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THE EREBUS INQUIRY

Given that Air New Zealand was a potential defendant to claims that would run in the millions it is understandable that it should not be over-enthusiastic to assume liability for the Erebus crash. However, bearing in mind that the crash raised significant questions of air safety it may well be suggested that its management went too far in attempting to minimise involvement.

The airline management knew within days of the accident that the flight crew had been briefed on a flight path that would take the aircraft down McMurdo Sound; that the co-ordinates were changed within hours of the flight; that the new flight path (which resulted in a 27 mile change in the destination point) would place the aircraft on a course in line with Mt Erebus; and that the crew were not told of this change. With litigation in mind one can understand the Chief Executive publicly denying this to be a chief cause of the disaster; but with public safety in mind it is disquieting that the Chief Inspector of Air Accidents had equally been misled as to (or had not appreciated) the magnitude and significance of the change.

Indeed had it not been for an inquiry before a judicial officer and skilled and persistent cross-examination by counsel it may well be that the "incredible blunder" and the administrative shortcomings leading to it would have been successfully concealed. By the same token the stigma of pilot error would have remained with the families of the air crew.

The Chief Executive not only denied that the change in co-ordinates was an operative factor causing the accident but also maintained that total culpability remained with the air crew. There are those who would call this a heartless ploy for the distress it visited on families of the air crew. Still, in the context of potential litigation the stance could be regarded as legitimate. Distress is often a by-product of litigation. But now that the roles have been reversed, those architects of distress who now find themselves in the quake zone can hardly expect much in the way of sympathy.

This leads on to the observation of Mahon J that he had listened to "an orchestrated litany of lies." The decision to depart from delicate euphemism would not have been taken lightly, for it was utterly predictable that this charge would be vigorously denied — as it has been. This is not a matter on which those who have simply read the report can really give a judgment. The report certainly outlines unusual coincidences but there are other possible explanations for them. The stance adopted by the airline, and particularly its reluctance to disclose information even, it would seem, to its own counsel, ("the cards were produced reluctantly, and at long intervals, and I have little doubt that there are one or two which still lie hidden in the pack",) suggested there was something to hide but again the airline could have been over-conscious of impending litigation. The report alone may not enable a definitive evaluation but taken overall it certainly does not encourage disagreement. In the end the public is left to choose between two incompatible versions — one, that of the eminent Judge who saw and heard all the witnesses and whose integrity is unimpeachable, the other that of senior officials with the strongest personal motives for pressing their views.

At the time of writing, just under a week has elapsed since the publication of the Royal Commission report. A cynic could have a field day. It is *now* — 17 months after the crash — that the Board of Air New Zealand is calling for an independent evaluation of its operation systems; only *now* is it calling for an inquiry into the conduct of certain of its employees. Why so long? Executive staff named in

the report have been transferred to other duties; executive pilots have been relieved of flying duties. The reason given is that the stress of subsequent inquiries would bear adversely on public safety. Surely the greater stress would have come from the Royal Commission Inquiry? The personal distress being suffered by those named in the report has been mentioned — solicitude strangely absent when blaming the crash on pilot error.

However this belated emphasis on safety and inquiry has one effect. It diverts attention from the real basis on which the actions of the Board and management of Air New Zealand will be evaluated. That basis will not be safety; nor will it be profit — the two traditional criteria. In this case Air New Zealand will be judged by the public at large on whether it has lived up to the social and behavioural standards expected today of a large public company — and this evaluation will be based on what happened, or did not happen, after the crash as much as before.

One other point should be mentioned. The file of the Inquiry has been referred to the police. The point made in a previous editorial ((1981) NZLJ 17) is worth repeating. A witness before an inquiry should have the same immunities and privileges as in a Court of law. This entails the risk of a guilty person escaping prosecution, but it is "much more important that everything reasonably possible is done to enable a Tribunal to establish and proclaim the truth about a matter which is causing a nationwide crisis of confidence." After the publicity of a Royal Commission hearing it would be "virtually impossible for a person against whom an adverse finding was made to obtain a fair trial afterwards."

DUNEDIN LAW CONFERENCE

Dunedin well and truly lived up to its two-fold reputation as a hospitable city and as a scholar's city. The standard of papers and contributions was extremely high and a number of comments were overheard to the effect that it was the most stimulating and successful law conference that had been held in New Zealand — and even Australasia!

The one disappointment (apart from weather not permitting the sailing of the oyster fleet) was that so often choices had to be made between which of several business sessions to attend. To enable a general catch-up, it is proposed to publish the papers, the commentaries, and the comments from the floor over a number of forthcoming issues of the Law Journal.

Meanwhile the Otago District Law Society in general and the Conference Organising Committee in particular are to be congratulated on a thoroughly enjoyable, if demanding, conference.

NEW ZEALAND LAW JOURNAL

As will have been seen from the last issue the New Zealand Law Journal has undergone its first major change since 1964. It will in future be published monthly on the 21st of each month. This will enable a much wider range of topic coverage as well as assisting in the rationalisation of the information flow across lawyers' desks.

Any suggestions for further improvements, whether as to layout or content, will be welcomed.

TONY BLACK

CRIMINAL LAW

THE POLICE AND THE TOUR

This is a further highly topical paper prepared by the Public Issues Committee of the Auckland District Law Society, whose members are those named at the beginning of the article on **Picketing** *at 6 NZLJ 116. They wish once again to emphasise that the views put forward are not to be regarded as necessarily representing those of the Auckland District Law Society.*

Considerable publicity has been given to proposed police action during the Springbok tour. The focus has been upon action to deal with unlawful conduct by both opponents and supporters of the tour.

Police officers have wide and well known powers to deal with trouble-makers on both sides. However, there must be some public concern that although police officers have the legal power to act there may be disruption on a scale which they may not have the capacity to contain.

In response to a question about that possibility the Commissioner of Police, Mr R J Walton, was reported on 15 April as stating that the police do not have legal powers to stop the Springbok rugby tour for any reason.

The police do, in fact, have a legal power in certain circumstances to prevent the tour continuing. Whether or not it will or should be used is another matter but the fact that such power exists is quite clear.

A primary duty of the police is, of course, to keep the peace in the community. The duty derives from the common law of England and has been confirmed by New Zealand Courts. It is contained in the oath required to be taken by all members of the police and is further recognised by a number of statutory provisions dealing with the commission of actual breaches of the peace. There is no statute in New Zealand which specifically gives power to the police to intervene when a breach of the peace is apprehended. But the New Zealand Courts have held that such a power exists, again derived from the common law.

The leading case in New Zealand is one decided in the Supreme Court in 1940, *Burton v Power*. That case has been followed in later Supreme Court decisions and approved by the Court of Appeal. And it is that case in particular which points to the potential power in the police to prevent the tour's continuing.

The Reverend Mr Burton was a pacifist. He actively promoted his views at public meetings. In September 1938 and twice early in 1939 he addressed public meetings. Disturbances occurred at these meetings when people with opposing views intervened. There was no suggestion that Burton had in any way been directly involved in the disturbances. On 29 March 1939 he was about to address another meeting in a public reserve in Wellington. Mr Power, a police constable, told Burton that he should not do so. Burton ignored that direction and began to address the meeting. He was promptly arrested by Power for wilfully obstructing a police constable in the execution of his duty.

Burton was convicted in the Magistrates Court and he appealed to the Supreme Court. He contended that Power was not acting in the execution of any duty. The Chief Justice had no difficulty in deciding that the constable was. The Court held that if the constable reasonably apprehended that a breach of the peace would occur if Burton addressed the meeting then the constable had a duty to take such steps as were necessary to prevent its occurrence. There was ample evidence from the previous meetings for the constable to reasonably apprehend a breach of the peace. He was therefore executing his duty in endeavouring to prevent it and Burton was therefore lawfully arrested.

The existence of a duty to act in that case was perhaps not open to serious argument. The case is of particular significance for the tour in two other respects. First, until he refused to comply with the constable's direction Burton had done nothing illegal nor was he intending to do anything illegal. Secondly, it was not suggested that he had at the earlier meetings been directly involved in the disturbances or that he would be so involved on the occasion in question (and that was so quite apart from his personal antipathy towards violence of any sort).

Burton's difficulty was that he was the catalyst. Although he was pursuing a lawful activity that activity was likely to result in members of his audience breaching the peace. It could be argued that Power should have taken steps to restrain or remove those

opposed to Burton's views and left a passive audience. Burton made that point to the Court. But Power decided that the most practicable course was to remove the catalyst. And in taking that action he was upheld by the Court.

If the Springboks are permitted to come to New Zealand then, obviously enough, they will be acting within the laws of New Zealand if they play rugby against New Zealand teams, travel about the country and stay at hotels. It is equally clear that if they do so there is a very real likelihood that there will be disturbances at the sports grounds and hotels and in the course of travelling around New Zealand.

In dealing with these foreseen problems today, as in 1939, there are two basic courses of action open to the police; to restrain those people, whether protesters or supporters, who are likely to cause trouble, or to remove the catalyst.

As already stated, the Police clearly have the legal power to act to prevent disruption or other unlawful conduct by protesters or supporters. And this committee does not in any way suggest that such activities by members of either group should be free from legal sanction, whatever the merits of the opposing views may be.

But there are legal as well as practical problems involved in endeavouring to contain the opposing groups. Both groups are wanting to pursue activities which are lawful in New Zealand. And both are entitled to be given reasonable opportunities to do so. Opponents of the tour cannot legitimately be totally prohibited from publicly expressing their views in appropriate ways and at appropriate places any more than the supporters can be prevented from watching matches. And it is in endeavouring to ensure a reasonable measure of freedom to both groups that the practical problems arise. For however restrained most members of both groups may be there are bound to be some on both sides who may cause trouble. If their numbers are small then the problem of controlling them may be straightforward. That is unlikely to be the case. The plans now being considered and the budget allocated for police action amply demonstrate the real apprehension the police has. On top of that there is the fact that large numbers of police officers are likely to be diverted from their normal activities.

It is probably beyond argument from a point of view of practicality and cost that the best way of avoiding trouble is to remove the catalyst; to prevent the Springboks from playing or indeed attending at any place where a disturbance is likely to occur.

In this respect the Springbok team (and the Rugby Union) is in no different position from Burton. The expression of an opinion by Burton, and the opinion itself, was no more unlawful than the playing of rugby.

The main objection to this approach must be that it appears to sacrifice matters of principle, freedom of speech or freedom of action, for expediency's sake. The decision in the *Burton case* has often been criticised for that reason. On top of that it requires the police to make a decision in a very sensitive political area. For both reasons the power should be exercised only when there is no viable alternative.

However, the question as to whether there is any viable alternative may loom large as the tour progresses. The possible breaches of the peace which troubled the constable in *Burton's case* were insignificant when compared with the civil disturbances which are now apprehended.

And there is a further consideration beyond the practical which adds force to the legal ruling in *Burton v Power*. That is that all freedoms under our system of law are not absolute and are subject to corresponding duties or responsibilities. The matter was put in the following way by the Chief Justice in *Burton v Power*:

> "I cannot help thinking that a speech delivered in a public place advocating [pacifist] principles or doctrines under present conditions is almost bound to lead to disturbances and breaches of the peace, and I can quite understand the apprehension of the police. [Burton] has chosen to insist upon what I cannot regard as anything but a misguided course. I do not mean by that that he was misguided in regard to his opinions — whatever I may personally think on the matter — because every man is entitled to his own opinions. But he is certainly misguided, in my opinion, if he insists on holding meetings in a public reserve when he is instructed by the police, and when it should be obvious to himself, that breaches of the peace are likely and in the opinion of the police are almost sure to result if the meetings are held."

MINING

MINING AND THE TOWN AND COUNTRY PLANNING ACTS

By G A HOWLEY, Barrister

In this article the author strongly criticises the practice of requiring applicants for mining privileges to apply to the local authority, for consent to a change of use under the Town and Country Planning Act 1977.

I do not believe that any local authority has a right in law to require an application for planning consent when an application for a mining privilege is made, provided that the land is open for mining in accordance with the Mining Act 1971. The practice is also, in my submission, both futile and illogical.

1. Unlawful

(a) Town and Country Planning Act 1977

Section 36 of the Town and Country Planning Act 1977 provides inter alia that a district scheme shall . . . "make provision for such matters referred to in the Second Schedule to this Act as are appropriate to the circumstances or as are necessary to promote the purposes and objectives of district planning set out in s 4 of this Act."

Section 4 of the Act sets out the general objectives of the Act to be taken into account when formulating a district scheme.

The Second Schedule to the Act sets out matters to be dealt with in district schemes, but not one of them mentions mining.

Section 11 of the Act provides for regional schemes which are different from and take precedence over district schemes (by virtue of s 37).

The First Schedule to the Act sets out the matters to be dealt with in regional schemes and it is noteworthy that s 3 of the First Schedule does mention mining, thus "The identification, preservation and development of the region's natural resources including . . . mineral . . . ".

It is clear therefore that while a regional authority has been empowered by the Act to have some say in the development of mineral resources, there is no such power given to a district authority.

(b) Mining Act 1971

"The Mining Act 1971 is an exclusive code in respect of the use of land for purposes under mining licences granted under that Act and it is not subject to the land use control provisions of the Town and Country Planning Act 1953".

This is the head-note to the case of *Stewart v Gray County Council*, a judgment of the Court of Appeal reported in [1978] 2 NZLR 577.

It has been criticised as not being authority for the general proposition that mining privilege applications do not need Town Planning consent, as

(a) being in respect of s 37 of the Mining Act which provides for private land being declared open for mining.
(b) being in respect of s 38A of the Town and Country Planning Act 1953.
(c) mentioning specifically mining licences and not other applications.

I propose to deal with those objections before continuing.

(a) The fact that the land in question was private land declared open for mining under s 37 is irrelevant. All that a declaration under s 37 does is make such land open for mining as if it were Crown land open for mining.
(b) Sections 38A of the 1953 Act and s 33 of the 1977 Act are identical in all material respects relevant to this issue.
(c) The fact that only mining licences are mentioned in the case is because that is what was being dealt with. I propose to show that the same applies to any mining privilege.

The following is a list of *some* of the sections of the Mining Act which I believe support this view. (All italics are mine).

Section 6

Notwithstanding anything to the contrary in any other Act, all gold and silver are the property of the Crown.

Section 7

(1) "Notwithstanding anything in this Act *or in any other Act* . . . the Governor-General may . . . declare in respect of any land that any specified mineral on or under the land shall be prospected for or mined *only* by the holder of an appropriate mining privilege granted under this Act in respect of the land or any part of it."

Section 8

(1) Provides that after the coming into force of the Mining Act all land alienated from the Crown shall be subject to a reservation in favour of the Crown of every mineral existing in its natural condition on or under the surface of the land.

(2) "Every such alienation from the Crown shall also be subject to the right to prospect for work, extract and remove every such mineral . . . in favour of the Crown and the holder of any prospecting or mining licence granted under this Act in respect of the land *or any other adjacent Crown land.*"

(3) . . .

(4) Provides that subs (2) will not apply without the consent of the owner and occupier if inter alia the land is situated within a borough or town district and has an area of half an acre or less. It will be noted that nothing in this section suggests that the consent of the local authority is required.

Sections 48, 60 and 69

The only authority able to grant or refuse a mining privilege in New Zealand is the Minister of Energy.

Section 68

The holder of an exploration licence has first priority for the grant of a prospecting licence.

Section 57

The holder of a prospecting licence shall have the right to have granted to him one mining licence in respect of any one part of the land over which he holds a prospecting licence.

Sections 26 and 28 specifically require that the consent of the local body be sought *by the Minister* in respect of mining operations in public reserves and endowments controlled by such authority.

It is noteworthy that s 26 is made specifically subject to s 57 which gives the holder of a prospecting licence an automatic right to a mining licence.

Again, there is no suggestion of any Town Planning consent, and such consent as is necessary is to be obtained by the Minister not the applicant.

Sections 110 and 111 prohibit mining operations from being carried on within set distances from roads, bridges and certain other specified public works without the prior consent (to which conditions may be attached) of the local authority. However, these consents again are not under the Town and Country Planning Act, and relate to the exercise not to the grant of the mining privilege.

The sections of the Mining Act to which I have referred are not exhaustive; but I believe they support the following propositions:

(a) That gold and silver are owned exclusively by the Crown.

(b) That all minerals in land alienated from the Crown in the past decade belong to the Crown.

(c) That consequently only the Crown has any authority to grant or refuse a mining privilege in respect of the exploration for or mining of such minerals.

(d) That the failure to mention local body consent has not been an oversight, but rather that the power of local bodies to have any say in the mining privilege process has been quite deliberately restricted.

(e) That no provision whatsoever has been made for local body consent apart from specific cases mentioned above, and these do not suggest that the Town and Country Planning Act can be invoked.

Finally it should be noted that the Town and Country Planning Acts were passed many years after the Mining Acts, and I submit must be read subject to the provisions of the Mining Acts.

2. Futile

If it is accepted that the above correctly states the law but it is not accepted that my interpretation is correct; in other words that this does not mean that a local authority cannot demand an application for Town Planning consent from an applicant for a

mining privilege, then let us consider what such an application can accomplish.

It is clear that the local authority cannot grant or refuse a mining privilege—only the Minister can do that. This not something new, as under the 1926 Act (and to a large extent in previous Acts) the Warden did not grant prospecting warrants or mining licences. He recommended them to the Minister of Mines for grant, and no valid licence existed until it was signed by the Minister. What then can be accomplished by putting an applicant, any objectors *and* the local authority to the time, trouble and expense of a second or even third hearing if the local authority cannot refuse a grant? I suggest that nothing is accomplished at all because the final say is not with the local authority. All the local authority can do is to *suggest* conditions to be imposed on the licence by the Mines Department.

Take the case of a local authority which demands that Town Planning procedures be adopted by applicants for mining licences. More often than not such applicants already have a prospecting licence. Since by virtue of s 57 of the Mining Act such a person is entitled *as of right* to a mining licence how can a local authority do anything that will take away this right? I suggest the clear answer is that it cannot, and further that the whole procedure is therefore a waste of everyone's time and money.

It is also futile because it is difficult to conceive what conditions can be recommended by a local authority that are not already imposed by virtue of the Mining Act itself and by various other bodies having statutory authority to do so.

Because in my experience it is clear that many local authorities (and regrettably their advisers), together with such groups as Federated Farmers, appear to be ignorant of the provisions of the Mining Act regarding protection of land, public works, the environment, parks, reserves, forests and natural water, I think it necessary briefly to detail the main provisions for such protection.

First of all, while theoretically possible, in practice it is highly unlikely that anyone could carry out any prospecting or mining operation within the boundaries of most boroughs. In the few instances where it is possible then the borough is amply protected now. No mining operation can take place within twenty to sixty metres of a road, bridge, building, garden, orchard or cultivated land (ss 110 and 111). If it is still possible to come within these restrictions and the land to be worked is half an acre or less, then the borough has to consent anyway (s 8(4)). Any damage to roads, streets, footpaths or bridges is forbidden by the Act and any person so damaging is liable to pay compensation. All holes have to be filled in and the land resown, damaged fences and gates must be repaired, again by operation of the Act itself. Penalties are provided in the Mining Act for mining outside the terms of a licence, and all the above terms are implied in any licence granted.

In addition to this the following (non-exhaustive) list of bodies can by the Act (and usually do) seek conditions on any licence.

(a) The Regional Water Board in respect of the use of natural water per se, in respect of what can be put into natural water, and in respect of the use of water and/or land likely to cause erosion to land.

(b) The Crown Lands Department in respect of damage to the land itself, in respect of leaving unfilled holes, in respect of making of tracks and carriageways, in respect of damage to gates, fences, buildings and livestock, in respect of topdressing land after use, and in respect of resowing the topdressed land and very often concurrently with that spreading lime and/or fertiliser.

(c) The Forestry Department in respect of anything at all likely to damage the forest itself or its natural inhabitants.

(d) The Department of the Environment in respect of anything likely to be dangerous or deleterious to the environment.

(e) The Ministry of Transport in respect of the use of natural waterways.

(f) Of course, the Mines Department itself, which can and usually does impose fairly stringent conditions relating mainly to the use of machinery, to see both that there is no damage to land and/or improvements unnecessarily, and more importantly to ensure that any damage is made good after the operations are completed.

Faced with this, what reasonable conditions can a local body impose which are not or cannot be covered by the Mining Act?

3. Illogical

These next remarks apply mainly to land which used to be in what the Mining Act 1926 designated as a Mining Area. I believe it is a fact that most mining applications are in respect of such land.

The first objection I have on the ground of logic is that applications are required for a "change of

use". Is all prospecting a "use" of land? A mineral like scheelite and many others are often prospected for by helicopter and the ground is never touched. Sometimes it is done from the ground using an ultra violet lamp. Many other minerals such as vanadium and magnetite are discovered using a variety of techniques none of which involves touching or disturbing the surface of the soil. Gold is often prospected for by panning in a river.

Are such operations a "use" of land? I think not.

Then comes the question of the logic inherent in asking someone to apply for a "change of use" of land of which the predominant and in many cases the *only* use for a century or more has been mining. That is about as logical as making shops in the existing shopping centres of any town and city in New Zealand a "conditional use".

Conclusion

It may be thought from the above that I do not believe that local authorities should have any say in or even information about what is going on in their area. Far from it. They should know and be consulted by way of existing notification procedure. If, because of some peculiarity in their particular area, there is some unusual condition which is not now provided for, and which is essential for the benefit and life-style of the people in that area, then by all means let the authority have the power to impose it, but *not* by way of applications under the Town and Country Planning Act. A very simple amendment to s 26 of the Mining Act could accomplish that.

Meanwhile it is regrettable that the only way to resolve this issue is for an applicant to refuse to make an application under the Town and Country Planning Act 1977, to insist on the Mines Department issuing a licence on satisfaction of any other conditions, and then to argue the point should a prosecution follow.

LANDLORD AND TENANT

LANDLORD'S REMEDIES

By ANDREW ALSTON*

This article contains, with minor adaptations and amendments, the text of an address given by the author to members of the Canterbury District Law Society in July 1980.
The topic divides itself into three parts — first, where the tenant fails to pay his rent; secondly, where the tenant defaults in some other manner under his lease; and, finally, where the tenant disappears owing arrears of rent.

1. Remedies where tenant fails to pay rent

(a) Re-entry

The rights and powers of a landlord depend in the first place on the express terms of the lease and, in the second place, on the provisions of the Property Law Act 1952.

Thus, in our first problem — where the tenant fails to pay the rent — the lease will most likely contain the usual proviso for re-entry on non-payment. If it does not, the landlord will be able to rely on s 107(b) of the Act which gives him the right to re-enter and determine the lease whenever rent is in arrear for a period of 21 days. If the premises are a dwellinghouse, then — whatever the lease says — this right cannot be abrogated. Section 104C guarantees for both landlords and tenants any "right, power, privilege or other benefit" provided for by Part VIII of the Act.

Furthermore, nearly all agreements for a periodical tenancy provide for termination by notice by either party. Assuming that the landlord can terminate the lease, how does he go about it? First, does he have to give the tenant notice? Section 118 provides generally for notice to be served on a tenant before a right of re-entry or forfeiture can be enforced. However, subs (7) provides that, unless the tenant is bankrupt, it is not necessary to serve notice in the case of non-payment of rent.

Nevertheless, it is common practice for landlords who seek recovery of possession, whether because of the tenant's default or not, to start with a notice to quit if the tenancy provides for such notice expressly or by implication. For the remainder of this section it will accordingly be assumed that the landlord has become entitled to possession of the premises, either by virtue of the proviso for re-entry in the lease or on the ground that the date for possession given in a valid notice to quit has expired.

What then? Can the landlord just walk in and physically eject the tenant? He can — but he takes a risk. If the tenant doesn't go peaceably, the landlord may face a criminal charge of assault or, worse, he may be charged with forcible entry under s 91 of the Crimes Act:

> "Everyone commits forcible entry when, by force or in a manner that causes or is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, he enters land that is in the actual and peaceable possession of another for the purpose of taking possession whether or not he is entitled to enter."

Subsection (4) provides for a penalty of imprisonment for a term not exceeding one year.

So, if a landlord wants to walk on to the premises and eject the tenant, he must be sure that he can do so peaceably or that he can get away with a bit of "physical excess". Here I raise two questions: first, "What is the extent of a landlord's right of peaceable re-entry?" and secondly, "What do I mean by getting away with 'a bit of physical excess'?"

The first question was raised in *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. Mr and Mrs Hemmings occupied premises owned by the Stoke Poges Golf Club. The club had a right of re-entry and sent people to take possession. According to Scrutton LJ, "They entered without any disturbance or violence. Mr and Mrs Hemmings declined to leave. Thereupon they carried Mrs Hemmings out sitting on a chair. They led Mr Hemmings out. They carried the furniture out and put it in a garage with one side open to the weather. The weather was

* Law Faculty, University of Canterbury.

showery and part of the furniture was wet. All these operations were carried out with no more force than was necessary to remove people who did not actively resist but declined to go unless carried". Mr and Mrs Hemmings brought an action for trespass, assault and battery. They lost: the Court of Appeal held that, as the defendants had a right to enter, they had not committed a trespass and that, as they had used no more force than was necessary, they had not committed assault and battery. Scrutton LJ concluded his judgment as follows:

> "It will still remain the law that a person who replies to a claim for trespass and assault that he ejected a trespasser on his property with no more force than was necessary may be met with the reply that he used more force than was necessary if the jury can be induced to find it. The risk of paying damages and costs on this finding, and the danger of becoming liable to a prosecution under the statute of forcible entry, may well deter people from exercising this remedy except by order of the Court. But I see no reason to add to the existing privileges of trespassers on property which does not belong to them by allowing them to recover damages against the true owner entitled to possession who uses a reasonable amount of force to turn them out."

The question remains: "What is a reasonable amount of force?" In *Hemmings v Stoke Poges Golf Club* it was reasonable to carry Mrs Hemmings out of the premises sitting on a chair and to escort Mr Hemmings out. Would it have made any difference if Mrs Hemmings had been picked up from the floor and bodily carried from the premises? I think not. I believe that the crucial point was that she did not actively resist. But it is a very fine line between active and passive resistance — as it is between necessary and unnecessary force. Furthermore, a landlord who enters "by force," whether the degree of force is reasonable or unreasonable, lays himself open to prosecution under s 91 of the Crimes Act. So, as a general rule, I would advise a landlord not to attempt taking possession by peaceable re-entry unless, of course, he can do so when the premises are unoccupied.

The other question which I have raised in the context of a landlord's right to eject a tenant is in respect of landlords getting away with a bit of physical excess. It happens frequently — sometimes when the tenant is not aware of his rights but also in circumstances when the tenant is aware of his rights but chooses not to assert them. I know of one case where a landlord, ignoring the advice of his solicitor, broke into the premises, confronted the tenants, ordered them to leave, threw out their property and changed the locks. One of the tenants was a solicitor and presumably knew the law. But they took no action against the landlord. Why? Because to do so would have resulted in their activities — shameful activities — as tenants becoming public knowledge and, being apparently respectable members of the community, they did not want this to happen. So, the landlord got away with it. Nevertheless, I think he was lucky and I do not think such high-handed behaviour is to be recommended. Indeed, as I have mentioned, I would not usually even recommend a landlord to enforce his right of forfeiture by peaceable re-entry.

Accordingly, a prudent landlord who wishes to evict his defaulting tenant will, if the lease or tenancy provides for determination by notice, serve a notice to quit. If this procedure is inappropriate or inconvenient he must rely on the express or implied proviso for re-entry. In any event, he will then be in a position to apply to the District Court for an order for possession under s 31 of the District Courts Act 1947, or start corresponding High Court proceedings if the rent or value of the premises takes them outside the jurisdiction of the District Court.

(b) Self-help

Action for possession and peaceable re-entry are not the only means of getting rid of a tenant. There are also "self-help remedies". By "self-help" remedies, I mean any methods of getting the tenant to leave other than by following the strict legal procedures. By way of example, I refer to the case of *Clifton Securities Limited v Huntley* [1948] 2 All ER 283. Denning J, as he then was, had to consider if a landlord was within his rights in cutting off gas, electricity and water supplies and in barricading a means of access to the demised premises. The tenants — or ex-tenants — were in unlawful occupation. His Honour held that the landlord was within his rights:

> "The plaintiffs did no wrong by cutting off gas, electricity and water supplies. The defendants had no right to have gas, electricity and water through pipes or cables on the plaintiffs' land. The defendants were not tenants. They were only trespassers. They could only claim a right for passage for gas, electricity, and water by reason of the lease and that had already been determined. If a right to supply of anything only exists by virtue of a contract and that contract

comes to an end then the supply can be cut off. The plaintiffs did no wrong by putting up the barricades. There was no right of way. That had come to an end when the lease came to an end. There was no reason why the plaintiffs should not put up a barrier to prevent the defendants getting into the premises."

(c) Order for possession

I now turn to two other aspects of question one: first — whether or not the landlord can bring an action against the tenant for the recovery of rent — the answer is, of course, yes. Like any other debt, unpaid rent may be recovered by the ordinary process of the law, and some corporate landlords make considerable use of the default summons procedure against existing tenants.

However, where the case is within the jurisdiction of the District Courts Act 1947, s 32 of that Act provides a convenient remedy where the landlord does not require possession of the premises so long as the tenant can be induced to clear the arrears of rent. Proceedings can be taken under s 32 where:

(a) the tenancy is for a term not exceeding three years, and is still in existence,
(b) the rent is in arrear for 10 days in the case of a weekly tenancy (or for specified longer periods in the case of tenancies for longer terms) and
(c) the tenancy agreement contains no express proviso for re-entry for non-payment of rent.

The order granted under this section will normally include arrears of rent as well as possession. The tenant can restore his position at any time up to actual eviction by payment of the full amount of the arrears and costs.

(d) Distress

A final question under this part of the topic is whether or not a landlord can seize a tenant's personal property in substitution for rent. In other words, can a landlord exercise the right of distress?The answer depends on whether the property is a dwellinghouse or other premises. Under s 107A(1) of the Property Law Act 1952 "[n]o person shall be entitled to distrain for any rent due under any lease of a dwellinghouse". In respect of other premises, however, a right of distress is given by s 107(c) of the Act. The procedure for exercising the right is set out in the Distress and Replevin Act 1908 and my only comment is that, unless the landlord is satisfied that there are unencumbered chattels of substantial value on the premises and that they are the property of the lessee, it is seldom worth proceeding under that statute.

2. Lease determinable on ground other than failure to pay rent

The second question raises many of the issues discussed in respect of the first. Here, the landlord wishes to know his rights and remedies when the tenant fails to perform or observe a term of the lease other than the covenant to pay rent.

In these circumstances, s 107(b) of the Property Law Act 1952 gives the landlord a right of re-entry and forfeiture. However, unlike the case of non-payment of rent, the right is not enforceable unless and until the landlord serves on the tenant a notice pursuant to s 118 of the Act. If, after a reasonable time, the tenant fails to remedy the breach — if it is capable of being remedied — the landlord may enforce his right of forfeiture by an action for possession or by peaceable re-entry.

Let us consider the requirement to serve notice. Section 118(1) provides:

> "A right of re-entry or forfeiture . . . shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor."

This section, which is reproduced from an English Statute of 1881, is fraught with ambiguity. However, like many such legislative provisions, its ambiguities have to some extent been clarified by a succession of judicial decisions. Perhaps the most helpful is the case of *McConnell v McCormick* [1929] NZLR 560 where Smith J stated the law in the form of five propositions.

First, he said that the notice must specify the particular breach complained of. This involves "(a) [s]pecifying or pointing out the particular covenants or conditions stated to have been broken" and "(b) [g]iving the lessee precise information of what is alleged against him and what is demanded from him — that is to say the notice must be such as to enable the lessee to understand with reasonable certainty

what it is he is required to do". As to the first aspect of this requirement, the safest course of action is to set the covenant out in full. As to the second aspect, the information in the notice should enable the tenant to decide which course of action to adopt. If for example the covenant broken is the covenant to repair, it is insufficient to simply state that it has been broken, because the tenant would be unable to remedy the breach or make any offer of compensation.

Smith J's second proposition was that "[t]he particulars in the notice may specify too much; but if that which is so specified is not a breach . . . or is general and immaterial . . . the notice is not valid".

His Honour's third proposition was that "[t]he notice may specify the breach of more than one covenant". However, each breach and what is required to remedy it should be separately stated. The authorities are uncertain if a notice is good or bad where it is sufficiently definite in respect of the breach of one or more covenants but is indefinite in respect of the breach of another covenant or covenants.

His Honour's fourth proposition was that "[i]f the breach is capable of remedy the notice must require the lessee to remedy that breach". The difficulty in which the landlord is placed in deciding whether or not a breach is capable of remedy is well illustrated by the two English cases of *Rugby School (Governors) v Tannahill* [1935] 1 KB 87 and *Glass v Kencakes Ltd* [1966] 1 QB 611. Both cases are neatly summarised in Volume 1 of Hinde, McMorland and Sim's *Land Law* at para 5154.:

> "In *Rugby School (Governors) v Tannahill*, the tenant committed a breach of her covenant not to use the premises for illegal or immoral purposes. The landlord's notice did not require her to remedy the breach. It was held by the Court of Appeal that ceasing to commit the breach was no remedy; that the breach was not capable of remedy; and that consequently the omission in the notice to require it to be remedied did not invalidate the notice. However, in *Glass v Kencakes Ltd* it was held that the use of the premises by a sub-tenant for the purposes of prostitution was not an immediate breach of covenant by the head tenant, when the head tenant did not know of the use to which the premises were being put and took prompt steps to forfeit the sub-tenant's lease when he found out. The landlord's claim to forfeit the lease failed because his notice did not require the head tenant to remedy the breach."

His Honour's fifth proposition was that "[W]here the lessor desires compensation he must ask for it in the notice; but where there is no sense in asking for compensation the notice need not require it". Where the landlord requires compensation, he need not specify the amount in his notice, and the tenant is only required to make reasonable compensation in money to the landlord. Apart from compensation, which is ascertained on the basis that the tenant will remedy the breach, the landlord may bring an action for damages if the tenant fails to comply with the notice under s 118(1).

The landlord is also entitled to bring an action for damages for breach of a covenant or condition as an alternative to exercising his right of re-entry and forfeiture. One other remedy which is available to a landlord in an appropriate case is a claim for an injunction to restrain further breaches of a covenant or condition.

There is another situation where a landlord can require a tenant to repair damage. This derives from ss 116D and 116E of the Property Law Act 1952. Under s 116D there are implied in every lease of a dwellinghouse covenants by the tenant that he will keep the dwellinghouse in a clean condition and keep any grounds forming part of the dwellinghouse free from any accumulation of refuse and rubbish and that he will, as soon as practicable, make good any damage to the dwellinghouse caused by or arising from his wilful or negligent act or omission.

If the tenant breaches any of these covenants then, under s 116E, the landlord may, without prejudice to any other remedy or right to which he may be entitled, apply to the Court for an order requiring the tenant to "carry out in a proper and workmanlike manner all such work as the Court considers necessary or desirable to remedy the breach".

If urgent work on the dwellinghouse is necessary to avoid the risk of further damage then, under s 116F, the landlord may enter the dwellinghouse and carry out the work and apply to the Court for an order requiring the tenant to pay him the reasonable cost of so doing. The Court will only make the order if it is satisfied that certain conditions are fulfilled, in particular, the landlord must, in all the circumstances, have acted reasonably in carrying out the work.

It is now necessary to consider the landlord's position if, following service of a notice under s 118(1), the tenant remedies the breach complained of, but the landlord still wishes to terminate the tenancy.

The answers to this problem depend on the nature of the breach, the time when it is remedied and whether or not the tenant takes other steps to restore the status quo.

It may be of interest if, before leaving this question, we consider whether the answers would be the same if:

(a) knowing of the tenants's breach, the landlord accepts rent which subsequently accrues and
(b) having done so, he later refuses to accept rent, the breach remaining unremedied.

This problem raises the issue of waiver and forfeiture. Waiver arises where the landlord, though aware that the tenant has behaved in a manner justifying forfeiture, performs an act which assumes the continuation of the lease. A passive act such as standing by will not suffice. The act must be positive, as for example where a landlord with knowledge of the breach *demands*[1] or *sues for*[2] or *accepts*[3] rent falling due after the breach. Other acts on the part of the landlord which have been held to constitute a waiver of forfeiture are distraining for rent,[4] whether due before or after the breach and agreeing to grant a new lease to the tenant to commence from the normal determination of the existing lease.[5] However, these acts will not amount to a waiver if they are done after the landlord has shown his final decision to treat the lease as forfeited, for example, by commencing an action for possession.[6]

By virtue of s 115 of the Property Law Act 1952, waiver by the landlord extends only to the particular breach to which it relates unless a contrary intention is apparent. It does not operate as a general waiver of all future breaches. Thus in our problem, where the breach remains unremedied, the landlord's later refusal to accept rent constitutes an end to his waiver.

3. Remedies where defaulting tenant disappears

If no personal property of value is left behind by the tenant, the landlord is in no better case than any other creditor. However, s 107B of the Property Law Act 1952 gives the landlord of a dwellinghouse a right to sell any personal property left by the tenant and apply the proceeds towards payment of the debt and the costs and expenses relating to the sale. The landlord is not permitted to keep any surplus, or instead of selling the property, to keep it for himself (s 107B(5)).

The landlord cannot proceed to sell the property until all the preliminary requirements specified in the section are complied with. In particular, the section does not apply unless the tenant is deemed to have vacated the premises. Under subs (1) this will happen if:

"(a) He has not tendered to the lessor any sum by way of rent during the preceding period of 2 months, or any sum by way of rent in respect of that period; and
"(b) He has not communicated with the lessor in any way during that period of 2 months; and
"(c) The lessor has no knowledge of the lessee having been in the dwellinghouse at any time during that period."

Even if the landlord complies with all the specified requirements he may find that he is unable to sell the property. Paragraph (b) requires the landlord, on demand by the tenant or any other person entitled to possession of the property at any time before the property is sold, to surrender the property to the tenant or that other person *"without charge of any kind"*.

Where the tenant has departed the premises without giving notice and without paying rent, the landlord should not re-enter until he is entitled to do so under the lease or, if there is no provision in the lease for re-entry on non-payment of rent, until 21 days have expired. He is then, of course, entitled to re-let to another tenant.

If the breach is of the covenant to pay rent, the tenant may — through a combination of rules of Equity and the provision of the Landlord and Tenant Act 1730 (UK) which is still in force in New Zealand — obtain relief against forfeiture. Thus, if the tenant pays the rent due and any expenses to which the landlord has been put, and if the Court considers that it is just and equitable to grant relief, he might be restored to his former position.

If the breach is of a covenant other than the covenant to pay rent, the tenant has two opportunities to maintain or restore his position under the lease. First, he has the opportunity, after receiving notice under s 118(1) of the Property Law Act 1952,

[1] *Segal Securities Ltd v Thoseby* [1963] 1 QB 887.
[2] *Dendy v Nichols* (1854) 4 CB (NS) 376.
[3] *Dufaur v Kenealy* (1908) 28 NZLR 269.
[4] *Doe d David v Williams* (1835) 7 C and P 322.
[5] *Ward v Day* (1864) 5 B and S 359.
[6] *Civil Service Co-operative Society Ltd v McGregor's Trustee* [1923] 2 Ch 347.

to remedy the breach and make reasonable compensation to the landlord and, if he does so, the landlord will be unable to enforce his right of re-entry and forfeiture.

Secondly, the tenant may apply to the Court for relief against forfeiture under s 118(2) of the Act:

> "(2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action, the lessee may, in the lessor's action (if any), or in any action brought by himself, or by proceedings otherwise instituted, apply to the Court for relief; and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the circumstances of the case, may grant or refuse relief, as it thinks fit; and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit."

The Courts are reticent to state principles on which they will exercise their discretion. However, as Lord Denning said in *Bathurst (Earl) v Fine* [1974] 2 All ER 1160 and 1162; [1974] 1 WLR 905 at 908:

> "In the ordinary way relief is almost always granted to a person who makes good the breach of covenant and is able and willing to fulfil his obligations in the future."

As may be seen from the foregoing, then, the landlord's right to continue with the proceedings and get rid of the tenant depends entirely on the conduct of the tenant. If the breach is capable of being remedied and the tenant takes the appropriate steps, he may stay as tenant.

DISTRICT COURT DICTA

"Using one's own experience of the world and of the affairs of men it must be accepted that bookmaking is sometimes regarded as a semi-respectable profession in New Zealand". Judge M F Hobbs, Wellington 4.11.80 *Police v Mitchell.*

"Surely the time has come to say that the Courts have gone far enough in accommodating the drinking driver in his desperate search for an escape route from the plain will of Parliament". Judge J E Millar, Hamilton 19.6.80 *Ministry of Transport v Saul.*

"Counsel set out the passage in his submission, but it is plain counsel himself did not read the extract since I found it unintelligible". Judge D D Finnigan, Otahuhu 12.5.80 *D v D.*

PROSECUTING VERBOSITY

A recent reserved decision in the District Court at Hamilton contains some forceful remarks on the prolixity of the forms of information now used to bring charges under the Transport Act 1962 and its attendant Regulations.

The defendant company was charged with breaking a certain condition attached to its goods service licence. After traversing for some 12 pages the preliminary submissions in which counsel for the defendant had attacked the wording of the information, His Honour Judge P W Graham had this to say:

"I have a very clear view of what the informant is saying and I think that, within the limits prescribed by a desire to avoid a dismissal of an information for technical reasons, the informant has adequately described the offence and fairly informed the defendant of the nature and particulars of the offence. This problem seems to arise because of the number of technical points which have been taken in transport matters over the years. The taking of those points and their acceptance by some Courts has led prosecutors to believe that, in order to avoid any risk of losing the case on a technicality, they must depart from a simple description of an offence and instead slavishly follow the wording of the statute creating the offence, in order to ensure that nothing is left out. I recently encountered such a case at Wanganui, where an information set out the particulars of the offence in such detail that there was little room left on the face of the information to type anything else, but the simple offence was passing on a double yellow line. The same tendency occurs in Transport Licensing prosecutions.

"I cannot help but compare this with procedure followed in the High Court. I refer to the Second Schedule of the Crimes Act 1961 which gives examples of the manner of stating offences. The first example is 'A murdered B at on .' If the High Court and Crown Solicitors were to be guided by the procedures followed in the traffic Court, then the wording of an indictment in those terms would be held to be defective. If our traffic precedents were followed A would be charged with committing culpable homicide on B, where death took place within a year and a day, such culpable homicide being intended to cause to the person killed the death of the person killed, and so amounting to murder. If it were intended also to allege that the offender intended to cause, to the person killed, bodily injury known to the offender to be likely to cause death and regardless whether death ensues or not, a second count would be required in the indictment. It goes without saying that indictments are not framed in this way and I have never been able to see why informations have to be framed in such a complex manner when all that is necessary is that the information will be in the proper form and will contain such particulars as will fairly inform the defendant of the substance of the offence with which he is charged.

"To take another example, we could move to the stage where a person is no longer charged with stealing a sack of flour but is charged with fraudulently and without colour of right taking, or fraudulently and without colour of right converting to his use, something capable of being stolen namely a sack of flour, with intent to deprive the owner or any person having any special property or interest therein permanently of such thing or of such property or interest. Those who practise regularly in the criminal Courts will agree with me that the examples I have given would never be acceptable as the proper wording of an indictment. The wording at present used is able to fairly inform the defendant of the substance of the offence. Why on earth then is it necessary in transport matters to lay informations in such a way that a careful study must be made of each and every word, and the defendant is given the opportunity to put before the Court the type of argument that I have heard, which is entirely without merit but which is invited by the very wording of the information?"

INFANTS AND CHILDREN

COMPLAINT PROCEEDINGS — BEYOND WHOSE CONTROL?

By IAIN D JOHNSTON

PART I

The author, a Senior Lecturer in Law at the University of Canterbury, researched and wrote this article while on study leave from the University in 1980. The findings and views set forth in the article are based on a study of the files of 142 complaint cases heard in the Children and Young Persons Court at Christchurch under s 127 in 1979, observation of the Court in operation, discussions and correspondence with solicitors experienced in Children's Court work, and discussions with legal advisers in the Department of Social Welfare, social workers, a Judge and Court staff.

CONTENTS

1. Introduction

"There can be few more drastic interferences by the community in the lives of individuals than when it intervenes to remove children from a family."[1] Despite this, complaint proceedings under s 27 of the Children and Young Persons Act 1974, which can have that very consequence,[2] appear to attract infrequent involvement by lawyers and almost no attention from legal writers.

While this may gratify social workers, who understandably prefer to see their benevolent, if coercive, intervention in parent-child relationships as part of the social welfare system, the compulsory dispensation of what the State deems to be welfare affects important legal rights and freedoms and must be seen also as part of the justice system. Although s 27 complaints are not criminal proceedings they have in some respects a punitive flavour and can undoubtedly be penal in their effects, both from the parents' and the child's point of view, especially where a guardianship order is made. Moreover, the proceedings can be based on offending by a child.[3] J A Seymour's observation that the history of New Zealand legislation dealing with juvenile offending can usefully be viewed in terms of a constant tension and continual movement between welfare and

[1] John Eekelaar "Family Law and Social Policy" (Weidenfeld and Nicholson 1978) at pp 91-92.

[2] S 31(1)(d)(i) of the Act provides for the making of an order placing the child under the guardianship of the Director-General of Social Welfare. The primary effect of such an order is to suspend parental guardianship: s 49. A less drastic form of intervention is the supervision order, authorised under s 31(1)(d)(ii). For the effects see ss 46-48. Other orders are also provided for in s 31.

[3] This is only so in the case of a child aged 10-13: s 27(2)(i). The term "child" will normally be used in this article in its popular sense and will cover all juveniles within the jurisdiction of the Act ie, people under 17. Where a distinction between "children" and "young persons" is relevant the term will be used as defined in the Act ie, juveniles under 14.

justice perspectives[4] is also applicable to the development of laws providing for action by the State against parents whose children are in need of care, protection, or control.

The present system, the Children and Young Persons Act 1974, puts more emphasis on legal safeguards than did its predecessor, the Child Welfare Act 1925, yet the realities of complaint proceedings under s 27 leave lawyers with a grave sense of unease; a feeling that "due process" is far from ensured. There are numerous special problems facing lawyers who become involved in these proceedings either as counsel[5] defending the parent(s) or as counsel appointed to represent the child(ren). In the case of counsel for the parents some of these problems stem from the legislation itself which, both in its substantive grounds and in its procedural and evidential rules, seems heavily loaded against his clients. Linked with this is a lack of judicial guidance which might have mitigated the effects of the Act's vagueness and obscurity in crucial areas.

Then there is the basic dilemma over whether the principle of the paramountcy of the child's interests[6] requires or justifies any modification of the role of counsel for the parents in what remains to some extent an adversary procedure. This dilemma is especially acute where the child lacks separate legal representation.

Some of the problems facing counsel for the parents stem from the realities of practice: the proceedings' offensiveness or incomprehensibility from his clients' point of view, the difficulty of obtaining relevant information from inarticulate, confused, or tight-lipped parents, the inaccessibility of material on the files of the Department of Social Welfare, and the inadequate access permitted to reports prepared by it, the Department's immense influence on the Courts, which tend to lack independent non-legal expertise, the fact that most lawyers lack training in the non-legal skills that would equip them to question social workers' and specialists' reports, and the lack of financial resources to acquire alternative expert reports.

In the case of counsel for the child some of the problems are traceable to his client's lack of party status in the proceedings. Secondly there is even greater uncertainty over counsel for the child's proper role than over that of counsel for the parents. Finally he may face practical problems stemming from his client's inability to comprehend the proceedings and give clear instructions or from his own lack of non-legal expertise, such as interviewing and communication skills and knowledge of child psychology.

Although the discussion of these problems will involve some criticism of the Act and of current practices under it, it is not the primary concern of this article to consider reform.[7] Some of the factual statements that will follow are based on or supported by findings emerging from an analysis of all, or nearly all, the s 27 complaints filed in the Children and Young Persons Court at Christchurch in 1979. The study, which will hereinafter be referred to as "the Christchurch survey" involved 142 cases. Although local variations in practice undoubtedly exist so that the results of the survey cannot be treated as entirely valid on a national basis, they are in fact broadly consistent with such national statistics as are available and with impressions conveyed by solicitors familiar with the operation of Children and Young Persons Courts in other centres.

2. The nature of complaint proceedings

Before embarking on a discussion of particular aspects of complaint proceedings it will be as well both to examine the nature of the proceedings and to state explicitly what the Court's function is in this area, since ambiguities inherent in the proceedings may be the cause of some of the specific problems to be considered. It is superficial and misleading to regard the function of s 27 proceedings as simply the administration of welfare. That is the function of the Department of Social Welfare. The Court becomes involved as the constitutionally proper body to authorise a compulsory basis for the proposed administration of welfare. Inherent in this is the recognition that such coercion attacks what are normally treated in our legal system as very important rights and freedoms flowing from the values of family autonomy and privacy and the protection of parental discretion. Ultimately the Court may be said to be

[4] J A Seymour "Dealing with Young Offenders in New Zealand — The System in Evolution" (Legal Research Foundation, Occasional Pamphlet Number Eleven, 1976).

[5] The term "counsel" will be used loosely in this article rather than to refer to barristers only.

[6] The principle is elaborated and qualified in s 4 of the Act.

[7] A more fundamental examination of the policy issues involved in this area and of possible alternative approaches will be undertaken elsewhere.

concerned with dispensing welfare *but only such welfare as is shown to be legally justified*:

> "A judicial process, normally associated with fairness, is employed to administer welfare. This causes confusion as to the task of the proceedings and confusion in the way in which they are conducted."[8]

The primary function of the Court must be, it is submitted, to test the complainant's case for intervention and this scrutiny must apply both to the grounds of complaint and, if they are upheld, to the recommended treatment.[9]

(a) Civil or criminal?

As to the nature of s 27 proceedings there is first of all a difficulty over their classification as civil or criminal. In some respects they resemble criminal proceedings: they are brought by the State through either a member of the Police or a Social Worker of the Department of Social Welfare; Part II of the Summary Proceedings Act 1957 (dealing with procedure in respect of informations) applies with some modifications;[10] and possible results of the proceedings, for both parents and children, include admonishment,[11] discharge "without further order or *penalty*",[12] an order to pay compensation for property loss or damage,[13] and an order to return property taken.[14] On the other hand the Act draws a clear distinction between jurisdiction in respect of offences and jurisdiction to hear complaints (the objective of the latter being to procure the necessary care, protection, or control of children); the criminal standard of proof is not usually applicable;[15] and Civil Legal Aid rather than Offenders Legal Aid is available.[16] Moreover there are other features of these proceedings that would be very surprising if the proceedings were truly criminal ones against parents, viz, the power to receive any evidence whether otherwise admissible in a Court of law or not;[17] the fact that the child, who is not a party, may be legally represented in the proceedings,[18] his counsel being empowered, inter alia, "to call any person as a witness";[19] and the fact that in certain circumstances a complaint "may be made and heard and determined in the name of the child or young person only".[20] It is clearly wrong then to regard s 27 complaints as criminal proceedings. On the other hand the presence of some criminal or penal elements, as explained above, makes their simple classification as civil proceedings misleading also. Realistically they can only be regarded as sui generis, an extraordinary mixture of civil and criminal elements.

(b) Adversarial or inquisitorial?

Secondly there is the problem of whether or to what extent the proceedings are to be treated as non-party, non-adversary proceedings. Again there is a basic ambiguity in the Act. Some aspects of it appear to suggest a non-party, inquisitorial approach. Thus a complaint is made "in respect of" a child;[21] it is not, in the terminology of the Act, made *against* the parents, guardians etc but is merely "addressed to" them;[22] and they are nowhere in the Act referred to as "defendants" but "may be examined in respect of the upbringing and control of [the] child . . .".[23] Further, the interests of the child are to be treated as

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[8] S Christie "Children at Risk and Care Proceedings" *New Law Journal*, 20 March 1980, p 280.

[9] "The role of the law is really confined to testing the case argued and to ensuring observance of due process." Bernard M Dickens "Legal Responses to Child Abuse" 12 *Family Law Quarterly* 1 (1978) at p 24.

[10] See the Children and Young Persons Act, s 99(1) and para 2 of the First Schedule, also s 74 of the Summary Proceedings Act 1957. Proceedings brought by way of complaint were treated at common law as civil but the effect of statutory developments such as s 74 of the Summary Proceedings Act has been to give the term criminal overtones. See *Jones v Metcalf* [1979] 2 NSWLR 709.

[11] S 31(1)(a).

[12] S 31(1)(b).

[13] S 31(1)(e).

[14] S31(1)(f). An order for the forfeiture of property to the Crown may also be made in certain cases: s 31(1)(g). (The reference therein to s 27(2)(f) should have been consequentially amended in 1977 to s 27(2)(i)).

[15] See Section C below.

[16] Legal Aid Act 1969, s 15(1)(b) as substituted by the Children and Young Persons Act, s 106.

[17] S 29(1).

[18] S 29(3).

[19] S 29(4).

[20] S 27(5).

[21] Eg, s 7(6)(a), s 28(1).

[22] Eg, s 27(4), (6) and (8).

[23] S 27(7). Presumably this examining of the parents can be conducted by the Court itself but the Court is not given a general power to call witnesses such as exists in the Domestic Proceedings Act 1968, s 9.

"the first and paramount consideration";[24] the child may be given legal representation or counsel may be appointed "to assist the Court";[25] a social worker's report is required at the dispositional stage;[26] and any evidence may be received.[27] The Court is envisaged as having a more active role than usual: eg, it has a duty, where necessary, to explain the proceedings both to parents and to young persons;[28] it has power to call for psychiatric reports on its own initiative;[29] and it has a discretion over whether the child to whom the complaint relates is to be legally represented.[30]

On the other hand there are features of the Act which suggest that the proceedings do have parties and are to a significant degree adversary in nature. A complaint is not proved simply by showing that a child "is in need of care, protection or control". There must be proof of one of the specific grounds in s 27(2) and this is in effect entails showing that the child is in need of care, protection or control *because the parents, guardians etc are not themselves providing it*. In reality then a complaint *is* made *against* the parents. A complaint may only be heard in the name of the child alone in special circumstances such as where there is no parent whose whereabouts are known.[31]

Moreover s 29(4) expressly recognises that the proceedings do have parties. If the parents were not parties but were merely witnesses called to be examined in respect of the upbringing and control of the child they would not have the degree of control over the proceedings which they in fact have. As parties they have a right to be represented by counsel, they may be granted civil legal aid,[32] and of course they may call evidence and cross-examine witnesses called by the complainant or the child.[33] They have a right of access to the social worker's report[34] and a right to tender evidence in rebuttal of it;[35] they may request that the person making the report be called as a witness;[36] no order in respect of them may be made while they are absent from the Court;[37] and they have rights of appeal.[38] Again, if parents were no more than witnesses in an inquiry into the child's welfare they would have no power to admit a complaint. They could admit facts alleged against them but whether a complaint was made out would always be a question for the Court going beyond parental admissions. In *L v Police* Casey J rejected as "untenable" an argument on appeal that the admission by parents of a complaint under paragraph (e) (exhibiting behaviour beyond the control of the parents and of such nature and degree as to cause concern for the child's well-being or social adjustment or for the public interest) did not amount to proof of the complaint. It is submitted that the learned Judge's ruling implicitly recognises the essentially adversary nature of the proceedings.[39]

It is clear from the above summary that the Children and Young Persons Act has not, in respect of s 27 complaint proceedings, made a definite choice between inquisitorial and adversary approaches, between welfare and due process models. There are elements of each approach, the difference between inquisitorial and adversary proceedings

[24] S 4. The child's interests are elaborated in the section by specific reference to the need for "care, guidance, and correction" and to the importance of relationships with others, including family relationships. The duty to treat the child's interests as paramount is also qualified by express reference to "the public interest".

[25] S 29(3).

[26] S 41(3).

[27] S 29(1). See Section C below.

[28] S 40. It also has a duty to convey to a child or young person "the substance of any part of the report bearing on the character or conduct of the child or young person" in any case where he is not actually shown the report and is not represented: s 42(2).

[29] S 42A.

[30] S 29(3).

[31] S 27(5).

[32] Legal Aid Act 1969, s 15(1)(b).

[33] S 67 of the Summary Proceedings Act 1957 regarding the conduct of hearings of informations appears to apply (except subs (2) of that section): see the combined effects of the Children and Young Persons Act, s 99 and the Summary Proceedings Act, s 74. If a s 27 case were truly a non-party inquiry it would be called *Re X (A Child)* not, as in practice, *Department of Social Welfare (or Police) v X (and X)*.

[34] S 42(1). The Court may, however, order in a particular case that the report not be shown to the parents: s 42(5).

[35] S 42(3).

[36] S 42(4).

[37] S 30(5).

[38] Ss 54 and 56.

[39] *L v Police* (Unreported, Supreme Court, Christchurch 25/7/78, M218 and 219/78). Interestingly the same Judge in a later case regarded s 27 proceedings as essentially non-adversary: *W v Department of Social Welfare* discussed below, Section C. It is arguable that on either view of the nature of the proceedings the Court should satisfy itself that a ground of complaint exists, rather than simply rely on parental admissions: see below, Section F.

being one of degree. It is therefore misleading simply to label the proceedings "inquisitorial" or "non-adversary" just as it is unsatisfactory to treat them as ordinary adversary proceedings. It is submitted however that in practice s 27 proceedings are basically adversary though modified by the introduction of some inquisitorial elements. The latter elements probably appear more significant to an innocent reader of the Act than to a person who watches the Children and Young Persons Courts in action, ie, the Courts do not make full use of the inquisitorial powers which the Act has given them.

3. Grounds of complaint

(a) Section 27(2)

The grounds on which complaint proceedings may be instituted to establish that a child or young person "is in need of care, protection, or control" are set out in s 27(2)[40] of the Act. Ten separate grounds are formulated but some of them cover more than one state of affairs. The subsection is worth setting out in full before more detailed comment is offered:

> "(2) A child or young person shall be in need of care, protection, or control within the meaning of this Act if —
>
> (a) His development is being avoidably prevented or neglected; or
>
> (b) His physical or mental health, or his emotional state, is being avoidably impaired or neglected; or
>
> (c) He is being, or is likely to be, neglected or ill-treated; or
>
> (d) His parent or guardian or the person for the time being having care of him, —
>
> (i) Has failed or is failing to exercise the duty and care of parenthood; or
>
> (ii) Is unable or unwilling to carry out the duty and care of parenthood; or
>
> (e) He is exhibiting behaviour which —
>
> (i) Is beyond the control of his parent or guardian or the person for the time being having care of him; and
>
> (ii) Is of such nature and degree as to cause concern for his well-being or his social adjustment or for the public interest; or
>
> (f) He has behaved in a manner which —
>
> (i) Was beyond the control of his parent or guardian or the person for the time being having care of him; and
>
> (ii) Was of such nature and degree as to cause concern for his well-being or his social adjustment or for the public interests; or
>
> (g) His parent or guardian or the person for the time being having care of him is unable to provide, or is failing to provide, adequate training and control; or
>
> (h) Being of school age within the meaning of the Education Act 1964, he is persistently failing to attend school without reasonable cause; or
>
> (i) Being a child of or over the age of 10 years, he has committed an offence or offences the number, nature, or magnitude of which indicates that —
>
> (i) He is beyond the control of his parent or guardian or the person for the time being having care of him; and
>
> (ii) It is in the interests of his future social training, or in the public interest, that a finding be made in terms of this section of this Act."

(b) General comment

It will be noted at once how broad or vague many of the grounds are. A degree of seriousness is clearly implied in paras (h) and (i) but the others all omit similar guidance and are quite unrealistic in their literal reach. Paragraph (a) is an extreme instance. Taken at face value it would cover most children at some time in their life. To give an example: the importance of talking and reading to children from a very early age, not simply for their development of language skills but for other aspects of their development also, is well established,[41] yet many children are deprived in this respect. No one however could sensibly regard this as a basis for coercive State intervention as opposed to a reason for improving parent education. What is the point of drafting such an idealistic formula, which ignores both the State's limited resources to help and the

[40] The present version was substituted for the original by the Children and Young Persons Amendment Act 1977, s 7.

[41] See Mia Kellmer Pringle, *The Needs of Children* (Hutchison 1975) pp 46-50, 91-95, 149-150.

counter-productiveness of over-eager intervention in terms of undermining family autonomy and parental confidence, self-reliance and responsibility?[42] The word "seriously" needs to be read into each of paras (a) to (g) if they are to become sensible. That it should have been left to the Courts to do this is inexcusable.

(c) Judicial guidance

In the case of *H v Department of Social Welfare*[43] the point was clearly made by Barker J in relation to the neglect ground (para (c)) that it is society's minimum standard against which parental performance is to be measured:

> ". . . the definition of 'neglect' must require a judicial officer to endeavour to reflect the community's minimum standards of parenthood."[44]

Although his Honour was not called upon to do so, it is submitted that he could equally well have made the same observation in relation to the other grounds in s 27. In the learned Judge's suggestion at the end of his judgment that the complaint might have been more successful if based on certain other grounds there is an unfortunate implication that the minimum-community-standard approach might be less applicable to those other grounds. It is hoped that this was not intended but rather that his Honour was only observing that some of the evidence was simply not relevant to the concept of neglect but could have been considered as possibly constituting other grounds. The Judge was concerned to minimise the scope for judicial imposition of personal standards of child-rearing, and while adopting a minimum-community-standard approach across the board would not give complete protection against subjective or class or culture-based standards, in that these could still influence the Judges' formulation of the community's minimum standard, it would at least be an important step towards countering the legislative vagueness.

> "The danger of legislative excess becomes apparent when the cultural content of child abuse is recognised . . . the child-rearing patterns of an identifiable minority group within a defined society, perhaps promoting juvenile self-reliance at an earlier age or to a stricter level than in the prevailing, indulgent population, or permitting overt sexuality generally considered precocious, or denying opportunities for autonomy generally permitted, may lead to misguided and culturally insensitive interventions. Similarly, the accommodations the materially deprived must make to their poverty may deny their children what the wider community considers the minimum resources of childhood, and intervention may more easily take the form of removing particular children to a better material environment rather than of social resource reallocation to alleviate this effect of poverty while maintaining the home intact."[45]

Barker J's judgment is one of the very few available instances of helpful judicial guidance on s 27. Judges in other jurisdictions have sometimes shown themselves to be sensitive to the dangers inherent in the kind of legislative overreaching represented by s 27, which is in fact very similar in some of its terminology to legislation in force elsewhere. In one Canadian case,[46] for example, the Judge observed:

> "This Court must not be persuaded to impose unrealistic or unfair middle-class standards of child care upon a poor family of extremely limited potential."

And in the American case *State of Oregon v McMaster*[47] where the Court was asked to intervene because a child was not maximising her potential in the custody of her parents it refused, commenting:

> "Many thousands of children are being raised under basically the same circumstances as this child. The legislature had in mind conduct substantially departing from the norm."[48]

A crucial general point made by Barker J in *H v Department of Social Welfare*[49] and one which affirms the view stated above that the Court's function is not simply the dispensation of welfare, was put in these terms:

> ". . . I accept counsel's submission that the section does not go so far as to justify the approach

[42] It is interesting that the Christchurch survey revealed not a single instance of reliance on para (a).

[43] Unreported, Supreme Court, Auckland, 4 December 1978, M1338/78. (Reprinted in "Child Abuse" — Report of a National Symposium, Dunedin 1979).

[44] At p 13 of the judgment.

[45] Dickens, supra n9 at pp 6-7.

[46] *Re Warren* (1974), 13 RFL 51.

[47] 486 2d 567 (Ore 1971).

[48] P 573.

[49] Supra, n43.

> of the learned Magistrate that in determining whether a complaint under s 27 is established, the Court is entitled to look at the range of orders under s 31 which can only be invoked if the complaint is proved. Put another way, the fact that a particular child, on an objective assessment, could benefit from a supervision order or the fact that a particular parent could benefit from counselling . . . is no justification for short-circuiting the procedure and using the alleged benefit as a ground for the decision under s 27(2)."[50]

Barker J's approach is supported by a careful reading of s 4 of the Act, which requires that:

> "Any Court which . . . exercises in respect of any child or young person any *powers conferred by this Act* shall treat the interests of the child or young person as the first and paramount consideration . . .".

Making a finding under s 27 is not a "power" in this sense and the power to administer welfare in the form of one or more of the orders under s 31 only arises *after* a complaint under s 27 has been made out. It is of fundamental importance that the two steps be kept separate and the possibly beneficial nature of some of the orders available not be allowed to increase judicial readiness to find s 27 satisfied:

> "Before the question of disposition can arise, a child must be shown to be in need of protection or care according to objective standards. Judicial recognition of the good intentions and sincere concern of welfare personnel and of their capacity to improve the child's material and other conditions of life is not in itself a sufficient basis for intervention between parent and child."[51]

(d) Some anomalies

In addition to its vagueness another feature of s 27 that may be a source of problems is its attempt to cover two quite different types of case: on the one hand *parental* behaviour that adversely affects a child and calls for "protection", and on the other behaviour *by a child* that threatens his own well-being or affects society at large and calls for better "control". Although the mixing of these two situations may be superficially attractive in the light of the therapeutic rather than punitive aims of the Act and the belief that behavioural problems in children will often be symptoms of prior emotional neglect, the gains in terms of tidiness of philosophy may be outweighed by the inappropriateness of adopting the same adversary procedure and the same form of orders in each area. The balance between welfare and due process for example might justifiably be struck differently in the case of abused or neglected children than in that of uncontrollable children. Again the supervision order which, as defined in ss 46 and 47 of the Act authorises supervision *of the child*, is clearly aimed at the delinquency situation but seems less appropriate in cases of abuse or neglect where it is the *parents* who should primarily be subject to supervision.

The therapeutic philosophy behind the Act is taken to its logical conclusion in para (i) which makes the commission of offences by a child aged 10 to 13, provided certain other conditions are satisfied, a ground for complaint action against the parents. This is in fact the only way in which such offending can be brought before the Court:[52] children as opposed to young persons cannot be charged with offences[53] except murder or manslaughter.[54] The conditions of para (i) and the fact that special rules apply to that ground only viz, a higher standard of proof,[55] more restrictive rules as to admissible evidence,[56] and the *doli incapax* principle,[57] makes it by far the most closely circumscribed ground in s 27.

This restrictiveness alongside the looseness of paras (e) and (f), which also focus on behaviour by a child, is ironical and produces some strange results. Thus a child under the age of 10 who engages in ac-

[50] Ibid, pp 12-13. This kind of short-circuiting may be permissible to some extent in relation to the offence ground: see the wording of para (i).

[51] Dickens, supra n9 at p 24. In Christchurch some Judges are developing the practice in defended s 27 cases of clearly separating the adjudicative and dispositional phases by allowing a significant adjournment between them. See eg, *Police and Department of Social Welfare v A* 1143/79 and 1429/79.

[52] It could of course be considered by a Children's Board: see s 15 of the Act.

[53] S 25(2).

[54] Ibid, as amended by the Children and Young Persons Amendment Act 1977, s 5(1). The exception abandons the Act's philosophy and can only be explained as an irrational concession to supposed public outrage at the immunity of young villains for two of the more heinous crimes.

[55] S 29(2)(a).

[56] S 29(2).

[57] S 29(2)(b).

tivities which, but for the fact that he is below the statutory age of criminal responsibility[58] would constitute offences, might provoke complaint action against his parents[59] based on behaviour beyond their control,[60] to which the restrictive criteria affecting similar activities by his 10 year old counterpart would be inapplicable. Again a child aged between 10 and 14 who commits offences might attract complaint action against his parents under paras (e) or (f) provided his activities are not labelled "offences". Whether s 27(3)[61] is effective to bar this method of bypassing the restrictions affecting para (i) is doubtful.[62] The inclusion of the offence ground in s 27 serves to increase the unlikelihood that a mainly uniform legal structure will be suitable for the different categories of case covered:

> ". . . the confusion of these cases with protection cases not only leads to procedural difficulty; it can cause confusion in the child's perceptions of 'aid' and 'punishment', a confusion which is shared by those welfare agencies and Courts which use the child's commission of a minor offence as a pretext for drastic intervention in a life they deem unsatisfactory. It has been urged that criminal law and welfare functions should be separated as far as possible to enable the assisting services to be developed without the restraints demanded by a coercive system and to permit the application of the criminal law 'free from the confusing claim that the child is being punished for his own good.' "[63]

4. Evidence

The difficulties of obtaining direct evidence of child abuse or neglect are obvious. Circumstantial evidence will therefore become important in this area eg, the probable non-accidental origin of a particular injury, the inconsistency or inadequacy of parental explanations, the state of the child's physical or emotional health, or the nature of his behaviour. This kind of evidence might be insufficient however and if the protection intended by the Act is not to be frustrated by undue technicality some relaxation of the normal rules governing admissibility, in particular the hearsay rule, must be accepted. The Act does this in s 29(1) by providing that "the Court may receive any oral or documentary evidence that it thinks fit whether it is otherwise admissible in a Court of law or not." An exception is recognised[64] in respect of para (i) of s 27(2), the offence ground of complaint. A distinction could also have been drawn for the other grounds based on behaviour by a child viz, paras (e) and (f) (behaviour beyond parental control) and para (h) (persistent truancy) since such behaviour would occur outside the family setting and direct evidence of it should often be available. But it is left to the Court to draw the distinction and be more insistent on the best evidence in the case of uncontrollable children than in the case of children needing protection.

It should be noted that the wording of s 29(1) is permissive not mandatory so that an objection to the admission of hearsay evidence might still be worth counsel's making, especially where better evidence should be available to the complainant. Given the law's traditional attitude to hearsay evidence it can be expected that some Judges at least will be responsive to such objections. More commonly perhaps the evidence will be admitted but its objectionable features will reduce the weight attached to it. Even to achieve this response may require the alertness of counsel: a Court like the Children and Young Persons Court which is in the habit of receiving all forms of "evidence" is in danger of losing its sensitivity to their relative degrees of cogency.

A fairly loose attitude to the question of admissibility and a judicial confidence that the problem can be handled in terms of the weight to be given to evidence can be seen in a Christchurch case[65] in which a social worker's report prepared in compliance with s 41(3) of the Act (ie, to assist the Court at the dispositional stage) was seen by the Magistrate at the adjudicative stage (ie, before he heard the evidence supporting the complaint). On

[58] Crimes Act 1961, s 21.

[59] The case should go first to a Children's Board which might adopt a solution short of recommending complaint action.

[60] Paras (e) and (f).

[61] "A complaint shall not be made under this section in respect of any offence or offences alleged to have been committed by a child of or over the age of 10 years otherwise than under para (i) of subs (2) of this section."

[62] In any event s 27(3) seems to be overlooked sometimes in practice. Cases were discovered in the Christchurch survey where complaints made under para (e) expressly alleged offending by the child. In only one such case was this defect apparently picked up by the Court and the complaint amended.

[63] Eekelaar, supra n1 at pp 97-98.

[64] See s 29(2).

[65] *Department of Social Welfare v W*, Children and Young Persons Court, Christchurch 672/78.

appeal[66] it was argued that this was a serious defect beyond the reach of s 45, which protects irregular decisions etc provided they involve no miscarriage of justice. It was stressed that the report contained much highly prejudicial hearsay material that was not given directly in evidence. In dismissing the appeal Casey J emphasised the wide discretion conferred by s 29 and was "not prepared to say that the learned Magistrate [was] precluded from looking at [the] report before he embark[ed] on a consideration of the case."[67] His Honour considered that ground for criticism would only exist if undue weight were given to such material but that that had not occurred because the sworn evidence was quite sufficient to support the decision:

> "If it were clear that the learned Magistrate had given quite disproportionate weight to irrelevant matters or to unverified hearsay, or if it were largely irrelevant, there might well be grounds for interfering with his decision. Beyond that, in this very special jurisdiction the admissibility and consideration of evidence under s 29 is one for the judgment and good sense of the Court entrusted with the administration of that Act."[68]

The overall tone of Casey J's judgment however conveys a different view from that suggested by the writer of where the balance between welfare and due process is to be struck in these proceedings. At pp 2 and 3 of his judgment the learned Judge made these generalisations:

> ". . . the purpose of a judicial enquiry in considering the welfare of children has been acknowledged in a number of decisions to be quite different from the situation prevailing in a dispute between the parties in a true adversary situation involving criminal or civil Courts.
>
> "The Court's concern in this case (and in similar cases) is not so much to make a finding whether one side or the other, in a contest between the complainant and the defendant, has prevailed; it is to determine whether or not the complaint has been substantiated in respect of the child, and the very important questions of its protection and welfare."

It is submitted that this overstates the effect of the Act. A basically adversary procedure has, whether rightly or wrongly, been retained and the sacrifice of due process should only occur to the extent clearly indicated in the Act. The fact that s 41(3) specifically envisages the use of a report for a particular purpose (to assist disposition) does, it is submitted, affect the propriety of using such a report for another purpose viz, at the adjudicative stage. While taking a different view from Casey J on this point it is not suggested that the result reached by the Judge on the facts of the case was questionable.

Although complaint proceedings are commonly perceived as criminal — by the parents and children involved, by inexperienced duty solicitors who sometimes complete Offenders Legal Aid Applications for parents, by some Police Officers who head their typed statement of facts with the word "Charge", and even, unconsciously, by Judges, who use such terms as "the prosecution", "the informant", and "remand" — they are not criminal, with the result that the appropriate standard of proof is not "beyond reasonable doubt".[69] A gloss however is to be put on the "balance of probabilities" standard. In *Social Welfare Department v M*[70] dealing with a complaint under what is now para (c) of s 27 White J held:

> ". . . the allegation of neglect is serious. To prove it on the balance of probabilities the preponderance of the evidence must bring the balance clearly down having regard to the serious nature of the allegation. I think the onus in this case can be summed up in the words of Morris LJ in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247: '. . . the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.' (ibid, 266 . . .)".[71]

5. Legal assistance for the parents

The majority of complaints made under s 27 are admitted by the parents.[72] This in itself is not

[66] Unreported, Supreme Court, Christchurch, 6 June 1979, M98/79.

[67] Ibid, at p 3 of the judgment. Taking that view the Judge did not need to rely on the curative power of s 45. He did rely on it however in a more recent case where the statutory 3-month limit on postponement of the final consideration of a complaint (s 31(3)) had been inadvertently exceeded: *H v Department of Social Welfare* (Unreported, Supreme Court, Christchurch 6/6/80, M96/80).

[68] Ibid, p 4.

[69] Except in the case of the offence ground, para (i).

[70] [1976] 2 NZLR 180.

[71] Ibid, pp 182-3.

[72] The proportion of admitted complaints in the Christchurch survey appeared as high as 80 percent.

necessarily alarming: it may indicate that the Police and the Department of Social Welfare usually initiate complaint action only in the most serious cases where preventive measures have already failed and the need for more formal intervention is manifest. What may give cause for alarm however is the fact that a majority of parents who admit complaints have not had legal advice or adequate legal advice and may not fully appreciate the possible long-term consequences of the proceedings.[73]

While it is true that the summons served on a parent will inform him (if he reads it in full) of the possibility of seeing a solicitor, that a duty solicitor may be available to give advice before the hearing, that the Court itself may draw the parents' attention to the possibility of seeking legal advice, that some social workers themselves may be good at explaining the purpose of the proceedings and the orders that can result or may even suggest legal representation, there are factors inhibiting parents from helping themselves as much as they could in this respect or limiting the value of advice received. Some of them distrust lawyers and do not realise that a lawyer will work primarily for them not the Court; some will hesitate to incur supposed financial burdens beyond their means and do not understand Civil Legal Aid; some may want the whole matter dealt with as quickly as possible and not think ahead; some may be hesitant to seem to question the sincerity of a social worker who appears to be making a genuine attempt to help them and their child, and some are simply cowed by authority. Where a duty solicitor is involved the pressures under which he operates will limit both the amount of advice and information he can convey to the parents and their opportunity for calm consideration of it.

When it is left to social workers to give the advice can we really be assured that they will indicate such things as the following: that if, say, supervision is ordered but fails to remedy the problem, whether through the fault of the parents, the child or the Department itself, further complaint action might be taken and guardianship sought; that if a guardianship order is made it cannot be reviewed by an independent body for 12 months,[74] and if not discharged, only at 12-monthly intervals thereafter;[75] that the child may be placed in such institution, foster home or succession of foster homes as the Director-General considers appropriate;[76] that such placements may be far away from where the parents are living; that access by the parents to their child and vice versa is at the discretion of the social worker attached to the case; that these matters and other concerns of the parents about how their child is being treated are not subject to review by the Court or, practically speaking, any other independent body;[77] and that in the course of their relationship with the Department they may find themselves dealing with a bewildering succession of social workers some of whom do not seem to be fully conversant with the background or prior understandings reached and do not last long enough to develop a satisfactory relationship either with the parents or the child?

While these examples do not give a balanced picture of the Department's work they are some of the realities and parents are entitled to know them. The more positive side of the Department's role — its undoubted success in helping some families — the social workers can be relied on to convey.

It is submitted then that there is room for improvement in the area of legal representation. The overall proportion of defended complaints might not change significantly but at least there would be better assurance that parents entered the Court with their eyes open and ran less risk of subsequent disappointment or sense of betrayal. Some would no doubt still refuse legal assistance, and some would, even after advice, still wish to be rid of unwanted or troublesome children either permanently or temporarily. But there must remain parents whose access to effective legal advice and representation is not sufficiently ensured by the present system.

[To be concluded]

[73] In the Christchurch survey the proportion which had had professional legal advice other than from the Duty Solicitor appeared as low as 15 percent.

[74] S 64.

[75] Ibid.

[76] Ss 49 and 67.

[77] The Ombudsman might be persuaded to look into the more serious allegations. Likewise the High Court's wardship jurisdiction might be relevant: this will be explored in a separate note.

[78] Dickens, supra n9 at p 30. For the view that the statutory paramountcy of the child's interests in the custody context does substantially affect the duties of counsel for the parties see *Clarkson v Clarkson* (1972) 19 FLR 112 per Selby J at p 114.

TOWN AND COUNTRY PLANNING

DISTRICT SCHEME OBJECTIONS

By KEITH BERMAN LLB, Dip TP, MNZPI

Solicitors are increasingly being required to advise their clients on the effects on the clients' property of a proposed Reviewed District Scheme. The increasing complexity of district schemes has meant that an examination of the scheme must go beyond a mere cursory glance at the permitted uses within a particular zone. Solicitors have a role to play in drafting district scheme objections and it is proposed to discuss the drafting techniques and the types of objections. In essence a solicitor must have a clear understanding of what his client objects to, what he wants done about it, and the best means of achieving that result.

Specialist planning lawyers, instructed after an objection has been filed, can have a battle before the Council or Tribunal trying to create a sensible result out of an inappropriate objection. Lodging an objection is not like filing a notice of intention to defend in the District Court with the opportunity to think about the real argument later. The objector is limited by what he requests in his objection.

The document lodged serves as both a submission and an objection. Where appropriate the objector can draft or re-draft a full ordinance or suggest or modify specific planning objectives. It is at this point that the objector has the opportunity for specific and detailed creative input into the scheme and to set out exactly what he wants. To do this he must consider the whole scheme and deal with all relevant parts and not just the zoning ordinance.

At the risk of over-simplification let us take an example: suppose your client has three adjoining residential sites within a low density residential zone. He has ambitions to amalgamate sites and do a medium density townhouse development but the proposed reviewed scheme does not let him. His objection can take several forms and seek several solutions.

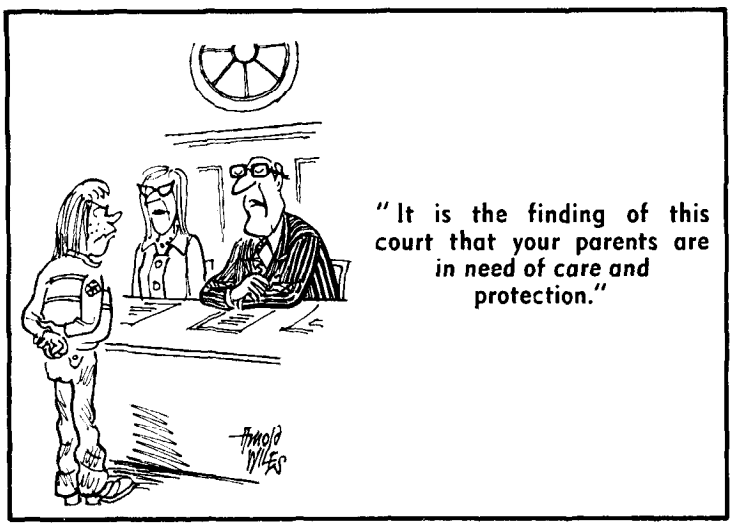
1. He can object to the zoning of his properties and request an alternative existing zoning which would permit him to do what he wants. "I object to my land being zoned Residential A and ask for Residential C". This is a very common form of objection but a very hard one to win. Your client's land does not have any special feature which distinguishes it from the surrounding residential land. The prospect of the amalgamation of the three lots into one big lot would not normally be such a feature. The Council is unlikely to give three unexceptional sites a differing zoning from the surrounding sites. The real problem may not be that the zoning is wrong but that the scheme does not make provision for the comprehensive development of large sites in that zone.
2. He can object to the zoning of his neighbourhood and request alternative existing zoning. It may be that his zoning and that of his neighbours is wrong and a valid argument exists for giving it a higher density zoning. Your client has the right to object to the zoning of his neighbourhood. A Council is more likely to be persuaded to treat a coherent neighbourhood uniformly than give a special zoning to three lots. It may be that your client's neighbours will concur in his request but perhaps they will not. Let us hope that he is a diplomat and skilled lobbyist.
3. He can accept his zoning but request changes to the restrictions and provisions of the zone. His real complaint is that he cannot amalgamate the sites and do a comprehensive development. He will need to draft his objection with care and examine some specific provisions for details such as living courts, service courts, landscaping, design and parking. You may have to persuade your client that his proposal could not be a predominant use but could be permitted as a conditional use. He will later have to take his chances with a planning application, but so long as he has ensured that appropriate objectives and guidelines have been incorporated into his scheme, he should not have too much trouble. As part of the process of drafting the objection your client would be well advised to do a design exercise to check that his proposal can fit on the site while complying with the various restrictions.

It is important to bear in mind that if your client's objection is successful it will affect every site in the district with the same zoning. He must be prepared to argue his proposals against the "low den-

sity" lobby amongst the local community planning watchdogs. But if his proposal is sound and the draftsmanship adequate it has a chance of success. Your client may not welcome the conditional use limitations placed on him by the proposed amended ordinances, but he must be convinced that unless he accepts them the objection will probably be dismissed out of hand.

4. He can object to his zoning and request an entirely new zoning. This form of objection would not normally be appropriate to the above example but can sometimes be the only solution where a client wants to establish a specialist development — say a regional shopping centre. It may be that no existing commercial zoning is appropriate. Accordingly, your client must object to the zoning and draft and annex a new zoning providing for his specialist use. If your client is prepared to accept reasonable limitations and the proposal is sound your client has a reasonable chance of success.

There are many variations on the above themes, but the important point is that the time to do the hard work and crystallise ideas is before lodging the objection, not before the hearing.



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INDUSTRIAL LAW

THE LAWYER, INDUSTRIAL CONFLICT AND THE RIGHT TO FIRE

By D L MATHIESON*

This is a revised version of a paper prepared for a Wellington District Law Society seminar held on 8 October 1980.

Introduction

"Most workers want nothing more of the law than that it should leave them alone."[1] Perhaps that is still the instinctive wish of most English workers. But in England today, even after the demise of the Industrial Relations Act 1971 (UK), there is much more law regulating the employment relationship and the collective aspects of industrial relations than there was in 1965. The latest statute is the recently enacted Employment Act 1980 (UK)—"a congeries of provisions dealing with individual rights and collective issues in piece-meal fashion".[2] Only the process of collective bargaining as such can be plausibly described as comparatively unregulated, and even that is propped up or strengthened by some important legal institutions.[3]

In New Zealand we have not had an "abstentionist" policy since 1894, the date of our first Industrial Conciliation and Arbitration Act. A few observers have bemoaned what they see as an excess of law in an area which should, they think, be left to employers and unions to bargain about, and fill with their own sets of mutual obligations. The unduly large amount of law is regarded as having engendered "legalistic" attitudes on the part of unions and their officials. But whether this is true, and, if true, whether it is to be deplored, depends on exactly what one means by "legalism". In such discussions the pejorative word "legalism" is usually left undefined. At all events the employer and union participants themselves, with some notable exceptions, seem reasonably content with the traditional "interventionist policy" in general, rejecting it only when it takes the form of permitting the Government to interfere with, or veto, collectively bargained rates of remuneration. Be that as it may, legal rules affecting both the process of bargaining, and the contents of the awards and collective agreements which are its fruit, have increased in number and scope — a generalisation which remains true even if one takes into account the repeal of the Remuneration Act 1979.

Since 1973 we have become familiar with the distinction between "disputes of interest" and "disputes of right".[4] "Disputes of interest" — in pre-1973 terminology "industrial disputes" — are largely settled in the statutory conciliation councils, with compulsory arbitration available for the small minority of disputes which cannot be so resolved. The legal picture is the same in essentials as it was before the Industrial Relations Act 1973 was enacted.

As an example of expanded powers, the Arbitration Court has had jurisdiction since 1974 to adjudicate upon demarcation disputes.[5] As another example, the 1973 Act laid down more thorough-going procedures for the settlement of disputes of right,

* Barrister, Professor of Law, Victoria University of Wellington.

[1] *The Worker and the Law* (Penguin, 1965), 9. Professor Wedderburn.

[2] I borrow this description from Drake's useful synopsis of The Employment Bill 1980 in (1980) 9 Industrial Law Journal 167.

[3] One notable prop is ACAS, the Advisory, Conciliation and Arbitration Service, which, amongst other things, has performed the function of determining recognition issues arising from a request by a trade union for recognition by an employer for the purpose of collective bargaining. Its objectives are to improve industrial relations and extend collective bargaining. On at least one occasion ACAS found itself a participant in, rather than a mediator and adjudicator of, inter-union rivalries; see eg, the tactical battles which gave rise to *Engineers and Managers Association v ACAS* [1980] 1 All ER 896 (HL). The statutory recognition procedure contained in the Employment Protection Act 1975 (UK) has been repealed by the Employment Act 1980 (UK).

[4] These technical expressions are defined, along with the still more basic concept of "dispute", in the Industrial Relations Act 1973, s 2.

with a right of appeal to the Court. Most notably, the insertion of a clause specifying the procedure to be used in an attempt to resolve such disputes was made mandatory. Under the Industrial Conciliation and Arbitration Act 1954 it had been optional. One species of dispute of right, the personal grievance dispute, will receive some detailed attention in this paper.

The Governmental power to intervene in what may be called "trade union law" has also progressively expanded. It is sufficient to cite one example only, the conferment of power on the Minister of Labour to require a ballot to be conducted on the question whether the adult workers who are members of a particular union wish to continue to be bound by an unqualified preference provision.[6]

There have of course been major disagreements as to what the content of the law should be, as we saw in 1972 when neither the central organisations, the NZ Employers' Federation and the Federation of Labour, nor the two main political parties, could agree on whether the Industrial Relations Bill 1972 should contain any penalties for industrial action; and as we saw when the Commerce Amendment Act 1976 was passed containing, amongst other new things, liabilities for what are a little misleadingly called "political strikes".

The role of lawyers

In this country a special kind of abstentionist policy has prevailed in relation to the services of lawyers in certain types of industrial dispute. They are not permitted to take any part in conciliation councils. In arbitration proceedings no barrister or solicitor holding a current practising certificate is allowed to appear or be heard before the Arbitration Court. "Except with the consent of all the parties", adds s 54(4) of the Industrial Relations Act 1973, but it is notorious that such consent is never forthcoming.

Only in non-arbitration proceedings, such as proceedings for the interpretation or enforcement of an award, may lawyers represent individuals (if they have standing) or employers or unions. In various types of non-arbitration proceedings lawyers commonly appear, often against counsel employed by the Department of Labour, quite often against industrial advocates.

The main point remains intact. In those collective bargaining procedures known as conciliation and arbitration, the characterising features of our legal regulation of industrial relations since 1894, the legal profession is excluded. Although the arguments for this exclusion are by no means conclusive, there is no longer any debate on the point. We lawyers have become resigned to the situation.

But in recent years my impression is that more and more members of the profession are finding that they must give advice in the area of industrial law. The days when there were just a few specialists have gone.

No doubt several reasons have contributed to this change. In this paper I propose to discuss three contributing reasons, and to say something about each of the areas of law to which they respectively relate.

First of all there has been, since 1974, when the Industrial Relations Act 1973 came into force, a new statutory remedy for "personal grievances". Section 117 of the Act defines a "personal grievance" as "a grievance that a worker may have against his employer because of a claim that he has been unjustifiably dismissed, or that other action by the employer . . . affects his employment to his disadvantage". What is the best advice to give to an employer who wants to fire an employee without risking the prospect of a successful personal grievance claim?

Secondly, some unionists and others claim that the law and the lawyers have no legitimate role to play in industrial conflicts involving "direct action". It is true that if workers are determined to stop work, and belong to a union with enough solidarity and industrial muscle, no law and no Court order will in the end be effective to prevent them doing so. All the same, various legal issues arise upon which almost instantaneous advice will often be sought. Is it lawful to fire a striking worker? Can striking workers be "suspended"? And when the main conflagration has died down, an employer may face a claim for wages lost during the strike. When, if ever, must he pay up; and when may he lawfully deduct sums representing the days lost from wages otherwise payable?

The third reason is that lawyers are now often asked to advise at short notice whether an interlocutory injunction could successfully be obtained from the High Court in an attempt to force the abandonment of a threatened strike. What needs to be shown to obtain such an injunction? What

[5] IR Act 1973, s 119. Prior to the IR Act 1973 the Court occasionally resolved what were in reality demarcation disputes indirectly.

[6] See IR Act 1973, ss 101A et seq, inserted by s 16 of the IR Amendment Act (No 2) 1976.

causes of action may be invoked? And how is the "balance of convenience" test likely to be applied?

"Personal grievances"

It would be wrong to imagine that s 117 of the Industrial Relations Act 1973 is the only recent statute intended to protect job security. Thus s 15(1)(c) of the Human Rights Commission Act 1977 makes it unlawful to dismiss any person, in circumstances where other persons engaged on work of the same descriptions are not, or would not be, dismissed, "by reason of the sex, marital status, or religious or ethical belief of that person". And there is a growing momentum towards the enactment of special review, or appeal, or review *and* appeal, procedures for employees who are usually called "officers" in various public and semi-public employments: secondary school teachers have enjoyed an overly complicated protective umbrella since 1959, and other groups with procedures enabling the merits of a dismissal to be investigated by a third party include Harbour Board employees and employees of the Fire Services Commission.

Section 117 is nevertheless the provision of widest scope and application. It is implicit in the section that it applies only when an award or collective agreement covers the dismissed person's employment, a proposition that was confirmed by the Court of Appeal in the *Te Kuiti Borough* case.[7] And it is submitted that the better view is that s 117 is inapplicable if the dismissed person is not a union member at the time of his dismissal.[8] Those limitations exclude only small numbers of workers in the private sector. Nothing in s 117 excludes the jurisdiction of the ordinary Courts to entertain the old wrongful dismissal action.

Choice of forum

From the worker's angle, however, there is no gainsaying the advantages of pursuing this new statutory remedy over suing for damages for wrongful dismissal. At common law the maximum damages recoverable were strictly limited; he might easily be held to have failed to take reasonable steps to mitigate his loss; he had to prosecute the litigation in his own name, engage solicitors and counsel, and shoulder the expense if he were not a recipient of legal aid; there was no remedy for *unfair* as opposed to *wrongful* dismissals; most importantly of all, perhaps, if he won the Court would not order his reinstatement in his old job.

No point would be served by setting out the prescribed procedure for processing personal grievances through the union and if necessary by reference to the Arbitration Court. It is all there in s 117, but perhaps not everyone may realise that since 1976 any flouting of a decision of the grievance committee or of the Court may attract a penalty as for a deemed breach of the relevant Award.[9]

Unjustifiable dismissal

The key word in s 117 is "unjustifiably". What flesh has been laid upon that statutory bone by the numerous decisions of the Arbitration Court?[10] I believe that the Court[11] has failed to do what Parliament intended that it should do, namely construct and develop a body of case law that would enhance predictability and reduce the number of references actually reaching the Court.

In May 1980 the Court confessed that it acts pragmatically, "refraining (to a degree) from laying down too early or too rigidly defined principles".[12] In April in another case it disclaimed laying down "any general principle" when it said that a company employer is entitled, when one of its employees reaches a normal retiring age, to cause him to retire.[13] One is reminded of Goodhart's dictum that a semi-absolute precedent is no more use than a semi-fresh egg. The April decision will be cited in other

[7] *Auckland Freezing Workers IUW v Te Kuiti Borough* [1977] 1 NZLR 211.

[8] This view derives some support from *Muir v Southland Farmers Co-op Association Ltd* (Ct Arb, 26 March 1979) and further obiter support from *Wellington etc Clerical Workers IUW v Greenwich*, 22 August 1980.

[9] See IR Act 1973, s 124A (6)(d) and (e), inserted by s 20 of the IR Amendment Act (No 2) 1976.

[10] No one has analysed what, if any, patterns emerge from the decisions of grievance committees; unlike decisions of the Court, they are not even semi-precedents. From the viewpoint of the student of industrial relations, these decisions could yield some valuable information as to the effectiveness of bipartite committees and the role played by their chairmen. For a discussion of s 117 and the Court decisions up to 1978, see G J Anderson, "An Examination of Section 117 of the Industrial Relations Act 1973", VUW Industrial Relations Centre, Research Monograph No 4, 1978.

[11] And its predecessor, the Industrial Court.

[12] *Auckland LA Officers IUW v Waitemata City Council*, 1 May 1980.

forced retirement cases; but it will only half-settle them.

What guidelines emerge from the collection of personal grievance decisions delivered by the Court? I put to one side complaints that employment has been disadvantaged, although these also fall within s 117. Obviously, the giving of due notice in terms of the relevant award or collective agreement does not automatically justify a dismissal.[14]

But the Court is prepared to hold that while a summary dismissal was not justified, a dismissal on notice would have been justified. In such an event it is prepared to exhort the employer to pay the wages that would fall due over the period of notice.[15]

The penalty of dismissal needs justification: depending on the circumstances, the Court may hold that the defendant employer could justifiably have censured, but not dismissed.[16]

There will be borderline cases where a reasonable employer could either dismiss or refuse to dismiss for misconduct, and "something must be left to the employer in assessing . . . to what extent leniency is justified".[17]

Where there has been a succession of small items of misconduct, the employer is entitled to reason that the last in the series is the "last straw".[18]

Procedural grounds

There is no clear answer to the fundamental question whether a dismissal may be accounted *substantively* fair but *procedurally* unjustifiable. If the instrument (ie the award or collective agreement) itself accords a worker a right to an opportunity to state his case before being dismissed, an employer who denies him that opportunity will probably be held to have dismissed unjustifiably.[19]

Such provision is unusual. In *Begumanya's* case[20] the Court held that the worker was "entitled to know exactly what the allegations against him were and to be given an opportunity of dealing with them in an orderly manner." Is this a general rule of law created by the Court, or a comment related only to the facts of that particular case? A perusal of the decision does not enable the reader to decide. Employers should I think be advised that the position is uncertain, but that to be safe they should tell an employee what inefficiency or misconduct is alleged against him and give him a reasonable opportunity to contradict or explain the facts upon which the employer proposes to rely.

The employer must justify a dismissal if it is challenged by reference to a reason for dismissal in fact existing in his mind at the time of dismissal, and which was in fact the ground of the dismissal.[21] In inefficiency cases there is probably also a prior duty to warn that a particular kind of inefficiency will, if repeated, place the employee at risk of losing his job. Thus in 1979 a nurse's dismissal was not based on any "proximate proved specific complaint" concerning her nursing skills and performance, and was held unjustifiable.[22] Section 117 itself does not distinguish between inefficiency or want of skill on the one hand, and misconduct on the other, but there can hardly be a duty to warn before dismissing when the ground of dismissal is dishonesty.[23] It is submitted that the duty to give a prior warning, as a condition precedent to a subsequent justified dismissal, ought to be required only in those cases where a pattern of like events is relied on

[13] *Taranaki etc Shop Assistants IUW v C C Ward Ltd*, 30 April 1980. Cf *Canterbury Clerks etc IUW v Burroughs Ltd*, 11 June 1980 ("We do not say that incompatibility in every case is a justifiable ground for dismissal and we look at every case on its merits.") But see also *Wellington Road Transport IUW v Shell Oil Co*, 30 July 1980.

[14] *Oakman v Bay of Plenty Harbour Board*, 8 February 1979; but in *Auckland LA Officers IUW v Waitemata City Council* (n(12), supra) this becomes more obscure, and it is suggested that the unjustified dismissal issue arises in connection with dismissals on notice only "where reasons are given for a dismissal," sed quaere.

[15] *Oakman's* case, n (14), supra.

[16] *Parisian Coat Manufacturing Co Ltd v Auckland etc Staff Employers IUW* [1976] ICD 55.

[17] *Bell v Air NZ Ltd* [1976] ICD 187.

[18] Eg, *NZ Food Processing IUW v W R Grace Ltd*, 20 December 1979.

[19] *McHardy v St John Ambulance Association* [1976] ICD 217.

[20] [1977] ICD 119. Cf also *Auckland Hotel etc IUW v Auckland Travelodge Hotel*, 13 October 1980.

[21] An important authority here among several that could be cited is *Dee v Kensington Haynes and White* [1977] ICD 67; see also *McDonald v Hubber* [1976] ICD 161.

[22] *Vial v St Georges Private Hospital*, 27 April 1979.

[23] The Court has recently stated that "it is not necessary that such a warning [sc of the consequences of pilfering] be given, but it does strengthen the hand of an employer in such circumstances if strict warnings have been issued to the staff": *NZ Baking etc IUW v Ford Bros Bakery Ltd*, 17 December 1980. In cases of *suspected* dishonesty it has been cogently argued that the safest course for the employer to follow is to suspend the employee on full pay: see Hughes, [1980] NZLJ 292, commenting on *Wellington etc Clerical Workers IUW v J N Anderson* (28 November 1979).

cumulatively as the ground of dismissal.

Redundancy

Is a dismissal by reason of redundancy unchallengeable? Once the genuineness of a redundancy is established, evidenced by (say) past trading losses,[24] the Court is likely to hold the dismissal justifiable without further ado.[25] But in one case a worker had done nothing wrong to justify his dismissal and the Court held that his dismissal was unjustifiable, and that "the alleged redundancy had been brought about by a lack of planning on the part of the company".[26]

Just how these decisions should be rationalised is unclear. In my view, which is consistent with, rather than expressly supported by, the decisions, a distinction must be drawn between real redundancy situations where the Court will refuse to revise an employer's decision to retrench by the reduction of staff, and situtations where "redundancy" is merely to disguise a dismissal effected for other reasons. In the latter situation an examination of the employer's profitability and managerial decisions will necessarily have to be undertaken in order to strip away the disguise.

The burden of proof

Before 1980 if one thing seemed settled it was that "it is for the employer to show the Court, on the balance of probabilities, that it had adequate grounds for terminating the employment".[27] In other words the employer bears the legal burden of proving that the dismissal was justified. But in *Auckland Local Authorities Officers Union v Waitemata City Council*,[28] in 1980 the Court, on this occasion presided over by Horn CJ, said: "We do not consider that the onus is wholly upon the employer, nor do we think a heavy onus lies upon the dismissed worker. We think that if the worker can establish a reasonable sense of unfairness or lack of minimal justification, then in an evidentiary way some onus lies upon the employer".

It is submitted that these remarks are incompatible with *Scholes'* case, which was referred to by the Court. True, the worker must establish that he has been dismissed, and has not voluntarily resigned.[29] But, once he has done so, whether he subjectively entertains a "reasonable sense of unfairness" (whatever that means) is irrelevant: the question is whether there were or were not adequate objective grounds for dismissing him.

Further, the Court's remarks confuse the legal and the evidential burdens. On policy grounds also the new approach seems indefensible, for a worker may have no knowledge why he was dismissed. Taken literally, the Court's remarks seem to mean that in that event, since he would be unable ex hypothesi to establish a lack of minimal justification, not even an evidentiary burden would fall on the employer. But it is precisely that situation in which the imposition of a legal burden of proving justification on the employer is most clearly warranted.

Remedies

If a grievance committee or the Court finds that the worker was unjustifiably dismissed, it *may* award reimbursement of the whole or part of wages lost by him; or his reinstatement in his former position or in a position not less advantageous to him; or the payment to him of compensation by his employer (s 117(7)). If reinstatement is ordered, this means reinstatement in toto, without loss of seniority or other penalty.[30] The Court will not order reinstatement if it is "not desirable in the in-

[24] As in *Templeman's case*, (1975) 75 BA 6561.

[25] The *Curtain Styles* case, [1978] ICD 53.

[26] *NZ Insurance Guild v Guardian Royal Exchange Co Ltd*, [1978] ICD 151. Cf *NZ Engineering etc IUW v Burm*, 7 October 1980, where a dismissal was held unjustified when the proprietors' conduct of a business led to its running out of work.

[27] *Scholes v AA Mutual Insurance Co Ltd* (1975) 75 BA 5515; see also *Bates v Dunlop (NZ) Ltd*, 22 December 1975. In conformity with this view of the allocation of the onus, a worker who was entitled to 7 days notice was held to have been unjustifiably dismissed in the absence of any reason being given to the Court for the dismissal, or of any evidence being adduced to justify it: *Wellington etc Shop Assistants IUW v Yolandes Delicatessen Ltd*, 1 July 1980.

[28] See n (12), supra.

[29] Thus on the facts in *Auckland Hotel etc IUW v King Size Burgers Ltd*, 8 August 1980, the worker had abandoned her employment or agreed to terminate it and upon that view "there can be no question of unjustifiable dismissal, or indeed of dismissal". The Court accepts a doctrine of constructive dismissal (see *Wellington etc Clerical Workers IUW v Barraud and Abraham Ltd* (1970) 70 BA 347) but if an employer makes resignation attractive, without forcing, coercing or inducing an employee's resignation, there is no dismissal, and hence no jurisdiction under s 117: *Taylor v Rangitaiki Plains Dairy Co Ltd*, 7 November 1980.

[30] *Doyle v Dunlop (NZ) Ltd* (1975) 75 BA 2883.

terest of either party".[31]

No rules fetter the Court's discretion to order reinstatement, but my reading of the cases suggests that the Court readily concludes that a reinstatement order would be impracticable, because confidence has been destroyed. Often the dismissed worker has not sought reinstatement if he is successful. In the employment situation which now exists it will not be surprising if claimants increasingly seek reinstatement.

When the shape of the new statutory remedy was under consideration in the late 1960s, I remember feeling some doubt as to whether a rule should be laid down to cover second dismissals following reinstatement. I need not have worried: the problem has not yet arisen in more than six years of operation of s 117.

"Compensation", so the Court has held, is not to be construed as compensation *for loss*; and so in at least one case the Court has allowed compensation for mental distress.[32] There is a duty to mitigate loss of wages: a failure to do so will result in a reduction of compensation, but the measure is not indicated by the decisions, and the deductions which have been made seem on the face of them to be arbitrary.[33] A small compensation order is justifiable if a worker has contributed to the situation producing his dismissal by his foolishness.[34]

When reinstatement is not being ordered, an additional sum may be ordered for "loss of employment" *if* on the facts of a particular case the dismissed person will *necessarily* be unemployed. The method of its calculation is not, however, revealed to the reader of the *Universal Business Directories* case.[35]

The Court does not rigorously separate the reimbursement of wages from the payment of compensation; nor has it clearly laid down that "compensation" must not include any wages-reimbursing element. Only sometimes are separate sums awarded under each head. It would be conducive to principled monetary awards if a clear separation were made in each case. In one case $1,000 compensation was awarded on a broad palm-tree basis, with no rationale being offered.[36]

It is debatable whether these rough and ready calculations can be justified on the ground that what unionists may think of as "legalistic" tangles are thus side-stepped, so that the value of the remedy is increased. Obviously a union has less need, given the Court's attitude towards remedies, to hire legal counsel to conduct cases, and I have not heard any outcry from employers. There is indeed no evidence to suggest that the existence of s 117 is feared by, or even widely known among, the huge number of smaller employers who on occasions dismiss staff.

Conclusion

Our statutory remedies and the decided cases look simple indeed as compared with the complicated rules for compensating unfair dismissals under the Employment Protection Consolidation Act 1978 (UK). Are the statutory ground rules too simple? Is the employer's supposedly deep pocket a justification for sacrificing the notion of principled awards between which there is some reasonable consistency? I answer that the ground rules are indeed too simple and skeletal, given the Arbitration Court's reluctance to enunciate principles, and its proven tendency to award sums on an unexplained and seemingly arbitrary basis.

Strikes and stoppages

Is it lawful to fire a striking worker? Such tactics are quite commonly employed, as, for example, by Air New Zealand Ltd, when it dismissed its domestic pilots in 1979, but with every expectation of re-engaging them when the immediate disruption being caused by the pilots had come to an end. The weapon of mass dismissal may or may not backfire, depending on all the circumstances. It is always *lawful* (though not necessarily *justifiable*) to dismiss an employee on proper notice. Is an employer entitled to dismiss striking workers summarily, ie without notice or wages in lieu?

Strike

The term "strike" is widely defined in s 123 of the Industrial Relations Act 1973. I wish to make only two points about the definition.

First, many concerted actions are "strikes" with-

[31] *McHardy v St John Ambulance Association* [1976] ICD 217.

[32] *McDonald v Hubber* [1976] ICD 161.

[33] Thus $2,242 was reduced to $1,500 in *General Motors Ltd v Lilomaiava* [1977] ICD 109.

[34] *Wellington Shop Assistants IUW v Wardell*, [1977] ICD 13.

[35] *Auckland Clerical and Office Employees' IUW v Universal Business Directories Ltd*, [1978] ICD 175.

[36] *Campbell v Vacation Hotels Ltd*, 19 February 1979.

in that definition although they are not so referred to as a matter of ordinary language. Thus if workers acting in concert wilfully disobey a particular order (eg "Deliver that oil to all the BP outlets") that is a "strike", even although the drivers obey all *other* lawful and reasonable orders issued to them, and continue to work an 8-hour day on other work. It is a "strike" because their acts of disobedience amount to breaches of their individual contracts of service at common law, and so fall within s 123(1)(b).

Secondly, that statutory definition services other sections in the Act making certain strikes "unlawful strikes" which attract penalties, and those new sections introduced into the Commerce Act 1975 in 1976 which are aimed at "political strikes" and go on to provide new remedies (which have never been invoked in a full-blooded manner) for strikes injurious to the economy. But the Act does not draw an explicit connection between the existence of a "strike" and the employer's right to dismiss: the latter depends wholly upon the common law.

Breach of contract

(i) *Non-repudiatory*

At this point we must distinguish non-repudiatory breaches from repudiatory breaches. A *non-repudiatory breach* is committed if, for example, a worker wilfully refuses particular work, or otherwise refuses to obey a particular order which is both lawful and reasonable. (It would, for example, be unlawful to order a worker to undertake work expressly or impliedly excluded by the relevant industrial instrument from the scope of his contractual obligations towards his employer). In such an event the employer may invoke that disobedience as "cause" for dismissal at common law. Dismissal for "cause", or other variant wording to the same effect, is still preserved in modern awards and collective agreements, leaving the employer's rights in that regard intact. The worker's breach will not automatically terminate the contract.[37]

(ii) *Repudiation by employee*

If, however, the employee's conduct goes to the length of manifesting an intention to refuse to perform the contract any further, and to abandon it, that will constitute a *repudiation* which the employer is free to accept or reject. If he accepts it — usually his only practical course — the contract will be at an end. He may evidence his acceptance by proceeding to dismiss, but saying "I dismiss you" is not in law essential to a valid and effective acceptance. Whether the employee's or the massed employees' actions will be construed as repudiatory depends on "the character of the contract, the number and weight of the wrongful acts or assertions, the intentions indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered and on the general circumstances of the case."[38]

(iii) *Repudiation by employer*

Let us now examine repudiation from the employer's side of the fence. If he dismisses lawfully or unlawfully (and, in deciding which it is, the question whether the Arbitration Court would hold the dismissal justifiable or unjustifiable under s 117 is irrelevant), that dismissal constitutes a repudiation. It is a vexed and still not finally resolved issue whether the contract of service is governed by the normal contractual principle that an unaccepted repudation is nugatory — "writ in water" as Asquith LJ once described it.[39]

Before the recent English Court of Appeal decision in *Gunton v Richmond Borough Council*,[40] I think that the balance of judicial authority favoured the view that the employer's repudiation *is* effective to terminate the contract, whether the repudiation is accepted or not. *Gunton's* case hardly constitutes the last word on this issue, on which there is no authoritative decision from our Court of Appeal.

Buckley LJ concluded, I think obiter, that the ordinary contractual doctrine applies, and that the employer's repudiation, standing alone, does terminate the *contract*.

According to Brightman LJ, the *relationship* of master and servant goes: "what has been determined is only the status or relationship". But it does not follow "that every right and obligation under the contract is extinguished."

According to Shaw LJ, dissenting in his reasons although not from the conclusion reached by the other Lords Justices, the more traditional, and in my respectful opinion the better, view is sound: "there can be no logical justification for the proposition that a contract of service survives a total repudiation by one side or the other."

[37] *Price v Guest, Keen and Nettlefolds, Ltd* [1917] 1 KB 781, 784 (affirmed, [1918] AC 760); *Consolidated Press Ltd v Thompson* (1952) 52 SR (NSW) 75.

[38] *In re Rubel Bronze and Metal Co Ltd and Vos* [1918] 1 KB 315.

[39] *Howard v Pickford Tool Co* [1951] 1 KB 417, 421.

[40] [1980] 3 WLR 714.

All three views were arguably obiter, given that at least Buckley LJ was prepared to hold that the employer's repudiation had been impliedly accepted by the plaintiff. Further, Shaw LJ's approach involves a new distinction which is of questionable correctness — a distinction between *total* and other sorts of repudiation.

Stoppages

Usually, employees' stoppages will not reveal an intention to abandon their contracts: the Courts will readily infer that their intention was to resume work with the same employer irrespective of whether their stoppage succeeds or fails in accomplishing the employer's acquiescence in their demands.[41]

So, unless they give notice terminating their contracts on due notice falling in on the day of the strike (which is unlikely in practice), the employer will, if he judges that mass dismissals represent an appropriate tactic, have to take the positive action of issuing summary dismissal notifications. Such dismissals will be lawful dismissals at common law. On what is submitted to be the better interpretation of s 117(1), they might lead to numerous personal grievance claims, but nothing which the Arbitration Court has said when deciding such claims encourages the view that such claims would have any chance of success.

Suspensions

What about suspensions? The Courts have set their face against implying a right to suspend (other than on full pay) into contracts of service.[42] Various statutes in the public and quasi-public sector expressly confer a right to suspend, if varying conditions precedent are met.[43] There is nothing comparable in the ordinary instrument governing an industry in the private sector. It follows that if an employer suspends without pay he is acting unlawfully.

There is, however, s 128 which since 1976 has provided: "Where there is a strike, and as a result of the strike any employer is *unable* to provide for any workers who are in his employment *and not on strike* work that is normally performed by them, the employer may suspend their employment *until the strike is ended.*" This disentitles validly suspended workers from receiving any remuneration, but on resumption of employment the "employment shall be deemed to be continuous", thus preserving seniority entitlement and rights under any contributory pension schemes.

There is a right of appeal to the Arbitration Court but that Court has held, correctly I think, that it has no jurisdiction to review the merits of a suspension, and can interfere only if the employer's action exceeds the limitation set by the words I have italicised, eg if the employer, despite his protestations, was able to provide the non-striking workers with their normal work.[44]

To revert to the case of unlawful suspension of strikers at common law, it may be noted that the Court has taken the view that while a suspension is not a dismissal, it is in the nature of a dismissal.[45] It follows that a dispute over the propriety of mass suspensions could be validly referred to a Disputes Committee as a "dispute of rights", utilising the standard procedure inserted into all awards and registered collective agreements by s 116.

No employer can afford to dismiss the possibility of legal proceedings as an unrealistic chimera, because he may find that he is fighting an uphill battle against the collective power of the Union in a Disputes Committee or on appeal to the Court — a battle which he may lose solely on the ground of having acted unlawfully.

Claims for lost pay

Sometimes the principal dispute ends and another one immediately blows up because the employer refuses to pay wages lost during the strike. What are his legal obligations, assuming that he is

[41] See eg *Sanders v Ernest A Neale Ltd* [1974] 3 All ER 327 (NIRC) where Sir John Donaldson explained *Hill's* case as an example of the rare situation where a dismissal leaves intact the relationship of mutual confidence between employer and employee. *Hill v Parsons* [1971] 3 All ER 1345.

[42] *Hanley v Pease and Partners Ltd* [1915] 1 KB 698, 705.

[43] See eg, the Secondary and Technical Institute Teachers Disciplinary Regulations 1969, reg 5(1) and *Furnell v Whangarei High Schools Board* [1973] AC 660; and reg 64A of the Public Service Regulations 1964 and *Elston v State Services Commission (No 3)* [1979] 1 NZLR 218.

[44] See *Waitaki NZ Refrigeration Ltd v NZ Meat Processors etc IUW*, [1977] ICD 149; *Canterbury Rubber Workers IUW v Firestone Tyre and Rubber Co Ltd* [1977] ICD 53; *Wellington District Woollen Mills IUW v Feltex Carpets (NZ) Ltd*, [1978] ICD 59; *Whitehouse v Ford Motor Co Ltd* [1978] ICD 287.

[45] *Re Appeal by Wellington District Boilermakers etc* (1972) 72 BA 3255.

not prepared, or cannot afford, to pay up in full? Let us assume that a collective stoppage of work has occurred, without complicating dismissals or suspensions. In the ordinary case the old maxim "no work, no pay" indicates the result, providing that we understood "no work" to mean that the workers have *neither* worked *nor* shown their readiness and willingness to work. There will have been a "default" in terms of the standard clause permitting the employer to make a "rateable deduction from the weekly wage of any worker for any time lost during the worker's sickness or default."

Difficulties arise if the employer feels obliged to shut down his operation in consequence of his inability to carry on. Can the workers claim that as from that point onwards they were ready and willing to work but were prevented by the employer from doing so? The answer is in the negative, even if readiness and willingness is proved.

In a 1971 case[46] Blair J stated that there is a principle that "employers are not liable to payment for periods of no work when the reason for there being no work cannot be said to be the employer's responsibility." The majority of the Court considered that the employer's decision not to carry on operations was the direct result of a series of actions by the workers who carried out restrictive practices contrary to the award. "It follows that the workers cannot found a claim for payment of wages for a period during which they were not working: *such a state of affairs having been caused by their own actions*" (emphasis added). In both this and a 1973 case[47] management had decided to close down their respective freezing works.

The Court has thus accepted the view that it is proper to examine the whole factual background to a closure: if the closure is then held to have been justifiable on the facts, the employers are held not "responsible" for that closure, even although a management decision was its immediate cause.

In two more recent cases[48] the Court has accepted the authority of *ANA Airlines Commission v Robinson.*[49] Mr Robinson was a pilot employed by TAA, which was controlled by the Commission. A series of rolling stoppages was being carried out by pilots. Mr Robinson was rostered for duty and, when asked if he was prepared to carry out his duties replied that he was, subject to the qualification that if the association later "called him out" he would then have to stop. This was not accepted, and he later sued the Commission for damages equivalent to his loss of pay, but the action failed. It was held that it was not enough for him to say that he was ready and willing to perform his contract of service according to its terms, provided that another term was added to it.

This principle was applied in *Northern Drivers Union v Mobil Oil NZ Ltd.*[50] Storemen at Mobil's Auckland installation disregarded the personal grievance procedure and withdrew their labour, demanding that a dismissed storeman be reinstated. They later declared the product valves "black" when management reopened them. When the drivers were instructed to load their tankers they refused to load, and they were told that this action amounted to strike action, and that rateable deductions would be made from their wages. The drivers did however express a willingness to comply with "reasonable" orders and to carry out normal duties, but only if these did not include obeying an order to draw a product from one of the blacked valves.

The Court held that they could not make that stipulation which would unilaterally vary their respective contracts of service. "We are satisfied", said the Court, "that there was a strike within the meaning of s 123, and consequently that the defendant was not in default when it failed to pay the drivers for the time lost by them."

I have no doubt that this was the correct result, but with respect it is strange to find the Arbitration Court, in the cases which have just been mentioned, placing weight on the point that there was a "strike" within s 123. While that inquiry is tempting, it is a red herring. The real question is whether there has been a "default" in terms of the relevant industrial instrument. And "default" always connotes loss of working time. By contrast, there may be a technical "strike" *without* loss of working time, eg if there is wilful disobedience to lawful orders but the employers permit other work to be done which fills up the ordinary working hours. Or there may be a "go slow" which will be a "strike" because the normal performance of the employment is reduced.[51]

That there is no necessary linkage between the existence of a "strike" and a "default" is illustrated

[46] *In re NZ Meat Processors etc Award* (1971) 71 BA 596, 599.

[47] *In re NZ Engineering Union and Shortland Freezing Co Ltd* [1973] 1 NZLR 326 (Ct Arb).

[48] *NZ Engineering etc IUW v NZ Steel Ltd*, [1978] ICD 131; *Northern etc Drivers IUW v Mobil Oil NZ Ltd*, 29 August 1980.

[49] [1977] VR 82.

[50] Note 48, supra.

[51] *Te Miha v Dunlop (NZ) Ltd* (1975) 75 BA 8829.

by *Shell Oil NZ Limited v Canterbury Drivers IUW*[52] (where one advocate successfully combated two experienced counsel!). The Award contained the usual rateable deductions clause. BP drivers had voted to take industrial action over a safety matter affecting BP alone. Shell Oil Co drivers were instructed to deliver petroleum products to the strike-bound BP outlets, in accordance with a well-known arrangement that exists between the oil companies to rescue each other, if one is hit by a stoppage. When they refused, they were told they were in default and deductions were made.

But Shell then made a fatal mistake. It refused to permit its drivers to continue with their normal duties. In fact there was "plenty of other work for them to do". The men lost wages because they were not permitted to carry out work. Therefore they were entitled to be paid during the period that they were off work.

The Court made no reference to whether the men were on "strike", and rightly. The "default" clause was held to operate only if the idle time was due to circumstances brought about by the worker.

To summarise: if no time is lost, there is no "default", although a "strike" may have taken place; if (as is more usual) time is lost, one must ask whether, although a "strike" may have occurred, this lost time was due to the workers, in which case rateable deductions may be made, or attributable to a managerial decision not in turn caused by the workers, in which case wages must be paid.

Deductions

An employer must be carefully advised as to the time at which he may lawfully make deductions. The Wages Protection Act 1964 lays down a prima facie rule in s 4(1) that "the entire amount of wages payable to any worker shall be paid to the worker in money when they become payable." Deductions for any lawful purpose are permissible by consent: s 7(1). Rateable deductions in respect of "defaults" will be made without consent! But s 11 provides that the Act does not make it unlawful to "comply with any provision of any award. . . ."

Thus deductions are lawful from the pay packet covering the weekly or fortnightly pay period during which the default occurred, because the award permits them, but not outside that pay period. This rule has a comparable application to contracts of service, as the Bank of New Zealand discovered to its cost after its bank officers went on strike for two days. They were told that two days' pay would be deducted. Their salaries were paid through a centralised computer, and it was impossible to alter the computer programme to make the deductions during the fortnightly pay period in which the strikes occurred. The officers succeeded in obtaining a declaration that the deductions were unlawful.[53]

Injunctions

In a contest between an employer who is strike-bound, or who apprehends a stoppage that may paralyse his operations, and unions or union officials, the practice of the Courts in relation to the grant of interlocutory injunctions heavily favours the employer.

Why are so few actually granted? The answer is that so few are applied for. From a practical point of view, the chief factor restraining employers is the consideration that an injunction will be inflammatory and sometimes counter-productive. There are also procedural problems in ascertaining who the appropriate defendants are when the employer knows next to nothing as to who said what at some stopwork meeting, and in effecting service of Court documents upon them when they are elusive.

(i) *The economic torts*

An employer, if so minded, will probably be able to utilise one of the three main "economic torts", or the dubious fourth tort. In a "political strike" situation he may in addition be an eligible plaintiff to seek an interlocutory injunction because he reasonably apprehends the commission against him of the statutory tort created by s 119B(3) of the Commerce Act.

The application of one or more parts of this complicated body of rules to complex facts, not fully before the Court and stated in affidavits whose deponents have not been subjected to cross-examination, is so problematic that in my view it will usually matter little whether an applicant for an interlocutory injunction must show a prima facie case, as the traditional approach would have it, or merely, as the House of Lords would have it in *American Cyanamid Co Ltd v Ethicon*,[54] that there is a "serious question to be tried", before the High Court will move on to consider the balance of convenience issue. It will matter little because almost all employers will be able with a little ingenuity to

[52] [1978] ICD 111.

[53] *McClenaghan v Bank of New Zealand* [1978] 2 NZLR 528.

[54] [1975] AC 396.

satisfy the sterner test, given that the armory of possible causes of action available to them is so well stocked.

(ii) *The "fourth tort"*

Perhaps the fourth tort deserves a few words. In *J T Stratford & Son Ltd v Lindley*,[55] which rested squarely on the tort of inducement of breach of contract, and which is also the leading authority for the traditional approach mentioned above, some remarks by Lords Reid, Pearce and Radcliffe favoured the existence of a fourth tort. But they were either dicta or clearly alternative and subordinate grounds of decision.

Lord Denning was more enthusiastic in *Torquay Hotel Co v Cousins*[56] and based the existence of this new head of liability on his reinterpretation of *Rookes v Barnard*,[57] in effect subtracting the conspiracy element from the facts which gave rise to that litigation. In *Acrow Ltd v Rex Chainbelt Inc*[58], Lord Denning gave full birth to the new infant, although the actual ratio of the case is something quite different and much narrower. He said:

> "I take the principle of law to be that . . . if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully. He is liable in damages: and in a proper case an injunction can be granted against him."

In New Zealand, Perry, J has held, but without the benefit of opposed argument, that "there is a tort of unlawful interference with the business of the plaintiff".[59] His Honour did not in terms even insist that the interference must be *deliberate*.

If this tort does exist, its possible applications are many. In particular there is no need to prove a combination; and one can deliberately interfere with another's business in many ways other than by disrupting, or causing a breach of, some commercial contract to which he is a party.

(iii) *Section 119B(3) Commerce Act 1975*

The statutory tort in s 119B(3) of the Commerce Act was designed to benefit the innocent victims of "political strikes". They may bring action if they have suffered loss or damage as a result, and clearly may rely upon the subsection as a basis for obtaining an interlocutory injunction. I know no examples of its use being attempted.

[55] [1965] AC 269.
[56] [1969] 2 Ch 106.
[57] [1964] AC 1129.
[58] [1971] 2 All ER 1175.
[59] *Emms v Brad Lovett Limited* [1973] 1 NZLR 282.

Conclusion

It is a well-known characteristic of "labour injunctions", both in England and in New Zealand, that if interlocutory injunctions are granted, this is almost always the end of the litigation. If the strike is stopped, the employer will have little incentive in pursuing damages in a full trial, especially since the strike will be a thing of the past by the time of the trial, and since damages will be typically difficult to quantify.

Thus the bold employer will probably rest content with an ex parte interlocutory injunction, arguing that, if this is not granted, his damage will be "irreparable".[60] The test that must be satisfied before an interlocutory injunction will be granted is uncertain.[61] The problem warrants a brief comment even if I am right in my view that its proper solution will hardly ever be of practical consequence.

Our own Court of Appeal has indicated in an economic tort case that the plaintiff must show a "strong prima facie case".[62] In the English labour injunction cases it can be argued that there is a movement of judicial thought back to the *Stratford v Lindley* view that a prima facie cause of action must be demonstrated, since the scales are otherwise too heavily tipped against the defendants.[63]

The latest English decisions are, however, now unhelpful in New Zealand, because some time ago the English Parliament inserted a new subsection into the Trade Unions and Labour Relations Act 1974 (UK), and that has been held to modify the principle laid down in *American Cyanamid*. It cannot too strongly be stressed that that was a patent case,[64] in which the peculiarities of labour injunctions were not, to say the least, uppermost in their Lordships' minds.

With regard to the balance of convenience, defendants in collective labour disputes have had little

[60] See Rule 400 (1)(a) of the Code of Civil Procedure.
[61] There is a comprehensive discussion of the authorities in B V Harris, [1979] NZLJ 525. Cf also *Otaki Borough Council v Sinmac Construction Ltd* (unreported, Hardie Boys J, 30 May 1980), noted in [1980] Recent Law, 373.
[62] *Northern etc Drivers etc IUW v Kawau Island Ferries Ltd* [1974] 2 NZLR 617, 621, McCarthy P per curiam.
[63] See *Star Sea Transport Corporation of Monrovia v Slater* [1979] 1 Lloyd's Rep 26 and *N W L Ltd v Nelson and Woods* [1979] 3 All ER 614 (HL).

success in their attempts to persuade the Court to take their interests fully into account. The employer can invariably point to the economic loss which the union's or the workers' industrial action is inflicting, or will imminently inflict, upon him. Often, the existence of this harm is undeniable, as where the employer is bound by a contract with definite time limits, and stiff penalties for late performance.

At the same time the Courts have taken a very narrow view of the harm likely to be suffered by the defendants as a result of the granting of interlocutory relief. An analysis[65] has shown that English Judges have commonly stated that the effect of the grant would be merely to delay the imposition of the industrial action for a few months, should the plaintiff fail to establish his case at full trial, whereas the plaintiff would suffer irreparable loss if the interlocutory relief were not granted.

Doubts as to the ability of the defendants to pay any damages awarded at trial also favour the plaintiff being awarded an interlocutory injunction. The Courts also tend to assume the ability of the union to impose sanctions for indefinite periods of time. In fact the longer the period the union has to keep up the pressure, the more difficult it will be for the union to carry its members along with it, a fortiori if the precipitating cause of the proposed stoppage is no longer operating.

Most important of all, the Courts reason, with perfect technical correctness, that if the union is enjoined the damage it will suffer from delaying its strike action cannot be readily quantified into monetary terms; and what is loss of face when balanced against the dire economic loss facing the plaintiff?

It is for these reasons that I have submitted that the practice of the Courts favours plaintiffs. If there are comparatively few "labour injunction" cases in New Zealand, where no "golden formula" protects union activity "in contemplation or furtherance of a trade dispute", the explanation does not lie in the law or in procedural difficulties. It must be accounted for by the fact that many employers remember that they will have to live with the unions when the present troubles have subsided, and by the fact that the enforcement of defied injunctions involves attachment and imprisonment, and tends to create martyrs.

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[64] See *N W L Ltd v Nelson and Woods*, n (63), supra. It is arguable that the Privy Council's adoption of the *American Cyanamid* test in *Eng Mee Yong v Letchumanan* [1979] 3 WLR 373 resolves the issue once and for all. But that was a case involving a dispute between a registered proprietor of land and a caveator, and it is submitted that the Privy Council's decision can be held decisive for labour injunctions only if the dubious contention that labour injunctions do not warrant being treated as sui generis is accepted by the Courts. It is that contention which raises the basic issue for present purposes.

[65] In the excellent two-part article by S D Anderman and P L Davies, "Injunction Procedure in Labour Disputes", (1973-4) 2 Indust LJ 213; 3 Indust LJ 30.

LEGAL LITERATURE

The Law of Town and Country Planning by Keith Robinson (Butterworths, 1981, pp xlii and 465). Price $58.50. Reviewed by *Keith Berman* LLB, Dip TP, MNZPI.

It is 13 years since the publication of the last edition of the author's book, a work long since overtaken by legislative change and other publications on the same branch of law. It is therefore pleasing to find that the 1981 Edition not only is a work of quality but also fills a gap not occupied by those other texts. The main text states the law as at March 1980 but an addendum sets out the 1980 Amendment Act changes.

A strength of the book for the practising lawyer and planner lies in its extensive use of references to cases and published works not found in the New Zealand Law Reports or the New Zealand Town Planning Appeal Reports but in such publications as Recent Law, Current Law, Town Planning Quarterly, Ministry of Works Digest of Cases, Ministry of Works Planning Bulletins, and People and Planning. While official reports tend to be confined to legal points, the other references help to clarify the legal principles by showing their everyday application.

There are advantages and disadvantages in both the loose-leaf annotated statute text book format and the more traditional topic-by-topic approach. The author has chosen the traditional approach and discusses topics in chapters which cover the sections of the Act, the relevant Regulations, the procedure, and the case law. The bringing together of those various elements assists the researcher to absorb a topic comprehensively and with clarity. On the other hand, it becomes desirable to have on hand a copy of the Act so as to gain an overview. Also the changes wrought by new case law must impose a pressure on the author and a demand for a future new edition rather sooner than 13 years hence.

Nowhere is the author's practical approach to his topic more apparent than in Chapter 2 which discusses what the author describes as "Principles of Town and Country Planning". This phrase, which implies an inappropriate rigidity, has been little used since the Board ceased being statutory arbiter of such principles. However the reader is warned that cases turn on their facts and that planning is an evolving process. In that chapter there is a gold mine of useful summaries with reference to cases and publications on a wide variety of topics. For example, the following is a random sampling of the topics considered on just three pages of that chapter — "grocery/dairy in residential zone, harbours, high-rise, highways, historic interest, home occupations, hostels, housing, incinerator, landscaping . . .". The paragraph on "subdivision of rural land" has over 40 case references. If after researching such a collection of references the lawyer is unable to find a dictum to support his client's case his client might be best advised to discontinue. The Chapter provides just the right kind of practical example to re-assure a timorous Council that what your client seeks to do has been done before without catastrophic results.

In addition to the thorough coverage of the Town and Country Planning Act the book provides a full and useful chapter on the Tribunal's jurisdiction under the Local Government Act, The Water and Soil Conservation Act and the National Development Act.

The clear setting out of the book and grouping of topics is enhanced by a full table of contents, table of cases, table of statutes, and index.

I already own a sound text on Planning law and I commenced reading this new book in the expectation that I would find it surplus to my needs. I was happy to discover that, contrary to my expectations, Robinson's Third Edition fills a gap in a way that makes it complementary to existing texts. The good shepherd's flock may not permanently stray but will also have much to gain from these green pastures.

Sentencing — edited by Hyman Gross and Andrew von Hirsch (New York, Oxford University Press, 1981). Reviewed by *W A Young*, Director of Department of Criminology, Victoria University of Wellington.

This is a useful book of edited readings in a number of areas related to punishment and sentencing. Divided into seven sections, it comprises 28 articles from various sources. Some of these are derived from classical statements of problems and issues in defining the nature and scope of punishment and in controlling the sentencing process. Others are less well-known and of more dubious quality. Overall, however, the book provides a number of articles of

relevance and importance to anyone interested in this field.

The book begins by discussing some of the more basic general principles of punishment. It then considers, from a variety of perspectives, the "individualised sentence" which is based upon the notion, most popular in the 1960s, that the purpose of punishment is to rehabilitate the offender. It also reviews the ethical and practical problems posed by the preventive confinement of offenders deemed to be dangerous. The next two sections discuss the value of punishment as a deterrent, the prevention of crime by the detention of offenders, and recent moves, particularly in the US, to reintroduce what has been called "commensurate deserts" or "proportional punishment" — the old-fashioned notion that the punishment should fit the crime.

Finally, there are a number of more recent articles which outline current attempts and suggestions, especially in the American context, to limit or control judicial discretion in sentencing and thereby to make sentencing more equitable and consistent. These include the introduction of sentencing guidelines, the incorportion of the so-called "presumptive sentence" into the legislation of several American states, and the establishment of Sentencing Commissions to fix appropriate sentence levels.

This is not a book which the practitioner will wish to use in day-to-day criminal practice. However, it is a useful book for students of the criminal justice system, and practitioners who are interested in the problems of punishment and sentencing and in the development of overseas thinking will find it worthwhile. Those intending to make submissions to the Penal Policy Review Committee recently set up by the Government may also find it a helpful book to dip into.

Cases and Materials on Industrial Law in Australia — by R C McCallum and R R S Tracey (Butterworths, Sydney, 1980. Pages xxviii and 652). Reviewed by *A Szakats*, Professor of Law at Otago University.

In this thick volume the authors present a complete outline of Australasian industrial law. Their method is by brief introductory notes followed by problems and substantial extracts from pertinent judicial decisions. Part One deals with settlement of disputes and the status of trade unions, while Part Two is devoted to the problem of industrial injuries.

An extensive overview of the federal system of industrial regulation occupies about half of the book (330 pages). The discussion commences with the origins of the system. It examines the constitutional power of the Commonwealth to settle interstate labour disputes and the role of federal employers' respectively workers' organisations in representing their members before the Conciliation and Arbitration Commission as well as before the Industrial Division of the Federal Court of Australia which has taken over the function of the now defunct Industrial Court. The requirement that the dispute be industrial is given a lengthy treatment followed by the contents of the award. The jurisdictional problems of what is a genuine interstate dispute, the ambit of a federal award, and its pre-eminence over state awards are analysed in depth.

Chapter 10 on enforcement deserves special attention. It describes the law relating to strikes, lockouts or any restrictions upon work called bans. It was a common practice to insert a bans clause in awards forbidding any organisation or party bound to "be a party to or concerned in any ban, limitation or restriction upon work". As the law has been amended bans clauses may now only be placed in awards by presidential members of the Commission. The procedure is that if a strike or work ban occurs breaching the bans clause, the relevant employer, employers' organisation or the Industrial Relations Bureau may ask the presidential member to look into the matter. If the member requested fails to settle the dispute or to prevent the continuation of the conduct, the party may ask for a certificate stating that proceedings may be taken in the Federal Court to fine the Union. The fine can be up to $500 — for each breach of the award, although the practice has evolved that successive breaches arising from a single course of conduct will be deemed to constitute a single breach.

This provision clearly implies that strike is not illegal or prohibited in Australia, and in order to make it unlawful the insertion of the bans clause followed by a breach of the clause must be prerequisites. Although the authors talk about the employer's proceedings against the Union, the wording of the relevant section (s 33 of the Conciliation and Arbitration Act 1904 as amended) clearly refers to any party and should equally apply to a lockout situation. There has not yet been any judicial decision on this point.

Another important part of the book deals with principles of wage fixing, quoting extracts from Adam Smith, *The Wealth of Nations*, a letter from Ricardo to Malthus, Routley, *Theory of Wage Fixation*, and a lengthy article by P H Douglas, "The Economic Theory of Wage and Regulation" (1937-38, 5

Univ of Chic LR 184) followed by readings from Parliamentary debates on the constitutionality of national wage cases. Court decisions on wages complete this part arranged around the topics of basic wage, standard hours, margins for skill, over-award payments and wage indexation. The decisions cover the period from 1907 to 1978. The wage fixation principles as pronounced in September 1978 by Sir John Moore, the President of the Arbitration Commission, are especially noteworthy.

The State systems receive only a cursory note pointing out the differences and similarities. New South Wales, Queensland, South Australia and Western Australia have their own systems of conciliation and arbitration with an Arbitration Commission empowered to make state awards. In Victoria and Tasmania Wages Boards operate.

The status of trade unions, their legal personality, rights and obligations have always posed complex questions for the judiciary. As Australian trade unions as well as those in New Zealand have their origin in Britain, extracts from, and references to, well known English cases (*Hornby v Close, Taff Vale Railway v ASRS, Kelly v Natsopa, Bonsor V Musicians Union*) open the discussions. From the late 19th century, however, different development occurred and problems peculiar to Australia are analysed in greater depth. Apart from such matters as a trade union's perpetual succession, and its personality distinct from that of its fluctuating members, the authors examine cases on the criminal and Civil liability of unions. Controls over unions and union security as against the rights of the individual present again fundamental difficulties with contradicting principles: the right to work, the right to join and to remain a member of a trade union, and the right to stay out of the union.

Part Two on industrial injuries demonstrates that this grave social and economic problem is still being tackled in Australia by common law tort actions and worker's compensation. Safety legislation plays a limited role but social welfare and social insurance Statutes have no great influence. At this juncture it could be interjected that the accident compensation scheme even in New Zealand has taken a declining turn due to recent amendments to the Act.

A good index and an extensive table of cases complete the book, which will be most useful as a compilation of judicial decisions and supplementary material to study the complexities of Australian industrial law bedevilled by its constitutional problems. The authors have done a laudable job in selecting relevant material and arranging it in a logical order. Apart from writing concise introductory notes and adding problem-questions to answer, the authors modestly stay in the background and let the cases speak for themselves. References to other published works on the topics discussed assist the eager reader who wishes to further his or her knowledge.

In one instance, nevertheless, the authors, or rather one of them (R C McCallum) abandons the impersonal presentation style and becomes lyrical. He describes a visit to Outrimm and Jumbunna, the scene of the coalmine where the strike giving rise to the Jumbunna case occurred. He was moved so much that he wrote not a legal essay but a poem which is included in the book. It has no legal significance but conveys the gloomy atmosphere of the abandoned mine and helps one to understand the background of the judgment discussed earlier. A poem by a legal writer is unusual in a textbook, but it does not detract from the value of the serious material on industrial law competently presented.

EMERGENCY MOMENTS

INTERIM INJUNCTIONS

By C B CATO, Barrister

Stymieing a vexatious winding-up petition.

The Problem

It sometimes becomes necessary urgently to prevent or restrain a person from taking some action or actions which may prejudice one's client. A common situation relates to bankruptcy or winding up petitions. For example, A & Co Ltd informs its solicitor that B, a former director, is claiming moneys allegedly owing under a severance agreement. A & Co Ltd informs its solicitor, however, that payment has not been made because, unknown to A & Co Ltd, B had been in breach of various fiduciary obligations to the company, and had allegedly accepted bribes. A & Co Ltd instructs its solicitor that diligent performance is a prerequisite to a valid entitlement for severance pay. Its solicitor is also of this opinion but he has not issued a writ since the company has been somewhat reluctant to sue for damages on account. A notice however under s 218 Companies Act 1955, has now been served on A & Co Ltd as has a winding up petition. No undertaking has been forthcoming from B's solicitors and A & Co Ltd are afraid that advertising the petition will seriously affect the Company's credit and reputation. Its solicitor is instructed to take all steps necessary to prevent advertising immediately, and at the same time to commence action for the various breaches of fiduciary duty.

The remedy

An interim injunction should be sought pursuant to Rule 462 of the Code. The law on interim injunctions is set out in Sim & Cain, Rule 462; paras 86(1) and 86(3), and reference should be made to *Phillip Morris (NZ) Ltd v Liggett & Myers Ltd* [1977] 2 NZLR 35.

Recent decisions have suggested that High Court Judges are prepared to follow the approach in *American Cyanamid v Ethicon* [1975] 1 All ER 504. For example Pritchard J in *Welcome Foundation Ltd v Peak Davis & Co* (A 542/80) High Court, Auckland, 11 September 1980. Savage J in *Weightwatchers International Incorporated v Quality Bakers of New Zealand Limited* (A 163/80) Wellington Registry, 19 June 1980.

When deciding whether or not to issue an interim injunction the Courts will consider:

(a) whether there is a serious question to be tried;
(b) whether the plaintiff's undertaking as to damages is sound;
(c) whether the plaintiff can be adequately compensated in damages;
(d) other competing factors in assessing the balance of convenience, including in an appropriate but perhaps exceptional case the strength of the parties' claims.

It may be necessary in certain cases where irreparable injury might be incurred to proceed ex parte under Rule 400 of the Code. This would probably be the case in an application like the present. In ex parte applications full and frank disclosure of all relevant matters including authorities is required; Barker J in *A W Bryant Limited v Hill & McDonald* (A 1860-79) Auckland Registry 1980. Failure to so disclose may lead to an order being rescinded.

Documents required

The documents required are:

(a) An undertaking as to damages from the client. There is no set form, but the undertaking must be addressed to the Court and signed by the client. In it he must undertake to indemnify the defendant against any loss or damage arising from the interim injunction if a permanent injunction is not granted.
(b) A notice of motion (either on notice or ex parte) for an order restraining the defendant in the form set out below.
(c) An affidavit from a responsible officer of the plaintiff broadly but sufficiently outlining the nature of the grievance and the basis for the claim set out in the writ. Some hearsay evidence will be inevitable, but in this regard consideration should be given to Rule 185 of the Code.

(d) A writ claiming damages for breaches of fiduciary duty, which should contain allegations sufficient to support a permanent injunction. Allegations that would be relevant in this case are (1) that the plaintiff's claims render the defendant's claim a disputed debt, (2) that the plaintiff will suffer harm to its credit and reputation if the petition is advertised, and (3) that the defendant's actions in moving for a petition or advertising a petition constitute an abuse of the process of the Court. If there is not time to prepare the writ, then at least a draft statement of claim should be presented to the Court. An injunction may be granted in an appropriate case before the Writ or other originating process is actually issued. (Spry: Equitable Remedies p 437. See Sim & Cain para 86/1.)

(e) An order in the appropriate form should be prepared ready for sealing and immediate service. See Form 33G in Schedule 1 of the Code.

Appearance

It will not generally be necessary to appear on an ex parte motion, but the solicitor concerned should take steps to discuss the matter with a senior Court officer to ensure that the application is placed before a Judge as quickly as possible.

PRECEDENTS

(i) Ex parte motion for interim injunction.

IN THE HIGH COURT OF NEW ZEALAND REGISTRY

BETWEEN

PLAINTIFF

AND

DEFENDANT

TAKE NOTICE that counsel for the abovenamed Plaintiff will move this Honourable Court for orders:

that until further order an Injunction issue against the Defendant restraining him by himself or his servants or agents or any of them from presenting to this Honourable Court a Petition for the winding up of the Plaintiff under the provisions of the Companies Act 1955, or alternatively from advertising any such petition.

UPON THE GROUNDS that the Plaintiff will suffer loss to its credit and reputation should the Defendant proceed to advertise or present a winding up petition AND UPON THE GROUNDS that the situation is one of extreme urgency AND UPON THE FURTHER GROUNDS appearing in the Statement of Claim and the affidavit filed herein.

DATED at this day of 19 .

To The Registrar of the High Court at

Certified pursuant to the Rules of Court to be correct.

This application is made in reliance on Rules 394, 398, 400, 462, 466, 468B of the Code of Civil Procedure. The attention of this Court is respectfully drawn to the memorandum of Counsel filed herein. [Or alternatively cite relevant authorities.]

Solicitor for the Abovenamed Plaintiff

This ex parte Notice of Motion for an interim injunction is filed by

Whose address for service is

(ii) Ex parte order for Interim Injunction.

INTITULING (AS ABOVE)

IN CHAMBERS

DAY the day of 19 .

UPON READING the writ of summons and statement of claim in this action and the notice of motion of the Plaintiff and the affidavits filed herein [and upon perusing the memorandum of Counsel filed herein] this Court hereby orders that:

[Recite the Order sought]

and further orders that this order contain the following undertaking of the plaintiff: [See Rule 468B]

DEPUTY REGISTRAR

AN INJUDICIOUS COMPILATION

By ANTHONY GRANT*

An Article in three parts concerning some of Her Majesty's Judges.

PART I

The appointment

Some get there by sheer hard work, and some despite the lack of it.

For instance, Lord Somers (Lord Chancellor 1697-1700) was able to dispense almost completely with sleep and thus able to work through the night to devote himself to his career and advancement.[1] In a similar way P B Cooke KC was said to immerse himself so thoroughly in his work that he would get "no more than three hours rest a night for a week before an important case began, preparing the answer to every point that could conceivably arise".[2]

Lord Halsbury, the Conservative Lord Chancellor, on the other hand, was not by repute the most conscientious lawyer. It was sometimes difficult to get him to read his brief. On one occasion when he was retained in an election petition, it was discovered by his juniors, the evening before the Commission opened, that he had neglected to take this elementary step. Unusually, for a Silk, he was placed by his juniors in a billiard room in company with his brief and the key was turned against him. Three hours later when a visit was made to see how he was getting on, he was found to be peacefully asleep on the settee with the brief being used as a bulky pillow![3]

Some have exceptional intellects: Lord Cairns lectured publicly at the age of eight in chemistry and by the age of eleven was writing articles for publication.[4]

Their backgrounds, if not impeccable, are usually orthodox. Sir John Denniston had a notoriously short temper. On one occasion he felt sufficiently provoked to say to his opponent in open Court: "If you say that again, I'll fling this (heavy ink-pot which he had by then seized) at your head". The Magistrate rebuked him and the "Otago Daily Times" ran an article on the incident. Denniston sued the paper for saying (amongst other things) that he had "foamed and raved in a manner that would have frightened the proverbial 10,000 devils out of their wits" and the case was "laughed out of Court".[5]

Mr Justice Alpers was expelled from the Teachers Training College in Christchurch for "insubordinate conduct" but was subsequently reinstated. He was also expelled from an art school but was not reinstated there, he having been quite pleased, so it seems, to be out of the place.[6] But few Judges have had the distinction of being elevated to the Bench after having been struck of the rolls for contempt of Court. The third appointment to the New Zealand Judiciary, Sidney Stephen, had suffered this ignominy although by the time of his appointment the Privy Council had reversed the decision and he had rejoined the Bar.[7]

The appointment can be attended by some unpleasantness although that is fairly rare these days. Violent protest occurred when Mr Justice Darling was appointed a High Court Judge on 27 October 1897. For nine days the country was in an uproar.[8]

When Baldwin appointed Thomas Inskip Lord Chancellor in 1939, Churchill remarked that Baldwin had necessarily to appoint a man of abilities inferior to himself while Michael Foot, the present leader of the Labour Party in England, gave wide currency to a quip that "no such surprising appointment has been made since the Emperor Caligula appointed his horse a consul".[9]

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* Barrister, of Auckland.

1 Godwin, *The Middle Temple*, 120.

2 *Portrait of a Profession* 176 per Sir Richard Wild CJ.

3 Heighton, *Legal Life and Humour*, 24.

4 Lord Birkenhead, *Fourteen English Judges*, 279.

5 J G Denniston, *A New Zealand Judge*, 61-63. (The author was the Judge's son).

6 His autobiography, *Cheerful Yesterdays*, 32.

7 *Portrait of a Profession*, 51.

8 *Lord Darling and his Famous Trials*, author anonymous. See also Walker-Smith, *The Life of Lord Darling*, and the chapter "A much criticised appointment".

Lord Birkenhead, on the day of his appointment as Lord Chancellor, woke to read *The Times'* statement that his appointment was "carrying a joke too far".[10]

The man who can be described with some confidence as New Zealand's most notorious Judge, Mr Justice Edwards, had a most unusual appointment. He was appointed a Judge in 1890, a short while before a general election. The incoming government disputed the validity of his appointment although he had by that time sold his practice and taken up his judicial duties. Edwards took the case right up to the Privy Council (NZPCC 204), where it was held that his commission to act as a Judge should be cancelled.

The end of his judicial career was as strange as was the beginning. Having been removed from Auckland to Wellinton and having made himself almost as odious to the Wellington Bar as he had to the Auckland Bar, he was asked to retire. He characteristically refused and it was not until the Government agreed to give him an extra $1,000 over and above his pension that he eventually went.[11]

Criticisms

When they are on the Bench, Judges are not assured of immunity from criticism. Viscount Haldane was described in the *National Review* as "a prodigious gas bag", an opinion which was obviously widespread since *John Bull* magazine wrote that "He can never say 'no' in less than 20 minutes!"[12]

In the run-up to the 1979 election, Lord Denning criticised "the misuse and abuse of power" by trade unions and others. Michael Foot saw red and obtained a lot of publicity for both himself and Lord Denning by saying that the latter had "made an ass of himself". But diarists can be even more savage than politicians: Harold Nicholson said of Lord Simon of Stackpole (Lord Chancellor 1940-45) "God, what a toad and a worm (he) is!"[13]

Usually the prestige of the office and the power of the Judges to commit for contempt of Court causes critics to be gravely muted but there will always be a fearless few willing to publish and be damned. The editor of the *Birmingham Daily Argus* was fined 100 pounds with 25 pounds costs by Lord Russell LCJ in 1900 for writing this candid piece about the same Mr Justice Darling referred to earlier:

> "The terrors of Mr Justice Darling will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from this impudent little man in horse hair, a microcosm of conceit and empty-headedness, who admonished the Press yesterday. It is not the credit of journalism, but of the English Bench, that is imperilled in a speech like Mr Justice Darling's. One is almost sorry that the Lord Chancellor had not another relative to provide for on the day that he selected a new Judge from the larrikins of the law. One of Mr Justice Darling's biographers states that an eccentric relative left him much money. That misguided testator spoiled a successful bus conductor. Mr Justice Darling would do well to master the duties of his own profession before undertaking the regulation of another. There is a batch of quarter session prisoners awaiting trial, who should have been dealt with at this assize. A Judge who applied himself to the work lying to his hand has not time to search the newspapers for indecencies."[14]

Historians can be unkind and so can academic writers. Heuston described Lord Brampton as "capricious, unfair and deceitful".[15]

Edmund Burke was much more picturesque. In a criticism of nisi prius lawyers (which presumably included judges as well as barristers) he said that their training was inadequate for determining large legal issues: "The rabbit which breeds six times a year cannot pretend to ascertain the time of gestation proper for the elephant!"[16]

Sometimes there has been a temptation to fight back. Lord Porter in a speech given in the debate in the House of Lords in 1952 was moved to say of

[9] Stevens, *Law and Politics — The House of Lords as a Judicial Body 1800-1976* (hereafter referred to as *Stevens*), 245.

[10] Heuston, *Lives of the Lord Chancellors 1885-1940*, 381.

[11] Dugdale, *Lawful Occasions*, 35.

[12] Koss, Lord Haldane, 96 and see *Stevens*, 218.

[13] *Diaries and Letters 1939-1945*, at 407.

[14] 82 Law Times Reports 534 (the Law Reports were protective of the Judge and did not print the article). See also *Law Guardian* 1979, 339.

[15] Op cit, 58.

[16] Three speeches of the Right Honourable Edmund Burke in the House of Commons and in Westminster Hall, 529-530.

academic lawyers that "if it were not for the mercy of God, they might be Judges themselves".[17]

Trouble with other judges

Even when disagreeing with each other, Judges usually are more than polite and it takes considerable provocation these days before candour is forthcoming.

In 1975 the highly idiosyncratic Judge who sat in the West London County Court, Judge McIntyre, had the ignominy of having one of his judgments overturned in the Court of Appeal, with counsel in whose favour it was given saying that not only could he find no authority in support of it but he could not even think of an argument which he could properly present to the Court of support it![18]

Scarman LJ's criticism of the judgment as being "very surprising indeed" and of the Judge as having "wholly misconceived the law" are nevertheless tame by comparison with the House of Lords' recent denunciation of Lord Justice Ormrod in *B v W* [1979] 3 All ER 83. Lord Edmund-Davies said that the Court had acted "irregularly and unjustly" (p 92) and Viscount Dilhorne in a judgment notable for its sustained invective described Ormrod LJ's decision as "astonishing" (p 90).

If there is to be criticism it is usually made in a softer manner. Lord Denning recently tarnished the memory of Mr Justice Ridley in the following way: "Mr Marshall Hall KC submitted . . . but that good argument was rejected by that lesser Judge Ridley who said, quite erroneously . . ." etc.[19]

If from time to time Judges do criticise each other, it is not common for them to do so whilst sitting together. In these circumstances ordinary decency dictates that considerable tact is required. Diplock LJ showed his mastery of the art in Hughes v Hughes.[20] In that case he sat with Denning LJ and Harman LJ both of whom gave judgments allowing the appeal. To the chagrin of Harman LJ, Lord Diplock's judgment consisted of the short sentence: "For the reasons given by my brother Harman I would dismiss the appeal".

A more pleasant technique was deployed by Lord Bramwell in a dreary equity case: "I have listened attentively for two days to the learned and lucid arguments of the very eminent counsel, without, unfortunately, being able to understand one of them; and I have listened to the profound and luminous judgments of my learned brethren with still greater attention, but I regret to say, with no better result. I am therefore, of the same opinion as they are, and for the same reasons".[21]

Judges sometimes object to this criticism from their peers. On an occasion in 1932 Mr Justice McHardie was rebuked by Lord Justice Scrutton, who commented tartly on a bachelor like McHardie displaying (as he had done in the decision being appealed) such an intimate knowledge of woman's underclothes. McHardie retaliated by proclaiming his intention of withholding any further notes of his cases from any Appeal Court on which Scrutton sat and the Lord Chancellor had to intervene to resove the unseemly dispute.[22] That incident had a most extraordinary sequel. Not long afterwards McHardie committed suicide and it was discovered that he had been gambling to the point of financial ruin. That his knowledge of female underclothing may not have been obtained dispassionately was indicated by the further discoveries that he had been keeping a mistress in the country and, in addition, there was a titled lady in London who claimed to be pregnant by him.[23]

But perhaps the saddest instance of judicial criticism concerns the celebrated case of Liversidge v Anderson [1942] AC 206.

Alone amongst the five Judges in the House of Lords, Lord Atkin declared that a Minister of the Government could not in wartime cause a subject to be detained under reg 18B of the Defence Regulations without showing that he had reasonable grounds for believing that he was justified in doing so. His criticisms of his fellow Judges as being "more Executive minded than the Executive" in allowing

[17] 117 Parl Deb, HL (5th ser), col 1109 (15 July 1952).

[18] *Portland Managements v Harte* [1976] 1 All ER 225 at 235b.

[19] *Imperial Tobacco Ltd v Attorney-General* [1979] 2 All ER 592 at 600g. An indication of Ridley's calibre is given in the incident recorded in Marjoribanks' *Life of Sir Edward Marshall Hall*. In a trial in 1900 Ridley declined to accept the evidence of a Mr Bottomley. "I can't believe this man's evidence" he said, to which Marshall Hall replied that "There is no reason why your Lordship should not believe this gentleman just as much as the plaintiff". The Judge then explained that he had "never heard of this man in my life!", p 131.

[20] Bar Library transcript 117a/1966 (CA). See Blom-Cooper & Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity*, 87.

[21] Heighton op cit, 78.

[22] See the account given in Montgomery Hyde's biography of Lord Birkett, 359-361.

[23] Ibid, 360.

the imprisonment had the result that Lord Maugham (who had presided over the Court) made a bizarre attack on him in a legislative session[24] and the Law Lords refused to eat with Atkin in the House of Lords or, at one point, even to speak with him.[25] Stevens records that may people felt that Lord Atkin never recovered from this treatment before his death in 1944 and that the shock robbed him of the urge to fight for new principles.[26] As Seneca said "It is a rough road that leads to the heights of greatness".[27]

In Part 2

Some Judicial Attributes
- (i) Plain speaking
- (ii) Great intelligence

Undesirable Habits

[24] Heuston, "Liversidge v Anderson in Retrospect" 86 LQR 45-46, 43.
[25] *Stevens*, 287.
[26] At pp 287 and 300.
[27] Epistulae ad Lucilium, Epis LXXXIV 13.