "obtained" it should be given the meaning of "to get in addi-

tion". Not only would this interpretation reconcile ss 8(e) and 9(2) but it would also aid the construction of other sections of the Act — particularly those having a bearing on co-ownership in unequal shares and the settlement of property after marriage (eg, ss 8(c) and 21). So anything the Privy Council may have to say about "acquired" on an Appeal from *Reid v Reid* will still be of interest notwithstanding the amendment.

Doubtless opinions will differ on whether the modification of the effect of *Reid v Reid* should have been left to the Privy Council, or whether it should be by way of structural change as in the Bill, or whether it should have been by way of defining "acquired". However the important point is that we have a Bill that sorts out a very real problem and the sooner it can be enacted the better.

(The text of the amending Bill is set out below.)

Juries

This Bill will replace the Juries Act 1908. The principal changes as summarised in the explanatory note are:

- Special juries, talesmen, pre-trial views, and jury precepts are abolished:
- The Crown's right to require a juror to stand aside is abolished:
- The list of persons who are not eligible for jury service is thoroughly revised:
- All functions previously performed by Sheriffs are vested in Registrars:
- Many of the purely mechanical provisions of the present Act are excluded and will be dealt with in rules (to be known as the jury rules).

Two points justify elaboration.

The Crown will be in the same position as any other party in respect of challenges. Each party will be entitled to challenge six jurors without cause. Otherwise challenges may be for want of qualification or for cause.

The basis of exemption for jury service has been changed. Section 6 of the 1908 Act lists persons who "shall be exempt from serving on any jury". It is to be replaced by a very much shorter list of persons who "shall not serve on any jury in any Court on any occasion". The lists includes barristers and solicitors, members of the police and traffic officers, Judges etc.

Formerly exempt occupations that are not listed include medical practitioners, members of the fire brigade, ambulance drivers, harbour pilots, the Master or member of the crew of any ship, teachers, members of the armed forces, certain persons holding office under the Civil Defence Act, and, it would seem, public servants employed in the Police Department.

Those who seek relief from jury service will apply to the Registrar who may excuse attendance on the ground that "because of that person's occupation, state of health, family commitments, or other personal circumstances, attendance on that occasion would cause or result in undue or serious hardship to that person, or to any other person, or to the general public,". Apart from previous jury attendance the only other ground for relief is that extended to "a practising member of a religious sect or order that holds service as a juror to be incompatible with its tenets."

This Bill when enacted may have the distinction of effecting the first repeal of an Act included in the new reprint series.

Town and Country Planning Amendment

Much of this Bill could be described as general housekeeping in that it deals with clarification and correction. However a number of the proposed changes will have the effect of improving the administration and operation of the Act. In brief these provisions deal with:

- Advertising — It is proposed that the public notice of an alteration to the scheme will simply notify the place at which the summary of any requests for alterations and the submissions and objections can be expected. It will no longer be necessary to include the summary in the advertisement. The present provision led to litigation, re-advertising and delay in the case of Wellington City.
- Joint hearings — Provision will be made for joint hearings under the principal Act and the Water and Soil Conservation Act 1967 by Councils and Regional Water Boards where there are applications under both Acts relating to the same subject-matter.
- Directions for service — The Planning Tribunal is to be empowered to give directions relating to the service of any document notwithstanding any requirement of the principal Act or regulations.
- Appeal — The provision under the 1953 Act which provided for appeals to the Court of Appeal against decisions of the High Court on questions of law only is to be reinstated.
- Works contrary — The power to apply for consent to works contrary to a proposed

change to a district scheme will be widened. It is no longer limited to owners and occupiers.

Of particular interest to local authorities will be the proposed widening of the power to delegate matters to committees or commissioners (the delegating power is to be extended beyond matters arising under Part IV) and the granting of express power to designate public works within the authority's district. The latter point corrects an anomaly in the original Act. That provision also sets out the criteria to which the Planning Tribunal must have regard when determining appeals against provision made by a council in its district scheme in respect of its own public works.

The maritime planning provisions are modified reasonably extensively, the basic intent being to bring maritime planning more in line with land planning. Thus provisions are inserted relating to interim control before a maritime planning scheme is operative, for planning in respect of land above mean high water mark that is included in a maritime planning area, and a Maritime Planning Authority is not to be disqualified from carrying out its planning functions by any negotiations relating to the use and development of land (including the bed of the harbour or sea).

Possibly the most significant provision and one that may well prove to be the most useful deals with a use that is not predominant under an existing scheme but is in conformity with a proposed change. Such works are to be permitted where the time for lodging objections has expired but no objection has been lodged, or where an objection has been dismissed or withdrawn and the time for lodging appeals has expired or where an appeal has been lodged but subsequently dismissed or withdrawn.

Generally speaking this is a useful amendment and while there may be the odd doubts (eg, will a direction as to service given by the Planning Tribunal substitute for an express statutory requirement: is the lesser degree of advertising adequate?) it should ease the lot of those involved in planning.

TONY BLACK

MATRIMONIAL PROPERTY AMENDMENT BILL

1. Short Title and commencement—(1) This Act may be cited as the Matrimonial Property Amendment Act 1980, and shall be read together with and deemed part of the Matrimonial Property Act 1976 (hereinafter referred to as the principal Act).

(2) This Act shall be deemed to have come into force on the 28th day of October 1980.

2. Matrimonial property defined—(1) Section 8 of the principal Act is hereby amended by repealing paragraph (e), and substituting the following paragraphs:

"(e) Subject to subsections (2) to (6) of section 9 and to section 10 of this Act, all property acquired by either the husband or the wife after the marriage; and

"(ee) Subject to subsections (3) to (6) of section 9 and to section 10 of this Act, all property acquired after the marriage for the common use and benefit of both the husband and the wife out of property owned by either the husband or the wife or both of them before the marriage or out of the proceeds of any disposition of any property so owned; and".

(2) Section 8 of the principal Act is hereby further amended by omitting from paragraph (f), and also from paragraph (h), the words "paragraphs (a) to (e)", and substituting in each case the words "*paragraphs (a) to (ee)*".

3. Separate property defined—Section 9(2) of the principal Act is hereby amended by omitting the words "sections 8(e) and 10", and substituting the words "sections 8(ee) and 10".

4. Transitional provision—In the case of proceedings filed under the principal Act before the commencement of this Act, the amendments made to the principal Act by this Act shall apply to those proceedings where the hearing of those proceedings has not been commenced before the commencement of this Act.

LEGAL PROFESSION

PRACTICE NOTE

PROCEDURE FOR THE APPOINTMENT OF QUEEN'S COUNSEL

The following memorandum, signed by the Chief Justice, the Rt Hon Sir Ronald Davison, and the Minister of Justice, the Hon Mr J K McLay, outlines new procedures for the appointment of Queen's Counsel.

From the date of this memorandum (6 November 1980) a new procedure will be followed for the appointment of Queen's Counsel:

1 Barristers seeking appointment should write to the Solicitor-General in confidence advising of their application, enclosing a brief history of their experience at the Bar and their particular reasons for seeking to take silk.

2 All applications should be in the hands of the Solicitor-General by not later than 30 November in each year.

3 Immediately after 30 November the Solicitor-General will forward copies of all applications to the Chief Justice and to the Attorney-General.

4 The Chief Justice will seek from Judges of both the High Court and the Court of Appeal their views as to the suitability of all applicants for appointment. On receiving such views will write to the Attorney-General indicating whether he supports the application.

5 The Attorney-General will consult with other persons as he thinks appropriate. This will include consultation with the appropriate judicial officers of any specialist jurisdiction in respect of which the applicant claims expertise; the Law Society or any other person.

6 Following these consultations the Solicitor-General will by 28 February in each year notify applicants in confidence of the result of their application.

7 The Attorney-General will, prior to 31 March in each year, publish a list of the Queen's Counsel so appointed.

8 These procedures will be departed from only in exceptional circumstances (for example where a law officer or a very senior practitioner is taking silk) or where there is agreement between the Chief Justice and the Attorney-General.

9 The following general guidelines will apply for future appointment of Queen's Counsel:

(a) In deciding upon applications the Attorney-General and the Chief Justice will have regard each year not only to the personal qualities of applicants but also to the number of Queen's Counsel in active practice in any district. No precise ratio will be established but the number of Queen's Counsel appointed will depend in part on the number of practitioners in the district who are generally regarded by the profession as actively practising as barristers.

(b) The practice which once existed whereby applicants give notice of their intention to apply for silk to those senior in call to them at the Bar is no longer to be followed.

(c) Queens Counsel will continue to practise only as barristers and not as solicitors and/or as partners in a legal firm. An application for silk made by a barrister whilst he is still practising as a solicitor and/or in a legal firm will only be considered in special cases and a reasonable period of practice as a barrister in his own account will normally be required of an applicant for silk.

(d) Applicants for silk will have their applications dealt with in only one of three ways. They will be advised either:

(i) That their applicant has been granted;

(ii) That their application has been declined;

(iii) That their application had been deferred.

Those applicants who are advised of deferment will also be told that they may apply again after the expiration of up to two years (but not longer).

(e) Applicants will be advised privately of the decisions made in respect of their applications. Only the names of successful applicants will be announced by the Attorney-General. All such applications and consultations will be treated in the strictest confidence.

CASE AND COMMENT

Matrimonial Property Act 1976 — Whether house property was wholly or partly matrimonial property

In *Oakley v Oakley* (High Court, Christchurch; Judgment 17 July 1980 (No M 155/78); Somers J) the respondent husband bought a section in 1954 for £400, the transfer to him being registered almost a year later. He had not then met the applicant wife. The section was zoned light industrial and was covered in scrub. The husband cleared and levelled it, got a permit to build a workshop and house on it in August 1955 and then changed his mind about what he would build. He fenced one boundary and built an iron shed. In 1958 he put new plans to the Council for a house and workshop. The latter was completed in mid-1959 and let. The work on the house continued. In mid-October 1959 he borrowed £500 on mortgage of the property, inferentially for getting on with the house. The parties met in March 1960 or 1961 and married at the end of 1961, moving into the house, which became the matrimonial home, in August 1962. The husband averred that the house was completed when they married. The wife said it was not. The Court found the general tenor of the wife's evidence acceptable, supported as it was by the increase of £500 on the mortgage in April 1962 and the fact that the parties did not move in until eight months after marrying. The wife was found to have contributed £500 for joinery work before the marriage. During her engagement and after marriage, she paid a sum (probably exceeding £300) to meet various accounts and she provided some furnishings.

The spouses lived in the house until June 1968 when they moved to another home. During that time, the wife substantially kept the gardens in order. Since leaving the (first) house it was let. While they lived in the (first) house, the workshop was let. The whole property was still subject to a mortgage and the Government valuation as at 1 July 1974 was $24,000.

The characterisation of the property fell to be made as at the date of the parties' separation. It was put for the wife that the house property was matrimonial property within s 8(e) inasmuch as it was property acquired by either the husband or the wife after marriage. This submission involved the contention, as the Court noted, that the word "acquired" was to be construed in the light of the ultimate purpose and use to which the building (then not completed) was to be put or, alternatively, that "acquisition" depended on substantial completion. This did not find favour with Somers J. He considered the word "acquired" meant "obtained, got or had". He went on to say that the land was, "in the relevant sense, acquired long before the marriage and the house was substantially built before marriage. I have considered whether the definition of property in s 2 of the Act can be interpreted in a way enabling the Court to depart from the normal rules of real property law so as to sever the building or part of it from the land. In a suitable case it may be so. But even that does not provide a satisfactory answer to the present case."

His Honour thought it not possible to say that, having once gained the character of matrimonial property the home must thereafter retain that character — this because its classification in earlier years as the matrimonial home depended on its user. In the Court's view once the home ceased to be the home it reverted to the character it had at marriage.

Somers J observed that no claim to a beneficial interest in the home by way of a trust or other fiduciary obligation had been made and that the circumstances suggested that a just method of resolving the matter could be had in

terms of the Act. In the first place, the money spent by the wife during the parties' engagement was laid out in the acquisition of materials for the completion of the husband's house. These could fairly be placed under s 8(d).

As to the money spent by the wife after marriage, that would be properly brought to account under s 9(3) of the Act.

As his Honour remarked, a question of valuation of such matrimonial property then arose. He considered the "two items so found to exist can be telescoped into one proposition. The matrimonial property can justly be treated as part of the value at the date of hearing of the [disputed] property bearing the same proportions as the aggregate of the wife's expenditures bear to the value of the property at the date of its completion in about August 1962."

In order to produce the appropriate figure an inquiry would have to be made (a) as to the value of the home at the latter date and (b) as to the amounts expended by the wife after the marriage. Somers J expressed his willingness to hear counsel on those matters at a convenient time and on any other issues remaining to be resolved.

Comment

This is not the first time that the Courts have had to look at the history of the home in order to decide whether or not it is the matrimonial home and thus matrimonial property. As Quilliam J said at first instance in *Castle v Castle* [1977] 2 NZLR 97, at pp 99-100, a property, once having acquired the character of a matrimonial home, does not necessarily retain that character indefinitely. Obviously, he continued, it ceases to be a matrimonial home if it is sold or if an agreement that is should cease to be the matrimonial home is entered into under s 21 of the Act. In the light both of this statement and of s 2(4) of the Act, Somers J was clearly correct in approaching the case in the way he did. The decision is, indeed, compatible with *Campbell v Campbell* [1979] NZ Recent Law 123, where McMullin J held that, to be divided under the Act, the home must exist as matrimonial property at the date of the parties' separation.

Somers J noted in passing that no claim was made that a trust or other fiduciary obligation existed. If such a claim had been made, it is submitted that s 4(4) of the Act would have required his Honour to decide the matter as if it had been raised in proceedings under the Act.

P R H Webb

Mortgagee exercising power of sale must remove outstanding caveats

In *Stewart v District Land Registrar* (High Court, Auckland, 23 September 1980 (M699/80), Barker J) the applicant was the first mortgagee of certain land. There was also a registered second mortgage. After the registration of the two mortgages a caveat had been lodged against the title by two persons who claimed an estate or interest under an agreement to mortgage. The mortgagor defaulted under the first mortgage, whereupon the applicant mortgagee exercised her power of sale. A memorandum of transfer of the mortgaged land executed by the applicant in favour of the purchaser was lodged in the Land Registry Office at Auckland for registration. That transfer was rejected on the ground that the presence of the caveat prevented registration. The applicant was dissatisfied with the decision of the District Land Registrar ("the Registrar") not to register the transfer and, pursuant to s 216 of the Land Transfer Act 1952 ("the Act") required him to "set forth in writing the grounds of his . . . decision". The applicant then invoked the procedure provided by s 217 of the Act and called upon the Registrar to appear before the High Court to substantiate and uphold the grounds of his decision.

Counsel for the Registrar pointed out that whilst the caveat remained in force s 141 of the Act prohibited the Registrar from making "any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat". He contended that those words clearly prevented the registration of the transfer from the applicant to the purchaser.

Two main arguments were put forward on behalf of the applicant. First, it was submitted that to require a mortgagee who is exercising his power of sale to remove all caveats lodged against the title to the land would have the effect of putting the caveator in a better position than subsequent registered mortgagees or encumbrancees. The reason advanced was that the registration of a transfer from a mortgagee exercising his power of sale extinguishes any subsequent mortgage or encumbrance by virtue of s 105 of the Act. Barker J rejected this first submission, and expressed the opinion that the interpretation of s 141 of the Act contended for by counsel for the Registrar was correct. Secondly, it was argued that s 105 of the Act operated to free the title from the caveat. The effect of that section, however, is that the registration of a transfer by a mortgagee exercising his

power of sale vests in the purchaser the mortgagor's estate "freed and discharged from all liability on account of the mortgage, or of any estate or interest except an estate or interest created by any instrument which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him". This second argument necessarily failed because a caveat does not itself create an estate or interest, but merely gives notice of a potential claim: cf *Forster v Finance Corporation of Australia Ltd* [1980] VR 63.

Having considered and rejected the arguments put forward on behalf of the applicant, Barker J went on to ask the question: what is the duty of the mortgagee if there should be a surplus from the mortgagee's sale after paying and discharging all the subsequent mortgages and encumbrances? Section 104 of the Act requires the mortgagee to apply the purchase money first, in payment of the expenses of the sale; secondly, in payment of the moneys then due or owing to the mortgagee; thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in the order of their priority; and fourthly, the surplus (if any) must be paid to the mortgagor. Since a caveat is not a registered encumbrance, Barker J asked: "How is the mortgagee, holding a surplus from the mortgage money, to decide on the validity of the claim of a caveator?"

It was held that the Registrar was correct in requiring the removal of the caveat before registering the transfer from the applicant to the purchaser. **Stewart v DLR is therefore authority for the proposition that a memorandum of transfer of land sold in exercise of a mortgagee's power of sale cannot be registered whilst a caveat against dealings remains lodged against the title.** This is so even if the caveat was lodged after the mortgage was registered. A mortgagee exercising his power of sale must therefore take whatever steps are necessary to remove all outstanding caveats before he can give title to the purchaser.

Barker J's judgment is based on a strict, literal interpretation of s 141 of the Act, and has the result of protecting the interests of caveators. Furthermore, it is in general accord with the decision of Crockett J in *Forster v Finance Corporation of Australia Ltd* [1980] VR 63, though the *Forster* case was, of course, decided under a somewhat different statute. It is, however, open to question whether, as a matter of principle and of policy, a mortgagee should be hampered — and perhaps prejudiced — in the exercise of his power of sale by the existence of a caveat lodged *after* the registration of his mortgage. It is noteworthy that the opinion has been expressed that:

> ". . . [I]t is the practice to permit the mortgagee or encumbrancee under a mortgage or encumbrance registered prior to the caveat, to exercise his powers, unless, of course, the caveat had been lodged against the mortgagee or encumbrancee in which case the grounds for so doing would have appeared in the caveat." Jessup, *Forms and Practice of the Lands Titles Office of South Australia* (5th ed 1973), 293.

This statement was accepted in Adams' *The Land Transfer Act 1952* (2nd ed 1971), 349, para 413, where it is stated:

> "This appears to be correct, for the estate caveated in such a case is the fee simple less the mortgage, or what, under the old system, would correctly be termed the equity of redemption. . . ."

The caveat system is one of the areas of the Land Transfer Act in which a number of problems remain to be worked out by the legislature or by the Courts. It is arguable that the law as laid down in *Stewart v DLR* is less than satisfactory from a mortgagee's point of view. Numerous problems may arise because of the varied interests which caveats may protect (see, eg, the discussion of caveats in relation to requisitions clauses in contracts of sale in Goodall and Brookfield, *Conveyancing* (4th ed 1980), 34, para 3.9). A possible way of overcoming the difficulties which may now be encountered by mortgagees exercising their powers of sale would be to amend s 141 of the Act to provide that a caveat lodged against the title to mortgaged land does not prevent the registration of a transfer pursuant to the power of sale in any prior mortgage. The interests of caveators could be guarded by amending s 104 of the Act to provide that the mortgagee must not pay any surplus money to the mortgagor until any caveator has been given the opportunity of taking proceedings to establish his claim to the surplus funds. The procedure could simply be by notice to the caveator calling upon him to apply to the Court within an appropriate time to substantiate his claim. Such procedure would have the merit of placing on the caveator the onus of establishing his claim to any surplus.

It is to be hoped that the potentially far-reaching questions raised by the decision in *Stewart v DLR* will be referred without delay to the Property Law and Equity Reform Commit-

tee for consideration, and that any amending legislation which that Committee may see fit to recommend will be introduced without waiting for the long-promised revision of the Land Transfer Act.

G W Hinde

Land subdivision — Assessment of reserve contribution — Formula sum — Extension of time in which to deposit survey plan

The judgment of Speight J in *Unit Subdivisions Development Ltd v East Coast Bays City Council* (High Court, Auckland, 23 May 1980 (M 1045/76), covers a number of legal questions of interest to practitioners and territorial authorities approving land subdivisions.

The applicant development company was engaged in the Broadvale Subdivision in East Coast Bays involving some 177 lots. With reference to lots 63-104, the Council approved the scheme plan in July 1972 and imposed a condition "reserve fund contribution . . . at 5 percent". Work proceeded on the balance of the subdivision and, when the two-year time limitation in which to deposit the survey plan arrived, under s 352 of the Municipal Corporations Act 1954, the company was able to obtain extensions in respect of certain parts of the subdivision, but the Council declined to extend the time with reference to lots 63-104 and required a fresh application to be made. The new subdivision plan was approved in June 1975, with a condition "in lieu of a reserve, a reserve contribution of 10 percent of the value of all of the created lots be paid, such value to be assessed at the time of sealing".

The applicant sought review of the decision of the Council in 1975 in imposing the 10 percent reserve contribution (which in practical terms increased the original reserve contribution from $31,000 to $130,000) and, secondly, as to the refusal of the Council to extend the original time within which to deposit the plan. In submissions, several other points of interpretation were raised which are of interest.

The first question was whether the Council had properly exercised its discretion under s 351C(1) in resolving to require a monetary contribution where "it is undesirable or unnecessary to require the owner to make provision for the making of reserves". It was argued that the Council resolution did not state that it had formed an opinion as to the desirability or otherwise of the reserve land, but on the evidence it appeared that the Council had, in fact, considered this question and his Honour ruled against the submission as follows:

> "In all corporate decisions it is implicit that there shall be deliberation given and opinions formed. But the matter is finally concluded when a question is decided by vote (s 69). It is common experience that the effect of what is decided is incorporated in a minute of proceedings (how much is recorded of the proceedings may vary according to the practice of the individual Town Clerk). The effect of the record is that it is prima facie evidence of the proceedings (s 75). It may be better practice in resolutions evidencing the refusal of approval to state the grounds of opinion . . . but failure to so record does not prove that the Council did not consider an appropriate ground as the Statute requires."

Accordingly, the Council had acted within its powers in requiring a monetary contribution.

The second point was whether the contribution had been fixed in a legal manner, in that it referred to a percentage based on the market value at the time of sealing of the land transfer plan. The issue was as to interpretation of s 351C(1)(a) empowering the Council to require the owner to "pay a sum of money to the Council within such time as it may specify". His Honour noted that the reference to specification was to the time of payment and not as to ascertainment of quantum. Reference was made to *Bidwell v Wellington City Council* (1978) 6 NZTPA 455, and *Flower v Whangarei City Council* (1975) 5 NZTPA 350, with the observation that while the Planning Appeal Boards required certainty in the conditions as to monetary contributions, they did not rule out the formula method. His Honour found some advantage in using that method to ensure the burden of contributions fell evenly on all subdividers and he stated:

> "If the formula method were not levied and a fixed sum called for some years before realisation, the temptation might be to err on the high side and this would be unfair on the subdivider."

But, although the method was fair, the question was whether it was legal. In conclusion his Honour ruled that the sum of money was capable of being ascertained as 10 percent of the market value at the time of sealing of the plan: "Money is designated and a formula for its quantification is fixed."

The third question was whether the two-year time limit under s 352(6) in which to deposit the plan ran from the initial approval of the scheme plan or from the later submission

of the survey plan. Having regard to the provisions then in force, his Honour ruled that the two-year period ran from the initial approval and would indeed have expired subject to the question of an extension of time.

The fourth issue was then whether the Council had exercised its discretion correctly in refusing to approve the time extension. Section 352(6) gave the discretion to the Council to extend the period "as the Council in any special case may allow". The evidence of the city engineer was to the effect that as a matter of policy an extension of time would *not* be given unless substantial engineering progress in the development work had taken place, and this would be assessed having regard to matters such as the formation of carriageways, the installation of water mains, and preparation of the survey plan. In the particular case, substantial progress had not been made and on that basis the extension of time was refused. It was incidental that in the meantime the Council policy on reserve contributions had increased from 5 percent to 10 percent of the sale value. His Honour ruled that, although the yardstick used was relevant, it was also contrary to the specific discretionary power reposed in the Council. His Honour stated:

> "There may indeed be cases where no progress has been made and yet they be regarded as a special case. To apply the policy which the Council had adopted would be an illustration of a body failing to direct its attention to the correct test or, as is sometimes said, 'asking the wrong question'. Otherwise it is relevant here to note that the evidence shows that this was an undertaking of great magnitude, that, as was to be expected, some parts would be taken to finality earlier than others, and that in assessing satisfactory performance of the applicant, an overall picture would require to be taken. Yet from the division of the application into some extensions and some refusals, it appears that the Council has taken an unduly narrow and restrictive view of these particular sections on the basis of a test which is not sanctioned as being a sole guide. For this reason I conclude that the Council decision of the 5th June 1974 must be set aside."

The decision was set aside pursuant to s 4(5) of the Judicature Amendment Act 1972. His Honour then indicated what the Court might think appropriate for the Council to consider at the redirected hearing:

> "It appears that the Council would be obliged to take into account the magnitude of the entire undertaking. The question as to whether or not any delay could be held to be the responsibility of the subdivider. The likely required time to complete the work. The adequacy of notice given for the application for extension. Whether or not there had been neglect on the part of the subdivider in attempting to comply with its obligations, and any other reasons which may be relevant to assessing whether or not two years was an adequate period to require completion in the circumstances."

Comment

The judgment has relevance under the new subdivision provisions which came into effect on 1 April 1979 pursuant to the Local Government Amendment Act 1978. The Local Government Act introduces a uniform two-stage process, requiring the submission of a scheme plan for approval within three years, and submission of the approved survey plan within a further three years for deposit. In both instances, the Act (s 305 and s 306) provides for the Council to grant "such extended period or periods as the Council in any special case may allow" and the direction by Speight J to consider the discretion on broad issues of fact should assist subdividers whose projects are held up through unforeseen events. In particular the duty to consider extension applications fairly and reasonably would prevent a council refusing an extension merely because it wished to take advantage of any inflation in land values or to increase the amount of the reserve contribution up to the maximum now specified.

On the second question as to whether the reserve contribution can in fact be set as a percentage of the value of the lots, one cannot be confident as to whether the approach of Speight J will still apply. Section 285(2)(a) requires the Council to impose a condition "that the owner shall pay to the Council, within such time as it may specify, *an amount of money specified by the Council*" and, in respect of commercial and industrial subdivisions, the Council may, under s 286(1)(a) impose a reserve contribution of "an amount specified by the Council, not exceeding 10 percent". Section 298 provides guidance as to when the value is to be determined, namely upon the value of the land as at the date when first available for sale, but this provision does not take the matter further. It may be that the Council can still impose a percentage sum in the first instance with the

owner being entitled to call upon the Council to state a specific dollar sum if so desired. As warned by Speight J, this latter approach may be contrary to the interest of the developer if the land values have dropped by the time the sections are first offered for sale. Conversely, the developer may well prefer to gamble with inflation of values.

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GROUND RENTS

By THE HON SIR DAVID SMITH

My articles on Ground Rents in the *New Zealand Law Journal* of 3 June and 15 July of this year ([1980] NZLJ 223,287) require, I think, a supplementary statement in order to assist those who are interested in the subject but who are not lawyers to understand the legal problems involved in the present state of the law — why, for example, in the *National Bank* case [1970] NZLR 660, the views of Wild CJ differ basically from those of the umpire and of the Court of Appeal in that case. Through the courtesy of the Editor, I am enabled to do so.

The principles of the *DIC* case apply to a Glasgow lease only where the ground rent is described in terms which are the same as, or the equivalent of, those used in the *DIC* case. It is essential that these terms require "fairness" in the interpretation and application of the terms of the lease.

The first two leases in the *DIC* case described the ground rent as "the fair annual ground rent". The third lease described the ground rent as "the full and improved ground rental of the said premises that ought to be payable during the said term". This alternative description was treated by the parties and by the Court of Appeal as being the equivalent of the description in the other two leases.

Although the *DIC* case lays down a method for fixing the ground rents so described, the parties may unanimously and completely agree upon any other method for fixing those ground rents which they think fit to adopt and, if so, they will be bound by their agreement. But if the parties do not so agree and if, in such a case, the arbitrator or umpire making an award purports to rely on the *DIC* case as legally authorising the one-sided standard for determining the ground rent which was adopted in the *National Bank* case by the umpire with the support of the Court of Appeal in that case, the consequences could be serious.

I pause to say that I think the umpire in the *National Bank* case must be taken to have adopted this one-sided principle. He did say that if the lessee were asked to pay too high an interest rate, he would probably then ask what the return to the lessor was likely to be in the way of accretion to the value of the land. But he described this situation as only "a possible minor qualification". After reviewing the umpire's reasons for his award, Wild CJ held that the umpire did not rely on this "possible minor qualification" and the Court of Appeal held that it imposed no effective limitation upon his one-sided general principle.

Let us now assume the existence of an important arbitration under a lease of the DIC type in which the parties were not unanimously and completely agreed upon the method of fixing the ground rent and in which the reasons for the award showed manifestly that the arbitrators or umpire making the award had relied on the limited and one-sided meaning of the word "prudent" adopted in the *National Bank* case by the umpire with the support of the Court of Appeal in that case. If this award were taken to the Privy Council for the legal interpretation of the terms of the lease and that Council held that the term "prudent" introduced into the interpretation by Stout CJ and his colleagues was relevant but had, instead of the limited and one-sided meaning attributed to it by the umpire and the Court of Appeal in the *National Bank* case, the much wider meaning envisaged by Wild CJ, the award could, I think, be set aside after heavy expenses and costs had been incurred.

The idea behind the meaning of the word "prudence" as contemplated by Wild CJ is, I think, that of "fairness". It would follow that when the standards of "prudence" and "fairness", whether the "fairness" is expressly required or is implied, are applied to a situation

where the lessor's land is likely to fall in value during the term, the "prudent lessee" would take that situation fairly into account in fixing the ground rent which he ought to pay.

On further reflection, I do not wish to express unqualified approval of the method of using the Government unimproved value of the land which I mentioned at the end of my first article. It could be tried and tested.

The general principle which I have deduced for fixing the ground rent in a lease of the DIC type depends on the meaning to be attributed to the key words "prudent" and "fair"; and I would state the general principle as follows:

> The arbitrators and umpire must look forward cautiously and wisely and take into account relevant matters which affect the lessor in addition to those which affect the lessee so that in interpreting and applying the terms of the lease in order to fix the ground rent for the ensuing term, the rent so fixed will be fair to both lessor and lessee.

The relevant matters for consideration and the method to be adopted for fixing a ground rent have, of course, to be determined. But that is also the situation under the one-sided prudent lessee principle. Here, experience is helpful. In my first article I listed various relevant matters, some affecting the lessee, some the lessor, which have been taken into account in fixing ground rents. Other relevant matters will, no doubt, arise according to the circumstances of each case, including matters originating in changed economic conditions. In my first article, I referred also to various methods that have been used for fixing a ground rent.

To illustrate the interaction between the application of the relevant matters and the use of the method adopted, suppose that the percentage method were adopted. Appropriate relevant matters would be applied to the fixing of the capital value of the unimproved land. Appropriate relevant matters would be applied to the determination of the rate of interest, i.e. the percentage, on that value in order to arrive at the ground rent. But under a lease of the DIC type, all would be done cautiously and wisely under the guidance of the general principle as I have stated it.

With all due respect to those who think otherwise, awards made in the way I have indicated, should provide precedents which should progressively help to simplify the application of the general principle and, perhaps, enable ground rents, under leases of the DIC type, to be fairly fixed even over a long period of difficult and changing economic conditions.

RECENT ADMISSIONS

Barristers and Solicitors

Agnew, N J	Auckland	3 October 1980	Hart, J W	Auckland	3 October 1980
Ainsworth, M C	Auckland	3 October 1980	Hudson, A C W	Auckland	3 October 1980
Barry, S M	Auckland	3 October 1980	Jackson, M I	Auckland	3 October 1980
Baskett, G G	Auckland	3 October 1980	Johnston, E E	Auckland	3 October 1980
Boles, S M	Auckland	3 October 1980	Kenderdine, S E	Auckland	3 October 1980
Bowen, H	Auckland	3 October 1980	Kwok, R	Auckland	3 October 1980
Bradbury, C R	Auckland	3 October 1980	McCann, K M	Auckland	3 October 1980
Buchanan, J M	Wellington	11 July 1980	Martin, P L	Auckland	3 October 1980
Carruthers, M C	Christchurch	25 September 1980	Mazari, S K	Auckland	3 October 1980
Christie, G J	Wellington	5 September 1980	Monckton, H E	Auckland	3 October 1980
Collins, F L	Auckland	3 October 1980	Morgan, O J	Auckland	3 October 1980
Cooney, B S	Auckland	3 October 1980	Nelson, R B	Auckland	3 October 1980
Cowie, A F	Auckland	3 October 1980	Ransfield, D T	Auckland	3 October 1980
Davis, M F	Auckland	3 October 1980	Riddell, S R	Auckland	3 October 1980
Dodds, M B	Auckland	3 October 1980	Shanahan, M A	Auckland	3 October 1980
Dukeson, S	Auckland	3 October 1980	Tall, M A	Auckland	3 October 1980
Finnigan, G S	Auckland	3 October 1980	Thinn, N F J	Christchurch	11 August 1980
Francis, J D	Auckland	3 October 1980	Tolich, M N	Auckland	3 October 1980
Goodyer, J G	Auckland	3 October 1980	Whitehead, C McA	Wellington	4 July 1980
Goulding, J E	Auckland	3 October 1980	Willis, T W	Auckland	3 October 1980
Gulley, S J	Auckland	3 October 1980	Wilson, J D	Christchurch	21 August 1980

INDUSTRIAL LAW

INDUSTRIAL JURISDICTION A COMPLEX HIERARCHY OF COURTS PART III

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.

V THE ROLE OF THE HIGH COURT

1 Industrial jurisdiction in general

Although the High Court is not in the position of an appeal tribunal from the Arbitration Court, certain matters still can be referred to it. Furthermore, pursuant to its inherent jurisdiction the High Court has competence in a variety of common law actions connected with some aspect of employer-employee conflict. Claims for damages on the ground of alleged wrongful dismissal, or for recovery of unpaid wages or holiday pay, or restraint of trade, or breach of the duty of fidelity clearly belong to this category. Remedy for wrongful expulsions from a trade union can be obtained only through invoking the High Court's intervention. Action in tort, the so-called economic torts, are within the High Court's competence, together with the invoking of its equitable jurisdiction in respect of "industrial" injunctions. Lastly, of course, many industrial matters come before the High Court by way of appeal from a District Court.[154]

2 Certiorari: Review Authority

Section 48 (6) of the IR Act states that "no decision, order, award or proceeding of the [Arbitration] Court shall be removable to any Court by certiorari or otherwise or be liable to be challenged, appealed against, reviewed, quashed or called in question", except on the ground of lack of jurisdiction. If an award or other decision of the Arbitration Court is made without jurisdiction, on an application for review the High Court may quash it, but has no power to interfere with the merit of the decision. It was held in *New Zealand Waterside Workers Federation IAW v Frazer*[155] that in order to receive the protection of s 48 (6) the award must be within the jurisdiction of the Arbitration Court, but certiorari would lie to bring into the High Court an industrial award in respect of excess of jurisdiction. Lack of jurisdiction can be pleaded only where:

(a) the Arbitration Court has no entitlement to enter upon the inquiry in question, in the narrow and original sense of the term "jurisdiction"; or
(b) the decision, order or award is outside the classes of decisions, orders or awards which the Court is authorised to make; or
(c) the Court acts in bad faith.[156]

The Supreme Court quashed an order and set aside an award, because it contravened s 6 (7) of the Equal Pay Act 1972. Haslam J emphasised that a tribunal with statutory jurisdiction must not exceed the ambit of the enabling Act: *New Zealand Textile and Garment Manufacturers IUE v Industrial Commission and Another.*[157] An award made under the IR Act may not be inconsistent with any other Act or Regulations: *Shop Employees IAW v Attorney-General and Others.*[158]

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[154] As from 1 April 1980 the Supreme Court of New Zealand has been reconstituted and renamed as the High Court: Judicature Amendment Act 1979, s 2; as to unpaid wages see Part II, 4(4).

[155] [1924] NZLR 689 (SC); the Judicature Amendment Act 1972, s 4, replaced the writs of certiorari, mandamus and prohibition with application for review; *New Zealand Fed Labourers etc v Tyndall* [1964] NZLR 408.

[156] IR Act, s 48(7).

[157] [1976] 1 NZLR 241 (SC); the decision relates to the now defunct Industrial Commission but it is applicable to the Arbitration Court.

[158] [1976] 2 NZLR 521 (CA); this was a special case removed into the Court of Appeal by the Supreme Court under R 245 of the Code of Civil Procedure.

An application for review was dismised in *Northern Totalisator and Allied Employees Assn (Inc) v Industrial Unions' Registrar and Others,*[159] where Wild CJ did not find an error of law that affected jurisdiction. He held that whether a certain matter submitted to the Industrial Court to support an application did or did not form "a substantial ground" within the meaning of s 168 (7) of the IR Act depended on the circumstances of the case and was a matter for the Arbitration Court to weigh and consider. In *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades IUW v Court of Arbitration and Others* the Administrative Division of the Supreme Court refused to quash a decision of the Arbitration Court. Upon appeal the Court of Appeal confirmed this view. Richmond J emphasised the difficulty in drawing a clear line between jurisdictional error in which case the decision of the Arbitration Court must be quashed and errors of law relating to the matter within the jurisdiction of that Court in respect of which the Arbitration Court is the sole judge.[160] Even though the House of Lords in *Anisminic Ltd v Foreign Compensation Commission,*[161] widened the field of jurisdictional error, preference was expressed for not departing from well established authority.

When the jurisdiction of the Arbitration Court depends on the construction of an award, the High Court should not act to quash it, as its construction is a matter exclusively for the Arbitration Court: *Point Chevalier Bakery (1956) Ltd v Tyndall.*[162] Davison CJ recently confirmed this view in *Hanson v Dunlop NZ Ltd*

[159] [1976] 2 NZLR 22 (SC).

[160] [1976] 2 NZLR 283 (CA); in *Wood v Thomson and New Zealand Seamen's Union* [1972] NZLR 53 (CA), upon appeal it was held that the Arbitration Court had power to include in the award a clause giving preference to those members of the union whose name was placed on a special register.

[161] [1969] 2 AC 147 (HL).

[162] [1962] NZLR 178.

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holding that claims relating to any bonus payable under a house agreement should be dealt with by the Arbitration Court. Consequently he declined to hear the action.[163]

Where a master and servant relationship exists, whether in public or private employment, certiorari is not the proper remedy: *Forbes v Johnston.*[164]

3 Wrongful dismissal

Where the employee is not covered by an industrial instrument and is not a member of a trade union, his only remedy for wrongful dismissal lies in a common law action. The statutory method of channelling the claim through the grievance procedure to the Arbitration Court for unjustifiable dismissal is not open to such employees, who are mostly in managerial or similar positions. The High Court in dealing with actions of this kind naturally observes the principles formulated mainly in English judicial decisions and cannot have regard to any considerations which guide the Arbitration Court in grievance disputes.

The High Court is still constrained by the rule laid down in the House of Lords judgment, *Addis v Gramophone Co Ltd*[165] to the effect that damages granted cannot include compensation for hurt feelings, injury caused to reputation, distress, social discredit or extra difficulty in finding other employment. Any claim based on such matters as well as malice, fraud, defamation or violence arising out of a breach of contract can be recovered only in a tort action. Consequently damages may equal only the amount of remuneration lost for the period of reasonable notice that should have been given. This approach was applied in *Cowles v Prudential Assurance Co Ltd*[166] and in *Clark v Independent Broadcasting Corporation.*[167] In the latter case the Court considered that three months' notice should have been given and granted a sum equal to the salary due to that period but refused to allow for the loss of potential benefits which the employee might have expected to receive in due course.

Similarly in *Bertram v Bechtel Pacific Corporation Ltd,*[168] Barker J followed the *Addis* principle, but commented on the difference between the conservative, not to say tight-fisted, attitude of the common law as enunciated 70 years ago and the more liberal approach under the Industrial Relations Act 1973. He said:

> "It is perhaps a matter of comment in these days of sensitive industrial relations that the law in relation to damages properly claimable for unlawful dismissal has not moved from the rather intransigent position of *Addis v Gramophone Co Ltd.* In areas where changes to industrial law is happening, such damages are possibly not quite so important. However, for persons in executive positions, summary and unfair dismissal can work injustice and there may be a case for reform of the law."

Despite this call for reform the common law has remained unchanged. In a recent decision, *Blake v L W R Gent Ltd and Others*[169] Casey J did not hesitate to apply the *Addis* rule and agree with the views of Barker J in *Bertram's* case — without the critical comments.

4 Other actions connected with employment

Although *Elston v State Services Commission (No 3)*[170] can be regarded as primarily concerning aspects of constitutional and administrative law, as it deals with the unlawful suspension of employees in the state-owned New Plymouth Power Station and with the unilateral variation of the terms and conditions of their employment, it clarifies significant principles in respect of industrial relations. Variation of the employment contract was also discussed in *New Zealand Needle Manufacturers Ltd v Taylor and Another* which was an action based on breach of the implied duty of confidence. McMullin J expressed the opinion that "a term as to confidentiality may be implied unless the contrary is expressly stipulated and that it will continue even after the rest of the contract comes to an end and the employment ceases".[171] In *Schilling v Kidd Garrett Ltd*[172] it was held that a contract of service with its implied term of fidelity subsisted during the period of notice notwithstanding that the

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[163] Unreported; SC A530/78 Wellington Registry, 27 July 1979.
[164] [1971] NZLR 1117 (SC).
[165] [1909] AC 488.
[166] [1957] NZLR 152.
[167] [1974] 2 NZLR 595.
[168] Unreported; SC A6/78 Whangarei, 3 August 1978; see Szakats, "Wrongful and Unjustified Dismissal: Damages and Compensation; A Case for Reform" [1979] NZLJ 13.
[169] Unreported; SC A46/79 Christchurch, 18 February 180.
[170] [1979] 1 NZLR 218 (SC); see note 95, ante.
[171] [1975] 2 NZLR 33, 41 (SC).
[172] [1977] 1 NZLR 243 (CA), on appeal from the Supreme Court; *Westminister Chemical NZ Ltd v McKinlay and Tasman Machinery & Services Ltd* [1973] 1 NZLR 659 (SC).

employee took the last fortnight as leave due and had actually left. As a result attempts to take over business agencies granted to the former employer by overseas manufacturers during that period amounted to breach of the implied duty.

Restraint of trade cases come also into this category. In *H & R Block Ltd v Sanott and Another*[173] the Supreme Court considered the validity of the period of restraint in the light of well established common law principles, and modified the restraint clause relying on s 8 (1) (b) of the Illegal Contracts Act 1970 which grants a discretion to the High Court to impose a reasonable modification ab extra "to give effect in the contract". Refusal by the Council of the Boxing Association in *Stininato v Auckland Boxing Association*[174] to grant a professional boxer's licence to Stininato on the ground of misconduct without giving him an opportunity to answer the charge, was held not only a breach of natural justice but also an unreasonable restraint of trade.

Holiday pay was claimed in *Weir v Hellaby Shortland Ltd*[175] in a representative capacity for approximately 1,200 workers for four statutory holidays which fell in a period of stoppage. The Court held that the employees were entitled to it, as their service contracts had been in existence during that time. Interpreting ss 26 (1) and 28 (1) of the Factories Act 1946 the right to payment of holiday pay does not depend on the performance of work but on the existence of a contract of service in that period. The decision is important also for holding that the industrial stoppage, or walk-out, or withdrawal of labour, as it was variously described, did not amount to rescission of the service contracts by mutual agreement, and the events did not destroy the substance of the contracts, so as to invoke the termination of those contracts by operation of law.

In *McClenaghan v BNZ*[176] where salaried bank employees were absent from work for two days in pursuance of a stopwork meeting resolution, and the employers deducted two days' pay from the following fortnightly pay, Chilwell J granted a declaration that such a deduction was unlawful under s 4 (1) of the Wages Protection Act 1964. He held that during that fortnight there had not been any breach of contract on the part of the employees and therefore the downward adjustment of pay was not justifiable. If there had been overpayments, these were during the previous fortnight and the employer could not make deductions from wages due for a subsequent period: *O'Halloran v Attorney-General*[177] and *Smith v Attorney-General*[178] were followed.

5 Industrial injuries and breach of safety regulations

Actions in tort for damages arising out of industrial injury were within the jurisdiction of the High Court until the coming into operation of the Accident Compensation Act 1972 on 1 April 1974. All accidents occurring before that date have remained subject to common law remedies, and there are some relatively recent decisions, though the majority of judgments originate from the time prior to statutory compensation. Many of these judgments based on negligence or breach of statutory duty have now lost their relevance.[179] It should be observed that when doubt arises whether a claim based on personal injury by accident should be taken to the Accident Compensation Commission or to the High Court, the Commission has the right to decide.[180]

Where breach of safety obligations imposed by legislation may involve besides civil also criminal liability the principles of responsibility pronounced remain valid. In *Jull v Wilson & Horton*[181] the Supreme Court held that the responsibility for the sound construction of machinery is shared between the owner and the manufacturer. Further the Court considered questions as "what is a dangerous part of

[173] [1976] 1 NZLR 213 (SC).

[174] [1978] 1 NZLR 1, (CA), on appeal from the Supreme Court; see also *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 (CA).

[175] [1975] 2 NZLR 204 (SC), confirmed by *Hellaby Shortland Ltd v Weir* [1976] 2 NZLR 355 (CA).

[176] [1978] 2 NZLR 528 (SC).

[177] [1968] NZLR 472 (SC).

[178] [1974] 2 NZLR 225 (CA) reversing the Supreme Court; see also *Commercial Printing etc Co v Flintoff* [1936] NZLR 346.

[179] *James v Wellington City* [1972] NZLR 70; *Morrison v Union Steamship Co (NZ) Ltd* [1964] NZLR 468.

[180] Accident Compensation Act 1972, s 5(5); a few compensation cases nevertheless reach the High Court by way of further appeal from the Accident Compensation Appeal Authority: *Re an Appeal by Petty* [1978] 1 NZAR 428; *Re Kivi* [1979] 2 NZAR 5; *Re Archer* [1979] 2 NZAR 25; some cases reached the Court of Appeal: L v M [1979] 2 NZLR 519; *ACC v Nelson* [1979] 2 NZLR 464. Some common law principles have reappeared: Szakats, "The Re-emergence of Common Law Principle in the New Zealand Accident Compensation Scheme" (1978) 7 *The Industrial Law Journal*, 216.

[181] [1968] NZLR 88; *Waitapu v R H Tregoweth Ltd; A A Edwards & Sons Ltd (third party)* [1975] 2 NZLR 218.

machinery?"[182] what is the meaning of the phrase "fitted with"?;[183] to whom the duty is owed?[184]

Interpretation of statutory provisions by the High Court pointing out hidden defects may influence the legislature to amend the Act. In *Labour Department v Merrit Beazley Homes Ltd*,[185] an appeal against the District Court's decision to convict the company for breach of reg 28A of the Construction Regulations, the High Court held that the Regulation was ultra vires. It imposed a duty on the contractor to cover or fence off excavations "likely to collect water of such a depth as will constitute a hazard to children". A child fell into a shallow pool and drowned. Mahon J took the view that there was nothing in the Construction Act 1959 or in the Regulations dealing with water safety of children, therefore the extension of liability was not authorised. He added that "regulations made under the delegating power . . . must be confined solely to the hazards contemplated . . . and must not be extended so as to include dangers to which workmen employed on the site would not be subject". As a result the conviction was set aside, but reg 28A, after having been revoked, was enacted as s 12A of the Act.[186]

6 Internal union conflicts

In the exercise of its inherent jurisdiction the High Court may intervene in internal union matters on the application of a member or a former member who considers that the union acting through its officials has deprived him of some right as a member or, what amounts to the ultimate deprivation of membership rights, has wrongfully expelled him. Following the principles evolved by English Courts the High Court will interfere only if a union official or a domestic tribunal in making the decision detrimental to the complainant has acted in breach of the Rules, exceeded jurisdiction given by them, or improperly exercised any power contrary to the precepts of natural justice. The Court is not, and cannot be, concerned with the merit of the case. In this respect its power is similar to the review authority which may be invoked if the Arbitration Court acts without jurisdiction.[187]

The conflict can occur between two organisations or between a union and one of its members. Declaration, injunction or damages are the usual remedies, separately or sometimes together.

An injunction was granted on the application of the Auckland Freezing Workers Union to restrain the New Zealand Freezing Workers Association from affiliating with the Trade Union Congress, now defunct.[188] Likewise, Mr Prior, a member of the Warehouse Union successfully applied for an injunction compelling the union to accept his nomination for office and to take a postal ballot for the election.[189]

With respect to membership it was held in *Armstrong v Kane*[190] that s 104 of the IR Act, confers a right of entry into the union on every worker "who is not of general bad character", does not give an indefeasible right to remain a member and the union can reserve power in its Rules to expel a member as such a power is not inconsistent with that section. Emphasis was always placed on the need to observe the rules of natural justice when the union applies its disciplinary procedure, and failure to do so invalidates its decision. Earlier judgments on this point have retained their validity: *Gibson v Wellington Federated Seamen's Union*;[191] *Law v Wellington Working Men's Club*.[192]

The Court specifically upheld the right of the wronged member to receive notice of the charge against him, and to fair hearing.[193] Damages were granted in *Gould v Wellington Waterside Workers' IUW*,[194] and *McGregor v Young*[195] by the jury, but there was no discussion of the principles of assessment in the judg-

[182] *Smith v Stockdill* [1960] NZLR 63; *Ralph v Henderson & Pollard Ltd* [1968] NZLR 759.
[183] *Inspector of Factories v Maoriland Timber Co Ltd* [1965] NZLR 613; *Fraser v Jenkins and Another* [1968] NZLR 816.
[184] *Howell v Caxton Works Ltd* [1971] NZLR 1068; *Hiroa Mariu v Hutt Timber and Hardware Co Ltd* [1950] NZLR 524.
[185] [1976] 1 NZLR 505.
[186] Construction Amendment Act 1976, s 2.
[187] See Lloyd, "The Disciplinary Powers of Professional Bodies" (1950) 13 MLR 281; "Judicial Review of Expulsion by a Domestic Tribunal" (1952) 15 MLR 413; R W Rideout, *Principles of Labour Law*, 3rd ed, London 1979, ch 9; Szakats, *Trade Unions and the Law*, Wellington 1968, ch 16.
[188] *Auckland Freezing Works and Abattoir Employees IUW v New Zealand Freezing Works and Related Trades IAW* [1951] NZLR 341.
[189] *Prior v Wellington United Warehouse Union* [1958] NZLR 97.
[190] [1964] NZLR 369.
[191] [1935] NZLR 664.
[192] (1911) 30 NZLR 1198.
[193] *McGregor v Young* [1920] NZLR 766 (Full Ct); *Millar v Smith* [1953] NZLR 1049; *Armstrong v Kane*, supra.
[194] [1924] NZLR 1025.
[195] Supra.

ment. In *Gilland v McFarlane*,[196] where the plaintiff claimed that he was wrongfully refused admission, Adams J, in examining the connections between lack of membership and loss of employment emphasised that without a preference clause in the award no actual loss would necessarily occur; even if there is a preference clause the plaintiff must mitigate the loss by trying to obtain other employment, in whatever industry his skills could be applied.

7 Injunctions and economic torts

The inherent jurisdiction of the High Court may be invoked to cut through and bypass statutory processes vested in the Arbitration Court relating to unlawful or unjustified industrial stoppages. Notwithstanding that the IR Act confers on the Arbitration Court "full and exclusive jurisdiction to deal with all offences" under that Act subject only to specific jurisdiction given to District Courts to recover penalties under ss 81, 125 and 125A[197] the High Court has always assumed the power of enforcing the law by injunction. Indeed Chilwell J in *Harder v Tramways Union*[198] declined to follow Turner J (as he then was) in *New Zealand Dairy Factories IUW v New Zealand Co-op Dairy Co*[199] to the effect that remedy in cases of industrial action must be found in the relevant statute, and emphasised the superior power of the High Court to grant injunction where a private citizen pleads public interest notwithstanding lack of fiat by the Attorney-General.[200]

A few years earlier the Supreme Court granted an injunction in the *Kawau Island Ferries*[201] case against both the Northern Drivers' Union and the New Zealand Seamen's Union, when they placed a ban on fuel deliveries, on the grounds of interference with contractual relations for the supply of fuel without lawful justification. The Court of Appeal dismissing the appeal considered that a strong prima facie case had been made out and held that the unions were not justified in their actions. Further, it was said that if the appeal was allowed the companies and the general public would suffer manifest detriment, while the unions would not be greatly inconvenienced if the ferryboat service was to continue.

In *Flett v Northern Drivers' Union*[202] a tavernkeeper claimed an injunction against the union on the ground of interference with contractual relations between himself and the brewery. In protest against increased beer prices the union prevented the delivery of supplies. The Supreme Court granted an interlocutory injunction on the balance of convenience. The Court, however, refused to grant an injunction in *New Zealand Dairy Factories etc IUW v New Zealand Co-op Dairy Co Ltd*[203] on the application of the union against the employers, the effect of which would have been the reinstatement of locked out employees. As has already been mentioned, the Court considered that a remedy could not be found outside the statute. Similarly no injunction was granted against the Minister of Labour, the late Mr Shand, in *PTY Homes v Shand and Others*.[204] The plaintiff alleged conspiracy as the relevant Government agency agreed to give preference to tenders which were not sub-contracted on a "labour only" basis, though this was the system preferred and practised by PTY Homes. The Court did not find a prima facie case.

Three industrial torts were alleged in *Pete's Towing Services Ltd v Northern IUW*,[205] intimidation, inducement of breach of contract, and conspiracy. The plaintiff used a mobile crane with forklifts to load sand directly onto trucks, and refused to employ waterside labour. After unsuccessful efforts in trying to obtain the plaintiff company's co-operation the Union together with the Drivers' Union declared the barge black. Ready Mixed Concrete Ltd which used the sand for its business, upon being approached by the Unions, decided that in the circumstances it would not be prudent to accept further deliveries from the blacked barge. The plaintiff claimed $41,739 — damages under the three headings mentioned.

The Supreme Court declined the claim.

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[196] [1930] NZLR 258.

[197] See Part II 4(3) and Part IV 3, ante.

[198] [1977] 2 NZLR 162.

[199] [1959] NZLR 910.

[200] The learned Judge relied on the judgment of the English Court of Appeal in *Gouriet v Union of Post Office Workers* [1977] 1 All ER 696; soon after the *Harder* decision the House of Lords unanimously reversed *Gouriet's* case, [1977] 3 All ER 70; see J J Waldron, "Gouriet's Case in the House of Lords" (1977) 4 *Otago LR* 87.

[201] *Northern (except Gisborne) Road Transport, Motor and Horse Drivers etc IUW and Another v Kawau Island Ferries Ltd* [1974] 2 NZLR 617 (CA); appeal against injunction was refused.

[202] [1970] NZLR 1050.

[203] Supra, note 199.

[204] [1968] NZLR 105.

[205] [1970] NZLR 32.

Speight J held that:

(a) Intimidation, defined as "procuring economic harm to another by the use of unlawful threats to curtail that other's freedom of action" was not proved; it had not been proved that the union was acting illegally or employing illegal means;
(b) Inducement of breach of contract was proved but the union had a duty to interfere and was justified in doing so;
(c) Conspiracy could not be upheld as the narrower defence of justification already established with regard to inducement of breach of contract a fortiori applies to the allegation of conspiracy.[206]

In *Martin v Attorney-General* Wild CJ refused to grant a declaration to the effect that an Amendment to the Oyster Fishing Regulations was ultra vires and therefore the embargo placed by the Seamen's Union on one boat operator was lawful. The Court expressed the view that it was "not concerned . . . with the rights or wrongs or the determination of the industrial dispute", merely with "the narrow legal question" of the validity of the Amendment.[207]

VI THE COURT OF APPEAL

The IR Act places the Court of Appeal in a special position as a Court of supervision and appeal with the task of ensuring that questions of law arising before the Arbitration Court in the course of adjudicating industrial matters are decided authoritatively. Legal problems of this nature may be brought to the Court of Appeal by two methods:

(a) Stating a case by a Judge of the Arbitration Court either of his own motion or on the application of any party;[208] or
(b) Appeal against the decision of the Arbitration Court by way of case stated.[209]

It is to be noted that in applying either method there should be a case stated on a question of law only and if a dissatisfied party appeals against a decision he must assert error in point of law. Questions on the construction of any award or collective agreement are, however, expressly excluded as the interpretation of these is within the exclusive jurisdiction of the Arbitration Court. The case stated should be in the form of specific questions seeking advice on the solution of a particular problem that actually has arisen in the proceedings, and not merely general questions. A statement of facts already settled should accompany the questions.

Questions of various nature have been submitted for the opinion of the Court of Appeal. Thus in *International Paints of NZ Ltd v Hopper*[210] the Arbitration Court asked for clear principles to apply to a situation where a worker performs tasks of two distinct characters which are governed by different awards or collective agreements. Should the doctrine of indivisibility or the doctrine of substantiality be applied? According to the first doctrine the worker must be paid under the instrument which fixes higher wages, notwithstanding that during the greater part of the work period the employee may have been employed on lower grade work. The second doctrine on the contrary means that if the volume of one kind of work is overwhelming in comparison with that of the other, the worker is substantially employed in the first kind of work and wages are payable solely under the award relating to that one. Both doctrines were applied in previous decisions and produced conflicting solutions.

Cornish J after reviewing earlier decisions illustrating the application of the two doctrines expressed the view that the conflict should be resolved by a compromise. The learned Judge

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[206] Ibid; further on injunctions and economic torts see J D Heydon, *Economic Torts*, 2nd ed, London, 1978; Davies and Anderman, "Injunction Procedures in Labour Disputes" (1973) 2 *Industrial LJ* 213 and (1974) ILJ 30; W Davis, "Injunctions and Trade Unions" (1979) 3 Auck ULR 429; I T Smith, "The Use of Injunction in Industrial Law" [1974] NZLJ 432; K W Wedderburn, "The Labour Injunction After 1974" (1976) 39 MLR 715; Szakats, *Law and Trade Unions: the Use of Injunctions*, Ind Rel Centre, Victoria University of Wellington, 1975.

[207] [1970] NZLR 158.

[208] IR Act, s 51; also from the Waterfront Industry Tribunal, the Aircrew Industrial Tribunal and the Agricultural Tribunal; see Part III, ante.

[209] Ibid, s 62A.

[210] [1948] NZLR 240 (CA), from Supreme Court.

set out detailed and lengthy guidelines which can be paraphrased by briefly stating that normally the doctrine of indivisibility would apply but in certain cases the principle of substantiality may override it.

The Court of Appeal held that the questions were general in nature and were presented in the wrong form as they invited the Court to reach some conclusions of fact which the relevant section did not permit. Thus the summary given by Cornish J may be regarded as a mere obiter.

In a more recent case, *AHI NZ Glass Manufacturing Ltd v The North Island Electrical etc IUW* the Court of Appeal laid down a test to draw a dividing line between a dispute of interest and a dispute of right where the matter is not clear. The merit of the decision has already been discussed.[211] The applicability of the grievance procedure to workers not covered by an award or collective agreement was the problem to be resolved in *Auckland Freezing Works and Abattoir Employees IUW v Te Kuiti Borough*.[212] The workers were members of the Union but their employment was not subject to the award. The Court of Appeal pointed out that s 117 (4) of the IR Act merely constitutes a model grievance clause which should form part of every industrial instrument, and it takes effect as a clause in the award or collective agreement. Where the worker's conditions of employment are not governed by an instrument the parties cannot invoke the procedure and the jurisdiction of the Arbitration Court.

The case of *Inspector of Awards v Malcolm Forlong Ltd*,[213] relates to the effect of the limitation period on claims for recovery of unpaid wages under s 158 of the IR Act. Under the repealed s 211 of the Industrial Conciliation and Arbitration Act 1954 the period was two years, but the IR Act which came into force on 8 March 1974 increased it to six years. The Court of Appeal was asked to answer the question whether a claim barred under the former Act could be revived under the present statute. The answer was that claims which originated prior to the coming into operation of the IR Act are still governed by the previous law.

In *Cornhill Insurance Co Ltd v NZ Insurance Workers IUW on behalf of D M Wilson*,[214] the burden of proof placed on the employer by s 150 (2) of the IR Act, the anti-victimisation provision, was required to be interpreted. This case came before the Court of Appeal pursuant to s 62A, as an appeal alleging that the decision of the Arbitration Court was erroneous in point of law. As Richmond P stated "all that the employer needs to prove is that he dismissed the worker, whether lawfully or not, for a reason independent of the worker's industrial action . . . under s 150 (2) [he] is not required to establish that the action he took against the worker was legally and factually justified". Richardson and McMullin JJ were in substantial agreement. Richardson J pointed out that the subsection refers to the "employer's real motivation in dismissing the worker", and the employer has to establish on the balance of probabilities "that the action against the worker would have been taken if the worker had not had that involvement. There is no obligation on the employer to go the further step and satisfy the Arbitration Court that the facts on which he claimed to rely when dismissing the worker were correct or that those facts justified the dismissal". Their Honours were unanimous in remitting the case to the Arbitration Court for reconsideration in the light of the direction given.

Suits concerning industrial issues also reach the Court of Appeal in the ordinary course of appeal from the High Court. Reference has already been made to a number of such decisions, but *New Zealand Freezing Companies Assn v Wages Tribunal and Another*[215] merits a brief treatment. The matter concerned reg 14 (1) of the Economic Stabilisation Regulations 1973, now revoked, and the interpretation of it by the Wages Tribunal, now defunct. The question was whether pieceworkers were included in the percentage increase provided by the regulations. The Court of Appeal so held affirming the judgment below.

[211] [1977] Arb Ct 21; see Part II 4(1), ante.
[212] [1977] 1 NZLR 211 (CA); see Part II 4(4), ante.
[213] [1977] 1 NZLR 36; see Part II 4(4), ante.
[214] Unreported, CA 100/79, 18 March 1980; see Part II 4(4), ante.
[215] [1978] 1 NZLR 243, CA; see *Employment, Supplement*, para 67(2).

VII THE FUTURE ROLE OF THE ARBITRATION COURT: SUGGESTIONS FOR REFORM

The preceding overview brings out clearly that only the Arbitration Court is a tribunal with full industrial jurisdiction, as it has the dual role of being a legislative and also a judicial organ. It is truly the pivot of the system.[216] The special tribunals share the legislative function with it in their particular fields of competence, but their judicial authority is most limited. The ordinary Courts of law in the exercise of their inherent or statutory powers are frequently called upon to adjudge industrial matters, but they have no competence in institutionalised wage fixing. The jurisdiction of the Arbitration Court, thus, both on the legislative and judicial sides is closely interrelated, or even intertangled, with functions of other bodies.

Should the role of the Arbitration Court be enlarged or reduced? Would it be a step in the right direction to separate again its two basic functions? The re-establishment of the Industrial Commission may provide a good basis for the integration of all special tribunals in a central wage fixing authority. The present arrangement under which a Judge of the Court sits as chairman seems nevertheless to have worked well, and there is no compelling reason to disturb the existing interconnection which combines autonomy with centralisation.

In any case centralisation itself would increase not so much the powers but mainly the duties of the Court, or rather of the Judge, and would in no way compensate for the loss of the general wage order making power. Wage adjustment, of course, can be accomplished by regulations, according to some views more quickly and efficiently than through the Court, but essential differences should not be forgotten. In Court proceedings the parties have all the safeguards of the judicial process: open hearing, with opportunity for making submissions and presenting evidence. The corollary of this method is that the ensuing decision, notwithstanding its legislative effect, results from the unbiased judicial evaluation of the material presented untainted by any political criteria. This statement equally applies to the making of awards, a power which the Remuneration Act so far has not touched.

The potential effects of the Remuneration Act are frightening. Regulations may be issued not only to nullify, amend and supersede existing collective agreements, awards, determinations, decisions, even individual employment contracts, but also for the purpose of appointing officers, committees, other bodies and tribunals with functions and powers to be defined, obviously for the purpose of replacing the Arbitration Court and the existing special tribunals in some aspects of their jurisdiction. These contingent future bodies presumably would work under narrowly prescribed authority executing Government policy without much, or even any, discretion. Fortunately "on the merits" decisions of the Arbitration Court and the special tribunals for the time being are expressly saved from cancellation or reduction by regulations.[217] The value of voluntary bargaining and even conciliation, however, would be absolutely destroyed, and the settlements virtually are "written on water". Contracts of employment, agreed in good faith, may also be torn up by the intruding regulatory hands. A further widening of the Act could engulf, or give power to engulf, the remaining legislative wage fixing authority of the Arbitration Court and the other industrial tribunals.

The problem in reality goes much deeper and the method of wage fixing represents merely a part of it. The related issues are: the new technology, the so-called silicon chips revolution that, despite reassurances by experts, is already causing mass displacement of workers, at least in the "short run"; the consequent obsolescence and disappearance of existing skills; training and especially adult retraining for new skills; redundancy, early retirement and unemployment in general; income policy for those who work by paying just and equitable wages; income policy for those who through no fault of their own do not work by providing pensions, redundancy payments and unemployment benefits. These are primarily economic, social and political problems, beyond the confines of this paper. They will create, however, indeed have already created, many legal problems. When an economic

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[216] Woods, *Industrial Conciliation*, 43; see further J A Farmer, "Law and Industrial Relations: The Influence of the Courts: I" and J L Ryan, "Law and Industrial Relations: The Influence of the Courts: II" (1971) 2 Otago LR 275 and 298.

[217] Remuneration Act 1979, s 6; see Part II 2(3), ante.

policy is formulated a legal framework will be necessary not only to implement it, but at the same time to safeguard the rights of individuals.[218]

No doubt, new state agencies will be established, or existing ones restructured, to administer manpower planning, retraining, redundancy and unemployment payments. Many disputes are likely to arise in respect of these matters. The Arbitration Court must have a key role in holding the balance between the efficient execution of the crystallised employment policy and the interests of the individuals affected. A procedure on the following lines should apply:

1. Appeal against decisions of administrative bodies in matters concerning
   (a) training and retraining, including right to, and exemption from, it;
   (b) retirement, compulsory or voluntary, and entitlement to pension;
   (c) redundancy payments, entitlement and amount;
   (d) unemployment benefits.
2. Further appeal to the Court of Appeal as already provided for.[219]

If it is thought that the placing of all these tasks on the Arbitration Court would overburden it resulting in a loss of efficiency two alternatives can be followed:

(a) Establishing a special tribunal for the above purposes with right of appeal to the Arbitration Court and further appeal to the Court of Appeal as at present. The special tribunal, or rather tribunals, should be set up on a regional basis to act quickly, efficiently, informally, according to equity and good conscience.
(b) An enlargement of the Arbitration Court itself.

Acting in the above matters would not be a legislative function, but it should enhance the Court's judicial authority. Further strengthening of it is desirable and the elimination of inconsistencies as a result of parallel jurisdiction in similar matters appears to be necessary.

In all actions for breach involving civil penalties as well as in summary criminal proceedings District Courts should have jurisdiction, on the basis of permanent delegation, subject to a right of appeal to the Arbitration Court. Such a statutory delegation would relieve the Arbitration Court of many penal cases, and should also speed up proceedings in that they could be heard locally. The Arbitration Court, nevertheless, should reserve the right to deal, as a tribunal of first instance, with cases which it considers important.

Actions of a civil character show even more inconsistencies. Money claims under certain Acts are to be commenced in a District Court, while wages due under an award or collective agreement may be recovered in the Arbitration Court. Workers whose employment is subject to a collective instrument can take advantage of the victimisation or grievance procedure and ultimately obtain better remedies from the Arbitration Court than those employees whose only redress lies in common law. The superiority of statutory remedies has even been commented on by the High Court.[220] Why should not the Arbitration Court be given exclusive jurisdiction in all actions concerning employment?

One of the most vexed and argued questions is that of the High Court's power to grant an injunction affecting an industrial dispute. There are many arguments both for and against the usefulness and propriety of injunctions where the issue is basically industrial. The confrontation between a business enterprise and a trade union extends beyond economic interests and touches the workers' very right to industrial action. It is said that such a clash of interests "involves the comparison of unlike factors".[221] The Arbitration Court has already been given power to order resumption of work and this amounts to a mandatory injunction.[222] This authority could be enlarged to enable intervention on the application of any party to strikes and lockouts, with power to refuse to make any order if settlement of the dispute by other means seems more likely. Applications for an injunction in industrial disputes and claims in the nature of economic torts should primarily also be within the Arbitration Court's jurisdiction, with the Court having power, if it considers it desirable, to decline jurisdiction

[218] The writer has already referred to this matter in his *Employment*, published in 1975, para 139.
[219] IR Act, 62A.
[220] See Part V 3, fn 168, ante.
[221] Heydon, *Economic Torts*, 18.
[222] Commerce Act 1975, s 119C; see Part II 4(3), ante.

and refer the matter of damages to ordinary civil Courts.[223]

Expulsion from industrial unions is another matter in which the High Court has exclusive jurisdiction applying the principles as laid down in English judgments. The issues as to whether the domestic tribunal acted within the powers granted by the Rules and whether the precepts of natural justice were observed, invoke considerations more in the nature of administrative than of private law; though besides a declaration damages may also be granted. Is there any compelling reason to withhold these actions from the Arbitration Court? There can be no doubt that the Arbitration Court, preferably a Judge alone, as in inquiries as to alleged election irregularities, would be able to deal with such proceedings most adequately if statutory power were given.

In conclusion it is suggested that the role of the Arbitration Court be broadened in the following manner:

(1) The Court should retain its legislative role in disputes of interest
   (a) to make awards as at present; and
   (b) to resume its lost general wage order making power when a wages policy has been formulated. The Court must be a privot in implementing the policy with all the safeguards of the judicial process.

(2) The Court should have full and exclusive jurisdiction in all rights disputes concerning any aspect of employment, collective or individual, subject to proceedings of a penal character being permanently delegated to District Courts. This includes:
   (a) Claims of civil character arising out of employment, whether or not the claimant is covered by a collective instrument, with remedies available as in grievance procedure and not as in common law.[224]
   (b) Disputes relating to training, retirement, redundancy and unemployment benefits.
   (c) Membership disputes, eligibility, wrongful expulsion, appeals from conscientious objection committees.
   (d) Power to intervene in unjustified industrial actions or to refrain from intervention.

Existing functions should not be affected. In order to cope with a considerably enlarged workload more Judges need to be appointed with the necessary number of nominated members enabling the Court to sit simultaneously in several places. The status of the Judges should be equal to that of the Judges of the High Court and consequently the Court itself would have the same standing. As a further consequence any dispute relating to jurisdiction will be removed to the Court of Appeal.

Lastly, as the Court would have competence in a much wider range of actions it is proper to suggest that the name Labour Court would much better describe its role, as a specialised Court in all matters concerning collective or individual labour disputes.

Whether or not anybody, especially those who are in a political decision-making position, will take notice of these suggestions, is an open question. The above outline could though, after consultations with Government agencies, employers' organisations, workers' unions and individual experts, be developed into a detailed blueprint and be the basis for an improved legal framework of industrial relations.

[223] See works referred to in fn 206, ante; see also W Davis, "Injunctions and Trade Unions" (1979) 3 Auck ULR 429; G Anderson, "The Disadvantages of Injunctions in Industrial Disputes", [1975] NZLJ 179.

[224] This includes also claims under the proposed Maternity Leave and Employment Protection Bill.

LEGAL LITERATURE

The New Zealand Civil Rights Handbook, T J McBride, Price Milburn and Butterworths, Wellington, 1980, 641 pp $15.50 limp. Reviewed by D F Dugdale.

There are grounds for pessimism concerning the durability of civil liberties in this country. The average New Zealander is not given to losing sleep over the dangers implicit in the width of the definition of sedition in the Crimes Act 1961, s 81 or the fact that according to the Chief Ombudsman there are at least 150 statutes which authorise officials to enter onto private property, or the telephone-tapping powers of the Security Intelligence Service. Such cries for freedom as are heard more often than not prove on investigation to be no more than agitation by persons in trade for the removal of this or that curb on commercial exploitation. In times of crisis, the very times when protection of fundamental rights is most needed, civil liberties tend to be jettisoned without compunction. Consider the wartime and post-war treatment of pacifists and conscientious objectors. Consider the Waterfront Strike Emergency Regulations 1951 (SR 1951/24). Consider Mr Gideon Tait on what he describes as the "Battle of Harewood"

> "I will always remember the sight of my men moving together, shoulder to shoulder, chanting, knees and elbows working, to demoralise and disperse radicals intent on damaging the American installations. . . . Paramilitary tactics? You might say we took on that guise, with the use of helicopters and marching, to scare the hell out of them. I shocked the rebels and that is what I meant to do. The odd wail of criticism did not worry me. I personally regard the operation as one of my greatest exploits."

(Subsequently Mr Tait attained the rank of Assistant Commissioner of Police and was awarded the OBE). There is no constitutionally entrenched protection for basic rights in New Zealand and the country's political history does nothing to suggest that governmental disregard of civil liberties is punished at the ballot box. Nearly three decades later the warning in W H Pearson's celebrated 1952 *Landfall* article still has its relevance:

> "Fascism has long been a danger potential in New Zealand. Of course fascism doesn't just occur. It is a deliberate strategy used by money-makers threatened with social discontent. But in countries nominally democratic, fascists have first to prepare the ground. In New Zealand the ground is already prepared in these conditions; a docile sleepy electorate, veneration of war-heroes, willingness to persecute those who don't conform, gullibility in the face of head-lines and radio pep talks".

If it is correct that civil liberties are jeopardised by public apathy and ignorance the appropriate counter-measure is to inform New Zealanders of their rights and warn them of the hazards. Hurrah then for Mr McBride whose book will do those things. But the book is something more than a sort of protester's vademecum. For Mr McBride the term "civil rights" has a meaning wider than the commonly accepted one of the fundamental rights of subjects. The difficulty if such narrow meaning is to be abandoned is to know where to stop. If tenants' rights (dealt with in this book) are civil rights then so must be the rights of landlords (not dealt with in this book). Mr McBride's concern is for underdogs of various categories. With a little help from his friends he has produced a rich, stimulating and immensely valuable hodge-podge of information which ought to be readily accessible to every citizen and which this book will make so.

Chapter 1 dealing with police powers contains homely advice ("If a policeman tells you he is arresting you, *ask him what for*, as he is bound to tell you") and includes facsimile reproductions of arrest and search warrants, references to statutes and decided cases reported and unreported, and appropriate excerpts from police practice manuals. Although this chapter is written for lay people the difference between its approach and that of conventional textbooks makes it useful for practitioners. The second chapter deals with drugs and alcohol and the third with legal aid and advice (including information as to how to go about complaining about lawyers). Chapter 4 deals with the rights of defendants in criminal cases in District Courts, Chapter 5 with prisoners' rights and obligations and Chapter 6 with those of mental patients. Chapter 7 com-

prises an interesting discussion of the rights of medical patients. It shows who to write to to lay a complaint against a medical practitioner and includes sections headed "The Right to Die", and "What should the rights of Hospital Patients be?" With Chapters 8, 9 and 10 we return to three of the traditional areas of concern for the civil libertarian, public order, censorship and privacy. The next chapter deals with the Security Intelligence Service and cogently criticises the statute under which that bizarre organisation operates. Then there are chapters on the rights of workers, tenants, immigrants and children. Chapter 16 on the rights of women deals with such matters as abortion, equal pay and protection from rape and domestic violence. A chapter on marriage and divorce may be thought to sit a little uneasily in a book dealing with civil rights but no doubt the information it contains is useful to the lay reader. Chapter 18 on welfare benefits is likely to prove particularly useful; it would have been even more so had it contained more information on how departmental discretions are exercised in practice. There are chapters dealing with race relations and the Human Rights Commission and the Ombudsman. Chapter 21 considers the question "Does New Zealand Need a Bill of Rights?" and sets out the 1963 Bill. The final chapter sets out various United Nations Human Rights documents and records the extent to which New Zealand has ratified them.

There are all sorts of petty criticisms that could be made of this book. It sprawls, it is stylistically inconsistent and in general it betrays a crying need for brutal sub-editing. It lacks an index. Its "suggestions for further reading" could be considerably expanded.

But these are minor faults. The book is a treasurehouse of useful information. Its value will of course diminish if it is not constantly updated. This reviewer earnestly hopes that it will sell sufficiently well to enable its regular replacement by successive new editions.

CORRESPONDENCE

Dear Sir,

Your editorial entitled "Dissolution of Marriage" (*New Zealand Law Journal*, 7 October 1980) puzzled me. The Family Proceedings Bill (No 2) does not require a person seeking the dissolution of a marriage to prove both irreconcilable breakdown *and* two years living apart. All that the applicant has to establish, by reference to a separation order or agreement or by any other means, is that the parties to the marriage have lived apart for at least two years immediately preceding the filing of the application. Proof of that fact will be proof that the marriage has broken down irreconcilably and an order of dissolution will be made.

Interested lawyers should look at clause 39 of the Bill, and in particular subclauses (2) and (4).

Yours faithfully,

J E Lowe (Mrs)
Senior Legal Adviser
Department of Justice

[Family Proceedings Bill:

39. Ground for dissolution of marriage — (1) An application for an order dissolving a marriage may be made only on the ground that the marriage has broken down irreconcilably.

(2) In proceedings for an order dissolving a marriage, the Court shall hold that the ground for the order has been established only where the Court is satisfied that the parties to the marriage are living apart, and have been living apart for the period of 2 years immediately preceding the filing of the application for an order dissolving the marriage.

(3) A separation order or a separation agreement (whether made by deed or other writing or orally) in full force for the period of two years immediately preceding the filing of an application for an order dissolving a marriage may be adduced as evidence of living apart for the required period.

(4) In proceedings for an order dissoving a marriage, where the ground for the making of the order has been established, the Court shall, subject to *section 45* of this Act, make an order dissolving the marriage.

Cf. 1963, No 71, ss 18(2)-(4), (6), 21; 1968, No 60, s 2]