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Judicial independence in Malaysia

As part of the normal editorial this month two statements from the International Commission of Jurists and LAWASIA are published in full. The background to these two statements which express concern at charges being made against the highest judicial officer in Malaysia, can be found in the *Far Eastern Economic Review* for 9 June 1988. There has been a continuing tension, to use a neutral expression, between the Prime Minister of Malaysia Datuk Sari Mahathir Mohamed and the judiciary for some time. A personal letter from the senior judicial officer the Lord President Tun Mohamed Salleh Abas to the King and the other eight Sultans, reported to be in defence of the judiciary, is the alleged basis for the suspension of Tun Abas and his trial before a Tribunal on a charge of "misbehaviour" under the Constitution. An article by Tun Abas was published in the *New Zealand Law Journal* last year: [1987] NZLJ 250.

It has subsequently been reported that the six member Tribunal is to consist of the Chief Justices of Malaysia, of Borneo and of Sri Lanka, a Singapore Supreme Court Judge, and two retired Malaysian Judges. Of these last two, one is now Speaker of the Lower House of Parliament, having presumably gone into politics, and the other who retired from the bench at the age of 49, has resumed the practice of the law and is active in business.

That this action has been taken at all is disturbing on the face of it. It is hard to avoid the presumption that it is an *in terrorem* act, whether technically successful or not in the outcome, intended to cow the judiciary. Should it succeed it will call into question not only the independence and integrity of the Malaysian bench but also that of Sri Lanka and of Singapore, unless there is something more significant than appears at present. In a very real sense the members of the Tribunal themselves will be on trial before the bar of international legal opinion as much as Tun Abas will be on trial before the Tribunal.

P J Downey

Statement by Secretary-General of the International Commission of Jurists

It has been announced that a Tribunal is being constituted in Malaysia to make recommendations to His Majesty the King on whether the Lord President Tun Mohd Salleh Abas, who is the head of the Judiciary, should be removed from office. Meanwhile the Lord President has been suspended.

The International Commission of Jurists and its Centre for the Independence of Judges and Lawyers has sent the following message by telex to the Prime Minister of Malaysia, Datuk Seri Dr Mahathir.

"Your Excellency,

The International Commission of Jurists and its Centre for the Independence of Judges and Lawyers, which was founded in 1978 to promote and protect the independence of the judiciary and the legal profession in all parts of the world, have followed closely the suspension of the Lord President of the Supreme Court of Malaysia, Tun Mohd Salleh Abas.

In considering such a matter we have regard to the relevant principles of international law as well as to the Constitution and laws of the country concerned. Applying these standards we respectfully question whether any action of the Lord President constituted 'misbehaviour' or 'inability' within the meaning of Article 125(3) of the Constitution of Malaysia.

As we understand the situation, in recent months there have been tensions between the executive and the judiciary arising *inter alia* from judicial decisions unfavourable to the government, and from public statements by the government critical of the judiciary and certain of its decisions.

In this context the Lord President believing, after a meeting with all the Kuala Lumpur judges, that such

statements served to undermine the independence of the judiciary, took what would appear to be the only proper course open to him, namely to inform His Majesty Yang di-Pertuan Agong (by whom he was appointed) of his concerns in a private letter. According to a statement released by your office, it was this letter, to which His Majesty took exception, which resulted in the decision to suspend the Lord President and to appoint a tribunal to consider recommending his removal to the Agong.

We respectfully call your attention to the Basic Principles on the Independence of the Judiciary which were unanimously approved in 1985 by the General Assembly (A/Res/40/32), which called on governments to respect them and take them into account in their national legislation and practice (A/Res/40/146).

Principles 8, 9, 18, and 19 provide

"8 In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9 Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

18 Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19 All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards or judicial conduct."

We note that Article 125(3) of the Federal Constitution of Malaysia similarly limits the grounds for removal to "misbehaviour or inability".

Our organisations respectfully submit that the actions of the Lord President in communicating his preoccupations to the Monarch in order, in his view, to protect the independence of the judiciary, cannot constitute "misbehaviour". By communicating his concerns to His Majesty by a private letter, the Lord President clearly conducted himself in such a manner as to preserve the dignity of his office.

If, however, a tribunal pursuant to Article 125(3) and (4) of the Constitution is to be appointed to consider the removal of the Lord President, we urge that the tribunal should be composed of judges or former judges of equal status to the Lord President. It would be invidious for junior judges to make recommendations concerning the Lord President who, we suggest, should clearly enjoy a similar privilege to that of public servants in such matters (cf Article 135(1) of your Constitution).

We assume that the Lord President will be entitled to the usual defence rights, including the right to call witnesses, to be represented by counsel, and to a public hearing if he so wishes.

Please accept the assurance of my highest regard.

Respectfully,

Niall MacDermot
Secretary-General"

Statement by Secretary-General of Law Association for Asia and the Pacific (LAWASIA)

The Law Assocation for Asia and the Pacific is deeply concerned at the suspension from office of the Lord President of Malaysia, Tun Dato Haji Mohamed Salleh bin Abas, the highest serving Judge in that country.

The suspension of the Lord President, without specifying any charges constitutes a grave abuse of the independence of the judiciary and is a further serious interference with the judicial process in Malaysia.

The Basic Principles adopted by LAWASIA on the Independence of the Judiciary in the LAWASIA Region state:

> Judges should be subject to removal from office only for proved incapacity, serious criminal default, or serious misconduct, such as, in each case, makes the Judge unfit to be a Judge.

LAWASIA notes the provision in Article 125 of the Malaysian Constitution which empowers His Majesty the King to appoint a Tribunal and to refer any representations made in respect of a Judge to that Tribunal.

It is noted that in this particular instance, the Tribunal has not yet been constituted, yet the Lord President has already been suspended from office.

LAWASIA regards this suspension from office as an unwarranted interference with the independence of the judiciary in Malaysia.

LAWASIA notes that the only allegation made against the Lord President is that His Majesty the King was unhappy over a letter the Lord President sent to him and other State Rulers in response to allegations made by the Prime Minister publicly against the judiciary. LAWASIA requests that any charges against the Lord President be detailed and made public immediately and that a Tribunal be appointed to hear the charges, consisting of senior Malaysian and Commonwealth Judges of eminence, standing, integrity and equal in status to the Lord President as far as practicable.

LAWASIA further requests that the proceedings before the Tribunal be open to the public. LAWASIA notes that the Constitution is silent on this issue yet it is accepted universally that while there is no objection to such proceedings being in camera, if requested by the Judge concerned, the proceedings should be open to the public. LAWASIA understands that the Lord President has requested a public hearing.

Any action short of these immediate steps will give further support to the view, already prevalent in the region, that there is, in Malaysia, a determined effort to exercise political control over what has been to date a highly respected and independent judiciary.

David Geddes
Secretary-General
LAWASIA

Case and Comment

Agency — ostensible authority

It would seem to me that questions of agency often give rise to difficulty, not so much in ascertaining what legal principles are applicable but in applying those principles. I hope that this brief case note will demonstrate the point.

In *Barton v Shields* [1987] BCL 1319 the vendors had cancelled an agreement for sale and purchase because of the purchaser's default and had put the property up for auction. At the auction, the property was knocked down to B "as authorised agent". The identity of B's principal was not disclosed.

It transpired that B had exceeded the instructions of his principal in that he bid too much for the property. B had apparently got "carried away" in the excitement. So far as the principal was concerned therefore, there was no contract between him and the vendor and so far as the agent was concerned, there was no contract between the agent and the vendor.

The question of whether a contract of some kind existed or not was important in the context of whether the vendors owed the auctioneer a commission and if so being part of the expenses of the resale of the property, whether that commission was recoverable from the original purchaser. Wylie J considered that there was no contract and that no commission was therefore payable. The learned Judge considered that the act of the agent (in relation to the *amount* of his bid) was not within the scope of his actual or implied authority nor was it in the scope of his ostensible authority. The Judge referred to *Halsbury* (4 ed, para 820) and *Armagas Limited v Mundagassa* [1985] 3 All ER 795.

With respect, the case is not particularly satisfactory on the agency point. Wylie J did not state why the agent's actions were not within his ostensible authority. Further, possibly in reliance on counsel's citations, Wylie J only referred to the Court of Appeal's decision in *Armagas* (supra). The case went to the House of Lords ([1986] 2 All ER 385).

Presumably, the reason why the level of bidding was held not to be within the agent's ostensible authority was because the principal, being unidentified, could not have held the agent out as having any particular authority.

In *Armagas* (supra) an employee, who was known not to have general authority to enter into contracts on behalf of his shipowner employer represented that he had specific authority to enter into a particular charter. The charter was entered into. The charterers alleged that the shipowners were bound by the actions of the employee. This allegation was rejected both in the Court of Appeal and in the House of Lords, because the agent's own representation, that he had a specific authority, could not bind his employers.

Barton v Shields (supra) involved similar circumstances to the extent that any representation by the agent that he had authority to bid as he did could not bind his principal who had not held the agent out as having such authority (or indeed, any authority at all).

As Wylie J pointed out, it was possible that the agent might have been personally liable on the contract but this was negated by the fact that the agent clearly did not intend to contract personally. The vendor's only remedy would have been to sue for breach of warranty of authority or, if appropriate, deceit.

There will be occasions where a vendor will, in practical terms, be left remedyless no matter what the contractual provisions are. If there is no principal or if the principal is not bound by the actions of the "agent", and if the agent is impecunious or of no fixed abode or, in the case of rural land, is a foreign person who would have little hope of obtaining consent to the transaction, the vendor will have no effective recourse against anyone. It will not be worth trying to enforce the agreement against the agent nor will it be worth suing the agent for a breach of warranty of authority or in deceit. From the point of view of forfeiture, the payment of a deposit by the agent will prove to be illusory if the agent stops his cheque.

It could be stipulated in the Particulars and Conditions of Sale that there will be no sale to any purported agent unless the agent can provide the vendor or auctioneer with satisfactory evidence of authority. Such a provision might, of course, reduce the number of prospective purchasers.

Barton v Shields (supra) does not, in my view, break new ground on the agency point nor, with respect, is the decision particularly instructive. However, because agency questions often give rise to difficulty and because the facts of the case are not unusual, this note might be useful.

S Dukeson

Review of company decisions; plaintiff's choice of procedure

Bentley Poultry Farm Ltd v Canterbury Poultry Farmers Co-operative Ltd (1988) 4 NZCLC 64,263.

Leaving aside probate matters and habeas corpus applications a plaintiff seeking to commence proceedings in the High Court is faced with five possible courses of action: a straightforward statement of claim and notice of proceedings; a summary judgment application; endorsement onto the commercial

list; an application for review; or an originating application. While the jurisdictional limitations may preclude one or more of these options, there is very often an overlap and the plaintiff will have to decide which way to go. This decision may well be influenced by the length of time involved before the dispute is resolved. Complications may arise, however, where an inappropriate procedure is adopted, and the result may be even greater delay than originally contemplated.

A problem of this nature arose in *Bentley Poultry Farm Ltd v Canterbury Poultry Farmers Co-operative Ltd* (1988) 4 NZCLC 64,263; in an innocuous-looking interlocutory judgment, Holland J in fact covered some very important ground. The dispute had arisen because the plaintiffs, both shareholders in the defendant, had ceased trading with it and wished to surrender their shares for their true value in terms of s 7(3) and s 9(b) of the Co-operative Companies Act 1956 (the Act). The defendant decided to call a meeting to require the plaintiffs to surrender their shares for the amount paid up on the shares together with interest at 5% from the end of the preceding financial year. This course of action was based on the provisions of s 8(1) and s 9(a) of the Act. The plaintiffs brought an application for review of the defendant's decision and subsequently applied for an order under s 8(1) of the Judicature Amendment Act 1972 (JAA), prohibiting the defendant from going ahead with the meeting.

As to the appropriateness of the procedure adopted by the plaintiffs, Holland J expressed some reservations. Although not convinced that the issue between the parties involved the exercise of a statutory power as defined in the JAA, he considered the argument in favour of the proposition to be strengthened by virtue of the fact that it was the decision to proceed under s 8(1) of the Act which was being challenged. In the final analysis, however, he held that, whether by virtue of s 8(1) of the JAA or an interlocutory injunction,

> . . . the plain fact is that justice requires the delay of this meeting until after the legal issues involved can be considered. (64,265)

The refusal of the Court to be hampered by technicalities is commendable, but the truth of the matter is that a decision was required *at this stage* as to whether or not an incorrect procedure had been adopted – it would hardly do to allow the matter to proceed to a hearing on the merits, only for the plaintiff to be told that proceedings under the JAA were inappropriate. Holland J appeared to be equivocal – he was not convinced either way on the correctness of the form of the proceedings. Despite this, the order granted was one pursuant to s 8(1) of the JAA and the hearing contemplated by the Court involved an agreed statement of facts and possibly affidavits (see 64,266). It would therefore appear that the Court had accepted the applicability of the JAA procedure.

This raises two interesting questions. The first concerns what would have happened if it had been held that the matter should have been brought in the ordinary way. Clearly the statement of claim would have to be amended. The need for an interlocutory injunction would still be present, however, and it seems this could be granted by virtue of r 5 and the Court's inherent jurisdiction. While an interlocutory injunction has additional requirements not specified in JAA s 8(1), those would undoubtedly have been satisfied on the present facts.

Matters could possibly be simplified by introducing a specific procedure in the rules (similar to District Courts Rule 76) whereby the Court could permit proceedings begun in an appropriate way to be continued, with the necessary modifications, in the correct form. While transfer on and off the Commercial List is provided for (rr 446C, 446D, and 446K), there is no easy route between ordinary proceedings and originating applications or between ordinary proceedings and JAA proceedings (apart from the limited exception in s 7 of the JAA). Facilitating the passage between procedures would reduce the risk faced by plaintiffs of making a wrong decision and allow for speedier provision of justice.

The second question relates to the subject matter of the proceedings. In the past, the Courts have been wary of allowing applications for review to intrude into the area of company law. As Woodhouse P said in *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 at 707:

> Parliament could never have intended that any corporate body recognised by statute or owing its existence to a specific or general statute such as the Companies Act could have all its commercial operations subject to constant judicial review.

In *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, Cooke J, in deciding the right of the applicants to bring review proceedings, stressed the public law aspects of the case and made it clear (at 178) that the judgment was not directed to company law matters.

While it has been suggested that a distinction may be drawn between decisions made in furtherance of normal commercial functions and those concerning the constitutional relationship between the company and its members (see *Consolidated Enterprises Ltd v New Zealand Guardian Trust Co Ltd* unreported, High Court, Auckland, 13 December 1984, A1333/84, Casey J), it is difficult to draw the dividing line in the present case. Holland J thought the discretion given to the company by s 8(1) of the Act was a relevant factor (see 64,265), but that does not seem to be determinative in terms of the JAA. To fall within the ambit of the JAA, the decision would have to amount to the exercise of a statutory power. The decision to proceed under s 8(1) of the Act could be fitted into the definition of "statutory power" in s 3 of the JAA as follows:

> [The exercise of] . . . a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision . . . affecting . . . [t]he rights . . . or liabilities of any person.

The situation would be distinguishable from the *NZ Stock Exchange* case, where the power arose out of a contractual relationship. On the other hand, it could be said that the nature of the decision was essentially commercial

and that review would amount to interference in the conduct of a statutory body within its statutory sphere. This was Woodhouse P's premise in the *NZ Stock Exchange* case; here, however, it is far more difficult to avoid the specific wording of the JAA definition.

The mere fact of a decision's being "commercial" is no longer a guarantee of exclusion from the ambit of judicial review: see *R v Panel on Take-Overs and Mergers ex parte Datafin plc* [1987] 2 WLR 699. Ultimately, it seems that decisions by companies pursuant to a power conferred on them by a statute or their rules may well be subject to review. This would appear to be so regardless of whether the decision is a commercial one or a constitutional one, as long as the particular decision falls within "one of the carefully defined and limited categories specified" in the JAA (*NZ Stock Exchange* at 706-707).

Generally, as far as companies are concerned, there will be better remedies provided by company law. In *Consolidated Enterprises*, a resolution was challenged as contravening the articles of association and being unduly harsh and oppressive to the applicant. An application for relief under s 209 of the Companies Act 1955 would have been available to Consolidated as would have been an application for a declaration that the resolution was invalid, based on an infringement of the contract between the applicant and the company in terms of s 34(1) of the Companies Act. Likewise, in *Bentley Poultry Farm*, the jurisdiction under s 209 is probably wise enough to cover the conduct complained of and would, in addition, permit the Court to make an appropriate order for relief.

In most cases, therefore, an Auckland plaintiff would not choose to proceed under the JAA, which is unlikely to be any quicker than a s 209 matter on the Commercial List. In other centres, however, (*Bentley Poultry Farm* was a Christchurch decision) there may be a time advantage. Proceedings for review may also be attractive to a plaintiff with standing difficulties: a creditor, outsider or ex-member. For persons in such a position, the door appears to be at least slightly ajar.

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An accused's self-serving statements

R v Sharp [1988] 1 All ER 65

1 Mixed statements produced by the prosecution

As a general rule, when the prosecution adduces evidence of a statement made by D the whole of the statement should be put in. This will often be a "mixed" statement: one which includes admissions of material facts which may support an inference of guilt (eg an admission that D was present, or participated in an offence), and also exculpatory claims (eg a denial of participation or mens rea, or an assertion of a defence, such as consent or self-defence). There has been some doubt about the effect of such evidence.

In one line of cases the Courts insisted that such out of Court exculpatory statements were not evidence of the facts except in so far as they contained admissions: eg *R v Sparrow* [1973] 2 All ER 129; *R v Thompson* [1975] Crim LR 35; *R v Barbery* (1975) 62 Cr App R 248. On this view the exculpatory parts of a mixed statement are not within the rule that voluntary confessions and admissions are admissible as an exception to the rule against hearsay, but nor are they excluded altogether as self-serving statements. It is a view which attempts to prevent the manufacturing of evidence, while allowing the context of the admissions to be given, but it clearly requires an explanation of what evidential effect the exculpatory parts might have. It might in theory be possible to apply this rule sensibly if the relevance of the exculpatory claim was confined to the assessment of what D meant by his or her statement. It will often be important to consider everything that was said in determining what, if anything, D was admitting (cf *R v Marcantelli* [1962] NZLR 974, 977) and exculpatory claims could rationally be taken into account in deciding this without regarding them as any evidence of the facts. This seems to be what is meant in Phipson, *Evidence* (13 ed) 791, when it is suggested that exculpatory passages may be "evidence cancelling out or explaining away the incriminating passages", but are not "evidence of innocence". Similarly, in *R v Donaldson* (1976) 64 Cr App R 59, 65-66 the Court took the view that a mixed statement is evidence of the facts only to the extent that it constitutes an admission, although a determination of that requires the jury to construe the statement as a whole, taking account of qualifications and explanations favourable to D, if they "bear upon" the alleged admissions. For example, if D said "I bought the goods, but did not know they were stolen", that would show that D was not admitting the mens rea of receiving, but it would be no evidence that D did not in fact act with such mens rea (although the admission as to purchase would be evidence that D committed the actus reus).

There seem, however, to be three objections to this parsimonious approach to the relevance of exculpatory claims. First, it seems less than fair when compared with the effect of the statement against interest. Second, it is too much to expect juries to understand it (and for the plight of "many lawyers", see *Sparrow*, supra, 132). Third, it ceases to be workable once it is recognised (as it seems to have been in *Donaldson*) that the jury is *not* confined to interpreting what D meant but is to decide what weight is to be given to the claim of excuse, and whether or nor it should be accepted. If, in the above example, the jury, having regard to all the evidence, concluded that D might be telling the truth it could not rationally do otherwise than treat the words as evidence of the facts, and acquit (cf Elliott and Wakefield, [1979] Crim LR 428, 434-435).

In *R v Duncan* (1981) 73 Cr App R 359 the Court broke from these authorities and held that when the prosecution adduces a statement containing both incriminating and excusing parts each part is evidence of the facts stated. This rule was adopted in the interests of simplicity and justice, it being thought to be unhelpful to suggest to juries that the exculpatory parts are something less than evidence of the facts. This was immediately accepted by the New Zealand Court of Appeal in *R v Tomkins* [1981] 2 NZLR 170, but unhappily the position was subsequently obscured by the Privy Council in *Leung Kam-kwok v R* (1984) 81 Cr App R 83. On a charge of murder the evidence included statements by D in which he

admitted shooting V but claimed he had not intended to do so. Their Lordships said that in such a case the entire statement is received "to show the precise context in which the admission was made", but that "what is said by way of explanation or excuse is not evidence of its truth". They added, rather mysteriously, that it was for the jury "to evaluate the admission and the unsworn explanation or excuse as they think fit", and then approved *Donaldson* but ignored *Duncan*.

This perhaps meant that in New Zealand *Tompkins* might be open to reconsideration, particularly as in that case the Court suggested that the crucial words were not truly exculpatory (they involved a denial that D had been a party to the murder charged, but an admission of aggravated robbery). However, in *R v Sharp* [1988] 1 All ER 65 the House of Lords has now approved *Duncan*. It was thought that that decision was supported by common sense and the weight of authority (in particular, *R v Higgins* (1829) 3 C & P 603; *R v Clewes* (1830) 4 C & P 221; and *R v McGregor* [1968] 1 QB 371; cf *Lopes v Taylor* (1970) 44 ALJR 412, 421-422), and that juries would be unlikely to understand directions that exculpatory passages are not evidence of the facts. Lord Havers also commented:

> How can the jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanation? It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only because the excuse or explanation might be true that it is thought fair that it should be considered by the jury.

This disregards the possibility that the explanation is relevant only to an assessment of the scope of D's admission, but the conclusion of the House of Lords certainly minimises the risk of confusion, especially as it avoids the idea that words may be evidence of the facts stated for some purposes but not others. Of course, the weight to be accorded the exculpatory claims is another matter, and this will be returned to.

2 Other exculpatory statements

Pursuant to *Duncan, Tomkins* and *Sharp* when the prosecution puts in an admission by D exculpatory passages may be relied on by D as evidence of the facts stated. But what is the position if the prosecution leads evidence of an entirely exculpatory statement by D, or if D has made a statement but it is not put in by the prosecution?

As to the latter, the general rule is that D may not adduce evidence of exculpatory statements he or she may have made, as, for example, when D offered an explanation to a relative (*R v Roberts* (1942) 28 Cr App R 102), a solicitor (*R v Kurshid* [1984] Crim LR 288), a psychiatrist or a hypnotist (*R v McKay* [1967] NZLR 139; *R v McFelin* [1985] 2 NZLR 750, 752). Such statements are not admissible as evidence of the facts or, if D gives evidence, as evidence of consistency (unless an established exception applies, as when recent invention is suggested or the *res gestae* principle is invoked). But the modern practice is for the prosecution to put in evidence all statements made by D to investigating officers, whether or not they contain admissions. It has been said that the prosecution is not obliged to do this, and if it does not D may not adduce such exculpatory material (Archbold, *Criminal Pleading and Evidence* (42 ed) para 15.58), but this is now doubtful.

In *R v Coats* [1932] NZLR 401, 407 Ostler J thought that properly obtained exculpatory statements made by D to the police in the course of their inquiries are always admissible both for and against D, and in *R v McKay* [1967] NZLR 139, 148 Turner J accepted that this might be so (cf Gooderson [1986] CLJ 64, 66-70). More recently, in England it has been held that such statements are "admissible" (*R v Pearce* (1979) 69 Cr App R 365), and "should" be received (apparently from either side), even if entirely exculpatory (*R v McCarthy* (1980) 71 Cr App R 142, where D when interviewed had claimed an alibi). It is acknowledged in these cases that there is a danger of manufactured evidence, but these decisions seem preferable to allowing the prosecutor to determine admissibility (cf *R v Higgins* (1829) 3 C & P 603; (1968) 5 VUWLR 82).

These cases concern statements made by D (orally or in writing) when first questioned, or in subsequent police interviews (*Pearce*, supra), but the position is regarded as different if D, perhaps after legal advice, makes a "carefully prepared" exculpatory statement. It is said that such a statement reveals nothing about D's "attitude", is merely self-serving, and is inadmissible, although the vagueness of the category is such that it would probably be more appropriate to recognise that the Court has a discretion to exclude prepared exculpatory statements: see *R v Newsome* (1980) 71 Cr App R 325; cf *R v Thatcher* [1969] 1 WLR 227. In *R v Sharp* [1988] 1 All ER 65 D's statement to the police had been made, and apparently planned, after legal advice, but the prosecution had put it all in and the House of Lords was not called on to consider whether there are circumstances when D's statement should not be received at all, or should be edited (ibid, 66, per Lord MacKay).

The remaining question concerns the effect of a purely exculpatory statement which is received in evidence. If D gives evidence at the trial it will be relevant to credibility (either as disclosing consistency or inconsistency): cf *R v Barbery* (1975) 62 Cr App R 248; Phipson, op cit, 792. But if D does not give evidence it has been said that it is never evidence of the facts stated, but is received only as evidence that D made the statement, and as evidence (said to be of "vital relevance") of D's "reaction . . . which forms part of the general picture to be considered by the jury at the trial": *R v Storey* (1968) 52 Cr App R 334, 337; *R v Donaldson* (1976) 64 Cr App R 59, 65; *R v Pearce* (1979) 69 Cr App R 365, 369-370); *R v McCarthy* (1980) 71 Cr App R 142, 145. This is very difficult to understand. If the evidence includes questions or accusations and D's reaction was such that it might be thought to involve admissions, the jury must be told to disregard the evidence except to the extent that D accepted the truth of the accusations (eg *R v Pollock* [1978] 2 NZLR 491), but if D's reaction amounts to an assertion of innocence it seems to have no value except as evidence of the facts stated: Elliott and Wakefield [1979]

Crim LR 428, 435. Moreover, in some of these cases statements have been regarded as "purely exculpatory" even though they clearly involved admissions, albeit that a defence was also asserted (eg *R v Thompson* [1975] Crim LR 35; *R v Barbery* (1975) 62 Cr App R 248). It is submitted that the rule in *Duncan* should apply in all these cases.

3 The question of weight

It is, of course, for the jury to decide what, if any, weight should be attached to a statement, and the jury may accept some parts but reject others. In considering an unsworn statement the jury may, and should, weigh it against any other relevant evidence but, although exculpatory parts are evidence of the facts even though they are unsupported by sworn evidence, there is no requirement that they must be accepted if there is no contradictory evidence: *R v McGregor* [1968] 1 QB 371. Moreover, not only is there certainly no requirement that the jury be directed to give all parts of a statement equal weight, it has been said that it is "only natural and proper" that more weight should be attached to admissions than explanations unsupported by sworn evidence from D (*McGregor*, ibid), and, when D has not given evidence the jury should take into account the fact that an exculpatory statement was not made on oath or tested by cross-examination (*R v Donaldson* (1977) 64 Cr App R 59, 65). In this context, however, there is one further statement in *Duncan* (1981) 73 Cr App R 359, 365, which is approved in *R v Sharp*, and which is more questionable. It was there said that there is no reason why the Judge should not comment in relation to the exculpatory remarks upon D's election not to give evidence, and further that:

> where appropriate, as it usually will be, the Judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight.

It is submitted that this goes too far. It is for the jury, not the Judge, to decide what weight should be accorded the various things said by D, and in *R v Tomkins* [1981] 2 NZLR 170, 174-175 it was held to be wrong for the Judge to suggest that exculpatory parts need to be supported by sworn evidence, or to suggest that the parts relied on by D were "less worthy of credence" than others. That was in the context of a passage which which was not entirely exculpatory (in that it involved an admission of a lesser offence), but it is submitted that it is never right for a Judge to direct that incriminating remarks "are likely to be true", or that claims to excuses carry less weight (in *Tomkins* the Judge's comments, which were modelled on *Donaldson*, fell rather short of this, but were disapproved). In *Burns v R* (1975) 132 CLR 258, 262, it was accepted that the reason why confessions are admissible is that they are likely to be true, but it was held to be wrong to explain this to juries:

> It would be a grave misdirection to tell a jury that there is a presumption that a confession made by an accused person is true. The jury, in deciding whether in the light of all the circumstances of the case they are satisfied of the truth of the whole or part of a confession, must approach that question without the aid of any presumption except that of innocence.

It may finally be noted that in *R v Harmand* (1985) 82 Cr App R 65 the trial Judge had ruled that exculpatory parts of a statement were not evidence of facts stated, and therefore did not provide the foundation for a defence of self-defence. D then gave evidence but was convicted. The Court of Appeal quashed this conviction on the basis that the Judge's ruling have been wrong and had made D feel compelled to give evidence, so that there had been a breach of the "fundamental principle" that D must have a free choice as to whether to testify. Some may think this a little old fashioned, but the prospect of the Judge directing on weight in the terms contemplated in *Duncan* might be thought to provide similar compulsion.

Gerald Orchard
University of Canterbury

The '60s generation, laws and the establishment

The generation of persons who are now in their forties, as well as some in their early fifties, is not the only one which has had to face the temptations of spurious ideals. . . . My own generation in its youth had its fill of temptations, slightly different from but closely related to the temptations faced by the generation which came of age in the Sixties. It might be interesting to compare the totalitarian temptation which my own generation faced to the antinomian temptation – embodied in a hatred of laws, rules, and institutions – with which the generation of the 1960s and 1970s was confronted. . . .

The antinomian temptation shares with its totalitarian ancestor the anticipation of plenitude. It goes further and assumes that plenitude already exists and that it is available through the activity of government. Governments can be made to provide this plenitude if they are sufficiently pressed by the groups desiring more than they can acquire through the operations of the market. . . .

Antinomianism can claim great success; it has permeated American society to the point where homosexuality is regarded as being as normal as heterosexuality, where abortion is as normal as childbirth, where patriotism was regarded for a long time as proto-fascist, and where being in favour of "law and order" was unmentionable for an equally long time.

Professor Edward Shils
University of Chicago and Honorary Fellow of Peterhouse, Cambridge University
in *The New Criterion*, May 1988

The High Court and labour law

By Johnnie Kovacevich, Judges' Clerk, Auckland

The inherent jurisdiction of a Court with general jurisdiction such as the High Court is one of those somewhat elusive, if not elastic concepts that are part of our constitutional inheritance. The jurisdiction of such a Court, as distinct from those of limited jurisdiction, like the District Courts or the Labour Court, is based, as David Walker has expressed it in The Oxford Companion to Law, *on the principle that general jurisdiction is derived from royal authority — not from Parliament — and Judges exercise jurisdiction in name and by authority of the sovereign. Johnnie Kovacevich looks at one aspect of this complex issue in the jurisdictional relationship between the High Court and the Labour Court.*

Prior to the Court of Appeal's decision in *New Zealand Labourers' Union & Ors v Fletcher Challenge Ltd & Ors* CA 54/88 21 June 1988, the High Court had held in a series of decisions, that it had power in its inherent jurisdiction to decide certain labour law matters notwithstanding the provisions of the Labour Relations Act 1987.

These decisions asserted a concurrent or contiguous jurisdiction to that granted to the Labour Court, propounding a common law jurisdiction in areas in which the Act did not apply and a residual jurisdiction in areas that might otherwise have been the province of the Labour Court.

The Court of Appeal's decision confirmed the High Court's jurisdiction to decide such matters. However, it affirmed that in the light of the statutory intent and the philosophy underlying its previous decision in *New Zealand Baking Trades Employees' Industrial Union v General Foods Corporation (NZ) Ltd* [1985] 2 NZLR 110, the Labour Court should be the Court of first instance for the interpretation of the Labour Relations Act. The High Court had a reserve or supportive role concurrent with its common law powers.

The effect is that in the High Court there are in some cases additional remedies to those available in the Labour Court, and the only remedy in cases to which the Act does not apply.

The Labour Relations Act 1987

There can be little doubt that Parliament intended the Labour Court to be a "closed shop" certainly as far as unionised labour was concerned. The Bill spoke broadly of the Labour Court being given "exclusive jurisdiction in labour relations".

In several instances, the Act speaks of the Labour Court's "full and exclusive jurisdiction". This is so in respect of:

1 named torts in respect of strikes and lockouts: ss 230(f) and 242(1);
2 injunctions in respect of strikes and lockouts: s 243(1);
3 "in all matters before it:" s 279(4); and
4 in all applications for judicial review where the named bodies in the labour area exercise statutory powers of decision: s 280(3).

Section 307(2) provides that in the absence of rules regulating the Labour Court's practice and procedure, the rules applicable to the High Court in respect of tort, injunctions and judicial review shall apply.

Though the High Court is specifically barred from hearing certain actions in respect of strikes and lockouts (s 242(2) and (3)), its residual jurisdiction gives it the potential to act in other areas (see Dr Rodney Harrison, "The Enforcement and Judicial Review Jurisdictions of the New Labour Court: the Residual Jurisdiction of the High Court in Labour Relations" in *Labour Relations Act 1987* NZLS Seminar August 1987).

1 Torts unnamed in s 242 arising out of strikes and lockouts including: (1) the tort of nuisance; (2) statutory torts under ss 81 and ss 82 of the Commerce Act 1986; and perhaps (3) interference with contractual relations not inducing breach of contract: *Merkur Island Shipping Corp v Laughton* [1983] 2 All ER 189.

2 Actions for damages for breach of contract as opposed to

applications for compliance orders under ss 207 and 279(1)(l). A plaintiff for example could seek both a compliance order in the Labour Court and contractual damages in the High Court in proceedings arising from the same dispute.

3 Common law contract of employment actions where the employee is not a member of a union in which case the Act does not apply and thus its protection is denied them. The most common example is self-employed persons.

4 Areas where the Labour Court lacks jurisdiction, for instance: the enforcement of agreements over and above an award. At present, the Labour Court has the power to enforce an award but not the power to enforce a secondary agreement greater than the award.

5 An argument remains that subs 279(4) is tautologous in that it only grants the Labour Court exclusive jurisdiction where a proceeding is commenced before it. Subsection 279(4) provides that:

> *In all matters before it* (other than any matter before it under s 242 or s 243 or s 280 of this Act) *the Labour Court shall have full and exclusive jurisdiction* to determine them . . .

Thus if the appropriate proceeding is commenced elsewhere, the argument runs that the Labour Court will not have jurisdiction, but rather the Court in which the action is commenced, will. Though some support may be found for this view in the judgment of the Chief Justice Sir Ronald Davison in *Hanson v Dunlop New Zealand Ltd* [1982] ACJ 650 (discussed infra), in the light of the Court of Appeal's decision in the *Labourers' Union* case this argument must be regarded as doubtful.

It was the issue of whether the High Court had jurisdiction over non-strike industrial action, that attracted much of the early High Court litigation following the commencement of the Act. The issues were whether (1) the High Court had jurisdiction in the first place to decide: (2) whether a picket or a ban was or was not a strike. If it was then it was in the exclusive jurisdiction of the Labour Court subject to appeal to the Court of Appeal. If it was not then the High Court retained jurisdiction.

Four High Court decisions held that it did have the jurisdiction, while one held that it did not, culminating in the Court of Appeal's decision in *NZ Labourers' Union & Ors v Fletcher Challenge Ltd & Ors* CA 54/88 21 June 1988.

The four High Court decisions in favour of a jurisdiction were: *Fletcher Development and Construction Ltd v NZ Labourers' Union* [1988] BCL 386 per Barker J; *Fletcher Challenge Ltd & Ors v NZ Labourers' Union & Ors* [1988] BCL 796 per Quilliam J; *Nalder & Biddle Ltd v Cutter & Anor* [1988] BCL 702 per McGechan J; and *NZ Van Lines Ltd & Ors v Auckland Waterside Workers' Union & Ors* per Gault J, HC Auckland CP 810/88. To the contrary was *Daily Freightways Ltd & Anor v The Northern Industrial Workers Union* [1988] BCL 795 per Hillyer J.

These decisions illustrate the way in which the High Court can assert a residual jurisdiction in the absence of specific statutory authority to the contrary. At the same time the High Court has taken cognisance of the Labour Court's statutory role.

Fletcher Development and Construction Ltd v NZ Labourers' Union [1988] BCL 386

On an interim injunction application to restrain a picket by members of the union, Mr Justice Barker rejected the defendant's contention that the High Court lacked jurisdiction to deal with the application. Although ss 230(f) and 242 gave the Labour Court exclusive jurisdiction in respect of certain civil actions, as there was no strike or lockout, the sections did not apply. So the proceedings could not be said to have been issued against any party to a strike warranting the jurisdiction of the Labour Court.

He also rejected the plaintiff's contention that the picket was unlawful because the union should have adopted the procedures under the Act for the resolution of a demarcation dispute. As the Act did not put a positive duty on the union to avail itself of the procedures in respect of picketing, the existence of alternative dispute resolution did not render the picketing unlawful.

Since there was no evidence of either direct or indirect interference by the union, the application for injunction was dismissed.

On the issue of the demarcation dispute the Labour Court resolved it in favour of the Engineers' Union (see *Fletcher Development and Construction Ltd v NZ Labourers' Union & Ors* ALC 19/88 19 April 1988).

Fletcher Challenge Ltd & Ors v NZ Labourers' Union & Ors [1988] BCL 796

In an action involving bans arising from the same demarcation dispute, the plaintiffs sought $10,000,000 special and general damages for alleged intimidation, conspiracy to cause damage, inducement of breach of contract and unjustifiable interference with the plaintiffs' businesses.

The defendants had applied for a stay on the ground that the proceedings ought to have been issued in the Labour Court not the High Court. It was argued that once there was an allegation of any tortious acts as specified in s 242 in respect of strikes, the High Court ceased to have jurisdiction. It was for the Labour Court to decide whether there was a strike and if not, the proceeding could then continue in the Labour Court.

Mr Justice Quilliam (as he then was), in dismissing the application, took the view that it would be:

> a novel proposition to say that where a proceeding is commenced in this Court there is no jurisdiction for the Court to decide whether it is entitled to hear the matter or not . . . I am unable to accept that this Court could be deprived of its jurisdiction to interpret a statute unless that should be provided by Parliament in the clearest terms. I can see nothing in the Labour Relations Act to suggest that any such result was intended.

He held that the plaintiffs were entitled to commence their proceedings in the High Court by

reason of their allegation that there was no strike. If they failed to prove it, then recourse could be had to the Labour Court.

Nalder & Biddle Ltd v Cutter & Anor [1988] BCL 702

The plaintiff – the owner of a dry dock – sought an interim injunction against the Wellington Watersiders' Union and its secretary, to restrain alleged interference with the performance of contracts. On the jurisdiction issue Mr Justice McGechan agreed with Mr Justice Quilliam in the *Fletcher Challenge* case (supra) that the High Court was able to determine the question of jurisdiction itself and need not abandon it to the Labour Court.

On the question of a "strike" the Judge held that communications by the defendants to the plaintiff's clients certainly threatened some form of industrial action. Had they threatened a strike then the Labour Court would have had jurisdiction. But had they implied picketing "that would not itself be a strike within ss 231 or 243". Further, had they threatened a ban then "on the approach adopted by Mr Justice Quilliam recently [in the *Fletcher Challenge* case] that might well not be a strike". Mr Justice McGechan concluded:

> the threat on the state of the evidence could have been one of activity not amounting to strike activity as defined and on that basis there could be jurisdiction in this Court and jurisdiction to grant an injunction.

After considering the overall justice of the case the Judge declined to issue the interim injunction and concluded that "the Courts should indeed move cautiously in the industrial area". Similarly he had said earlier that the "need for caution may be even more evident in the light of the policies implicit since the Labour Relations Act 1987".

NZ Van Lines Ltd & Ors v Auckland Waterside Workers' Union & Ors Gault J, HC, Auckland, CP 810/88, 23 May 1988

The plaintiffs were household movers who alleged that several waterside unions were in breach of a contract for the removal of containers from the waterfront for unpacking. On an interim injunction application the second defendant argued that since a strike had occurred, the High Court was denied jurisdiction. However, since the plaintiffs were not the employers of the watersiders within the meaning of s 231 of the Labour Relations Act, it was accepted by the parties that the High Court was the appropriate forum for the proceeding as drawn.

Mr Justice Gault adopted the approach of Mr Justice Quilliam in the *Fletcher Challenge* case (supra) assuming jurisdiction, leaving the issue to the substantive hearing for final determination and granting interlocutory orders to release the containers then on the wharf.

Daily Freightways Ltd & Anor v The Northern Industrial Workers' Union [1988] BCL 795

The plaintiffs applied for an interim injunction to restrain members of the union, employed by the plaintiffs' customers, from inducing breaches of contract in refusing to deal with the plaintiffs' trucks or containers.

The ban had been imposed in an effort to force a negotiation on redundancy for 62 workers who had been dismissed for attending an unauthorised stopwork meeting. The plaintiffs claimed the ban constituted the tort of procuring or inducing a breach of contract.

Mr Justice Hillyer accepted that the common law right to sue in respect of unjustified interference with contractual relations was available generally in all circumstances to all people and may be employed in industrial disputes (*Northern Drivers Union v Kawau Island Ferries* [1974] 2 NZLR 617) and that the tort of actionable interference with contractual rights might be committed by a union and be restrained by injunction (*NZ Baking Trades Employees' Industrial Union v General Foods Corporation (NZ) Ltd* [1985] 2 NZLR 110 (see infra)).

But after reviewing the jurisdiction of the Labour Court in respect of strikes (ss 242-243), the definition of a "strike" (s 231) and the judgment of Mr Justice Quilliam in the *Fletcher Challenge* case (supra), he held that the action of the defendants amounted to a strike within the meaning of s 231(a), (b) and (d). The defendants (a) discontinued or reduced the normal performance of their employment; (b) broke their contracts of service; and (d) refused or failed to accept work for which they were usually employed.

This was the case even though the employers – to avoid industrial strife – employed other freight forwarders to do their cartage and thus union members ultimately had fulfilled the plaintiffs' requirements.

It followed that since a strike had occurred, the Labour Court had exclusive jurisdiction. The Judge agreed with Mr Justice Quilliam to the extent that the High Court had the jurisdiction to decide, as a matter of a statutory interpretation, whether the facts disclosed a strike as defined by the Labour Relations Act.

Whereas he understood Mr Justice Quilliam to mean that no strike occurs where the industrial action is by third parties, he took the contrary view holding that the industrial action need not be by the plaintiffs' employees to constitute a strike. In consequence, the Judge was unable to grant the interim injunction because in his view a strike had occurred.

NZ Labourers' Union & Ors v Fletcher Challenge Ltd & Ors Court of Appeal, CA 54/88, 21 June 1988

The union appealed the decision of Mr Justice Quilliam (discussed supra) in which he had declined to stay the action on the ground that the High Court had jurisdiction. The appellants claimed that the issues should be tried by the Labour Court not the High Court.

This was the first Court of Appeal case to consider the Labour Relations Act. The judgment of a Full Bench of the Court of Appeal was delivered by the President Sir Robin Cooke. The approach the Court of Appeal had taken in *NZ Baking Trades Employees' Industrial Union v General Foods Corporation (NZ) Ltd* [1985] 2 NZLR 110 under the Industrial

Relations Act 1973, was held applicable to the new Act.

It was said in that case that both the Court of Appeal and the High Court should be slow to determine questions of industrial law which had not been initially considered in the Arbitration Court. It was in the public interest and of value to the ordinary Courts that they should have the benefit of the Arbitration Court before giving rulings. Questions under the Act should be left to the Arbitration Court at least in the first instance and the ordinary Courts should have only a reserve or supportive role.

In the present case, the Court of Appeal noted that the provisions of the Labour Relations Act were worded in general language. They left their practical interpretation to be worked out by the Courts giving effect to the basic intent of Parliament stating that "the purpose must be to make the Act work".

The Court confirmed the High Court's jurisdiction to determine questions of interpretation of the Act (at 8):

> That the High Court has *jurisdiction* to determine them is, we think, beyond dispute . . . The jurisdiction is simply part of the ordinary authority of the High Court as a court of general jurisdiction to determine questions of fact and law (including the interpretation of statutes) in proceedings before it.

The Labour Court also clearly had jurisdiction. It had the necessary incidental power to determine whether there had been a strike and whether a defendant was a party to it under ss 242-243, subject to appeal and cases stated to the Court of Appeal.

The Labour Court's jurisdiction was less clear where the plaintiff brought proceedings in the High Court alleging that there had not been a strike.

Following "the philosophy stated in the *Baking Trades* case and, as we think, partly underlying the 1987 Act" the Court of Appeal held that ss 242 and 279(1)(g), operating together, were wide enough to give the Labour Court jurisdiction to determine whether a strike or lockout had occurred.

This jurisdiction could be invoked whether proceedings had commenced in the Labour Court or the High Court. The Court of Appeal accepted that (at 12):

> It is a jurisdiction concurrent with that of the High Court; but in a case where there are serious questions of labour law to be tried it will usually be preferable for the Labour Court jurisdiction to be resorted to.

A mere assertion by a defendant that the conditions applicable under s 242 were fulfilled could not of itself justify a stay of proceedings. Though ultimately it was a matter in the discretion of the High Court Judge, the Court of Appeal propounded the "reasonably arguable" test (at 12):

> A defendant applying for a stay should usually be granted one if on the pleadings and any supporting evidence he [or she] satisfies the High Court Judge that it is reasonably arguable that the conditions stated in s 242 are fulfilled.

Although the plaintiff was "not lightly to be deprived of their right to a High Court adjudication" the governing principle was that (at 13):

> Serious and substantial questions of labour relations law and similar questions of fact are best determined in the Labour Court, subject to the statutory rights of appeal.

The party asserting that the High Court action be barred, has the onus of establishing what they allege. A normal condition of the stay would be that the defendant applied to the Labour Court for a declaration that the case fell within s 242 and that accordingly the Labour Court had jurisdiction.

Though the question of whether the ban constituted a strike was not before the Court, it noted that by s 234(1)(c) a strike was unlawful if it concerned a demarcation dispute whereas under s 233(1)(a) it was lawful if it related to disputes of interest. It referred to s 231 and the judgment of Lord Wilberforce in *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15, 101 and concluded (at 16) that:

> Clearly the New Zealand section has been drawn to bring within the wide statutory definition of "strike" various forms of industrial action which may not fall within the common law meaning of the term.

It was also clear that concerted action which did not amount to breaches of contracts of service may nevertheless constitute a strike within the meaning of the Act (*Ross v Moston* [1917] GLR 87). It had been suggested that the respondents had acquiesced in the ban, in which case the employees would not be in breach of contract (*Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, 225). However it did not follow that there would be no strike within the scope of s 231. If the respondents' products would normally have been handled by union members then there may have been a partial discontinuance of employment within the meaning of s 231(1)(a) and perhaps (d) and (e) even though other work may have been substituted.

The Court refrained from discussing the questions further because (at 17):

> We do not have the advantage of the Labour Court's opinion on them . . . We value that Court's opinion and think that it is generally better for us not to determine a labour law question without it.

The Court of Appeal, in agreement with Mr Justice Hillyer in the *Daily Freightways* case (discussed supra) held that a strike need not be by employees of the plaintiff to come within s 242 nor was there anything in its wording to limit it to proceedings brought by employers of the striking workers. On the plaintiffs' pleadings, it was reasonably arguable that what occurred was a strike within the meaning of the Act and the affidavit of one of the appellants admitted as much.

The appeal was allowed and a stay of the High Court action granted on condition that the defendants commence proceedings in the Labour Court within two months seeking a determination as to whether or not the action fell within s 242 of the Act.

The Court observed that further problems might arise in meshing ss 242 and 243 into the general system of court structure, procedure and law. Not all such problems could be foreseen and dealt with in one judgment. The case law would evolve step by step in the light of experience of the working of the legislation. The Court stated (at 20) that:

> We have indicated a general approach but do not in this judgment profess to answer questions not yet before this Court in a practical form. It seems better to proceed with caution, recognising that industrial litigation has a character of its own.

The Court of Appeal

The view that the High Court retains a residual jurisdiction in the labour relations arena must be read subject to the Court of Appeal's approach to specialist tribunals in general and industrial courts in particular. On many occasions this century both under the Arbitration Act and its predecessors, the Court of Appeal has taken a hands off approach to industrial courts, acknowledging that Parliament intended these bodies to be the primary forum for the interpretation of labour law legislation. The *Labourers' Union* case (supra) is an example of this approach.

In *Wellington District Hotel Workers v Attorney-General* [1951] NZLR 1072, the Court of Appeal took the view that the industrial affairs of unions were intended to be under the control and direction of the Court of Arbitration (under the Industrial Conciliation and Arbitration Act 1925) and as long as it was acting within jurisdiction, it was supreme.

A similar view was taken by a later Court of Appeal in *New Zealand Food Processing Factory Employees Union v Skeggs Foods Ltd* [1985] ACJ 961; in *Foodtown Supermarkets Ltd v NZ Shop Employees IUW* [1984] ACJ 1043; and in *Winstone Clay Products Ltd v Inspector of Awards* [1984] 2 NZLR 209 in which Sir Thaddeus McCarthy delivering the judgment of the Court said (at 211, line 24):

> It is a fairly commonplace statement that it would be most dangerous to overlook the special nature of the Arbitration Court, its purposes and its powers. It is not to be assumed that propositions of law, however prestigious and well established in the High Court or the Court of Appeal, will apply with the same clear force in the Arbitration Court. That is a specialist Court, designed for a specific field. In the matters directed by the statute to come before it, it has exclusive jurisdiction, and, when exercising it, it must take into account other considerations besides legal issues. It is concerned primarily with fairness.

The Court of Appeal reiterated the point in *New Zealand Baking Trades Employees' Industrial Union v General Foods Corporation (NZ) Ltd* [1985] 2 NZLR 110. Workers at a bakery had claimed a pay rise of 3% over the award rate. When it was refused by the employer, they went on strike. Mr Justice Sinclair at first instance held that strike action was unlawful and issued injunctions against both the union and the workers.

On appeal, a Full Bench of the Court of Appeal held (Mr Justice Richardson dissenting in part) that while the Industrial Relations Act 1973 did not supersede or abrogate the jurisdiction of the ordinary Courts to control tortious and unlawful behaviour, the Arbitration Court should be recognised as the primary forum for the interpretation of the Industrial Relations Act and the determination of industrial disputes.

The High Court was seen by Mr Justice Cooke (as he then was) having "a reserve or supportive role" (at 117, line 12) and by Mr Justice Thorp as being there "to support and complement" the functions of the Arbitration Court (at 127, line 39).

The decision was applied in *Tip Top Icecream Co Ltd v Northern Clerical Workers Union* [1987] BCL 211 by Mr Justice Thorp and in *New Zealand Road Transport Workers v Fletcher Merchants Ltd* [1987] BCL 274, in which Mr Justice Henry concluded that the High Court "does have a supervisory or supportive role to perform" (at p 7). This accords with earlier High Court authority including *New Zealand Harbour Boards Employers v Tyndall* [1944] NZLR 584; [1944] GLR 241 per Blair J; *Wellington Municipal Officers v Wellington City Corporation* [1951] NZLR 786; [1951] GLR 414 per Gresson J; and *Point Chevalier Bakery (1956) Ltd v Tyndall* [1962] NZLR 178 per TA Gresson J.

In *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 613, the Court of Appeal held that the High Court had in its inherent jurisdiction, the power to protect the processes of inferior Courts including the power to punish contempts of the Arbitration Court (citing *Attorney-General v Blundell* [1942] NZLR 287). It also held that the High Court had the jurisdiction to order the writ of sequestration, notwithstanding that the Code of Civil Procedure did not provide any sanction against a company for contempt, nor did the Arbitration Court have an inherent jurisdiction to punish it.

Quality Pizzas may be interpreted as a case on the residual inherent jurisdiction of the High Court. As Mr Justice Chilwell pointed out in *Benipal v Minister of Foreign Affairs & Anor* HC, Auckland (A878/83, 6 September 1983), in the absence of any qualifying statue or statutory rules, the inherent jurisdiction of the High Court remains in the sense of both an "implied" jurisdiction and in the sense of an "inherited" jurisdiction. Its inherited jurisdiction is found in s 16 of the Judicature Act 1908 which states:

> The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

However, whereas the Arbitration Court was unable to punish contempts, that deficiency has been alleviated now to an extent by s 207 of the Labour Relations Act 1987 which gives the Labour Court power to issue compliance orders to effect compliance with an award or agreement and sanctions under s 207(7) include (a) a stay or

dismissal of proceedings; (b) striking out; (c) imprisonment for up to 3 months; (d) a fine of up to $5,000; and (e) sequestration. There is power to enforce the order in the District Court (s 208).

In addition there is power to punish contempts in the face of the Court via s 281 as did the Industrial Relations Act but with the added sanctions of detention, imprisonment for up to three months or a fine of up to $1,000 for each offence.

The Court of Appeal is given appeal jurisdiction under:

(1) s 309: in proceedings founded in tort;
(2) s 310: in respect of contempt of Court;
(3) s 311: from an application to review; and;
(4) s 312: on questions of law.

Under s 308 it is given power to review a proceeding of the Labour Court. This first instance power of review may be tempered by s 279(6) and (7) which provides that a decision of the Labour Court may only be reviewed on the ground of "lack of jurisdiction". In addition a case may be stated to the Court of Appeal from the Labour Court under s 294 on any question of law. Questions on the construction of an award or agreement are specifically excluded.

Presumably this is because Parliament envisaged a speedy and efficient resolution to any industrial dispute, preferring to sidestep litigation in the High Court and the possibility of its subsequent appeal (as had been the case under the Industrial Relations Act) for a definitive and early decision by the Court which would have heard that appeal.

Given this extended jurisdiction and in the light of the Court of Appeal's approach both under previous labour law legislation and in the *Labourers' Union* case (supra), it is unlikely that the Court of Appeal will condone anything other than a reserve or supportive role for the High Court in the labour relations arena. As the President of the Court of Appeal Sir Robin Cooke pointed out when presenting his paper to the first Canada-Australasian Law Conference in April 1988 (see "Fundamentals" [1988] NZLJ 158, 164):

> In New Zealand by an Act of 1987 a Labour Court has been created (Labour Relations Act 1987, ss 278-314). It has taken over, *to the exclusion of the High Court* but subject to rights of appeal to the Court of Appeal, jurisdiction over (inter alia) tort and inducement of breach of contract actions connected with strikes or lockouts, including the power to grant injunctions.

The Case Law

A body of case law has developed in which the High Court has asserted its common law jurisdiction in the employment area. This jurisdiction may be said to be concurrent or contiguous to that of the Labour Court.

In many of the cases, the High Court had been asked to consider questions which were prima facie within the exclusive jurisdiction of the Labour Court or the Arbitration Court respectively. Each had to consider the privative clauses under the Labour Relations Act 1987 or under s 48 of the Industrial Relations Act 1973 from which the current s 279(1)(g) and (4) derive.

In each, the Court was acutely aware of the need to defer to the specialist tribunal but each, to an extent, asserted a contiguous jurisdiction usually where:

1 The need to prevent illegality arose;

2 A remedy was unavailable in another forum or a greater remedy was available in the High Court;

3 It was a common law or equitable matter; or

4 The matter was factual and of no wider industrial significance.

Pete's Towing Service Ltd v Northern Drivers' Union [1970] NZLR 32

In this case Mr Justice Speight (as he then was) took the view that where an alleged breach of an award was relevant to a common law action, the Court could not prevent itself from considering the award. Where actions were brought by persons outside the employer/employee relationship, the Court if necessary, was to consider or interpret the industrial award if relevant to the case brought by a third party. His Honour stated at 54:

> Now, this Court's jurisdiction is not being invoked to enforce or repress. This is an action in tort where a legitimate defence is raised. When question of fact and law arise for determination in a matter which is properly brought before the superior Court, it must have jurisdiction to decide all such matters as are relevant to the matter before it unless there is clear statutory provision preventing it from doing so.

Harder v NZ Tramways Employees [1977] 2 NZLR 162

The plaintiff was a member of the public who claimed he had suffered special damage by reason of an alleged illegal action on the part of a union and a union official. The plaintiff was not a party to any industrial award. He had no other way in which to enforce his rights than by taking injunctive action in the High Court. Mr Justice Chilwell cited the decision of the English Court of Appeal in *Attorney-General v Chaudry & Anor* [1971] 3 All ER 938 for the proposition that (at 170):

> notwithstanding that a statute provides a remedy such as here by way of prosecution, this Court nevertheless has power to enforce obedience to the law by way of injunction where it is just and convenient to do so.

His Honour referred to the judgment of Mr Justice Speight in the *Pete's Towing* case (supra) emphasising the need for clear statutory provisions before the jurisdiction of the Court was ousted and he concluded (at 171):

> In my judgment Mr Harder, as with every other citizen, has the right to expect that strikes will be legal and there is a corresponding

> duty upon the worker and the unions to ensure they are legal. It follows that there has been an infringement of a public right. In my judgment this statutory provision is for the protection of the public including Mr Harder.

On this point see also *Attorney-General ex rel Mt Maunganui and Tauranga Stevedores Ltd v Registrar of Industrial Unions* [1984] 2 NZLR 726, in which Mr Justice White, in granting an injunction to prevent a proposed amendment to union rules, followed Chilwell J in *Harder* concluding (at 733, line 35) that:

> the Industrial Relations Act 1973 provided a special code with regard to industrial relations, but the power of this Court to enforce obedience to the Act by injunction is not questioned. In my opinion it is clear that the Court of Arbitration does not have exclusive jurisdiction.

Hanson v Dunlop New Zealand Ltd [1982] ACJ 650

In this *Hanson* case Sir Ronald Davison had to consider a house agreement between the Canterbury Rubber Workers' Union and the defendant, whereby bonus payments were inflation-indexed to the percentage increase of the award wage. The agreement provided for General Wage Orders and a dispute arose as to whether the Wage Order only applied to ordinary pay or whether the percentage increase flowed on to the bonus payments.

The action involved the interpretation of the house agreement, a collective agreement, the provisions of the General Wage Orders Act 1977 and the Wage Adjustment Regulations 1974 and was prima facie within the exclusive jurisdiction of the Arbitration Court. The question of the jurisdiction of the High Court thus came to be decided.

In the course of his judgment the Chief Justice said (at 652):

> Mr Cleary pointed out that the matters to which I have just referred are not within the *exclusive* jurisdiction of the Arbitration Court unless they are before the Court (see s 48(4) and s 158(1)). *This is so.*

Subsection 48(4) is the predecessor of s 279(4) of the current Act and provided that:

> *In all matters before it* the Court shall have full and exclusive jurisdiction to determine them in such manner and to make such decisions, orders, or awards not inconsistent with this or any other Act, as in equity and good conscience it thinks fit.

The two subsections are fundamentally the same. Each speaks of "in all matters before it". The Chief Justice agreed that unless the matter was commenced in the Arbitration Court then it did not have exclusive jurisdiction. This gives credence to the view that the same situation applies under the Labour Relations Act, that if a matter is commenced in another Court, for instance the High Court, then it and not the Labour Court should have jurisdiction.

However after considering the fact that the Arbitration Court was specially constituted with expertise in the field of industrial relations to deal with industrial matters, and after referring to *Wellington Municipal Officers v Wellington City Corporation* [1951] NZLR 786, concluded (at 652) that:

> Even if therefore there is a concurrent jurisdiction in this Court and the Arbitration Court to deal with the matters in issue in this action, as Mr Cleary submits there is, I do not consider that this Court should deal with them. The appropriate body is the Arbitration Court.

Mr Justice Ellis in *Fitness v Auckland Farmers Freezing Co-operative Ltd* [1986] BCL 880, (infra) took this to mean that "while the Chief Justice accepted that the High Court had concurrent jurisdiction to determine the question he considered that it was more appropriate that the matter be litigated before the Arbitration Court."

The Chief Justice declined to hear the action and adjourned it to enable the plaintiff to have proceedings commenced on his behalf in the Arbitration Court.

This accords with the view he took in the later case of *New Zealand Plumbers Union v Attorney-General & Ors* HC Auckland A1231/83 12 September 1984, in which he exercised his discretion against making any order on an application under the Declaratory Judgments Act 1908 as to the meaning of s 3(1)(c) of the Plumbers, Gasfitters & Drainlayers Act 1976 while the matter was still before the Arbitration Court.

The Chief Justice enunciated the principles which guide the Court in such matters: (1) in its discretion under s 10 of the Declaratory Judgments Act "it will decline to make such a declaratory order" where, as in that case where there was a demarcation dispute; (2) it involves the interpretation of relevant awards and Acts; and (3) mixed questions of fact and law for which the Arbitration Court, as a specialist Court, properly has jurisdiction.

However access to the High Court was not denied the plaintiff who had an option. If it was desired to continue in the High Court then "the appropriate proceeding is by way of action when disputed questions of fact can be determined along with matters of law which may be relevant". The alternative was to return to the Arbitration Court.

NZ Shop Employees IUW v Foodtown Supermarkets Ltd Barker J, HC, Auckland, A1348/82, 16 December 1982, noted in [1983] ILB 19

A supermarket chain wanted to open an extra night in the week before Christmas. The Union applied for an injunction to restrain it from opening on three nights instead of two.

On the question of jurisdiction, Mr Justice Barker referred to s 48 of the IRA 1973 which gave the Arbitration Court "exclusive jurisdiction" to determine questions of interpretation of industrial awards.

He cited *Wellington District Hotel Workers v Attorney-General* [1951] NZLR 1072, and *Point Chevalier Bakery (1956) Ltd v Tyndall* [1962] NZLR 178, confirming the view that the Arbitration Court was specifically set up by Parliament to deal with industrial disputes.

However after an analysis of the case law he concluded that there were "three special categories" of cases in which the High Court had jurisdiction notwithstanding the IRA 1973.

The first was where there had been an excess of jurisdiction by the Arbitration Court citing *NZ Waterside Workers' Federation v Frazer* [1924] NZLR 689.

This power now reposes exclusively in the Court of Appeal which is given original review jurisdiction of Labour Court decisions under s 308, limited by s 279(6) and (7) to what is called "lack of jurisdiction".

The second category was where the alleged breach was relevant to a common law action, the Court could not be prevented from considering the award, citing the *Pete's Towing* case (supra)

The third category was the *Harder* type case (supra) where the plaintiff, a member of the public who has suffered special damage as a result of illegal action being breach of an industrial award, can enforce his rights by taking injunctive action where no other action is available to him.

Undoubtedly categories two and three remain. The same cannot be said for category one in the light of the Court of Appeal's original review jurisdiction.

The Judge considered that the case did not fall into any of "the three very special categories" and after considering the balance of convenience and whether there was a serious question to be tried, he refused the injunction though without disclaiming jurisdiction.

Domestic Pilots' Committee v Aircrew Industrial Tribunal Eichelbaum J, HC, Wellington, A373/82, 3 September 1984, noted in [1983] ILB 74

In a dispute involving the redundancy of pilots and the coverage of a certain class of domestic pilots, Eichelbaum J concluded that the High Court had a jurisdiction to decide such matters, notwithstanding the lack of a right of appeal from the Aircrew Industrial Tribunal's decision and that "the Legislature did not intend to exclude the normal supervisory role of this Court" (p 40). His Honour took the view that (at 40):

> When Parliament creates a new inferior Court the superior Courts will have inherent jurisdiction to supervise, and will be slow to hold that power to decide a question of law conclusively has been conferred

(citing *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223n, 234 per Browne J at first instance, and *In re Racal Communications Ltd* [1981] AC 374, 383 per Lord Diplock; see also: *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338 and *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 among others).

Like the Labour Relations Act, there was no explicit privative clause denying the High Court jurisdiction, and though His Honour held that it did have jurisdiction, it should be slow to make orders that could be seen as interfering in industrial matters. Although the learned Judge expressed disagreement with some of the Tribunal's findings, he did not think that it justified an order quashing the Tribunal's decision.

King v Taharoa C Incorporation & Ors Gallen J, HC, Hamilton, A97/84, 5 July 1984 noted in [1984] ILB 57

The plaintiff had had his employment terminated and whilst awaiting a hearing of the substantive proceedings in the Arbitration Court, sought an interim injunction in the High Court to prevent dismissal in the meantime. Gallen J assumed jurisdiction though the High Court would not have been able to determine the matters of fact in dispute (citing the *NZ Shop Employees* case (supra)).

His Honour took the view where a remedy was not available in an inferior Court, then an application may be made to the High Court, and if the circumstances demanded it, the High Court may issue a remedy, even though it would not be the tribunal deciding the issues of fact.

The Judge took the view that where a remedy was not available in an inferior Court, then an application could be made to the High Court. If the circumstances demanded it, the High Court could issue a remedy, even though it would not be the tribunal deciding the issues of fact. However he concluded that since an unlawful termination could be compensated by damages in the Arbitration Court, the application for an injunction should be refused.

Dallimore Groundworks Ltd v Hawke's Bay Road Transport IUW & Anor Eichelbaum J, HC, Napier, A19/84, 16 August 1984, noted in [1984] ILB 63

Contractors entered into an agreement with the Union providing for special terms and higher wages than in the award. The agreement stated that it also applied to workers employed by subcontractors. For a period, a subcontractor failed to do so. The Union invoked the disputes procedure, naming a mediator and asking for a hearing in the Arbitration Court. The plaintiff, a subcontractor, sought an injunction to restrain the Union and the mediator from invoking the provisions of the agreement.

Mr Justice Eichelbaum held that the two Courts had a co-ordinate jurisdiction quoting 10 *Halsbury's Laws of England* (4ed) para 713:

> Prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so. . . . An objection to the jurisdiction of one of the superior Courts of general jurisdiction must show what other Court has jurisdiction, so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary. The High Court, for example, is a Court of universal jurisdiction and superintendency in certain classes of action, and cannot be deprived of its ascendancy by showing that some other Court could have entertained the particular action.

His Honour held that the matter was within the jurisdiction of the

High Court because (at 7):

> the matter that the plaintiff wishes to argue is a contractual question based as I see it on ordinary common law principles which this Court is no less competent to try than is the Arbitration Court. There is no question of what is commonly described as an industrial situation, since I have been informed that work under the agreement has been completed and essentially the dispute is centred on the recovery of wages allegedly unpaid.

Having concluded that the Court had jurisdiction, an interim injunction was issued against the defendants.

Fitness v Auckland Farmers Freezing Co-operative Ltd [1986] BCL 880

A freezing worker, in a representative action, sued on behalf of himself and some 890 other workers who were allegedly wrongfully prevented from working by the defendant for a period of time. The defendant submitted that the workers were on strike and filed for a stay of proceedings on the ground that the issue was within the Arbitration Court's jurisdiction and would be more appropriately heard by that tribunal.

The plaintiff submitted that proceeding in the High Court had the advantages that: (1) he could proceed in a representative capacity; (2) the parties would be entitled to full discovery under the High Court Rules; (3) there was a right of appeal to the Court of Appeal on fact and law; and (4) the remedies of a declaration and an inquiry into the loss were available.

Mr Justice Ellis examined the jurisdiction of the Arbitration Court. Despite the fact that the plaintiff would: (1) have to enlist the assistance of his Union or the Inspector of Awards in making his claim, (2) have probable lengthy delays before hearing, and (3) have no full appeal rights; His Honour was of the view that the appropriate forum was the Arbitration Court.

He referred to the *Dallimore* case (supra) and concluded that the pleadings disclosed an industrial issue of possible significance beyond the contractual matters raised and noted the special jurisdiction of the Arbitration Court to determine it on grounds of fairness as well as the common law.

The Judge ordered a stay of the High Court proceedings to enable commencement of proceedings in the Arbitration Court.

Cull v Alliance Freezing Co (Southland) Ltd [1987] BCL 1578

Cull sued on behalf of chamber hands employed between 1978 and 1985 claiming for short paid bonuses because the defendant had included in the bonus pool two men who were ineligible. Mr Justice Williamson reviewed the jurisdiction of the Labour Court under s 279 and for the recovery of wages under s 198. He concluded that the Labour Court was a specialist Court set up to deal with industrial matters quoting Davison CJ in *Hanson v Dunlop New Zealand Ltd* (supra) and citing several Court of Appeal judgments to similar effect.

He then referred to the *Dallimore* case (supra) in which Mr Justice Eichelbaum held that the High Court had jurisdiction where it was a question based on common law principles and not upon the interpretation of an award or the Act. He referred to the *Fitness* case (supra) where because proper discovery was unavailable in the Arbitration Court, the proceeding might be brought in the High Court. While appreciating the desirability of industrial disputes being dealt with by the Labour Court, Mr Justice Williamson concluded that the proceeding should remain in the High Court on the grounds that:

(1) The principal issue in the proceedings was a factual one as to whether or not there was an oral agreement by the defendant to pay bonus payments at the levels alleged. In contrast with *Hanson v Dunlop NZ Ltd* (supra) and *Fitness* (supra) there did not appear to be an industrial issue of possible wider significance than that which was apparent from the relief sought in the Statement of Claim.

(2) In order to pursue the claim properly the plaintiff may require full discovery which was available under the High Court Rules but was not available in the Labour Court.

(3) The plaintiff may have been able to pursue a greater claim in the High Court than in the Labour Court. Under s 198(2) of the Labour Relations Act an action may be commenced within six years after the day on which the money became due and payable. Consequently if an action were to be commenced in the Labour Court it would relate only to moneys which became due and payable since October 1981.

Because the plaintiff was seeking to recover moneys due as from 1 April 1978 claiming that he could do so in the High Court by virtue of s 28(b) of the Limitation Act 1950 (as applied in *Inca Ltd v Autoscript (NZ) Ltd* [1979] 2 NZLR 700), the application to stay proceedings was dismissed and the defendant directed to file a Statement of Defence.

Mawson v Auckland Hospital Board [1988] BCL 385

The plaintiffs were doctors on the staff of a public hospital operated by the defendant. They claimed it was an express or implied term of their contracts of employment that they receive a free meal at meal times at the defendant's expense.

On an interim injunction application, an objection was raised by counsel for the defendant, as to the jurisdiction of the High Court to hear the matter.

After reviewing ss 243-244 and ss 279-280 of the Act Mr Justice Barker concluded that there was no "industrial agreement" relating to the plaintiffs, warranting the jurisdiction of the Labour Court. Rather the claim was based on ordinary common law contract principles and was not forbidden by statute citing the *Cull* case (supra). The plaintiffs' claim for an injunction based on breach of an alleged term of the contract was also not forbidden by s 280 of the Act.

The Judge held that "in the absence of very clear statutory provision, the Legislature cannot be presumed to have excluded the normal jurisdiction of this Court".

He concluded (at 7) that:

(1) Because the Court's equitable jurisdiction for an injunction for alleged breach of contract was invoked, the provisions of s 279(4) did not apply – the Labour Court in such case not having exclusive jurisdiction.

(2) Because the question before the Court was contractual and not one of interpretation of an industrial agreement, the Court had jurisdiction citing *Dallimore* (supra).

(3) Since the principal issue was factual, the Court had jurisdiction citing *Cull* (supra).

However, since damages would have been an adequate remedy in the circumstances, the interim injunction was refused.

At common law

1 The High Court has a reserve power to enforce the law as enacted, and to ensure obedience to the law, whenever it is just and convenient to do so:

Attorney-General v Chaudry & Anor [1971] 3 All ER 938
Harder v NZ Tramways Employees [1977] 2 NZLR 162

2 Where members of the public suffer special damage as a result of illegal action, being a breach of an industrial award, they can enforce their rights by injunctive action:

Harder v NZ Tramways Employees [1977] 2 NZLR 162

3 Where a matter is properly brought before a superior Court, it must have jurisdiction to decide all such matters as are relevant, unless there is a clear statutory provision preventing it from doing so:

Pete's Towing Service Ltd v Northern Drivers' Union [1970] NZLR 32, 54
NZ Shop Employees IUW v Foodtown Supermarkets Ltd Barker J, HC, Auckland, A1348/82, 16 December 1982

4 Where an alleged breach of an award is relevant to a common law action, the Court cannot prevent itself from considering the case:

Pete's Towing Service Ltd v Northern Drivers' Union [1970] NZLR 32, 54

5 Where a remedy is unvailable in an inferior Court, then an application may be made to the High Court, and if the circumstances require it, the High Court may issue a remedy:

King v Taharoa C Incorporation & Ors Gallen J, HC, Hamilton, A97/84, 5 July 1984

6 Where the question before the Court is contractual and based on common law principles, in which the question of interpretation of an industrial agreement does not arise, then the High Court may have jurisdiction:

Dallimore Groundworks Ltd v Hawke's Bay Transport IUW & Anor Eichelbaum J, HC, Napier, A19/84, 16 August 1984

7 Where the principal issue is factual, and the issue is of no wider industrial significance, the High Court may have jurisdiction:

Cull v Alliance Freezing Co (Southland) Ltd [1987] BCL 1578; *Mawson & Anor v Auckland Hospital Board* [1988] BCL 385

8 Where discovery, crucial to the case, is unavailable in another forum, the High Court may have jurisdiction:

Cull v Alliance Freezing Co (Southland) Ltd [1987] BCL 1578

9 Where a plaintiff may pursue a greater claim in the High Court than otherwise available in another forum, then the High Court may have jurisdiction:

Cull v Alliance Freezing Co (Southland) Ltd [1987] BCL 1578

10 Where the High Court's equitable jurisdiction is invoked, the Labour Court shall not have exclusive jurisdiction:

Mawson & Anor v Auckland Hospital Board [1988] BCL 385

11 In the absence of very clear statutory provision, the Legislature cannot be presumed to have excluded the normal supervisory role of the High Court:

Domestic Pilot's Committee v Aircrew Industrial Tribunal Eichelbaum J, HC, Wellington, A373/82, 3 September 1983

12 In so far as the Labour Relations Act 1987 does not supersede or abrogate the jurisdiction of the ordinary Courts to control tortious and unlawful behaviour, the High Court retains "a reserve or supportive role":

NZ Baking Trades Employees' Industrial Union v General Foods Corporation (NZ) Ltd [1985] 2 NZLR 110; *NZ Labourers' Union & Ors v Fletcher Challenge Ltd & Ors* CA 54/88 21 June 1988

13 The High Court has an inherent jurisdiction to see that orders of the Labour Court are obeyed:

Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union [1983] NZLR 612

14 In the absence of any qualifying statute or statutory rules, the inherent jurisdiction of the High Court remains in the sense of both an implied jurisdiction and in the sense of an inherited jurisdiction:

Benipal v Minister of Foreign Affairs & Anor Chilwell J, HC Auckland, A 878/83, 6 September 1983.

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Books

Sentencing in New Zealand

By Geoffrey G Hall, LLB (Hons) (Otago), LLM (Victoria University of Wellington)
Published by Butterworths of NZ Ltd, 1987, Price $90.00. ISBN 0 409 60107 1

Reviewed by J D Rabone, District Court Judge

This, the first textbook in New Zealand solely on the subject of sentencing, is to be welcomed because of the substantial changes that have been made, in the last three years, to the law in this country as it relates to sentencing many offenders. The Criminal Justice Act 1985, which came into force on 1 October of that year, put renewed emphasis on imprisoning violent offenders and, conversely, directed that full-time custodial sentences not be imposed for offences against property punishable by seven years or less imprisonment, except in special circumstances. The Act introduced a new sentence of community care in an apparent attempt to integrate offenders into what was presumably seen as a caring and rehabilitative community, and required the Courts to sentence offenders to make reparation for property damage, unless the Court was satisfied that it would be inappropriate to do so.

The Court of Appeal too, within that period, had delivered what Mr Hall describes as "guideline judgments", such as *R v B* [1984] 1 NZLR 261, to which should now be added *R v B* (unreported, CA 308/85, 11 April 1986), both giving directions to sentencing Judges in cases of sexual abuse on children. The latter judgment contains some instructive passages about the discretion of Judges at first instance in imposing sentence. The President of the Court, as he now is, said:

> Individual Judges, like other men and women, will differ in their response to the competing influences of abhorrence and compassion. They may be sceptical about the prospects that heavy sentences will deter other potential offenders; but that purpose of punishment cannot be safely ignored. Individual Judges are not likely to be gifted with unique insight into the solution of the sentencing problem, which is a complex human and social one more than a legal one . . . Failing significant social research offering a different solution, or some radical change in accepted standards in the community, or a new legislative policy, the courts would not be justified in any general lowering of sentencing levels . . . Not only in this field but in relation to all crimes, the only tenable course for a Judge is generally to keep his sentences reasonably in line with prevailing levels. It is wrong that punishment should vary markedly according to the particular Judge before whom an offender happens to come. While every Judge has a right to exercise mercy for particular reasons in special cases, that does not extend to adopting habitually different levels.

It will be noticed that the Court was referring to the approach in sentencing for all crimes, and so it is very appropriate that Mr Hall should have drawn his readers' attention to decisions of the Court of Appeal, of which the first were probably *R v Smith* [1980] 1 NZLR 412 and *R v Dutch* [1981] 1 NZLR 304 (dealing in and cultivating cannabis respectively), in which the Court has assembled schedules of sentences imposed in preceding and unreported decisions of its own. The schedules, and of course the reported cases themselves, are an ideal source of prevailing sentencing levels, to which sentencing Judges can be expected to turn (and to refer counsel by whom they are being addressed) in the pursuit of consistency and uniformity.

An author of a book on sentencing might either, as some English authors have done, look at offences in categories, indicate the current tariffs for them, describe what the Courts have regarded as aggravating and mitigating factors in such cases, and provide brief descriptions of illustrative decisions. Or he may, as Mr Hall has done, make a study of the principles of sentencing, and of the related procedure. Nevertheless Mr Hall's book is essentially practical and is designed for use by the busy practitioner and Judge.

The author describes his book as a companion volume to Garrow and Caldwell, *Criminal Law in New Zealand*, and Maxwell, *Summary Proceedings and Police Court Practice*. As the framework of those texts is an annotation of the Crimes Act 1961 and of the Summary Proceedings Act 1957 respectively so the major part of this book is an annotation of the new Criminal

Justice Act. There is however also a substantial introduction about the principles of sentencing, describing such things as the aims and objectives of sentencing, and there are three appendices, two of which deal with procedure pertinent to sentencing, and appeals against sentence.

Because the law is stated as at 31 July 1986, there are areas where the book is out of date, and indeed now incorrect. For instance, an important change to s 5 of the Criminal Justice Act was effected by s 2 of the Criminal Justice Amendment Act (No 3) 1987, which makes a full-time custodial sentence mandatory when the offence is one punishable by imprisonment for two years or more, where serious violence has been used or serious danger to the safety of another caused, and the Court is not satisfied that there are special circumstances of the offence or the offender. Similar provisions made in subs (2) where any violence has been used or any danger caused, if the offender has a previous conviction (within the preceding two years) for an offence punishable by imprisonment for two years or more.

Another topic upon which Parliament changed its mind after a short interval, so as to make the book out of date, is the way in which a remand in custody prior to sentence is to be taken into account. Under s 81 of the 1985 Act, as Mr Hall explains, the Court was not to take the period of remand into account in determining the length of sentence, but was to ascertain that period, which became material in determining the date on which the inmate became eligible for release on parole. In the No 3 Amendment Act the Courts are now again to take into account time spent in custody by reduction of the term of imprisonment that would otherwise have been appropriate.

Mr Hall's book is undoubtedly a work of reference, rather than one to be read for pleasure. Nevertheless the book contains some plums which can be stored away for future use, such as the following passage which Mr Hall quotes as authority for regarding "grassing" on accomplices as a mitigating factor.

> it is expedient that [thieves] should be persuaded not to trust one another, that there should not be "honour among thieves" (per Darling J in *R v James and Sharman* (1913) 9 Cr App R 142)

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Judicial Ethics in Australia

By the Hon Mr Justice J B Thomas
The Law Book Company Limited, Sydney, 126 pp, A$25. ISBN 0 455 20782 8

Reviewed by the Hon M Hardie Boys, a Judge of the High Court of New Zealand

The Australian judiciary, at its highest as well as its lowest levels, has had its troubles of late. It is therefore not surprising that an Australian should be moved to make this contribution to the subject of judicial conduct. It is a topic upon which there has been much pronouncement in the United States, if the bibliography is a fair guide. But the method of judicial selection employed in many jurisdictions there – the popular vote – has produced such a number of Judges with unusual qualities that the discipline and control of the judiciary has long been a very live and important issue. By contrast with such characters as the Judge who brought his cases to a prompt conclusion by threatening counsel with an electrically charged device of a kind that I imagine is available only in speciality shops that few of us visit, we in the Antipodes, like our closer kin in the United Kingdom, are an unexciting lot. By and large the eccentricities Judges in this part of the world have developed as a natural outcome of the enforced isolation of their calling have been tolerable and tolerated, and there has been general acceptance of their integrity and competence. In New Zealand, there have been few complaints about judicial conduct, and no Judge has had to be removed from office.

But times are changing, and Mr Justice Thomas' book is evidence of that fact. A Judge of the Supreme Court of Queensland, he has presented papers on the topic of judicial ethics to Conferences of Australian Supreme Court Judges, and this book is an expansion of one of those papers. In his foreword, Mr Justice Pincus of the Federal Court says "It is a bold writer who undertakes to tell other people how to behave". That may be thought a rather surprising remark for one Judge to make about another: for what else are Judges for? However it is not a fair summary of the purposes of this book, which is to pose questions for consideration rather than lay down principles or precepts.

Mr Justice Thomas' thesis is that as in other professional groups the Judges have established clear ethical standards; that these ought to be formulated in a way that will inform not only the judiciary but also the

public at large; and that the maintenance of these standards by the Judges themselves will render it unnecessary for the state to establish any formal complaints or disciplinary procedure. The author therefore argues for the insistence on high standards both on and off the Bench, and against outside interference which can only compromise judicial independence. He does not of course suggest that the ultimate remedy of removal from office should not be retained, but proposes that where there arises a serious question as to whether this remedy should be exercised it should be referred to a commission of senior or retired Judges for investigation and recommendation. This was what was in fact done recently in Australia.

It is the need to argue this case in the public arena that is indicative of changing times. The judiciary increasingly comes under public scrutiny. Whilst the purpose is usually political advantage, the effect is to create a climate in which Judges are seen to be accountable to apparent public opinion and, as a not unnatural extension of that view, to the litigants themselves.

In this country politicians have made comments showing variously ignorance of the Judges' inability to enter into public debate over their cases and regret that such a disability exists. In New South Wales the accountability of the Judge to the litigant has been taken to the stage of the establishment of a complaints procedure and associated bureaucracy, which, as Mr Justice Thomas points out, gives troublemakers an unrestricted range of attack upon Judges. The American experience in this respect causes him to be fearful of the establishment of similar procedures elsewhere in Australia. We in New Zealand should have the same fear.

There is little that Judges can do to stem misguided public criticism, save to be disloyal to their oaths of office. They can only wish at times that someone would don the mantle that was traditionally the Attorney-General's of speaking up in their defence, or at least of explaining the reasons for what was done. Whether other forms of criticism would be allayed by the formulation of ethical guidelines such as Mr Justice Thomas proposes may be debatable. In any event, such a formulation would not be easy, particularly – to repeat the expression – in these changing times.

No one seems to have taken exception to Lord Campbell's response to tedious counsel when, after marching up and down the Bench casting furious glances at counsel,

> folding his arms across his face he leaned as if in absolute despair against the wall, presenting a not inconsiderable amount of back surface to the audience. (Ballantine, *Some Experiences of a Barrister's Life*).

Most Judges today have I hope a better perception of appropriate conduct on the Bench. The discussion of this topic undertaken by Mr Justice Thomas would find universal acceptance. Offering to "square up" to a defendant, or the hurling of abuse and insult at counsel are urges which all would agree must be suppressed. Sometimes personal knowledge or indirect financial interest, such as the holding of shares in a company which is a party to the proceedings can cause concern, but the proprieties are well known. More challenging perhaps, are the Judge's views on "headline hunting", and the use of the trappings of one's office for personal advantage, but again there can be little room for doubt on the conclusions he expresses.

The real difficulties arise off the Bench. Here there are conflicting pressures and demands and widely differing views. No one expects Judges now to live the monastic kind of life that was thought proper for their predecessors. Few Judges now expect to have to live it. Yet a Judge cannot go on living just as he did before his appointment. The dangers of so doing are obvious. Moreover he will be confronted with many inhibitions on the part of others. His life can thus be a little lonely, and that in itself can proffer a serious temptation. A State Attorney-General in Australia recently said that Judges are no longer respected because they live apart from the community: they do not stand in the crowd in the pub or at the footie. Does the citizen expect Judges to do this, however; and should they? How close should their friendships with practitioners be? How involved in community organisations? Are a Judge's personal morals relevant to his fitness for office?

It is questions such as these that Mr Justice Thomas explores. His views in some respects are quite strict: for example he is not much in favour of Judges serving on Royal Commissions and similar inquiries, and he has doubts about the extent to which they should engage in financial and business activities. (The case of an Illinois Judge who supplemented his salary of $7,500 with a stipend of $42,500 as a commissioner of baseball is an example only of the need for adequate remuneration). Not all Judges will agree with the author's views in this area. Nonetheless he gives some very interesting insights into the judicial conscience, and poses questions which deserve consideration by anyone interested in the integrity of our judicial system. The discussion of these serious subjects is laced with delightful anecdotes of judicial failings, most of them, one is glad to say, derived from places far away. Such things one is sure (even if a little regretfully) could never happen here. The book is at times a little solemn "It is as well to mention however the observation that 'a Judge is not expected to be seen in pubs frequently' " – but that detracts neither from its value nor its readability.

It may be that in this smaller country some of the concerns which prompted the book do not arise, although to take just one point it will be a helpful reference for some if the question of a Law Commission is raised again. Most may agree that of particular interest and pleasure is the inclusion, as an appendix, of the 18 "things necessary to be continually had in remembrance" which Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench, wrote out for himself in the 1660s. This marvellous piece begins with an affirmation of duty to do justice "(1) Uprightly (2) Deliberately (3) Resolutely"; and it ends with a reminder "To be short and sparing at meals that I may be fitter for business". Is there anything more to be said? □

Books

NSW Police Law Handbook

By J Oxley-Oxland
Published by Butterworths Pty Limited, Sydney; 1988; pp 166. $A22.

Reviewed by David Bates, a Hamilton practitioner

This book of pertinent and precise principles of law is mainly for use by police officers in New South Wales. Treatment of topics is of sufficient depth to enlighten the reader initially but not so detailed as to daunt those not too familiar with use of legal texts. The method of statement of principle, reference to authorities in support, and commentary, is consistent throughout and easy to follow.

The three parts headed respectively "Interrogation", "Arrest" and "Search and Seizure" are further divided each into seven topics. With one exception (Misprision of Felony), all topics are of fundamental importance to police and traffic officers in New Zealand. For example, "Detention for Questioning" and the "Voluntary Confession Rule" in Part I, "Meaning of Arrest" and "Reason for Arrest" in Part II, and "Search of Person" and "Search Warrants" in Part III are all matters of importance here as well as in New South Wales.

The table of reported cases discloses some references which will be familiar to New Zealand police officers and lawyers. These are of general application on matters of importance in Commonwealth jurisdictions; eg *Rice v Connolly* [1966] 2 All ER 649 as to wilful obstruction of a constable in the lawful execution of his duty; and *Christie v Leachinsky* [1947] AC 573 as to matters of arrest and false imprisonment. Probably most of the references to Australian cases will be unfamiliar to New Zealand readers even though many of the principles involved are important in this country.

Regrettably, only one New Zealand case is referred to – *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) as to the invalidity of "General" search warrants. Not even *Blundell v Attorney-General* [1968] NZLR 513 (CA) as to the illegality of restraint short of lawful arrest is mentioned. But then, the book is not written with New Zealand in mind.

(Fortuitously perhaps, most of the topics covered in this book and more, are given detailed coverage in Maxwell & Bates *Police Law In New Zealand*, shortly to be published by Butterworths to replace the 1967 edition of Luxford's *Police Law In New Zealand*.)

Because of its essentially Australian orientation, the *NSW Police Law Handbook* will be of most use to police officers there. But, that peculiarity aside, the material it contains makes it a complementary primer for New Zealand law enforcement officers, students of criminal law, and of course, the lay reader. □

Recent Admissions

Barristers and Solicitors

Aitken JBE	Wellington	10 June 1988
Anderson DW	Wellington	10 June 1988
Anderson DJ	Wellington	10 June 1988
Avren JDS	Auckland	1 March 1988
Baldwin KA	Wellington	10 June 1988
Beckett AO	Wellington	10 June 1988
Bergseng J	Wellington	10 June 1988
Brennan DSL	Wellington	10 June 1988
Brian DS	Wellington	10 June 1988
Capes GV	Wellington	10 June 1988
Caughey LHO	Wellington	10 June 1988
Clarke AG	Wellington	10 June 1988
Corrigan ME	Wellington	20 May 1988
Cruden LJ	Wellington	16 May 1988
Derby JC	Wellington	10 June 1988
Dunn AMM	Wellington	10 June 1988
Everett KSJ	Napier	19 February 1988
Fawcett AD	Wellington	10 June 1988
Flewitt DP	Wellington	10 June 1988
Frankel SR	Wellington	10 June 1988
Freeman-Greene DM	Wellington	10 June 1988
Gentithes TG	Auckland	4 March 1988
George DF	Wellington	10 June 1988
Gibson JA	Auckland	30 March 1988
Goodman DS	Wellington	10 June 1988
Gordon CJ	Wellington	10 June 1988
Gougoulas A	Wellington	10 June 1988
Gradwell FG	Wellington	10 June 1988
Guild JS	Christchurch	17 December 1987
Hamilton NJ	Auckland	19 May 1988
Hartland PRQ	Christchurch	27 April 1988
Harwood RM	Wellington	10 June 1988
Hawkins JE	Auckland	18 February 1988
Ho GKK	Wellington	10 June 1988
Hoggard CJ	Wellington	10 June 1988
Holden CMH	Wellington	10 June 1988
Hooker WI	Christchurch	12 April 1988
Jamison HI	Auckland	18 May 1988
Kiernan AE	Auckland	14 April 1988
Laufale AE	Wellington	10 June 1988

Mergers and takeovers under the Commerce Act 1986

By David A R Williams, QC, Barrister, Auckland

In this article, which is a revised version of an address given to the 1988 New Zealand Commerce Act Workshop at Wellington on 22 May 1988, Mr Williams discusses the operation of the Commerce Act 1986 and suggests that various procedural reforms are necessary. The article is topical in view of the proposed review of the Act announced recently by the Minister of Trade and Industry.

Introduction

The Commerce Act 1986 came into force on 1 May 1986. Thus the new mergers and takeovers regime of the Act has been in operation for a little over two years. It is therefore time to review the experience under the Act and consider the leading decisions of the Commerce Commission, the High Court, and the Court of Appeal.

By means of this review I hope to establish my thesis that while the Act and the decisions of the Commission now contain a coherent and workable set of principles governing takeovers and mergers there are serious procedural inadequacies in the Commerce Act which need urgent attention. In other words, the substantive law is in a sound and settled form as a result of the exposition of the Commission and the Courts but the procedural framework of the Act has been shown to be deficient. Moreover, the limited resources of the Commerce Commission coupled with an excessive workload are creating unacceptable delays in decision making. Such delays tend to engender a disrespect for the law in the eyes of the commercial community and may lead to a situation where attempts at avoidance or evasion of its requirements become commonplace. Such developments would be most unfortunate and might require the reintroduction of the monopolies investigation powers previously contained in s 61 of the 1975 Act as well as the catch-all evasion clause of the former s 67(7) (as introduced by s 26 of the 1983 amendment).

The aims and objectives of the 1986 Act

Before an assessment can be made as to how the Commerce Act has worked in practice it is necessary to specify what were the legislative objectives that were sought to be attained by the new merger provisions of the 1986 Act.

In discussing the legislative objectives of the 1986 Act brief reference must be made to the prior law of mergers and trade practices contained in the Commerce Act 1975. Under the 1975 Act the Examiner of Commercial Practices investigated and prosecuted trade practices complaints. There were comparatively few complaints and they often took years to come to a hearing. The powers of the Commission to act against trade practices were limited. It is therefore fair to say that, so far as trade practices were concerned, the 1975 Act was a weak and ineffectual statute.

Under the 1975 Act and its subsequent amendments it might broadly be said that there was a reasonably intensive scrutiny of mergers and takeovers. A large number of mergers and takeovers required advance notification and clearance. The lack of a comprehensive and coherent trade practice regime and the fairly high levels of concentration in many New Zealand industries led to a wide net being laid to ensure the scrutiny of merger and takeover proposals in advance of their implementation. In addition to specific industries in respect of which merger or takeover proposals required advance notification and clearance, all merger and takeover proposals to which the Act applied and in respect of which the aggregate value of the assets of all the participants involved was $20M or more and the assets of the smaller participant exceeded $2,500,000 required notification and clearance.

Mr Peter Neilson MP, Chairman of the Commerce and Marketing Select Committee said in the House of Representatives when reporting back the Commerce Bill of 1986 that one of the major elements of the Bill was the introduction of an effective trade practices regime along the line of equivalent Australian legislation. He went on to state that effective trade practice provisions would enable the level of scrutiny of mergers to be lessened. He predicted that the number of merger proposals requiring clearance or authorisation would be significantly reduced under the new Act through an increase in the minimum asset threshold levels of such proposals, the previous

thresholds being altered to $100M and $5M respectively. Mr Neilson also stressed the streamlined procedures for merger approval which were introduced under the Bill. The extent to which these objectives have been achieved is considered hereafter.

The main provisions of the Commerce Act 1986

The main features of the Act are now reasonably well known. A brief summary of the central provisions of the Act is all that is necessary.

The key sections are ss 66-69 which establish the statutory criteria in relation to merger or takeover proposals which require prior notification and approval. They provide that where the Commission is satisfied that implementation of a merger proposal would not result in any person acquiring or strengthening a dominant position in any market, it is required to give a clearance within 20 working days of the registration of the proposal notice. Where it is not so satisfied, it must nevertheless grant an authorisation to the proposal if it is satisfied that the proposal would result in a benefit to the public which would outweigh any detriment to the public from the proposal arising out of the acquisition or strengthening of a dominant position. Any decision to decline authorisation must be made within 100 working days of the proposal notice. The clearance or authorisation must be acted on within 12 months of the Commission's determination.

Section 66(7) in relation to clearances, provides:

> The Commission shall give a clearance under subsection (6) of this section unless it is satisfied that the merger or takeover proposal, if implemented, would result, or would be likely to result, in any person [whether or not that person is a participant in or otherwise a party to the merger or takeover proposal] acquiring a dominant position in a market or strengthening a dominant position in a market.

"Dominant position" is defined in s 3(8) to mean:

> For the purposes of sections 36, 66 and 67 of this Act, a dominant position in a market is one in which a person as a supplier or an acquirer of goods or services either alone or together with any interconnected body corporate is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market . . . .

Section 3(8) further provides that for the purposes of determining whether a person is in a position to exercise a dominant influence over the production, acquisition, supply or price of goods or services in a market, regard shall be had to –

> (a) The share of the market, the technical knowledge, the access to materials or capital of that person together with any interconnected body corporate;
>
> (b) The extent to which that person is constrained by the conduct of competitors or potential competitors in that market;
>
> (c) The extent to which that person is constrained by the conduct of suppliers or acquirers of goods and services in that market.

Section 66(8), deals with the public benefit test and provides:

> The Commission shall grant an authorisation under subsection (6) of this section unless it is satisfied that the merger or takeover proposal, if implemented, would result or would be likely to result, in a benefit to the public which would outweigh any detriment to the public which would result or would be likely to result from any person [whether or not that person is a participant in or otherwise a party to the merger or takeover proposal] acquiring a dominant position in a market or strengthening a dominant position in a market.

Public benefit is not defined in the statute but, as we shall see, the parameters of the concept have been carefully considered by the Commission in its decisions.

Determining dominance

News Limited/INL

The Commission's approach on the vital issues of "dominance" and "public benefit" can be deduced by reference to six leading decisions. The first of these was an early decision (No 164: (1986) 5 NZAR 47) of the Commission given on 9 May 1986 involving the proposal by Rupert Murdoch's News Limited to increase its shareholding in Independent Newspapers Limited from 21.68% to 40%. Consent was granted.

In discussing the concept of a "dominant position" the Commission made a number of pronouncements which have provided the foundation for its subsequent decisions. It said at 6 NZAR 50:

> A person can be considered to have a dominant position in a market when that person is able to make significant business decisions, particularly those relating to price and supply, without regard to the competitors, suppliers or customers of that person. Having regard to the fact that the long title of the 1986 Act provides that its object is to promote competition in markets within New Zealand, it may reasonably be inferred that this ability to act independently is presumed to arise only in markets where there is an absence of competition.
>
> . . . s 3(8) requires the Commission to have regard to factors affecting both the *structure* of the market [s 3(8)(a)] and the *behaviour* of concerns engaged in the market and of suppliers and acquirers in such market [s 3(8)(b) and (c)]. This requires the Commission to consider how the proposal affects or is likely to affect the relevant markets, judged at the time of the transaction from structural and behavioural facts, as to whether there is an acquisition or strengthening of a dominant position therein.

The Commission then went on to provide (6 NZAR 51-52) an explanatory list of some of the factors which can be relevant to the

issue of dominance. The factors were:

(i) The structure of the market which requires a consideration of:

  (a) The share of the market of the merged new concern.
  (b) The degree of market concentration.
  (c) The size distribution of all concerns in the market.
  (d) The extent to which the products in question are characterised by product differentiation and sales promotion, ie whether there are reasonably close substitutes.
  (e) Access to technical knowledge, materials and capital.
  (f) The financial stability of the merged concern in relation to other operators in the market.
  (g) The nature of any formal, stable and fundamental contracts, arrangements or understandings between concerns in the market.
  (h) The extent of corporate integration (eg interlocking shareholdings and cross directorships) among concerns in the market.
  (i) The extent of vertical integration.

(ii) The extent of restraints imposed by the conduct of competitors or potential competitors or by others affected which requires a consideration of:

  (a) The extent to which competition exists or has existed and is likely to continue.
  (b) The extent to which the concern is constrained by the conduct of competitors.
  (c) The capacity of the concern to determine prices in or to exclude entry to the market without being inhibited in that determination or action by suppliers and acquirers.
  (d) The height of barriers to entry in that market and the ability of potential competitors to enter the market and to sustain a position in the market.

The Commission stressed that the list was not necessarily exclusive of the matters which needed to be considered nor would all of the factors be relevant in any particular case. It went on to say that (6 NZAR 52):

> The end result of the assessment required by s 66(7) is to test whether in the relevant markets, having regard to all of these factors, the degree of dominance of the new concern, as created or strengthened by the proposal, allows or would be likely to allow workable or effective competition in the relevant market.

As to the critical question of when a person can be considered to have a dominant influence in a market the Commission concluded (6 NZAR 50) that such a position arises

> . . . when [a] person is . . . able to make significant business decisions, particularly those relating to price and supply, without regard to the competitors, suppliers or customers of that person. . . .[T]his *ability to act independently* is presumed to arise only in markets where there is an absence of competition. [emphasis added]

Magnum/DB

The analytical importance of this ability to act in an independent unrestrained fashion was underlined by the Commission in its November 1986 decision (No 182) to grant consent to the proposal that Magnum Corporation Limited (Rothmans) acquire up to 100% of the issued share capital of Dominion Breweries Limited.

In assessing dominance in that case the Commission felt it appropriate to aggregate with the liquor and related interests of Magnum those of Brierley Investments Limited which at the time of the application had a significant shareholding in Magnum and which later acquired control of Magnum. This approach required the Commission to take into account Brierley's interests in Cook/McWilliams and Quill Humphreys Limited.

The consequence of this aggregation was to reveal that the Magnum-Brierley Group would have the largest market share at the national level in all product groupings. The Commission also examined the regional markets. It found that in Canterbury the Magnum/Brierley Group would have approximately 70% of the off-premises retail liquor market. However, the Commission noted that Lion, together with its subsidiaries, also had a significant market share while both Wilson Neill and the various Trust groups also provided strong independent competition.

The decision contains a detailed discussion of the question of dominance. The Commission began by pointing out that:

> . . . dominance is a measure of market power. Being in a "dominant position" is interpreted by the Commission, in essence, as *having sufficient market power [economic strength] to enable the dominant party to behave to an appreciable extent in a discretionary manner without suffering detrimental effects in the relevant market[s].* This interpretation stresses independence of behaviour, ie conduct that is pursued independently of the presence, actions or reactions of existing or potential competitors, purchasers or suppliers. The interpretation therefore suggests a lack of restraint on the behaviour of the dominant party – restraint that would be assumed to be associated with conditions of effective competition. Thus, to prevent the acquisition or strengthening of a dominant position, as the Act seeks to do, is to reduce the risk of individual or group exposure to adverse consequences arising from the lessening in effective competition implied by dominance. [emphasis added]

Later the Commission said:

> In any particular merger/takeover case an examination is required, within the defined markets, to determine whether or not one or more of the competitors could act on a continuing basis without regard to the others. *An*

> *important consideration is whether or not at least one strong competitor would remain outside the merged entity* ie a competitor to whom the merged entity would have to have regard in determining its pricing and other behaviour in the market. [emhasis added]

On the facts of that case the Commission found that dominance would not be created in spite of the high market shares of the Brierley Group because the Commission was satisfied "that the merged concern would continue to be constrained by the presence and conduct of its competitors, especially Lion".

The Commission found that rivalry between the major liquor groups was evident in terms of price, product, and access to independent distribution channels.

Lion, which had opposed the merger before the Commission, sought judicial review of this decision. It was compelled to proceed by way of a review because it did not come within the limited category of persons to whom a right of appeal is given by s 92.

Lion's basic contention before the High Court was that the Commission's interpretation of dominance wrongly applied the threefold statutory criteria for determining a dominant position in a market (s 3(8)) by overemphasising s 3(8)(b) and (c) and giving inadequate weight to s 3(8)(a). Lion's precise submission was expressed as follows:

> . . . the Commission has disregarded the words of s 3(8) in formulating its approach to dominance. It has extracted two subsidiary elements of s 3(8) namely s 3(8)(b) and (c) and developed them into its "independence of behaviour" thesis which thereafter pervades its approach to the evaluation of the evidence. It does not, as required by the section, treat "the dominant influence" criterion as paramount. Moreover, it gives no or no adequate weight to the "structural" elements especially market shares referred to in s 3(8)(a). That subsection is not once mentioned explicitly (or implicitly) in paragraph 77.
>
> It is not going too far to say that the Commission had to downplay or ignore market shares in this case if it was to give a clearance because, as we shall see, the Brierley group market shares as a result of the merger were very high in many markets.
>
> To downplay the significance of market shares not only ignores the explicit provisions of s 3(8)(a) but also ignores the universal recognition of the vital significance of high market shares as an indicator of dominance . . .
>
> The basic issue in terms of s 3(8) is whether the merged company will be "in a position to exercise a dominant influence" in the market. The Commission has elevated the "independence of behaviour" concept to such a degree as to replace this primary test and in doing so has misconstrued the statute.

The Chief Justice (unreported judgment, 27 November 1987, M/666/86 and CP 561/86, Wellington Registry) rejected the argument and upheld the Commission's approach in the following passage at pp 14-15:

> After careful consideration of the whole of the Commission's decision I am unable to accept [the Lion argument] as a valid criticism of what the Commission has done. It has applied the "dominant influence" test in as far as it is spelt out in the section but it has had to decide for itself what would constitute a "dominant" influence. It had to give a meaning to the word "dominant" as it would apply it in the context of the case. It adopted the so-called "independence of behaviour test" as equating to "dominance" so that where throughout its decision it referred to "independence of behaviour" it was in fact referring to "dominance". Such a so-called test did not simply extract the two paragraphs (b) and (c) of s 38(8) and use those as a basis for its interpretation of "dominance". It also included the para (a) requirements as is apparent from that part of its decision just referred to when it spoke of a person in a "dominant position" having sufficient market power [economic strength]. Market power and economic strength are matters referred to in para (a) which speaks of the share of the market, technical knowledge, access to materials or capital.

The *News Limited/Magnum DB* approach to dominance has been applied consistently by the Commission in subsequent cases: see *Brierley Investments Limited/Petrocorp* decision 215.

This approach is now firmly established in New Zealand and appears to have general support from the business community, doubtless because it represents a high competition threshold. That this is so is confirmed by the very small number of mergers and takeovers which have been found to create dominance.

Mr J G Collinge, the Chairman of the Commission, has recently summarised those cases where dominance has been found. His summary, supplemented by an analysis of the *Brierley/Petrocorp* case, is as follows:

(a) Where the only two concerns in the market wish to join together [eg transformers in *Cory Wright & Salmon/Tolleys*]. A slight variant is where the only two national concerns wish to join together and the competitors are local only and have a small market share [eg icecream in *Wattie/Taylor Freezer*]. Another variant is where the merger would vertically integrate the dominant operators at the wholesale and retail levels of a market eg Petrocorp (owner of the sole transmission/transportation system for natural gas) and Brierley Investments Limited (owner of the largest retailer of natural gas): Decision 215.

(b) Where one of the participants to the proposal already has a dominant position in one market and where downstream acquisitions are likely to create dominance in another market [eg kraft paper and containers made therefrom in *NZFP/Amcor*].

(c) Where a concern [usually having a significant market share] captures the essential

> inputs for that market so that thereby its competitors will have to purchase their supplies of raw material from it [eg bread – yeast and flour in *Goodman Fielder/Wattie*].

In Australia, where the House of Representatives Standing Committee on Legal and Constitutional Affairs is presently undertaking an inquiry into mergers, takeovers and monopolies, there have been suggestions that the similar, if not identical, test for market dominance contained in s 50 of the Trade Practices Act 1974 should be amended so as to lower the threshold for mergers and takeovers by introducing the "substantial lessening of competition" test. This test applies to trade practices both in New Zealand and Australia. This was in fact the test under the original 1974 Act until the dominance test was substituted in 1977! Time will tell whether there is any likelihood of this change being made in Australia. In New Zealand it seems doubtful that such a change will be made, notwithstanding the fact that arguments may be made for a unified test for mergers and trade practices. The current review of the Act is unlikely to involve major changes to a relatively new Act where issues such as these were canvassed extensively at the time of its introduction.

In this connection it is not without interest to note that the new Canadian Competition Act of 1986 introduces, in relation to mergers, the "substantial lessening of competition" test. This test closely resembles the United States standard in s 7 of the Clayton Act which prohibits acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly". Thus there will now be importation into Canada of concepts of United States antitrust law. The Canadian Competition Act is discussed again below when matters of procedure are considered.

Assessing public benefit

NZFP/UEB

The other leading decisions involve findings of dominance and a consideration of claimed public benefits. The first of these was the decision (No 199) on 7 May 1987 to refuse consent for the establishment of a joint venture company, to be owned as to 50% each by New Zealand Forest Products Limited and UEB Industries Limited to acquire all of the assets of UEB's paper board packaging business and such part of UEB's flexible packaging business as should mutually agreed between NZFP and New Zealand Equities Limited.

Consistent with its earlier approach, the Commission examined in relation to the kraft and paperboard markets, structural factors, domestic competition, import competition, barriers to entry and constraints by suppliers and customers. It concluded that

> . . . there is no competition to NZFP in the production of kraft and paperboard in New Zealand. Also, there are no likely potential competitors – either from existing manufacturers, new entrants or from importers. Likewise, there are no constraints upon the merged concern from customers or suppliers. Having regard to the foregoing considerations the Commission has concluded that NZFP is in a dominant position in the market for kraft papers and paperboard.

The Commission made similar findings in relation to the production of coated papers and multiwall bags.

Having thus found dominance the Commission was required to examine the claimed public benefits in order to decide whether an authorisation should be granted. Two public benefits were claimed by NZFP, namely "enhanced competition arising out of its intended greater involvement and use of its expertise in kraft packaging products to enhance the performance of the packaging division" and also "the retention of New Zealand sourced supply". The Commission concluded that in essence these arguments were that further efficiencies as a result of the proposal would enable NZFP to perform better both domestically and internationally.

While prepared to recognise this as a benefit which could be considered under the Act, the Commission was not satisfied as to the extent of such efficiencies or the manner in which the benefits would materialise. It concluded that their likely beneficial impact on various sections of the community had not been sufficiently established. Having thus found no proved public benefit to exist, it was not necessary for the Commission to undertake the weighing exercise eg benefit compared to detriment.

Goodman Fielder/Wattie

The Commission's comments on public benefit in the NZFP case signalled a relatively stringent approach to the identification, proof, and quantification of public benefit. This was taken a stage further in the next decision to be discussed namely the merger between Goodman Fielder Limited and Wattie Industries Limited.

Space does not allow a detailed consideration of the lengthy 77 page decision (No 201A; (1987) 6 NZAR 446) given on 14 May 1987 in the *Goodman Fielder/Wattie* case. It will suffice to record the Commission's conclusion on dominance (6 NZAR 449) which was as follows:

> The proposal will result in the acquisition or strengthening of dominance in the markets for poultry and stockfeed, North and South Island flourmilling, yeast, bread and other bakery products. We believe that all of the markets in which dominance has been found meet the test of dominance in *Magnum/DB*, namely, that the merged concern would be able to act to an appreciable extent in a discretionary manner without suffering detrimental effects in the relevant markets. In all markets, for the reasons canvassed, there is a lack of restraint upon the merged concern even taking into account all of the sources from which this could come – substitutability of products, de novo entrants, opportunities for existing competition to expand, and imports.

The Commission was therefore required to determine whether or not the proposal should be authorised and thus to address the public benefit arguments. This led to the first detailed examination of

the principles which the Commission considered should apply in the assessment of public benefit. The following propositions, which have been followed in later cases, emerge from the Commission's analysis:

1 In weighing benefits and detriments the Commission takes into account the detriments resulting from those markets where dominance is found and weighs against them the benefits flowing from the *whole* of the proposal. If the Commission finds dominance to exist it is required to refuse consent unless the applicant can satisfy the Commission that public benefit flowing from the proposal outweighs any detrimental effect from the loss of effective competition.

2 When public benefits are being claimed, the mere making of assertions and vague claims will not suffice. What is required, if any weight is to be given by the Commission to claimed public benefits, is evidence in relation thereto.

3 The establishment of a stronger export base is a public benefit assuming that the goods in question are produced in New Zealand and improvements to employment, economic prosperity etc in New Zealand result therefrom. However, it is also necessary that the applicants demonstrate that the merger is the only way to achieve these objectives. In the particular case the Commission referred to s 44(g) of the Act exempting co-operation in exporting from the trade practices provisions of the Act and inferred that joint venture exporting could be accomplished by the participants without the need to merge.

4 Efficiency gains through lower operating costs and rationalisation of resources will constitute a public benefit. However, the weight to be attached to such benefit is unlikely to be significant if such benefits will only flow to a limited section of the public ie shareholders and investors. If these efficiency gains are to be given significant weight it must be demonstrated that they will be passed on to the consumer (ie to a wider section of the public) in the form of lower prices, better terms or conditions, improved quality range etc.

Although the Commission found that claims of efficiencies as a result of the merger were established, it decided it would not place great weight on them since there seemed to be no realistic prospect that they would be passed on to the New Zealand consumer. It stressed that "it is competition which protects the consumer and the interests of the consumer must always bulk large in the Commission's deliberations." In the result no clearance or authorisation was granted. The applicants appealed to the High Court and thence to the Court of Appeal. As discussed below a clearance was subsequently granted (Decision 212A, 19 November 1987) on the basis of undertakings to divert certain assets.

New Zealand Forest Products and Amcor

The next major decision (No 208, 21 August 1987) to be mentioned is the application by Amcor Limited to acquire up to 50% of the shares in New Zealand Forest Products and for a joint venture company owned as to equal shares by Amcor and NZFP to acquire the assets employed in connection with the pulp and paper business of Amcor and NZFP and the business of Anfor Pty Ltd.

In para 47 of its decision the Commission found that there was no competition to NZFP in the production of kraft and paper board in New Zealand and that there were no likely potential competitors – either from existing companies in the timber industry, new entrants or from importers. Likewise, it was found that there were no or no sufficient constraints upon the merged concern from customers or suppliers, nor from alternative packaging or wastepaper manufacture.

The Commission therefore concluded that NZFP was in a dominant position in the market for kraft papers and paperboard and that the merged concern, as heir to the NZFP pulp and paper business would likewise have such dominance. Further it was held that the joint venture would also have a dominant position in the case/container production based on kraft paper and board. It was found that the implementation of the proposals would strengthen that dominant position in both markets.

On public benefit the Commission found that the merger was likely to enhance the development of the New Zealand timber industry by encouraging and assisting projects which develop unutilised resources and would also produce benefit in terms of employment, increased work for service industries and general prosperity as well as providing a better base for world competition. However, while the Commission was impressed by such benefits it was not, on balance, satisfied in terms of s 66(8) that the public benefit outweighed the detriment flowing from the acquisition or strengthening of a dominant position in a market. Thus authorisation was refused.

The Commission in this case further refined the general principles upon which it assesses public benefit issues. At para 52 it summarised the public benefit principles in so far as they applied to mergers and takeovers as follows:

General

52 The Commission has endeavoured to outline some general principles upon which it will assess public benefit issues in *Goodman Fielder/Wattie* [Decision No 201A] and *Whakatu/Advance* [Decision No 205]. The latter case related to an authorisation of a restrictive trade practice rather than a merger or takeover. The respective provisions – though similar – are not identical. Accordingly, it may be convenient to summarise here the public benefit principles in so far as they apply to mergers and takeovers:

(i) The Act appears to rest on the premise that the interaction of competitive forces will yield the best allocation of New Zealand's economic resources, the lowest prices, the highest

quality and the greatest material progress etc, unless it is shown, for example, that the possession of a dominant position is better able to achieve economic efficiency or, for example, that some other public benefit from the proposal should have precedence [*Goodman Fielder/Wattie*].

(ii) The Commission is required by the Act to take the whole of the proposal into account [and not only those parts which create dominance] in determining public benefit flowing therefrom. It can, however, only take those markets in which dominance exists in evaluating detriment flowing from the dominance. The effect is to allow detriments resulting from dominance to be offset by public benefit resulting from the whole of the proposal and not merely those created by the dominance [*Goodman Fielder/Wattie*].

(iii) The test is worded broadly and there appears no limitation as to the categories of "public benefit" which may be claimed [*Whakatu/Advance*].

(iv) A benefit is something of value to the public. It could include economies of scale for example, even though the cost-savings may not actually be passed on to the consumer or user, say in lower prices, at least in the short term. Of course, the weighting of various benefits may differ according to their nature, impact, circumstances etc [*Whakatu/Advance*].

(v) As to the meaning of "public", it seems clear from the preamble of the Act that "public" refers to the New Zealand public [*Whakatu/Advance*].

(vi) Further, the term is wider than simply consumers. It could extend to various trade interests such as manufacturers, wholesalers or retailers, as well as to users, investors and so on. Further, it includes benefit to the country as a whole — as in the fostering of a national interest, through an internationally competitive industry [*Whakatu/Advance*].

(vii) An important aspect of the meaning of "public" is that it used in contradistinction to an interest which is purely private in nature. A benefit to an individual from the agreement would not of itself constitute a benefit to the public. As to when the interests of individuals become those of the community, a test is that the effect is sufficiently widespread or indiscriminate that it is likely to provide a benefit to a whole range of persons [*Whakatu/Advance*].

(viii) The test of probability [as distinct from possibility] has been laid down by the High Court in relation to mergers or takeovers. A further refinement to the test of probability is added by the Australian case of *Howard Smith Industries* [1977] ATPR 40-023:

> this does not mean that the likely effects must be more probable than not, but rather that there must be a tendency or real probability of a particular result . . . [see *Whakatu/Advance*].

(ix) The legal onus, ie at the end of the day, is upon the applicants to establish that benefit outweighs the detriment shown to exist — see *Goodman Fielder/Wattie* for the reasons therein expressed.

Fletcher Challenge/NZFP

In decision 213 dated 5 November 1987 involving Fletcher Challenge Limited and New Zealand Forest Products the Commission once again refused to grant an authorisation. The Commission found that acquisition by FCL of 100% of NZFP would result in the acquisition or strengthening of dominance in the markets relating to log utilisation, kraft pulp, kraft packaging and board and by vertical integration of the whole of the forestry sector.

The general public benefit argued by FCL was the creation of efficiencies and savings which would enable the merged firm to compete better with overseas concerns, translating into benefits for consumers and the many private shareholders of FCL and NZFP. Furthermore FCL offered to undertake that 150,000 cm of sawn logs a year would be made available to competitors.

A wide range of additional public benefits were argued but once again the Commission found that the benefits were comparatively small in comparison with the detriments flowing from the lessened competition in an important sector of the economy and authorisation was refused. So too was FCL's second application which was to be allowed to increase its holding in NZFP to 35%.

Comments on "Public Benefit" principles

The Commission has thus laid down a fairly strict approach to "public benefit", especially when one takes into account the inherent difficulty of "proving" public benefit. The observation, in a helpful recent article on the topic by R J Ahdar[2] that "the signs are present that in New Zealand authorisation will be a privilege granted sparingly" seems to state the position fairly. In only one merger case, the recent decision in the *New Zealand Co-operative Dairy Company/Auckland Co-operative Milk Produce merger* (Decision 216), has an applicant succeeded in establishing public benefits which outweighed the detriments flowing from dominance. In that case the Commission held that:

> the prospective efficiency gain from the participants' rationalisation proposal, together with the prospective gains from the merger's facilitation of the

> Winter Milk Scheme, were sufficient for the Commission to conclude that public benefit from the proposal would be likely to outweigh the competitive detriment resulting from the strengthening of dominance in the Auckland town milk market.

The Commission's requirement that if efficiency gains are to be given significant weight it must be demonstrated that they will be passed onto the consumer has not passed without criticism. Thus Mr Philip L Williams said in a recent paper[3] entitled "Why Regulate for Competition":

> It is clear that, despite the urgings of economists, the Australian Trade Practices Commission, and New Zealand's Commerce Commission do not always adopt the standard of economic efficiency in their evaluation of public benefit. In particular, they frequently depart from Hume's law that a dollar is a dollar. Because they value benefits to consumers above benefits to, say, shareholders, both bodies have hesitated to classify cost reduction from re-structuring as public benefits unless competition in product markets compels the re-structuring firm to pass on these benefits to purchasers in the form of lower prices.

Mr Williams went on to point out that this has never been the attitude of the Australian Trade Practices Tribunal. He noted however, that the Australian Trade Practices Commission has recently restated its view along the same lines and pointed to a similar approach in New Zealand particularly in the *Fletcher Challenge Limited/New Zealand Forest Products Limited* (decision of 15 November 1987 No 213 paragraph 167).

Mr Williams contends, in my view with considerable force, that to impose this requirement

> is to confuse the efficient allocation of resources with the distribution of income. The authorities which administer trade practices statutes should not have to pursue two goals simultaneously — (i) an efficient allocation of resources; (ii) a redistribution of income from shareholders to purchasers. Better implementation of policy would result if trade-practices authorities were to aim only for an efficient allocation of resources, and so leave concern about the distribution of income to the departments of government responsible for taxation and transfer payments.

In the light of these criticisms the observations made by a differently constituted Commission in the recent *New Zealand Co-operative Dairy Company* (decision 216) at para 14.27 are of some interest because it seems that the Commission has moved away to some degree from the position taken in earlier cases. The Commission said:

> The Commission also accepts that detriments and benefits may impact on different groups. Indeed . . . the Act allows public benefit from the proposal as a whole to be addressed independently of the markets affected by the acquisition or strengthening of dominance, and any competitive detriments therein. The Act sets no distributive standard and does not therefore require the Commission to deny a public benefit claim simply because participants cannot prove that it will necessarily flow to particular groups of the public, and, in particular, to those consumers who, potentially, could be adversely affected by the acquisition or strengthening of dominance. To suggest therefore that a public benefit claim should be discounted because there is no competitive pressure to ensure that it will be passed on to a particular group of consumers, would unduly prejudice a proposal.

Divestments — partial clearances

In an article published shortly after the enactment of the 1986 Act in [1987] *NZLJ* at 96-7 Mr J G Collinge drew attention to the elimination of the previous power of the Commission to grant a consent subject to conditions. He also referred to the problems which he predicted would follow in relation to partial clearances. He said:

> It is the area of partial clearances which raises particular difficulties. In relation to a proposal which affects a number of markets, if there is dominance in relation to one market only, should the whole proposal fall or part only? It seems clearly untenable for the whole transaction to be deemed bad because there is concern over say one product market. . . . Overseas, the tendency has been for the Commission's equivalent to allow mergers subject to the divestment of certain brands. . . . The Commission has renewed its efforts to have the legislation changed to specifically allow partial clearances and will be examining the Act closely for assistance in allowing it to do so.

Apparently the efforts of the Commerce Commission were to no avail because there is no provision for partial clearances included in the Act. However, as is by now well known, the Court of Appeal came to the rescue in the *Goodman Fielder* case (*Goodman Fielder v Commerce Commission* [1987] 2 NZLR 10) with their decision that on a true construction of the Act clearances could be granted on the basis of promised divestments in appropriate cases. The case arose after Wattie and Goodman Fielder had appealed from the Commission's refusal to authorise their merger. They had divested certain interests and given undertakings to make certain further divestments so as to eliminate market dominance in certain areas. They asked the High Court to approve the modified proposal. The High Court refused to do so and instead remitted the case to the Commission to investigate and report back to the High Court for decision.

The Court of Appeal reversed the direction that the Commission report back to the High Court and the consequent adjournment of the appeal. It held that the High Court on appeal can remit a matter or decide itself but not both. It can remit an application which has changed from that which was before

the Commission. It further decided that the Commission may clear or authorise mergers/takeovers upon conditions or undertakings to divest. Any other result, the Court of Appeal said, would be commercially unreal.

In its decision the Court of Appeal noted the difference between structural and behavioural modifications to a proposal and laid stress on the sanctions available to the Commerce Commission to ensure that divestment membership was adhered to. It said the Commission has a discretion to require a completed divestment, or a contract to divest, or an undertaking to divest. Which of these it requires will depend on the nature of the modification, the trust in the parties, and the efficacy of sanctions.

In the Amcor/NZFP case (Decision 208, 21 August 1987) the Commission commented on the Court of Appeal ruling as follows:

X. COURT OF APPEAL DECISION

78 During the consideration of the Commission's determination in this matter, the Court of Appeal decision in *Goodman Fielder/Wattie* was handed down [CA 117/87, 14 August 1987]. Among other matters, the Court of Appeal indicated that it "would be commercially unreal for the Commission to disregard shareholding or other significant asset changes occurring while a merger proposal is under investigation". In that the Commission had not itself adopted that rigid approach, eg it had in the past accepted amendments represented by divestments for which there was a contractual commitment prior to decision. Further, in relation to the question of whether divestment proposals or undertakings not intended to be carried into effect until after clearance or authorisation may be taken into account the Court of Appeal said:

> Any proposal necessarily involves future changes. No reason is apparent why a proposal should not include any changes by way of divestiture or even by way of modification of trade practices. Such different kinds of changes correspond to "structural" and "behavioural" conditions to which counsel referred in argument.

Later it said:

> So, if a merger proposal includes some divestiture, it must be cleared or authorised as a whole and any conduct wholly or in part effecting its completion will contravene s 50 unless the divestment duly takes place . . . We do not think that the Act lacks strong teeth to enforce any divestment elements in a merger proposal.

The Court of Appeal further said in this respect that it should give the Commerce Act a broad interpretation "bearing in mind the changes that can continually occur in the structures of business".

79 This allows the parties to include in their proposal divestment of assets or modification of trade practices to come into effect after the decision. Also, the decision of the Court of Appeal appears to countenance the inclusion of both structural and behavioural conditions in the proposal, though the Court sounded a note of caution about the enforcement difficulties associated with behavioural conditions. The Court of Appeal indicated that the weight or bearing to be given to the undertaking "must be a discretionary one for the Commission". Further, the decision appears to envisage amendments to the proposal throughout the course of proceedings prior to the decision.

80 There are, however, issues which need to be resolved and in endeavouring to do so the Commission believes that it should be guided by the spirit of the Court of Appeal's decision, which is to take a broad interpretation of the Act in relation to the procedures and jurisdiction of the Commission in line with commercial reality.

81 First, could the Commission suggest to the applicants that they might consider amending their proposals in the course of proceedings? This has some relevance in the present case where the applicants submitted [before the Court decision] that only voluntary inclusions in a proposal were acceptable in terms of the Act. The Commission sees no reason why it should not in the course of proceedings discuss issues with the applicants in a constructive way with a view to having them consider amending their proposals – on the basis of course that the decision is ultimately one for the applicants. Whether such amendment is made should not depend upon the fortuitous event of whether the parties or the Commission thought of it first. Whether the Commission should canvass such possibilities would, of course, be at the discretion of the Commission in each case. It may elect in any matter not to intervene or appear to intervene, for example, because of a commercial battle for control of a company or, for example, because the decision is better left to entrepreneurial judgment.

82 Secondly, should the Commission be able to decline to accept an undertaking in a proposal if the Commission did not consider it to be appropriate? Again, this issue is directly raised in this case for reasons which are outlined later. The Commission sees no reason why it need accept all of a possibly long list of undertakings especially if they are of a behavioural kind or contrary to the objectives of and scheme of the Act.

83 Thirdly, can the Commission itself impose conditions upon the grant of consent? This is a matter which was also pertinent in these proceedings. The Commission believes that its powers do not extend to the

> imposition of conditions at its own option. Such an express power was in the 1975 Act but deleted from the 1986 Act. Further, enforcement of a condition depends upon whether the "proposal" is "implemented" in accordance with its terms. A condition imposed by the Commission [as distinct from one which is adopted by the parties at the suggestion of the Commission] is not part of the proposal as defined by the applicants, and a breach of a condition imposed by the Commission would not appear to be a breach of "the proposal".

The Court of Appeal decision is greatly to be welcomed, especially in view of the stringent standard which the Commission is requiring for the proof of public benefit. The Court of Appeal decision may be seen as a response to the need for a much more flexible approach in New Zealand such as that which operates in Australia. There the Trade Practices Commission is willing to entertain proposals for voluntary divesture designed to enable a merger to proceed to a successful conclusion. The "all or nothing" system which, until the Court of Appeal decision, appeared to be mandated by the New Zealand Commerce Act was clumsy and inefficient.

The workload of the commerce commission — Delays in decision making

As noted earlier in this paper, it was the hope of the proponents of the Act that the higher clearance thresholds would reduce the number of mergers and takeovers requiring scrutiny and thus reduce the workload of the Commerce Commission and enable mergers and takeovers to be processed more expeditiously. The statistics show that this hope has not been realised.

Moreover, the Commerce Commission appears to be significantly understaffed and this is a serious weakness when one takes into account its important enforcement responsibilities, its wide-ranging obligations under the Trade Practices provisions of the Act, and its new jurisdiction in relation to the Fair Trading Act. It is not surprising that the Commission appears to be acting under pressure in many situations and that its workload continues to grow. These factors have meant that in all of the significant merger cases the Commission has utilised all or almost all of the 100 working days period. From a commercial standpoint 100 working days is a long time to wait for a decision. The law must take into account "the special needs of the financial markets for speed on the part of decision-makers".[4]

Mr Collinge has mounted a spirited defence to the criticism of the time taken to make some of the major decisions including the *Goodman Fielder/Wattie* decisions. In his paper "The Regulation of Competition: Some Aspects of the New Zealand Experience" delivered at the NZCIS Regulating for Competition Conference at Auckland (7 March 1988) he noted that "over the six months to 30 September 1987 for example, the average time taken to give 207 clearances for merger and takeover proposals was 13.2 days. Of those which had to be considered in more depth, one took 26 working days, three between 50 and 80 days and five at 100 days."

In relation to the *Goodman Fielder* case which went the full 100 working days allowed by the Act Mr Collinge went on to describe what happened after the Commerce Act decision.

> 7 The applicants appealed to the High Court which kept the parties, who were in a high degree of conflict, to a tight timetable. The Court of Appeal's determination was exceptionally expeditious in under two weeks. Together, the appeals took approximately three months. The Commission, upon receiving the proposal back for reconsideration, bore in mind the words of the High Court in relation to the significance of the divestments and requested its officers to proceed with priority given the necessity to do a thorough job to protect the general public interest. The new proposal was researched, investigated, further amended and the decision given in eight weeks. The decision was announced in advance of full written reason for the convenience of and at the request of the applicants. Although the applicants have stated that the determination took a year, the time actually taken for consideration of the two proposals by the Commission was 20 working weeks and 8 weeks respectively. The Commission considered that its staff had worked extremely hard and diligently, for the proper protection of the general public interest, and that the criticisms of the delay in relation to the proceedings before the Commission were hardly warranted in the circumstances.

However, the real question is not whether simple cases are dealt with in 20 days but what time is taken in the major decisions such as *Goodman Fielder*. The period of 100 working days is far too long bearing in mind the commercial realities affecting a merger or takeover and the harm which will be done by delay: see the comments of Sir John Donaldson M R in *R v Monopolies and Mergers Commission* [1986] 2 All ER 257 at 266.

Dealing more specifically with the *Goodman Fielder* case it is my submission that the eight weeks taken by the Commerce Commission to grant a consent after reference back by the Court of Appeal was quite unwarranted. First, the exhaustive knowledge that the Commission had acquired of the merger in its original decision should have meant a rapid decision. Secondly, the Commission had undertaken to the Court of Appeal to give any reconsideration "priority". Thirdly, the Commission had through its counsel announced in the High Court that:

> The obligation placed on the Commission by s 66(7) of the Commerce Act 1986 in relation to its proceedings is that it shall give clearance unless it is satisfied that a merger or takeover proposal if implemented would result or would be likely to result in any person acquiring a dominant position in a market or strengthening a dominant position in a market. On the information available to the Commission (and it has made no

investigation subsequent to its decision) it has no reason to expect that it would be so satisfied in relation to a merger as outlined.

For these reasons it is my respectful submission that it should have been perfectly possible for the Commission, on the reference back, to make a decision within the usual statutory 20 day period.

Suggested reforms

In a recent address reported in the *Auckland Star* Friday April 22, the Chairman is quoted as saying that:

> The advance clearance system which required the Commission to write hundreds of decisions each year upon proposals which had no impact on competition should be changed . . . there is nothing worse from a regulatory viewpoint in undertaking investigation and work which does not produce any gain in terms of promoting competition or efficiency . . . A mandatory prior notification system from which the Commission would select those mergers which were appropriate for full investigation would be better. . . . Under this system most mergers would obtain automatic aproval when a stipulated time period, say 10 days, had expired. Similar selection processes took place in the United Kingdom and the United States . . . . The present dual system which enabled the Commission's decisions to be able to reviewed by the High Court and appealed to the High Court should also be changed. A single right of judicial review would be sufficient. The High Court had substantial powers of review to ensure compliance with natural justice and to ensure the reasonableness of decisions, but the appeal procedure meant contested mergers and takeovers might be considered twice at two separate enquiries. Traditionally the Courts did not get involved in making economic policy.

Reform of the present clearance and authorisation procedure

Few would disagree with the first part of Mr Collinge's proposals. Much could be gained from an examination of the procedure under the Canadian Competition Act 1986 (discussed in Grover and Kwinter, "The New Competition Act" (1987) 66 *Canadian Bar Review* 267). Under that Act pre-merger notification is required and in addition there are statutory waiting periods which in the case of a detailed long-form notification is 10 trading days or such longer period not exceeding 21 days as may be allowed by the rules of the Stock Exchange before shares must be taken up. If these periods pass without the Director of Investigation and Research bringing an application before the Competition Tribunal seeking to halt the merger then the merger may be lawfully implemented. A procedure of this kind has great merit. If adopted in New Zealand it would dramatically reduce the work load of the Commerce Commission because the Commission would have to investigate only those mergers it perceived to have major competition implications. On the other hand, it would be an open and public process in contrast to the Australian approach where informal negotiations with the Trade Practices Commission characterise the present system. Plainly changes of this kind would require extensive revision of ss 66-68 and in particular the elimination in s 66(10) of the Act requiring determinations of the Commission to include written reasons.

The Canadian legislation also sensibly recognises that any harmful effects of mergers can be extremely difficult to reverse or offset once the merger has been completed. Thus the Canadian pre-merger notification system is intended to give the authorities an opportunity to act before the merger is consummated. The Director of Competition is empowered to bring before the Canadian Competition Tribunal applications for interim orders to restrain the implementation of mergers. Such interim orders, either on notice, or in limited circumstances, on an ex parte basis, are available to prevent mergers that would be difficult to undo subsequently after a lengthy proceeding or where there has been a failure to comply with the pre-merger notification requirements. Interim orders have effect for ten days in respect of ex parte orders and twenty-one days in respect of orders obtained on notice. Interim orders may also be obtained outside of the merger context on the usual basis used by the Courts. Where such an order is granted, the Director is required to proceed as expeditiously as possible with the main application.

The statute also provides a panoply of remedies, including the divestiture of assets or shares, the dissolution of an amalgamation, the prohibition of a proposed merger or the allowance of a proposed merger to be completed only on specified conditions.

A most important aspect of the Canadian Act is the availability of consent orders. The provision allows the Tribunal to accept an order on terms agreed upon by the parties without hearing further evidence. This obviously points to the likelihood of negotiated settlements. Consent decrees have played a major role in United States civil antitrust enforcement, with the majority of government civil antitrust suits being settled on a consent basis. Before entering a consent judgment in the United States, the Court must consider any comments received in respect of the proposal and must determine that the entry of such a judgment is in the public interest: *US v Gillette Co* (1975) 406 F Supp 713.

The inability of the High Court in the *Goodman Fielder* case to make a consent order on appeal (see [1987] 2 NZLR 10 at 15 per Cooke P) is to be regretted. The presence of the lay members surely provides sufficient expertise for the Court to decide whether the allowance of the appeal by consent was appropriate. The statute should be amended to make it clear that consent orders in the High Court or Court of Appeal are permissible in appropriate cases. As may be seen from the *Goodman Fielder* case itself, reference back to the Commission can be a time consuming exercise.

Orders of the Canadian Tribunal can be rescinded or varied on application by the Director. Also any order of the Tribunal whether final, interlocutory or interim, may be appealed to the Federal Court of Apeal, as if it were a judgment of the Federal Court Trial Division but

leave to appeal is required if the appeal relates to a question of fact.

Appeal — Judicial review

Mr Collinge's second suggestion that the right of appeal to the High Court should be eliminated is not soundly based. There are strong arguments that it should be retained but modified so as to specifically allow consent orders in proper cases. The fact that the High Court has reversed the Commerce Commission on several occasions for good and valid reasons shows that the appeal right remains necessary. The provisions of expert lay members on the High Court should assuage any concerns about the High Court not being appropriately qualified to handle appeals.

There are a number of problems with the suggestion that Commerce Commission decisions should be amenable to challenge only by way of judicial review. First, the test of reasonableness or irrationality in administrative law would, for all practical purposes, put the Commerce Commission beyond the reach of any Court so far as the substance of its decisions are concerned. Only procedural improprieties would provide a basis for relief and this would almost invariably involve a reference back for reconsideration. There seems to be no compelling reason why the tradition of appeals from the Commerce Commission to the High Court should be ended.

Secondly, there is the difficulty of ordering divestment if a merger consent is held to be invalid on review. Because of the likelihood that if an interim order is sought an undertaking will be required, there is a disinclination to give undertakings. If an interim order effectively prevents a merger being consummated but the applicant later fails in his challenge the undertaking could have disastrous consequences for the applicant. This means that in practice, as shown by the *Lion/DB/Magnum* case, by the time a review proceeding is heard, if the Court annuls the consent, the merger will have been implemented in the absence of an interim order and there is no power in the Commerce Act or in the Judicature Amendment Act to require divestiture. By contrast under s 95 of the Commerce Act the Court may order that the determination to which the Appeal relates shall not operate pending the determination of the appeal in which case the merger cannot be implemented in the meantime. Therefore, quite apart from the inherent difficulties of substantive review, if such a case succeeds there will be little that can be done about it.

Thirdly, there is the difficulty on review arising from the deeming provisions of s 66(4) and s 66(8). Those subsections provide that if the Commerce Commission allows the 20 day or 100 day time limits to pass without taking the appropriate action, a clearance or authorisation shall be deemed to have been granted. In *Compass Tax and Duty Free Shopping Limited v Miles DFS Limited and DFS Group Limited and the Commerce Commission* (CP 440/87, unreported, High Court Auckland, Wylie J, 5 June 1987) it was said, in the context of a challenge by way of review to a clearance, that:

> Even if I am wrong in the conclusions I have come to under the last two headings I think the applicant faces a further, and it may well be, insuperable difficulty. Assuming the validity of the notice so that the Commission was empowered to deal with it, it seems inevitable that if the applicant were to succeed in establishing that the Commission's decision was invalid in law — whether "wrong", "void", "null", "ultra vires", or "ineffective" as pleaded does not much matter — the clearance given would have to be regarded as a nullity, and the situation as if the Commission had done nothing: Wade, *Administrative Law* (5 ed p 39-40). If that be so then it is difficult to see how the applicant could escape the consequences of s 66(4) which in effect provides that if within 20 days of registration of the proposal the Commission does not either give a clearance, or a notice that it is not satisfied as to the dominance matters, then a clearance shall be deemed to have been given. By its own challenge the applicant would have brought about a situation which would render unchallengeable that which it seeks to destroy.

Other matters

There are several other matters which need to be addressed in the forthcoming review. One is the desirability of legislative exclusion (cf Trade Practices Act 1974 Australia s 80(6) and (7)) of the obligation on the Commerce Commission to give undertakings as to damages when carrying out its enforcement duties. In *Commerce Commission v Megavitamin Laboratories* (1987) 7 NZAR 123 it was held that the usual rules applied to the Commission in this respect.

Another issue is the adequacy of the divestment provisions in s 85 of the Act which are presently limited to those situations where a breach of s 50 has been established. The much more extensive Canadian provisions are worthy of consideration.

Concluding comment

The foregoing analysis proceeds on the assumption that the Government is unlikely to accede to the currently fashionable argument (see eg Wheeler, Takeover Regulation: More of a Hindrance that a Help (1988) *NZ Business Review* 16, p 10) that all regulatory controls on mergers and takeovers should be eliminated. The continuing debate on that controversial issue is therefore beyond the scope of this article. □

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1 See GFK Santow "Mergers and the Commonwealth Trade Practices Act 1974" (1975) 49 *Aust L J* 52 and for a discussion of the rationale for the different competition thresholds found in the Australian and New Zealand Acts W R McComas, "Competition Thresholds — Progression Through Part IV of the Trade Practices Act" (paper given to 1986 Trade Practices Workshop Sydney).

2 "Authorisation and Public Benefit under the Commerce Act 1986: Some Emerging Principles" (1988) *Australian Business Law Review* 128, 147.

3 Presented at the NZ Centre for Independent Studies Conference, Auckland, March 1988.

4 *R v Panel on Takeovers* [1987] 1 All ER 564, 578 per Sir John Donaldson M R; see also *Sunday Star*, June 5, 1988 p D3 where the Executive Chairman of Goodman Fielder describes the damage caused by the 12-month battle over the Commerce Act consent.

The Fiji revolutions of 1987

By F M Brookfield, Professor of Law, University of Auckland

The military take-over of the government in a South Pacific country on 14 May 1987 came as a shock to New Zealanders. Politically its effects are still being felt. It also raised substantial constitutional and legal issues. In this article the Dean of the Faculty of Law at the University of Auckland considers these in the light of developments in the succeeding 12 months. He considers the present situation in respect of de facto and de jure authority.

In an interesting and instructive article ("The Fiji Constitutional Crisis of May 1987", [1987] NZLJ 175) written shortly after Colonel Rabuka's first coup d'etat in Fiji, of 14 May 1987, Mr Campbell McLachlan expounded the duty of the then Governor-General to use his reserve powers to ensure a return to constitutional government. A main purpose of the present article (which really begins where Mr McLachlan left off) is to show that the Governor-General, perhaps for what seemed to him good political reasons, did not perform that duty but in fact responded to the Colonel's revolution by attempting a more moderate revolution of his own; which, having failed, was succeeded by Colonel Rabuka's second coup, that of 25 September 1987, and establishment of de facto republican government. This article will consider the status in Fiji municipal law both of the Governor-General's moderate revolutionary interim regime and of its republican successor.

I The Governor-General's regime: 19 May to 25 September 1987

When Mr McLachlan wrote the Governor-General had already, as that writer noted, purported to dissolve the Parliament of Fiji; he had also purported to dismiss his Ministers. These actions he took by proclamation of 19 May 1987,[1] which read as follows:

P K Ganilau [L.S.]
Governor-General

PROCLAMATION
(No.3 of 1987)

By His Excellency Ratu Sir Penaia Ganilau . . . Governor-General and Commander-in-Chief in and over Fiji

WHEREAS pursuant to Section 72 of the Constitution the executive authority of Fiji is vested in Her Majesty;

AND WHEREAS that authority may be exercised by me on behalf of Her Majesty either directly or through Officers subordinate to me;

AND WHEREAS being satisfied that an occasion has arisen which is likely to give rise to a state of civil commotion I have declared that a state of emergency exists in Fiji.

AND WHEREAS I am satisfied that in the situation presently obtaining in Fiji the Prime Minister and his Ministers are unable to discharge the powers duties and functions conferred upon them by the Constitution.

NOW THEREFORE I make the following Proclamation —

(a) Parliament is hereby dissolved;

(b) The following offices are hereby declared vacant —

(i) Prime Minister
(ii) Attorney-General
(iii) all Ministers of the Government
(iv) Leader of the Opposition.

Given under my hand and the Public Seal of Fiji this 19th day of May 1987.

GOD SAVE THE QUEEN

Noting that, under s 72 (1) of the Fiji Constitution of 1970[2] "[t]he executive authority of Fiji is vested in Her Majesty" and that under subs (2) that authority may generally "be exercised on behalf of Her Majesty by the Governor-General . . .", we necessarily turn to the Constitution itself to search for authority for what the Governor-General purported to do. That no section of the Constitution other than s 72 is invoked by the proclamation certainly leads one to think that no other section was applicable: and that implied emergency powers, let in, so to speak, by s 72, were relied on; rather than the sections of the Constitution dealing expressly with the dismissal of Ministers and the dissolution of Parliament.

We shall conclude below that neither powers conferred by those sections of the Constitution nor the implied emergency powers gave legal validity to the Governor-General's actions here to be considered. But it is convenient first to consider the basis and proper scope of the implied emergency powers available to the Governor-General of Fiji, that supplemented the powers expressly conferred on him.

One must begin with the prerogative of the Crown to act for the preservation of the State and of society. In a jurisdiction lacking a written Constitution — in the United Kingdom or in New Zealand — this prerogative is of most uncertain scope, as the conflicting opinions of Lord Reid and Viscount Radcliffe show in *Burmah Oil Co v Lord Advocate* [1965] AC 75. The emergency prerogative, said Lord Reid (at 101):

> is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute.

Viscount Radcliffe, on the other hand, allowed (at 118) that the prerogative power may

> even . . . dispense with or override the law where the ultimate preservation of society is in question.

The *Burmah Oil Co* case concerned the actions of the armed forces of the Crown, exercising the emergency prerogative, in destroying oil installations in Burma to prevent them from falling into the hands of the advancing Japanese. Following Lord Reid, some may conclude that the emergency prerogative, which can only be based on some form of necessity principle, is limited to actions such as those, involving the infringement of private property rights; and that, under the principle of *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, even that limited power is available only when it has not been superseded by statute. Recent Commonwealth authority however would allow a wider prerogative power based on a wider conception of the doctrine of necessity, which goes beyond the emergency infringement of private rights to embrace temporary change in the constitutional structure itself. How this wider prerogative power, which finds some support in Viscount Radcliffe's dictum, would apply in New Zealand or in the United Kingdom in the absence of a written constitution is not our concern here. The Commonwealth authorities now to be referred to show clearly how and to what extent it applies in a jurisdiction like that of Fiji where a written Constitution is the supreme law of the land.

Thus, in *Special Reference No 1 of 1955* PLD 1955 FC 435 (and see also the report in Jennings, *Constitutional Problems in Pakistan* (1957) 259, 307), the Pakistan Governor-General's actions in dissolving the Constituent Assembly (which had exercised its authority illegally) in 1954 and in validating by proclamation certain of its purported legislation which the Federal Court had in a previous decision held invalid, were upheld by that Court under a limited doctrine of necessity. More recently, the Pakistan Supreme Court in *Bhutto v Chief of Army Staff* PLD 1977 SC 657 somewhat questionably extended the doctrine to validate the emergency acts not of a Governor-General or, in the republican context, of a President, but of a martial law administrator. Whatever doubts may attach to that, there can be few about the limited necessity doctrine recognised in *Special Reference No 1* itself: the power of a Head of State under a written Constitution extends by implication to executive acts, and also to legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful Legislature) to preserve or restore the Constitution, even though the Constitution itself contains no express warrant for them.

The same principle has been applied in Grenada where (inter alia) the Governor-General's proclamation continuing in force certain measures of the revolutionary Bishop government (it having been since overthrown) was likewise upheld for the time being by the Grenada Court of Appeal in *Mitchell v Director of Public Prosecutions* [1986] Law Reports of the Commonwealth (Const) 35, until the restored lawful legislature could make due provision in the matter.[3] And the same or a similar principle has been applied by the Supreme Court of Canada, in *Reference Re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1, to validate, again temporarily until it could be validly enacted, a body of legislation which had been "enacted" unconstitutionally in English only instead of English and French. It is of no consequence that in this instance the Court itself validated the legislation rather than recognising validatory action taken by the Head of State.

The essence of the emergency powers, considered in their possible application in Fiji, is that they are implied to enable the Crown or the Governor-General to act to preserve or restore the Constitution when it is under revolutionary attack or otherwise in crisis. Necessarily such powers are not dependent on the words of a particular Constitution, except in so far as that Constitution designates the authority in whom the implied powers would be found to reside. Thus, in Fiji, emergency powers so far as they are executive in nature are let in by s 72 which vests executive power in the Queen. So far as they are legislative the emergency powers reside in the Queen as Head of State. In either case they are in general exercisable by the Governor-General as her delegate (expressly so, under s 72(2), in the case of executive powers).

The above account agrees in most respects with that given by Mr McLachlan in the article referred to earlier. But I would suggest that the Governor-General in exercising the

powers would act, in Mr McLachlan's phrase ([1987] NZLJ at 178), "outside the Constitution", only in the sense that the powers are not expressly contained therein. The Constitution must be taken to imply those powers or to assume their existence. Further, any legislative action taken in exercise of them must in general be temporary only, to be in force until the lawful legislature is (restored and) able to deal with the matter in the exercise of its regular functions.

We turn now to consider the validity of actions taken by the Governor-General of Fiji, in the light of the Fiji Constitution and of the emergency powers vested in him under the necessity doctrine discussed above.

The dissolution of Parliament by proclamation of 19 May 1987

Section 70(1) of the Constitution empowers the Governor-General "acting in accordance with the advice of the Prime Minister" at any time to prorogue or dissolve Parliament. Two provisos to that subsection allow the Governor-General to dissolve Parliament, "acting in his own deliberate judgment", (a) where (within certain time limits) the Prime Minister fails either to resign or to advise the Governor-General to dissolve Parliament, after the House of Representatives has passed a resolution of no-confidence in the Government; and (b) where the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able, within a reasonable time, to appoint to the office a person commanding the requisite support in the House of Representatives.

In the proclamation the Governor-General did not claim to act on the Prime Minister's advice nor did he invoke either of the two provisos. There has been some suggestion that the "non-justiciability clause" in s 78 (3) of the Constitution would bar a Court from going behind the proclamation. This subsection provides:

> (3) Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question [sic] in any court of law.

But that surely could not require a Court to assume, no matter how absurdly, that the Prime Minister's advice was relied on in the present case. It is notorious that no such advice was given and that it was not is indicated by the lack of the Prime Minister's counter-signature on the proclamation. In any event *Bribery Commissioner v Ranasinghe* [1965] AC 172, 194-195 is sufficiently in point, despite the different context, to support a proposition that the Court would not be required to close its eyes to the reality.

In fact, of course, the Governor-General in purporting to dissolve Parliament was "acting in his own deliberate judgment", without however being able invoke either of the provisos to s 70(1). Being manifestly outside the ambit of each proviso, the purported dissolution must be void unless some other authority can be provided for it. (Here one may compare *Hewett v Fielder* [1951] NZLR 755, 760, where it is implicit that the proclamation and regulations would have been void if they had not expressly or impliedly been made within the ambit of the power conferred by the Public Safety Conservation Act 1932). Necessarily the Governor-General must fall back on an alleged prerogative power to dissolve Parliament at will or on the ground of necessity. But, in the light of *Attorney-General v De Keyser's Royal Hotel* (above), the Constitution itself precludes the first ground; and the second must at least be clearly set out and relied on in the proclamation itself.

But the recitals in the proclamation disclose no necessity for dissolving Parliament. Indeed, the likelihood of "a state of civil commotion" would rather be a ground for summoning Parliament – that is, for appointing a new session since Parliament had been put de facto in abeyance by the coup – under s 69(1). The necessity arising from the circumstances recited might justify a formal *prorogation* if Parliament itself (as distinct from external forces coercing it) were in a state of commotion. But, as the proclamation stands, the purported *dissolution* is, from the recitals, simply a non sequitur.

Judgments of the High Court of Australia in *Victoria v Commonwealth* (1975) 134 CLR 81, 120, 178 suggest that a merely de facto dissolution, done in excess of his power by the Governor-General, is legally effective to bring a Parliament to an end; and certainly that the ensuing general election would be valid. But in that case Gibbs J (at 157) suggested also that the Court could intervene to stop the invalid proclamation being given effect and (presumably) to prevent the ensuing election. In any case the ensuing election, if it took place, would have to be conducted under the existing Constitution: that is assumed by the Judges in *Victoria v Commonwealth*.

Hence, even if the Fiji Governor-General's ultra vires dissolution of Parliament were to be given legal effect, the elections that should have ensued would have had to be held under the existing Constitution and not under one of the Governor-General's devising – had his efforts to devise a new Constitution succeeded.

Dismissal of Ministers

At common law and in terms of their warrants, Ministers of the Crown generally hold office at the pleasure of the Crown. But in Fiji the matter is governed by s 74 of the Constitution, which, under subs (1), directs the Governor-General (unless Parliament has been or is to be dissolved under s 70(1)) to remove the Prime Minister from office if the latter has been defeated on a no-confidence motion in the House of Representatives and does not within three days resign. Subsection (2) empowers the Governor-General "acting in his own deliberate judgment" to dismiss the Prime Minister if the latter has suffered a defeat in a general election and the Governor-General considers that he will not be able to command parliamentary support in the House of Representatives. The remaining subsections deal, apparently exhaustively, with the other situations where the office of Prime Minister becomes vacant and also with the tenure of other Ministers. As to the latter, it is enough for present purposes to note that an individual Minister must vacate

office if dismissed by the Governor-General on the Prime Minister's advice and if the Prime Minister himself resigns or is removed from office under subss (1) or (2).

The provisions just discussed or referred to do in substance embody and define some of the constitutional conventions which, in New Zealand or the United Kingdom, regulate or limit the legal power of the Crown to dismiss its Ministers at will. It cannot be doubted that on the normal application of the principle of *Attorney-General v De Keyser's Royal Hotel* (above), the provisions of s 74 supersede the prerogative power of the Crown to dismiss its Ministers at will. Nevertheless, on the principle of necessity discussed above, an emergency prerogative power to dismiss Ministers who are acting grossly illegally or to overthrow the Constitution, might well be implied.

But there is nothing in the Governor-General's proclamation of 19 May to bring the purported dismissal of his Ministers either under s 74 (which manifestly does not apply and which was in any case not invoked) or under the emergency power. We must assume that the latter was purportedly invoked in the fourth recital of the Proclamation, where the Prime Minister and his Ministers are said to be "unable to discharge the powers duties and functions conferred upon them by the Constitution". But since the Prime Minister and the Ministers were unable to exercise their functions because they were detained and disabled by rebels, what was necessary (*to save the Constitution*) was not to dismiss them or to proclaim their offices vacant but for the Governor-General to secure their restoration and to provide for government in the meantime.

It is possible of course that some actions taken by the Governor-General for the maintenance of public order might have been upheld on the necessity principle. But there seems no doubt that the principle did not justify either the dissolution of Parliament or the dismissal of Ministers. Hence the proclamation of 19 May, being authorised neither under the express provisions of the Constitution nor under the necessity principle, cannot be upheld; and the Governor-General's action, whatever its political merits and however desirable it might have appeared as a compromise in the crisis, amounted to his "joining the revolution" or to mounting one of his own. Had the Governor-General succeeded in maintaining his authority, there is little doubt that in time other principles (see further below) would have legalised his government in Fiji municipal law, as they are likely in time to legalise the present republican regime which replaced that of the Governor-General after the Colonel's second coup. But as matters stood, the proceedings which the deposed Prime Minister, Dr Bavadra, brought to contest the validity of the Governor-General's actions, and which were still pending at the time of the second coup, ought to have succeeded had they come to trial.

II The second coup: the de facto Fiji Republic

On 25 September 1987, Colonel Rabuka carried out his second coup d'etat and replaced what might be described as the moderate revolutionary regime of the Governor-General with a more extreme revolutionary regime of his own making. His authority could, initially at least, rest only on the effectiveness of his rule, as did his abrogation of the 1970 Constitution on 1 October and declaration of a republic six days later.[4] The less constitutionally significant handing over of power to an oligarchic civilian regime,[5] pending the setting up of a new revolutionary constitution, followed in December.

It is likely that, with the second coup and the de facto establishment of a republic, Fiji is moving toward a new constitutional beginning. A counter revolution may now be unlikely. If one were to occur and the 1970 Constitution to be restored, generally the validity of acts of government of the republican regime (whether the military regime of Rabuka or the civilian one that succeeded it) would fall to be decided by the restored Courts of the 1970 Constitution in accordance with the doctrine that the acts of usurpers are to be accorded limited recognition. For this, authorities from Hugo Grotius to 19th and 20th century decisions of a number of jurisdictions may be cited.[6] The principle is again one of necessity (a second form of the principle): day-to-day acts of government, not tending to the entrenchment of a usurpation, and not derogating from constitutional rights, are necessary for the preservation of society, whatever the title to rule of the regime that performs them, and are to be given effect to by the lawful Courts.

But when the revolution succeeds, as that in Fiji carried out by the second coup appears to be doing, how is the transition from the old Constitution to the new to be understood in law and what is the role of the Fiji Courts in the transition?

Where a Court has been called upon to decide whether a new revolutionary regime has become lawful, there are two possible views as to its jurisdiction:

1 The Court, if created under the pre-revolutionary Constitution, is without jurisdiction to recognise the revolutionary regime as lawful; if created by the latter it has no jurisdiction to do otherwise than recognise its creator. This is the older constitutionalist view which finds support in the judgments of the Supreme Court of the United States in *Luther v Borden* 48 US (7 Howard) 1, 12 L Ed 581 (1849) and in the dissenting judgment of Fieldsend AJA (in the High Court of what was then Southern Rhodesia) in *Madzimbamuto v Lardner-Burke N O* 1968 (2) SA 284, 422 et seq; and in the latter case, on appeal to the Privy Council, in the dissenting judgment of Lord Pearce (*Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 732).

In the words of Fieldsend AJA (at 432):

> The law to be administered by a municipal court is ... determined solely by the set of norms prescribed by the legal order upon which the court ... is founded.

That, if correct, precludes a municipal Court from recognising a new revolutionary regime as lawful. The Judges must maintain this non-recognition as long as the revolutionaries permit the Court to function or until the Judges themselves resign. Similarly, the

revolutionaries are necessarily assured of full legal recognition by any Court *they* set up.

2 A newer view supported by the majority judgment of the Privy Council in *Madzimbamuto v Lardner-Burke* is that the Courts, even when created by a written Constitution, are authorised and required to decide when and if a revolutionary regime seeking to overthrow that Constitution has become lawful and to recognise it as de jure in municipal law accordingly.

In the words of the majority in *Madzimbamuto* ([1969] 1 AC at 724):

> It is an historical fact that in many countries — and indeed in many countries which are or have been under British Sovereignty — there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'etat. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.

This question, the judgment makes plain, a municipal Court "must decide" (ibid). In the context of *Madzimbamuto's* case, the Southern Rhodesian rebellion against the United Kingdom, the Privy Council had in mind a Court set up by the pre-revolutionary constitution, which survives the revolution. But (it follows from this view) a Court set up by the revolutionary regime itself may also have to decide the same question without its decision necessarily being determined by the source of its jurisdiction. Thus in *Mitchell v DPP* [1986] LRC (Const) 25, the Grenada Court of Appeal, originally set up by a law of the revolutionary Bishop regime (1979-1983), considered whether that regime had become lawful (before its overthrow by a further revolution and the taking of emergency measures by the Governor-General: see above).

Under this newer view the Courts exercise a kind of supra-constitutional jurisdiction. Authorities differ as to whether in doing so the Courts should, as the Privy Council perhaps suggests in *Madzimbamuto*, do no more than apply a third form of the necessity principle that a de facto government, revolutionary and illegal in its origins, should be recognised by the municipal Courts as lawful if and when it becomes firmly and certainly established; or whether other principles may be applicable also and have the effect of inhibiting or delaying such recognition. Those other principles await fuller discussion in another article; but we may certainly take as applicable, on the strength of persuasive authority, at least the principle that "government should be by the consent of the governed".[7]

Thus in the Supreme Court of Pakistan, in both *Jilani v Government of the Punjab* PLD 1972 SC 139, 161, 174 and in *Bhutto v Chief of Army Staff* PLD 1977 SC 657, 683-684 it was made plain that in that country a revolutionary constitution "acquire[s] validity by its general acceptance by the people of Pakistan and recognition by the superior Courts" (ibid at 683). More specifically and clearly, it was held by the Grenada Court of Appeal in *Mitchell v DPP* (above) that a revolutionary regime, though firmly established, should not be recognised by a municipal Court as lawful unless the regime has been freely accepted by the people, their "conformity with and obedience to" its rule being "due to popular acceptance and support" and not "mere tacit submission to coercion or fear of force" (per Haynes P, [1986] LRC (Const) at 72. See also Liverpool JA at 115 and Peterkin JA at 118). It follows that approval of the revolutionary regime, by referendum or by the people's participation in free elections conducted by the regime under its new, revolutionary constitution, may be necessary before the Court may properly recognise the regime and its constitution as lawful; though in the meantime it may give effect to the regime's day to day acts of government under the second form of the necessity principle mentioned above.

Now of course, if this principle of consent is to be applied, the people's acceptance of a revolutionary regime — the consent of the governed — may in the end have to be assumed from acquiescence. Nevertheless considerable time may elapse before the new revolutionary government has so consolidated its hold and been accorded a sufficient measure of implied acceptance or acquiescence for a Court to hold it to have become lawful. Judicial refusal for whatever reason to recognise a revolutionary regime as lawful is likely, at least ultimately, to lead to the Court's being swept away by the revolution. In that case the revolutionary authorities have to create a new Court.

But one should not in any particular case dismiss too readily the possibility that a revolutionary regime may be patient enough to seek and to await the perceived advantages of full legal recognition from the lawful (pre-revolutionary) Court. Where this happens, the Court best upholds the rule of law, as it should be manifested in modern democratic society, by requiring that the regime be not only effective and firmly established but also freely accepted by the people, even if in the end acquiescence may have to suffice.

In the Fiji crisis the Republican regime appears to have assumed that the Supreme Court created by the 1970 Constitution would either never recognise it or at least would not do so promptly enough. At all events, unlike the Smith regime in rebel Southern Rhodesia (which contented itself with merely de facto recognition by the Courts of the country, until nearly three years after its coup[8]), it was apparently not willing to wait and see and, by decree of 3 October 1987 (Fiji Judicature Decree 1987 (*Fiji Gazette*, Vol 1, No 3)), dissolved the Court and the offices of the Judges (and set up its own Court). Had the Judges been permitted to remain, presumably the binding authority of the Privy Council in *Madzimbamuto v Lardner-Burke* would have required them to reject the older constitutionalist view and to assume jurisdiction to determine whether the republican regime had become lawful. As to what principles they would then have applied we can only guess. I think, on what seems the better view, they should have refused recognition until not only was the regime firmly in control but was also accepted by some free manifestation of choice on the part of Fiji citizens generally, including the Indian community. Ultimately the Court might have had to assume that the people's

acquiescence was a sufficient acceptance. There would also have been the problem, mentioned further below, of deciding what weight should be given to the claims of indigenous Fijians to special constitutional status and protection.

But the republican regime chose not to seek nor to wait for the judicial recognition that it would most probably have ultimately obtained. The Judges no doubt had no alternative but to accept their effective dismissal, which they did, the Chief Justice advising the Governor-General accordingly. The Governor-General's own resignation followed almost immediately, on 16 October 1987. It is convenient to quote here in full the Queen's statement that followed (*New Zealand Herald*, 17 October 1987):

> The Queen has received the following message from the Governor-General of Fiji: "Your Majesty – with humble duty, I wish to submit to you the following advice, acting in my capacity as your representative in Fiji. Owing to the uncertainty of the political and constitutional situation in Fiji, I have now made up my mind to request Your Majesty to relieve me of my appointment as Governor-General with immediate effect. This I do with the utmost regret; but my endeavours to preserve constitutional Government in Fiji have proved in vain, and I can see no alternative way forward.
>
> With deepest respect.
> Penaia Ganilau
> Governor-General."
>
> In the light of the Governor-General's decision that he can no longer effectively exercise executive authority in Fiji, the Queen has accepted with regret the resignation which Ratu Sir Penaia Ganilau has tendered.
>
> Her Majesty has expressed to him her gratitude for his loyal services and her admiration for his courageous efforts to avert changes to the form of Government in Fiji by force.
>
> The Queen accepts that it must be for the people of Fiji to decide their own future and prays that peace may obtain among the people of all races in that country.
>
> Her Majesty is sad to think that the ending of Fijian allegiance to the Crown should have been brought about without the people of Fiji being given an opportunity to express their opinion on the proposal.

The Governor-General's message to Her Majesty invites the immediate comment that what he called his "endeavours to preserve constitutional Government in Fiji" were, as we have seen above, really an attempt to effect a compromise revolution, that the Queen could never have legally sanctioned. But what did the Queen's own actions signify in apparently accepting that the allegiance of her Fiji subjects had ended with the Governor-General's resignation? The reasoning behind her statement is not explicit but its nature can be inferred. The Judges' de facto acceptance of their dismissal and the Governor-General's resignation on the ground that he could no longer maintain the Queen's authority were taken to imply that that authority had effectively come to an end. In effect the Queen's statement is an acknowledgment that she has been deposed.

What effect has the acknowledgment in Fiji law? Certainly it must be seen as contributing to the de facto authority (with resulting legal consequences) of the republican regime. But it is not an abdication or an acceptance that her *legal* authority had *ended*, for the Queen could not abdicate (or make such an acceptance) without the consent of her subjects by Act of the Fiji Parliament under the lawful 1970 Constitution.[9] (Compare in this connection the United Kingdom Act of 11 December 1936 deemed necessary to give effect to Edward VIII's instrument of abdication). If one were right in supposing that the republican regime lacks de jure status in Fiji law until it is sufficiently and freely accepted by the people and that that has not yet happened, then in law the Queen is Queen of Fiji still, though she has now no representative in that country and neither her Ministers nor the Parliament under the 1970 Constitution can function. But the republican regime is de facto exercising executive and legislative power. It has created its own Court and appointed its own Judges who include the former Chief Justice. (See now the Judicature Decree 1988 (*Fiji Republic Gazette*, Vol 2, No 3, 16 January 1988)). One may find that, if the authority of the new regime is tested before it, the new Court will advert to the older constitutionalist view and hold itself precluded from adjudicating upon that authority. Even if it did not do so,[10] the Court, applying the principle of necessity and effectiveness, and (if it goes further) considering that the principle of the people's consent or acquiescence is already sufficiently satisfied, might well recognise the republican regime in accordance with the newer authorities which allow it jurisdiction to decide the regime's status.

The alternative, and in my view correct, course would be to allow the regime at most de facto status until the new constitution now being prepared is complete and is generally accepted by the people (including the Indian community) in referendum, or else at least acquiesced in by their participation in free elections held under it. This, following Pakistan and Grenada authority, would legitimate what will be a new revolutionary constitution and establish it in lieu of that of 1970.

But there are some final complications to consider. To speak of legitimacy of the revolutionary constitution is to suggest a distinction between legitimacy and legality that cannot be fully explored here. It is enough to say that the distinction may in any event be largely dissolved when a Court, in determining the status of a revolutionary regime, invokes principles that go beyond that of necessity and effectiveness, ultimately controlling as such a principle may tend to be in any particular case. In Fiji, as elsewhere (including New Zealand), the question of constitutional legitimacy is affected by the claims of indigenous people to a specially protected position in the constitutional structure. There may thus become relevant a further principle which is quite separate from, and indeed may be inconsistent with, that of a simple acceptance of a Constitution by a majority of the people without regard to ethnic distinction. In Fiji,

in the 1987 revolution, it has been forcefully asserted that the principle was insufficiently recognised in the 1970 Constitution and that the principle, given proper weight, justifies a new constitutional order in which indigenous Fijian dominance will be secured and perpetuated. If a Fiji Court, called upon to determine the legal status of the new regime or of the Fijian dominated Constitution that the regime is expected to introduce, held itself free to do so, without regarding the issue as determined by the Court's own status as a Court of the revolution, the Court might weigh in favour of the regime or its Constitution not only a principle of necessity and effectiveness but also the principle (stated extremely) that the people indigenous to a country are entitled to rule it. To take that principle strongly into account would inevitably affect the degree to which acceptance by non-indigenous Fiji citizens (notably the Indian community) is regarded as relevant to the issue before the Court.

But one would argue to the contrary that the 1970 Constitution itself adequately took account of the special position of indigenous Fijians and was by and large accepted at its inception and for nearly seventeen years by both them and Fiji Indians; that accordingly that Constitution was fully legitimate as well as (having been duly conferred by the Crown) formally legal; that the election victory of the Coalition headed by Dr Bavadra afforded no justification for forcibly overthrowing it in order to secure Fijian dominance;[11] and that no new revolutionary constitution should be recognized in Fiji municipal law which has not been generally accepted by Fiji citizens as a whole. Such arguments, attractive as they might have been to the Judges of the Court of the 1970 Constitution had they retained office, might have little appeal to Judges appointed by the revolutionary regime to a republican Court, even if the latter could be persuaded to consider them. But the arguments have force nevertheless.

III Conclusion

From 19 May to 25 September 1987 the Governor-General of Fiji, following the Rabuka coup of 14 May 1987, took emergency measures for the government of Fiji. Two of these, the purported dissolution of Parliament and dismissal of Ministers by proclamation, were ultra vires, being unauthorised by any express provision of the Constitution or by his emergency powers (based on necessity) to act for its preservation.

The second coup of 25 September 1987 led to the establishment of a de facto republican government. If the test for de jure recognition of that government in Fiji municipal law is merely one of effectiveness and firm establishment, then the test may well have been satisfied; but not if (as submitted) the test requires also free acceptance by Fiji citizens generally. Here too a principle of necessity operates: the necessity for an effective and established revolutionary government to be recognised de jure by the Courts; but arguably a principle that the governed must consent is applicable also. Finally, the day to day acts of government of the republican regime during the period of its de facto status, not tending to its entrenchment, would be treated as valid (again on a principle of necessity) were the 1970 Constitution to be restored.[12] □

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1 *Fiji Royal Gazette*, Vol 114, No 38, of that day. (The Governor-General also (unsuccessfully) recalled the armed forces to their "lawful allegiance", as to which see G M Illingworth, "Revolution and the Crown" [1987] NZLJ 207.)

2 Conferred by the Queen in Council by the Fiji Independence Order 1970 (*Fiji Royal Gazette Supplement*, 6 October 1970) which generally came into force 10 October 1970. Provision had been made for independence and for Fiji legislative powers by the Fiji Independence Act 1970 (UK).

3 For comment, see (1986) 35 *Int & Comp L Qrly* 950 (P StJ Smart). And see further, on temporary validation, *Mitchell v DPP* 1987 LRC (Const) 127.

4 See respectively the Fiji Constitution Revocation Decree 1987 (*Fiji Gazette* Vol I, No 1, 1 October 1987) and Declaration [sic] – Republic of Fiji Decree 1987 No 8 (ibid, No 5, 7 October 1987).

5 Apparently under the Appointment of Head of State and Dissolution of Fiji Military Government Decree 1987 (not available to me). See the Head of State and Executive Authority of Fiji Decree 1988 (*Fiji Republic Gazette*, Vol 2, No 3, 16 January 1988).

6 Grotius, *De Jure Belli ac Pacis*, 1.4.15; post-Civil War decisions of the American Courts, such as *Texas v White* 74 US (7 Wall) 700, 19 L Ed 227 (1869); *Madzimbamuto v Lardner-Burke* (cited in text; in both the High Court of Southern Rhodesia and Privy Council, recognition of the principle being speculative ("it may be" – [1969] 1 AC at 729) on the part of the majority in the latter). See also *Jilani*, *Bhutto* and *Mitchell*, cited in text. For discussion, see eg Brookfield, "The Courts, Kelsen, and the Rhodesian Revolution" (1969) 19 *Univ of Toronto LJ* 326, 349-351.

7 Eekelaar, "Principles of Revolutionary Legality" in *Oxford Essays in Jurisprudence* (2d series 1973) 22, 40. Eekelaar's statement of the principle adds "whether voters or not". He states in all nine principles as possibly pertinent to revoutionary situations: ibid, at 39-40. I now generally accept Eekelaar's view, in preference to the older constitutionalist view (see Brookfield, 19 *Univ of Toronto LJ* at 338) or mere application of a necessity principle.

8 Recognition de jure by the Rhodesian Court came finally in *R v Ndhlovu* 1968 (4) SA 515.

9 Cf Hale, *The Prerogatives of the King* (Vol 92 Selden Society, 1976, ed Yale), 15-16.

10 It might be argued that the Judges' oaths of office (see the Schedule to the Judicature Decree 1988, cited in text) would preclude them from examining the legality of the republican regime. But this does not appear to be so. See *Bhutto v Chief of Army Staff* PLD 1977 SC at 674, where counsel and (by implication) the Court alike agreed that "the taking of the fresh oath [administered after the imposition of martial law] by the Judges of this Court does not in any way preclude them from examining the question of the validity of the new Legal Order . . . ."

11 That is, there was no " right to rebel". See Tony Honore's analysis of the right, (1988) 8 *Oxford JLS* 34.

12 Constitutional crises of the Fiji type and the necessity and other principles applicable therein have been much written about. Apart from sources referred to above, and among recent writing, see L Wolf-Phillips, *Constitutional Legitimacy: a Study of the Doctrine of Necessity* (Third World Foundation Monograph No 6; abridged version in (1979) 1 *Third World Quarterly*, No 4, 97); and S Guest, "Revolution and the Position of the Judiciary" [1980] *Public Law* 168. For the Pakistan necessity cases, see M Stavsky, "The Doctrine of State Necessity in Pakistan" (1983) 16 *Cornell Int LJ* 341.