LAW AND INDUSTRIAL RELATIONS: THE INFLUENCE OF THE COURTS: I

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Introduction

Industrial relations has become one of the most vital topics of concern in all industrial states, including New Zealand, and the damaging nature of industrial disputes between employers and trade unions has seen in recent years an increasing demand for greater legal regulation in this area. New Zealand's problems in this respect are particularly accentuated by the need to expand its secondary industries and to increase its export receipts because of the fear of Britain entering the European Economic Community. The apparently declining state of the country's industrial relations is reflected in the following table showing the number of industrial stoppages and the number of man-days lost through the period from 1963 to 1969:

Year	Stoppages	Man-days lost
1963	60	54,490
1964	93	66,834
1965	105	21,814
1966	145	99,095
1967	89	139,490
1968	153	130,267
1969	169	138,675

(Figures taken from Labour and Employment Gazette[1])

Legal regulation has been and can be effected both through statute and statutory institutions (the Arbitration Court, Conciliation Councils, industrial tribunals) and through the common law and its institutions, the ordinary law courts. In New Zealand, the principal legal control has been achieved by statutory means and, at least until recently, both employers and employed were reasonably happy to settle their differences within the confines provided by legislation,[2] and in particular within the framework of the Arbitration Court and Conciliation Councils. In Britain, on the other hand, legal control through industrial legislation has been of a very limited piece-meal nature only and the ordinary courts have therefore been called on rather more often to provide a common law remedy. The English common law has not been kind to the unions[3] and this has undoubtedly coloured their attitude towards pro-

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1 Vol. XX, No. 2, May 1970, p. 17.

2 Notably the Industrial Conciliation and Arbitration Act 1954 and the Labour Disputes Investigation Act 1913.

3 For example, *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426; *Rookes* v. *Barnard* [1964] A.C. 1129 and, recently, *Torquay Hotel Ltd.* v. *Cousins* [1969] 2 W.L.R. 289.

posed statutory regulation of any kind and even to industrial tribunals, special industrial courts, arbitrators and the like. When Professor Wedderburn says of British industry, "Most workers want nothing more of the law than that it should leave them alone",[4] he is therefore talking of all law, whether statutory or common law.

The trade union attitude to law in New Zealand is a little more difficult to define. The Arbitration Court has recently fallen into disfavour largely because of its 1968 nil-General Wage Order and over recent years there has been a substantial increase in the direct negotiation of ruling wage rates and other extra benefits over and above those provided in the industrial agreement or award settled through the legal channels of the Conciliation Council and Arbitration Court. But the system of legal conciliation and arbitration, although shaken, is unlikely to be toppled in the forseeable future and indeed the Industrial Conciliation and Arbitration Amendment Act 1970, which served to maintain and strengthen the existing order, received the assent of the Federation of Labour before being introduced into the House.[5] It is equally clear, however, that there will now always be a greater or lesser degree of industrial negotiation which takes place completely outside the legal machinery. In some industries, the present practice of negotiating ruling rates will probably never come back fully into the award system, although that was the purpose of the 1970 Amendment, and in most industries factory or plant informal agreements over work practices and conditions, which always have been the order of the day, will undoubtedly continue. The place of the productivity agreement in the New Zealand industrial scene remains unclear[6] but it is doubtful that it could be given any form of legal status.

So far as the ordinary law courts in New Zealand are concerned, neither employers nor unions have had very much to do with them, although once again the last two or three years have seen some change in this respect. In this time, New Zealand judges have been asked to provide legal remedies in a number of industrial disputes and this article will be largely concerned with an evaluation of at least those cases which have been reported or otherwise received wide public attention. The cases are *Pete's Towing Services Ltd.* v. *Northern Drivers' Union*,[7] *Flett* v. *Northern Drivers' Union*[8] (and subsequent developments), and *Martin* v. *Attorney-General*.[9] In addition, because it appears likely to be the subject of litigation in the reasonably near future, the legal status of

4 *The Worker and the Law* (Pelican 2nd ed.), 13. English trade unions certainly exhibit a remarkable degree of paranoia towards law.

5 Until very recently it might have been thought that a constitutional convention that the Federation of Labour should give its assent to indusrial legislation before it is presented to the Governor-General for his assent was developing in New Zealand but the passing of the Stabilisation of Remuneration Act 1971 would now appear to have dashed that view.

6 A Conference on Productivity was held by the Institute of Management at Auckland in May 1970 in which English productivity agreements were discussed, with (in my observation) little enthusiasm from the audience. The General Wage Orders Act 1969 also places some emphasis on increased productivity as a factor to be taken into account in determining general wage orders but, apart from the Dunlop rubber productivity agreement (initiated by the rubber workers' union!), employers have not seen fit to move away from the present forms of wage-fixing and determination.

7 [1970] N.Z.L.R. 32.

8 [1970] N.Z.L.R. 1050.

9 [1970] N.Z.L.R. 158.

informal industrial agreements negotiated outside the legal machinery will be examined, with reference to a recent English case on the subject—*Ford Motor Co. Ltd.* v. *A.E.F.*[10] What I hope will emerge is an understanding of the legitimate boundaries of the Law in the effective regulation of industrial relations including some comment on the dangers which are inherent in the use of the ordinary courts as an instrument for settling industrial disputes.

The Legal Enforceability of Industrial Agreements—The Law of Contract as applied to Industrial Bargaining

Some interesting comparisons and differences can be drawn between industrial agreements in Britain and those in New Zealand. In Britain, industrial agreements are formed on two levels, which approximate two systems of industrial relations—characterised by the Donovan Royal Commission on *Trade Unions and Employers' Associations*[11] as the formal and informal systems. Formal, or collective, agreements are concerned with wage rates and conditions of employment between an employer or employers and a trade union or unions and are often concluded on an industry-wide scale. Such agreements are necessarily expressed for the most part in general terms because they cover a wide area and must endeavour to accommodate quite widely differing conditions and circumstances applying to different factories and different groups of workmen.[12] This therefore accounts for the informal agreements which pervade industry and which are concluded on a wide scale at factory or plant level, covering specific problems which cannot satisfactorily be dealt with by the generalities of the revelant formal collective agreement.

It is important to realise that informal factory agreements do not develop only where there is a gap (or other ambiguity) in the formal collective agreement. In many cases the collective agreement will be regarded as laying down minimum standards or conditions only—a feature also of the New Zealand situation—and further improved conditions for the worker are left to be negotiated at factory level. But more than that, there is a web of customs and practices in each factory which are not even embodied in most cases in written form.[13] This lack of formality does not mean however that an inconsistent provision in a collective agreement will inevitably override such customs and practices. "The informal system," says Donovan, "undermines the regulative effect of industry-wide agreements."[14] In short, it is difficult, if not impossible, to draw a distinction in Britain between "disputes of right", concerning the application or interpretation of a collective agreement, and "disputes of interest", involving the negotiation of new rights and obligations not already laid down in an existing agreement.[15] The two merge into each other. This will be as true in areas where the collective agreement is silent (for example, work practices, recruitment) as in those where the agreement does have some relevant provisions.[16]

10 [1969] 1 W.L.R. 339; [1969] 2 All E.R. 481.
11 (1965-8) Cmnd. 3623.
12 *Ibid.*, Ch. III, particularly pp. 18-19, para. 68.
13 *Ibid.*, p. 121, para. 456.
14 *Ibid.*, p. 36, para. 149.
15 *Ibid.*, p. 121, para. 456; p. 36, para. 148; pp. 16-17, para. 60.
16 *Ibid.*, p. 36, paras. 145, 149.

A few further words might usefully be said about the negotiation of informal agreements—or, as it is variously called, fractional bargaining, factory or plant bargaining, or workshop bargaining. The Donovan Commission accepted its characterisation as being "largely informal, largely fragmented and largely autonomous".[17] The net result is a "shift in authority from the industry to the factory . . . accompanied by decentralisation of authority in industrial relations within the factory itself."[18] In many cases, there may be no question of "bargaining at all, either because the issue is readily determinable by settled custom or practice or because a decision (e.g. to establish a closed shop or to limit output) is taken unilaterally by workers and accepted by management".[19] Donovan denied vigorously that the informal system described could be forced to comply with the assumptions of the formal system: " . . . bargaining in the factory is of equal or greater importance [to industry-wide collective agreements] . . . . Reality cannot be forced to comply with pretences."[20] No doubt, of course, an attempt could be made to bring some matters now the subject of informal agreement into the scope of formal agreements—for example, ruling rates of pay, dispute procedures[21]—but this would still leave untouched, and untouchable, the vast body of work practices and understandings which permeate industry.

In New Zealand, industrial agreements may be freely negotiated but if they are registered with the Clerk of Awards then, by virtue of the provisions of the Industrial Conciliation and Arbitration Act, they become legally binding and are as fully enforceable as an award imposed (in default of voluntary agreement) by the Arbitration Court.[22] Those agreements which are registered approximate the British collective agreements but their resulting legality—collective agreements in Britain, as we shall see, are not legally enforceable—has not prevented the flourishing of informal or fractional bargaining over wage rates, conditions of employment and work practices. Workers demand and receive the right to negotiate directly for further and better benefits both immediately after the conclusion of the formal agreement or award and during its currency.[23] It is possible that the Industrial Conciliation and Arbitration Amendment Act 1970, which seeks to bring the negotiation of ruling wage rates back into the legal system, will have some effect but in my view it is unlikely to be fully effective and cannot in any event affect negotiations other than those over wages in all probability.

Formal and informal agreements exist therefore both in Britain and in New Zealand but probably not in the same kind of proportions.[23a] The vital difference is that the formal agreements in New Zealand are

17 As described by Allan Flanders when giving evidence to the Commission: see Report, p. 18, para. 65.
18 *Ibid.*, p. 18, para. 65.
19 *Ibid.*, p. 19, para. 69.
20 *Ibid.*, p. 36, para. 144 and para. 150.
21 As has been attempted in New Zealand by the Industrial Conciliation and Arbitration Amendment Act 1970.
22 Industrial Conciliation and Arbitration Act 1954, ss. 105, 153; see also Labour Disputes Investigation Act 1913, s.8.
23 For an elaboration of this point, see [1969] N.Z.L.J. 654.
23a The opinion will be expressed below that, at least until recently, the legality of formal industrial agreements in New Zealand has hindered the development of personnel policies and acted as a deterrent to direct communication between employer and employed and that which grows out of it—fractional bargaining.

legally binding and enforceable (at least in theory) whereas in Britain they are not. Even more so are informal agreements in Britain unenforceable at law. The position of an informal agreement in New Zealand—for example, a ruling rate agreement—remains unstated by the courts. Under the Industrial Relations Bill of 1971, however, collective agreements in Britain are soon to be "conclusively presumed to be intended by the parties to it to be a legally enforceable contract", unless there is a provision in the agreement which states that it is not intended to be legally enforceable.[24] Informal factory agreements will not be touched by this enactment and so the strange situation will exist where industrial agreements will at one level be legally enforceable and at another level not. Although, as has been said, the legality of informal agreements in New Zealand has yet to be the subject of a legal ruling, the opinion will be expressed that they are not legally binding so that the same situation probably exists in this country also. There are major implications from this so far as the standing of Law is concerned. On one view, it can be said that, even if some industrial agreements cannot readily be enforced at law—because they are fragmented, or uncertain, or not written down and therefore not proveable—this is no reason for not enforcing those which can be and a start may as well be made on collective agreements (or in New Zealand, agreements registered with the Clerk of Awards). On another view, it can be argued that the ease with which the formal industrial agreements are superseded by informal agreements and practices, the impunity with which disputes procedures are ignored or disregarded and the forgiveness of those defaults in the interests of a settlement (by any means) and return to work means effectively that industrial agreements are observed only to the extent that both sides allow. Legal rights and obligations under the agreement are freely discountable at will with the result that Law becomes a dead letter and ultimately falls into disrespect.

These were the issues which must have been present in the mind of Geoffrey Lane J., when he gave his celebrated judgment in the *Ford Motor Company case*.[25] The facts of the case were as follows. The Ford Motor Company's industrial relations with the various trade unions with which it was concerned were regulated by a collective agreement made in 1955 and a second agreement made in 1967. The earlier agreement covered largely procedural matters and it prescribed a joint negotiating committee consisting of one official from each of the unions involved and an equal number of officials appointed by the company. The later agreement was concerned more with conditions of employment such as wage rates and hours. Neither agreement contained any express stipulation that it should be legally enforceable and many of the clauses in each were said to be worded in vague aspirational terms which would render enforcement from a practical viewpoint difficult.

In January 1969 the company submitted to the negotiating committee certain proposals for variation of the 1967 agreement. These included higher wage rates and other benefits but also contained provisions under which holiday benefits and certain other matters of advantage to the workers would be lost if they took part in unconstitutional action. Under the 1955 agreement, any stoppage of work which occurred before a

24 See clause 32 of the Bill.

25 *Ford Motor Co. Ltd.* v. *Amalgamated Union of Engineering and Foundry Workers* [1969] 1 W.L.R. 339; [1969] 2 All E.R. 481.

settled procedure outlined in the agreement had been exhausted was deemed to be unconstitutional. The proposals were accepted by a majority vote of the trade union members of the negotiating committee and that acceptance communicated to the company. Subsequently, the company sent to the secretary of the trade union side of the negotiating committee a detailed document with space at its foot for the signatures of the representatives of the nineteen trade unions with which the company was involved. The document contained the terms previously agreed but also some additional terms including one which extended the no-stoppages clause in the 1955 agreement by providing that the unions would wait a further twenty-one days after the disputes procedure had been exhausted before taking industrial action. This document was never signed by the unions because of the following events.

A minority of the unions, it appeared, was dissatisfied with the terms of the 1969 proposals and in particular with the penal clauses outlined above under which by unconstitutional action certain benefits would be lost. The company was asked by the secretary of the union side of the negotiating committee to reconsider the proposals in the light of this dissent. Two days later the employees at one of the company's plants began an unofficial strike and when the company then insisted that the 1969 proposals were binding on all the parties the strike was declared official by both the Amalgamated Union of Engineering and Foundry Workers and also by the Transport and General Workers' Union. The company initiated an action against the unions and obtained an injunction ex parte pending the hearing of their application for interlocutory injunctions. The basis of the plaintiff's case was that the three agreements (1955, 1967 and 1969) were enforceable by law. The defence was, firstly, that collective agreements of this kind are binding in honour only and, secondly, that in the case of the 1969 proposals, no agreement had in any event been concluded. Geoffrey Lane J. held that none of the agreements was binding at law and the greater part of his judgment is devoted to demonstrating this. He also thought that it was at least strongly arguable that the negotiating committee was a recommendatory body only so that in any event no agreement had been concluded on the 1969 proposals.[26]

The learned Judge first distinguished a series of cases cited by counsel for the company as not concerning directly the question of the enforceability of collective agreements.[27] He then noted that there was no express provision by the parties in their agreements which gave any assistance as to whether or not they intended the agreements to be legally binding.[28] "Consequently," he said, "it is necessary to look at all the surrounding circumstances to ascertain what the intention of the parties was."[29] At this point he recalled a general classification of agreements (legal and non-legal) which he had given earlier in his judgment:

> . . . are these agreements enforceable by legal process in this court or not? There is a dearth of direct authority on the point. This is, perhaps, hardly surprising, because most cases in this branch of the law fall plainly into one

26 [1969] 2 All E.R. 481, 496.

27 In particular, he pointed out that the two most recent authorities—the Privy Council decision in *Young* v. *Northern Canadian Rly. Co. Ltd.* [1931] A.C. 83 and *National Coal Board* v. *Galley* [1958] 1 All E.R. 81—were both actions between individual workers and their employers so that the question of the enforceability of collective agreements remained open.

28 [1969] 2 All E.R. 481, 490.

29 *Ibid.*

> or other of two categories. Either they are commercial contracts between parties at arm's length, which are obviously intended to be enforceable at law unless the parties by express provision declare that they are binding in honour only, or otherwise they are social or domestic arrangements which are equally obviously not designed to be legally binding, the type of arrangement whereby one person says to another, "I will meet you at 7.30; you bring the food; I will bring the drink".[30]

Geoffrey Lane J. admitted to his inability to fit collective agreements neatly into either of these categories. Insofar as the agreements regulated the business matters of wages, working conditions, terms, penalties, and so forth, they looked like commercial agreements "carrying the usual sanction with such agreements, namely, recourse to the courts should there be a breach on either side."[31] But, His Honour said, the executive officers of both the company and the unions "must have been aware of current attitudes and developments in this field."[32] Then followed extensive references to industrial and academic opinion which overwhelmingly favoured unenforceability at law of collective agreements. Much of course was made of the Donovan Report[33] and submissions to the Royal Commission by the Trades Union Congress and the Confederation of British Industry, all of which assumed that collective agreements were not legally binding contracts because the parties to them "do not intend to make a legally binding contract."[34] Other non-legal sources relied on by the court included the Ministry of Labour's 1961 *Industrial Relations Handbook* and the report of the court of inquiry into the electricity supply industry in 1964.[35] The learned Judge's finding was that the men on both sides responsible for the Ford agreements must have known that no legally enforceable contract resulted from collective agreements and that ultimately this fact, added to the "vague aspirational wording" and the nature of the agreements themselves, outweighed the commercial appearance which their subject-matter gave.[36]

The emphasis placed by the court on industrial opinion has been strongly criticised. "The climate of opinion is irrelevant . . . . One cannot use the current climate as an all-embracing blanket of immunity, and the current climate cannot determine for the parties that which it is for them, and them alone to determine,"[37] says one lawyer. It is certainly a novel approach to the question of intention to create legal relations to ask: what do other parties to similar agreeemnts think of the legal effects of their agreements, although it may not be as conceptually unsound as has been suggested. It would, in my view, have been preferable if the Court had simply said, "This is an area where public policy requires that the normal rules of contract must yield to other considerations. We will not enforce collective agreements." The nearest analogy would be contracts in restraint of trade in respect of which the courts have given effect to certain requirements of economic policy which make such contracts undesirable and contrary to the public interest.

30 *Ibid.*, 488.
31 *Ibid.*, 490.
32 *Ibid.*, 490.
33 (1965-8) Cmnd. 3623.
34 *Ibid.*, p. 126, para. 470; [1969] 2 All E.R. 481, 491.
35 Cmnd. 2361.
36 [1969] 2 All E.R. 481, 496.
37 Selwyn, *Collective Agreements and the Law* (1969), 32 M.L.R. 377, 395.

And to make collective agreements legally enforceable would undoubtedly cause very real social and economic losses which the common law might reasonably be seised of. Donovan, for example, pointed out that over-emphasis on industry-wide agreements in Britain had led many companies to neglect their responsibility for their own personnel policies.[38] This was true even although such agreements were not legally enforceable. To make them so could only aggravate the situation and there are certainly any number of instances in New Zealand where employers have chosen to treat the award or industrial agreement as their charter of industrial and personnel relations. To treat the industrial or collective agreement as the whole charter (because it has legal backing) will stunt the growth of fractional bargaining although, as we have seen, it is unlikely to eliminate it altogether. Now, contrary to accepted opinion, there are very real economic advantages in fractional bargaining. If we accept that there is a direct link between worker motivation and increased productivity and if we accept further that worker participation (in the sense of delegation of responsibility to workers and of their involvement in their industry) means increased motivation, it will be seen that fractonal bargaining is an obvious instrument for employers to turn to their advantage by giving the workers a greater say in the running of their industry. Bargaining is a continuous process, Donovan noted, "in which differences concerning the interpretation of an agreement merge imperceptibly into differences concerning claims to change its effect."[39] Put another way, fractional bargaining means more communication between the lower ranks in a factory and management in that factory. More communication eases the way for increased delegation of responsibility to the rank and file, makes consultation on plant planning and technical and labour innovation more feasible and generally gives the worker a greater sense of involvement. A greater sense of involvement means increased motivation, increased productivity and increased profits.[39a] Ultimately, it will also mean better human relations.[40]

These, then, are the economic and social reasons for the common law not according its imprimatur on industrial agreements, irrespective of what level they are concluded at. To have given effect to them under the heading of public policy would in my view have made Geoffrey Lane's judgment in the *Ford Motor Company case* more tenable. They are arguments which would, I hope, convince a New Zealand Judge willing to examine the policy of the law, if he were unable to evince the same "climate of opinion" existing in New Zealand in respect of informal industrial agreements. They are also arguments against the legal "award" system in New Zealand and in favour of repealing that part of the Industrial Conciliation and Arbitration Act which makes

38 Report, p. 36, para. 149.

39 *Ibid.*, p. 126, para. 471.

39a The economic cry of the 1970s is that of increased productivity and, if productivity agreements eventually do become the instrument in New Zealand by which that goal is achieved, very real difficulties will arise if a court should hold those agreements to be legally enforceable. One of the essential characteristics of a productivity agreement is that it has built in to it machinery for continuous review and change, something which the static concept of contract would find difficult, if not impossible, to encompass.

40 There have been several surveys and books which amply demonstrate these points: see, for example, Blumberg, *Industrial Democracy—The Sociology of Participation* (1969) and Brown, *The Social Psychology of Industry* (1969).

industrial agreements filed with the Clerk of Awards legally binding. The price of the earlier stability afforded by the Act (at a time when the unions were weak) has been poor personnel relations as a result of employers sheltering behind the law. Now that the unions are strong enough to flout the law with impunity, that price is being paid for in strikes and inflation. It will be difficult hereon to stem the flow in any event but making informal agreements legally enforceable will only accelerate it.

The Control of Industrial Action by the Courts

Employers and others who have been injured by industrial action taken by trade unions have been able to seek a remedy from the common law, if they wished. The remedy (in the form of damages or the grant of an injunction) has been remarkably comprehensive although, like all aspects of the common law, it does have limitations. In Britain, changing views in the twentieth century of what legal controls by the courts of trade union action are desirable economically and socially have led to legislative protection being given to the unions. The Trade Disputes Act 1906 provides:

> s. 3: An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person . . . .
> s. 4(1): An action against a trade union . . . or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

And, to alleviate the effects of the House of Lords' extension in *Rookes* v. *Barnard*[41] of the scope of the tort of intimidation, the Trade Disputes Act 1965:

> s. 1(1): An act done after the passing of this Act by a person in contemplation or furtherance of a trade dispute . . . shall not be actionable in tort on the ground only that it consists in his threatening—
> (a) that a contract of employment (whether one to which he is a party or not) will be broken, or
> (b) that he will induce another to break a contract of employment to which that other is a party;
> or be capable of giving rise to an action of reparation on the ground only that it so consists.

"Trade dispute" is given quite a wide definition in the 1906 Act[42] and covers all disputes between employers and workmen (whether employed by the disputant employer or not) and between workmen and workmen, so long as the dispute is "connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person".[43] The Trade Disputes Acts are due for repeal in the United Kingdom Industrial Relations Bill but the immunities afforded are bye and large re-enacted in the Bill.[44]

New Zealand has never enacted a Trade Disputes Act, or anything equivalent to it. Oddly enough, until recently, employers and others have not taken advantage of the weak legal position in which the

41 [1964] A.C. 1129.
42 Applicable also to the 1965 Act: *ibid.*, s.1(1).
43 Trades Disputes Act 1906, s.5(3).
44 See clause 118.

unions have been put as a result and there are very few reported actions for inducing breach of contract, conspiracy and intimidation, the common law tort headings in this area.[45] The 1970 law report, however, contains two such cases and indications are that there may be more to come. These cases are interesting for different reasons, and the rest of this section of the article will be devoted to a discussion of one of them. This is *Pete's Towing Services Ltd.* v. *Northern Drivers' Union.*[46]

The facts of *Pete's Towing* were as follows. The plaintiff company operated a large steel barge in which it carried on a substantial coastal trade in bulk cargoes, which it was able to carry at a significantly lower price than the ruling rates of most other land or sea transport organisations. There was, unfortunately, a catch. It could only maintain its cost advantage by avoiding the use of ordinary waterside workers' labour in loading and unloading in ports. In place of this labour, the company used a self-propelled mobile crane, which was normally carried on the barge, together with forklifts hired from another firm. It was not very long after the company began operating its barge, however, that it found itself in conflict with the Waterside Workers' Union. The Auckland Branch of the Union complained that it was entitled under the Waterfront Industries Act and under its award to be paid the equivalent amount of wages in respect of the loading of steel on to the barge by the mobile crane. The proprietor of the company—a Mr Jamieson—apparently believed, however, that cost-effectiveness comes before the law for he was (as Speight J, the trial Judge, found) "curt and unco-operative".[47] The union eventually referred the matter to the local port conciliation committee as it was entitled to do under the normal statutory machinery. Jamieson refused to appear before the committee for negotiations and this left the committee with no option but to refer the matter—unresolved—to the Waterfront Industry Tribunal for adjudication. And there the matter rested.

Meanwhile, the company incurred the wrath of other branches of the Union—at Mt Maunganui and Whangarei—by its activities. The dispute in Whangarei, which was the one which eventually came before Speight J, occurred when the company unloaded sand, without union assistance, by using a front-end loader hired from another firm. The front-end loader took buckets full of sand from the stockpile on the deck of the barge, drove down the stern ramp on to the harbour bed and emptied the sand into a waiting truck owned by Ready Mixed Concrete Ltd., who had contracted with the plaintiff for the consignment of the same to Whangarei. Jamieson was approached by local union officials about this procedure but he in effect refused to discuss the matter with them and was adamant that he was not obliged to employ union labour. The union, it should be noted, was willing to allow Jamieson to continue his operations while negotiations took place but the latter's position was simply that he would not negotiate under any circumstances. On Jamieson's attitude in this respect, Speight J. commented:

> Having myself observed his smug and unyielding manner, I cannot think of any behaviour which would be more provocative of industrial trouble, even

45 The most notable being *Hughes* v. *Northern Coal Miners' Union* [1936] N.Z.L.R. 781: see also *Blanche* v. *McGinley* (1912) 31 N.Z.L.R. 807; *Ruddock* v. *Sinclair* [1925] N.Z.L.R. 677; *Miller* v. *Collett* (1913) 32 N.Z.L.R. 994; *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105.

46 [1970] N.Z.L.R. 32.

47 *Ibid.*, 36.

had he been dealing with docile persons—which he was not. [The President of the Whangarei branch of the Union] was entitled to conclude that Jamieson intended to operate without regard for industrial law.[48]

Shortly afterwards, the activities of the plaintiff were discussed at the Biennial Conference of the various branches of the Waterside Workers' Union and a resolution was passed declaring the plaintiff "black" until such time as it should enter into discussions on a proper basis with the Union. Subsequently, the President of the Whangarei branch of the Waterside Union approached the local organiser of the Northern Drivers' Union and told him of the dispute. The latter then spoke to the Manager of Ready Mixed Concrete Ltd. and pointed out that support from other unions such as the Drivers' Union for the Watersiders' case could lead to a disruption in the transport, cargo working and labour industries and cement supplies to Ready Mixed might even be in jeopardy. The Manager of Ready Mixed formed the opinion, as a result of this conversation, that it would be prudent not to accept any more sand delivery until such time as the situation between the plaintiff and the Waterside Union was settled. Because of this incident (and a similar one three months later) little, if any, work was able to be undertaken by the plaintiff in the use of the barge. The plaintiff then sued the Drivers' Union claiming damages in tort for loss of prospective profits under the heads of intimidation, inducement of breach of contract (the contract with Ready Mixed) and conspiracy.

Speight J. found for the defendent union. His findings can be summarised briefly:

(1) "Intimidation," he said, "is procuring economic harm to another by the use of unlawful threats to curtail that other's freedom of action."[49] Insofar as there are lawful means of striking (see below as to this), he was not satisfied that there had been an "unlawful threat".

(2) The Union had induced a breach of the contract of supply between the plaintiff and Ready Mixed but in all the circumstances the Union was justified in so interfering. Justification is a legal defence to the tort of inducement of breach of contract.

(3) *A fortiori,* the wider conspiracy defence of justifiable self-interest must defeat the conspiracy claim.

The case as a whole is an interesting one in that it raises the difficulties, from a legal viewpoint, of balancing a trade union's claim to protect its labour position with the businessman's claim to operate efficiently and to cut his costs. These respective claims are of course not so much legal in their nature as industrial and economic. It is fundamental to the whole structure of trade unionism that the position of labour be maintained. Similarly, it is a matter of economic necessity that the industrialist should be able to prune his expenses as far as possible so that the consumer may be offered a cheaper service or product. In a difficult and complex area of the common law such as this one, the Judge will be faced with a number of different threads which, by a process of selection and adjustment, will enable him to adopt a legal formulation which will lead to a result that is industrially just. This is not to say that the unions must always win but merely that any solution that is not seen by industry as a whole to accord with industrial realities will only serve to bring the law into contempt.

48 *Ibid.,* 37-8.
49 *Ibid.,* 41.

The central legal threads in *Pete's Towing* were those of justification and the lawfulness of strike action. Speight J showed how justification can be an excellent legal tool for doing Industrial Justice. Having regard ot the circumstances in which the drivers' union organiser was placed, he said, and taking into account the fair conditions which he and the Waterside Workers' Union proposed, the cause giving rise to the dispute and the fact that the unions were willing to allow the plaintiff to continue his operations during negotiations, the organiser was *under a duty* to interfere.[50] It should be made clear that justification was only referred to in the context of inducing breach of contract. The Judge's denial of intimidation rested solely on his finding that an unlawful threat had not been established. Doubts will be expressed below as to this view, but in any event the same result could have been reached by extending the defence of justification to any intimidation that was proved. Although justification to a claim of intimidation has never been established by a court, it was not ruled out in *Morgan* v. *Fry*[51] by the English Court of Appeal and one would hope that there was sufficient flexibility in the common law to enable a court, for example, to develop a principle analogous to the requirement of "exhaustion of legal or administrative remedies" in administrative law as a defence to intimidation caused by the plaintiff's conduct in failing to use existing procedures for settlement of a dispute. In this connexion, there was clearly something unfair in a plaintiff's crying "Unlawful threats" in *Pete's Towing* when the plaintiff had, by its own unlawful refusal to use available legal procedures, contributed substantially to the particular unlawful action that it was complaining of.

The legal question of lawfulness of strike action gives rather more trouble. According to Lord Denning, the English common law has long recognised the right to strike, provided only that notice of intention to do so at least equal to the notice required to terminate the contract of employment were first given.[52] A strike notice of the proper length was, he said, "perfectly lawful".[53] The basis of his reasoning is interesting:

> If a notice to terminate is lawful, surely a lesser notice is lawful: such a notice that "we will not work alongside a non-unionist" . . . The truth is that neither employer nor workmen wish to take the drastic action of termination if it can be avoided . . . . Each side is content . . . to accept a "strike notice" of proper length as lawful. It is an implication read into the contract by the modern law as to trade disputes.[54]

In short, the right to strike is an implied term in all contracts of employment in Britain. As such, however, it can be excluded by express agreement to the contrary and this was the distinguishing feature between the case before Lord Denning (*Morgan* v. *Fry*) and the earlier House of Lords' decision of *Rookes* v. *Barnard*.[55] In *Rookes* v. *Barnard*, a no strike clause in a collective agreement had been incorporated in all the individual contracts of employment of union men employed by B.O.A.C.[56] When a draughtsman employed by B.O.A.C. had resigned

50 *Ibid.*, 51; and see pp. 48, 49 *et seq.*
51 [1968] 2 Q.B. 710, 729.
52 *Morgan* v. *Fry* [1968] 2 Q.B. 710, 725 (rejecting earlier views stated by him in *Stratford* v. *Lindley* [1965] A.C. 269, 285).
53 *Ibid.*, 727.
54 *Ibid.*, 727-8.
55 [1964] A.C. 1129.
56 Admitted in Court: *ibid.*, 1166.

from the union, the union had informed the corporation that if he were not dismissed within three days union employees would withdraw their labour. The draughtsman was dismissed and he later sued the union officials successfully for damages under the tort of intimidation. The House of Lords held that intimidation comprehended not only threats of criminal or tortious acts but also threats of breaches of contract.[57] By going on strike the union men would be breaking their contracts of employment. In *Morgan* v. *Fry*, on the other hand, the absence of a no strike provision in the workmen's contracts of employment and the giving of proper notice meant that there was no threat to break those contracts and hence no unlawful act upon which the tort of intimidation could rest.

The relevance of the English approach to *Pete's Towing* can now be shown. The Northern Drivers' Union, the defendant in *Pete's Towing*, as with ninety per cent. of all trade unions in New Zealand, is registered under the Industrial Conciliation and Arbitration Act 1954. The first of the I.C. & A. Acts was passed in 1894 and it is fundamental to the legislation that unions which choose to register under its provisions forgo any right to strike which they might otherwise have. (Or so, the "climate of opinion" has been.) Because the I.C. & A. Acts have dominated the New Zealand industrial scene for such a long time, it is questionable to what extent there is room for implication of a right to strike in a New Zealand worker's contract of employment in those cases —if any—where the statute does not forbid him to strike. Lord Denning's sociological assumption in *Morgan* v. *Fry* was that industrial custom or usage in Britain includes an acceptance by employers of the right to strike (amounting to an implied term of the contract of employment). In my view, the sociological assumption in New Zealand is quite the reverse.[58] Industrial custom here does not and (at least since 1894) never has condoned strike action. Put in another way, the I.C. & A. Acts can be said to have conditioned employers into treating all strike action as illegal so that it is virtually impossible to imply a contractual acceptance of strike action even in those cases—if any—where strike action is not rendered illegal by statute.[59]

These are in fact the issues on which Speight J. eventually proves to be open to criticism. In deciding whether the pressure brought to bear by the Union on Ready Mixed not to trade further with Pete's Towing was illegal, His Honour said:

> As I understand it, with particular reference to Part X of the Industrial Conciliation and Arbitration Act, 1954, a strike as such is not illegal and indeed, there are lawful methods of striking. *A fortiori,* it may be lawful to threaten to strike . . .[60]

In fact, a strike as such *is* illegal under the Act. Section 191 (in Part X) does, it is true, provide a special secret ballot procedure which must be

57 Since nullified in the United Kingdom by the Trade Disputes Act 1965, s.1 (above).

58 *Quaere,* whether the right to strike can ever be implied as a contractual term in a contract of employment set in a context of statutory compulsory arbitration of labour disputes—for example, New Zealand, Australia.

59 That is, to the ten per cent. of unions not registered under the I.C. & A. Act and falling therefore within the terms of the Labour Disputes Investigation Act—which in itself imposes stringent conditions on the exercise of strike action and which leaves unanswered the legal position of strikes which do satisfy those conditions.

60 [1970] N.Z.L.R. 32, 44.

followed where there is a proposal that there should be a strike and, in certain circumstances, a penalty on summary conviction of imprisonment for a term not exceeding twelve months or a fine not exceeding two hundred dollars or both can be imposed if the procedure is not observed. But, and this is the essential point, the penalty under this provision is not for striking but for violating the ballot requirements. If the requirements are observed, this does not render any subsequent strike action legal for by subsection 8:

> Nothing in this section shall be deemed to render lawful any strike or lockout which would otherwise be unlawful, or to derogate from the other provisions of this Part of this Act.[61]

And when we turn to section 192(1) of the Act, we find:

> When a strike takes place in any industry every worker who is or becomes a party to the strike and who is at the commencement of the strike bound by any award or industrial agreement affecting that industry shall be liable to a penalty not exceeding one hundred dollars.

That is, members of the Northern Drivers' Union, being covered as they were by an industrial agreement or award, could not strike legally without at any rate first deregistering their union from under the Act. Further, it is provided by section 153(1) of the Act that every award shall, in addition to the parties thereto, "bind every worker who is at any time while it is in force employed by any employer on whom the award is binding".[62] (A similar provision exists in section 105 in respect of industrial agreements.) Industrial agreements, it should be noted, normally provide (and the agreement covering the Northern Drivers' Union was no exception) for the reference of all disputes to a disputes committee for settlement, "the essence of (the award or agreement) being that the work of the employers shall not on any account whatsoever be impeded but shall always proceed as if no dispute had arisen . . . . "

For these reasons, therefore, I think, with respect, that Speight J. was wrong when he said that a strike as such is not illegal and that it could be lawful to threaten to strike. His Honour envisaged a lawful strike as being one where the notice of strike action would not be less than the notice required under the award to terminate the contract of employment. In that the union official had not committed his drivers to "acting illegally" by giving a shorter period of notice than the award provided for termination of employment, the learned Judge thought that the plaintiff had failed to make out the tort of intimidation.[63] But, under section 189, a strike is defined (*inter alia*) as meaning the "act of any number of workers . . . in discontinuing (their) employment, whether wholly or partially . . . the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers . . . with intent to compel or induce any such employer to . . . comply with any demands made by the said or any other workers."[64] It is surely clear, therefore,

61 S.191(8).

62 Under the Act, this provision applies to every worker falling within its ambit, irrespective of union membership.

63 [1970] N.Z.L.R. 32, 44.

64 The New Zealand statutory definition of "strike" is thus wider than the ordinary meaning attributed to the word. Dixon J. in the Australian case of *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 360, thought that "in most of the attempts to state what amounts to a strike, prominence is given to the cessation or reliquishment of work, or at least the failure to resume work after a normal interruption or suspension." He conceded, however, that the word had "no certain connotation which is settled or accepted."

that the period of notice is irrelevant and cannot affect the legality of the action under the Act or under the award.

The result is that the case is on all fours with the *Rookes* v. *Barnard* situation. In both cases, it is a breach of the worker's contract of employment to go out on strike, regardless of the question of notice. The only difference is that in *Rookes* v. *Barnard* this is because of an express contractual term whereas in *Pete's Towing* the prohibition is imposed by statute. It may have been open to Speight J. in the latter case to find that on the evidence there had been no threat[65] to strike by the union —the evidence appears to be equivocal on the point—but his finding that there could be a lawful threat to strike must be open to serious doubt.

It is patently clear from his judgment that Speight J. thought that the "industrial merits" were on the union's side in the case before him. Not only was the union's labour position being challenged by a plaintiff who was altogether lacking in the qualities of reasoning (let alone reasonableness) and compromise, but in this case that position had been given legal backing in the form of a statute and a legal award. There is of course the possibility that another Judge might see the industrial merits of a similar case rather differently and so the desirability of a Trade Disputes Act in New Zealand becomes an urgent one, an even more urgent one in fact that it would be in Britain where the lawfulness of strike action is still a matter of contract.[66]

The Court as an Instrument for Settling Industrial Disputes

The second economic tort case reported in the 1970 volume of the New Zealand Law Reports is *Flett* v. *Northern Drivers' Union*[67] and it throws some interesting light on to the role of the court in the settling of industrial disputes. It also shows the limitations of the remedy of the injunction as a means of ordering industrial relations. The case had arisen following an increase in beer prices shortly after Christmas 1969. The breweries claimed that rising costs had necessitated the increase which, in the case of jugged beer, amounted to three cents extra for the consumer. Some hotels, however, took the occasion to pass on a five cents increase. Demands by consumer and trade union groups for an inquiry into the propriety of the increases met with a Government announcement that the new prices were fully justified. Not satisfied with this decision, the Northern Drivers' Union (backed by other trade union groups) determined to apply a selective boycott. A number of the hotels which had passed on the larger increase were chosen for the exercise. The Union arranged that the drivers of brewery wagons should refuse to deliver beer to these hotels until such time as the price of jugged beer in those hotels was reduced. The boycott continued for several days and, as the legend of the pub with no beer became an imminent reality, one of the hotel proprietors finally brought an action in the Supreme Court for the grant of an interlocutory injunction. The cause of action alleged was commission of the tort of inducing breach of contract.

65 The distinction between a "warning" on the one hand and a "threat" on the other was recognised by Lord Loreburn L.C. in *Conway* v. *Wade* [1909] A.C. 506, 510. It is surely arguable that a statement that inter-union sympathy and solidarity can lead to disruption in industry, without some firm indication that union action will take place, is little more than a "warning".

66 *Morgan* v. *Fry* [1968] 2 Q.B. 710, 725.

67 [1970] N.Z.L.R. 1050. I have a "pop" version of this case in "Games Lawyers Play" [1971] N.Z.L.J. 252.

Strangely, counsel for the Union did not attempt to raise a defence of justification at the hearing but, for the most part, contented himself with a denial that the plaintiff's affidavit amounted to proof of the tort alleged.[68] Speight J., before whom the case had come, held, however, that the affidavit was prima facie evidence which was sufficient for the application. The union's activities, he said, appeared to constitute the tort of inducing breaches of contract between the plaintiff and certain breweries. Interlocutory injunctions were therefore granted against both the union and its secretary who was said to be responsible for the organisation of the boycott. The Judge did, on the other hand, recognise that the injunction might not provide ultimate satisfaction to the plaintiff:

> It is undoubtedly the case that the Courts are reluctant to grant injunctions which will be difficult to enforce. From the papers here it appears that there are persons other than the Defendants whose conduct may also be contributing to the Plaintiff's difficulties. Primarily these are the brewery workers referred to in the communications from the two brewery companies and possibly other persons who have or may in the future act in an individual capacity irrespective of the conduct of the two Defendants. A Court injunction on the present proceedings cannot affect them.[69]

In the event he was proved right. Under the unintentionally ironic billboard heading "Speight's Beer Order in Danger" the newspapers announced next day that the brewery workers were refusing to load the wagons. The next step in the drama was of course the initiation of an action for an injunction against the brewery workers' union. It was clear, however, that this was merely ripening the situation for a series of wildcat strikes or industrial action taken by individual groups of workers and eventually[70]the Minister of Labour announced that, in return for the workers lifting their boycott, he would arrange for the Minister of Industries and Commerce to refer the whole question of beer prices to the Price Tribunal for an early investigation under the Control of Prices Act.

At this stage, it looked like the unions had not only won their battle with the breweries but had also made the Law look rather silly as well. In a paper on Industrial law which I gave at the A.U.L.S.A. Conference in Brisbane shortly after this,[71] I wrote:

> The result is that, just as anti-strike legislation is rendered ridiculous by an inability to enforce legal penalties,[72] the feared injunction was made impotent

68 Personal recollection only. (The taking of notes in the Auckland Supreme Court by members of the public listening to cases is prohibited by police officials. Whether this is for reasons of national security or in order to maintain the majesty of the Law or for reasons of Law and Order, I do not know.) One of the plaintiff's arguments was that industrial action of this type was *ultra vires* a trade union's permissible activities and this type of reasoning, if accepted, might well have defeated a justification defence.

69 [1970] N.Z.L.R. 1050, 1052.

70 On the eve of the hearing before Hardie Boys J. of a fresh action for an injunction brought by Flett against the brewery workers' union.

71 19 August 1970: "The Role of Law in Industrial Relations—Recent Contract and Tort Developments".

72 For an excellent and amusing account of a British war-time attempt to prosecute striking workers, see the written evidence of Sir Harold Emmerson to the Donovan Commission, reproduced in Appendix 6 of the Report: p. 340. In New Zealand, since the I.C. & A. Act was amended (following criticism of lack of Government action) to allow employers to prosecute striking workers (1962 Amendment), there have been only three prosecutions: Woods, *Report on Industrial Legislation in New Zealand* (1968).

> at will. The solution to the problem was a political one and in the end it must surely be acknowledged that the only effective solutions in situations of industrial strife are of this kind.[73]

I spoke too soon. The Law was not finished yet for it eventually triumphed over the unions, although at what may yet prove to be a fearful cost. The sequel of events was as follows. The Price Tribunal began its inquiry under the power given it by section 10 of the Control of Prices Act 1947 to "investigate" all complaints referred to it (*inter alios*) by the Minister of Industries and Commerce. Under the Act, the Tribunal had extensive powers in relation to the production of documents and the breweries were forced to produce their accounts and details of costs as they affected prices. The inquiry received a great deal of publicity as it continued but, suddenly and quite unexpectedly, the Tribunal announced that it was discontinuing its investigation as a result of a fresh wage increase which had just been given to brewery workers. This wage increase, the Tribunal thought, made the question of the justification of the beer price increases as at Christmas 1969 irrelevant for, if they were not justified at that time, they were certainly justified now.

This rather remarkable step by the Tribunal not only infuriated the unions who had been attempting to expose the motives of the breweries in raising their prices in 1969, in an economic context where the unions were receiving the blame for every price increase that manufacturers and suppliers chose to make, but it also embarrassed the Government. The Minister of Industries and Commerce publicly expressed some disquiet about the Tribunal's action and newspaper comment was generally unfavourable. Finally, the Public Service Association took over from the drivers and the brewery workers by bringing an action in the Supreme Court seeking the issue of mandamus against the members of the Price Tribunal to continue its investigation and to make a report to the Minister. The case came before Wild C.J. who refused a remedy.[74] The Tribunal, the Chief Justice said, was under no duty to report to the Minister the results of its investigation and indeed was not even under a duty to finish its investigation. In short, to investigate means to investigate—no more, no less. Statutory purpose clearly plays no part in such analysis. Nor does common sense. One might validly ask: does this reasoning mean that where a statute provides that a court or tribunal is to "determine" a dispute (a common enough formula), then the court or tribunal is under no duty to do more than "determine" that dispute, and need not, for instance, announce the results of its determination?

The net result, therefore, was that the political solution agreed upon by the parties to the dispute and the Government was undermined by the court's upholding the Price Tribunal's refusal to carry out the terms of that solution. The trade unions could surely be forgiven for forming a jaundiced view of the law and its institutions. The ramifications of the outcome of the beer boycott dispute will undoubtedly have serious effects on the standing of law in the eyes of the unions and hopes of union acceptance of a moderate system of legal regulation of industrial relations in the future have received a severe setback. Not only does it seem unlikely that the unions will henceforth put any trust at all in attempted

73 Paper, p. 31.
74 *New Zealand Public Service Association* v. *Barnett & ors.*, Wellington, 25 September 1970 (as yet unreported).

settlements of industrial disputes through legal institutions such as tribunals, committees of inquiry and arbitration but there is a very real danger that the hitherto independent position of the ordinary courts will no longer be viewed as such by the unions. Not the least of the virtues of Speight J.'s judgment in *Pete's Towing* was the fact that the result fitted the industrial merits of the case. And if the traditional view of the permissible limits of trade union activity is taken (namely, the betterment of wages and employment conditions alone), his decision in *Flett's case* was doubtless fair as well. But when Flett chose to abandon the legal process and do a deal with the unions and with the Minister of Labour, was it fair that the Price Tribunal and the Chief Justice should in effect torpedo that settlement in the name of Law and Justice?

The Chief Justice was also responsible for giving the trade unions further cause for shunning the law and its institutions. This arose from his judgment in the Bluff oyster dispute, reported as *Martin* v. *Attorney-General*.[75] It was an instance where a trade union voluntarily went to court itself seeking Justice. As we shall see, it may be the last such instance for a long while.

The facts giving rise to the case are summarised in the reported judgment but a proper understanding of the case, and its implications, can only be gained from the giving of a rather fuller account. I shall therefore fill out the bones of the reported statement of the facts, as given in Wild C.J.'s judgment, by reference to the transcript of the evidence, where necessary. The plaintiff, Martin, was the President of the New Zealand Seamen's Union and he sought a declaration that Amendment No. 3 (S.R. 1969/84) to the Oyster Fishing Regulations 1946 was a nullity. Amendment No. 3 provided that the period commencing 21 May 1969 and ending 31 August 1969 should be a "close season" in that part of the Southern Area lying south of latitude 46 degrees South, and "during that close season it shall be unlawful for any person to take oysters in that part of the Southern Area". Under the principal Regulations, oyster fishing during this period was permissible and the normal close season ran from October through to February,[76] so that Amendment No. 3 was an exceptional (and temporary) measure. Its effect was to bring an end to the normal oyster season in the Foveaux Strait-Stewart Island oyster beds which had begun at the beginning of March. This effect was very sudden, to say the least, for it was Gazetted on 20 May, only one day before, according to the Regulation, the season was to close.

The plaintiff, we learn from the Chief Justice's judgment, alleged that "upon its true construction Amendment No. 3 was made for the purpose of putting pressure on the plaintiff Union and its members in respect of an industrial dispute, and not for the purpose of conserving oysters; and that on 23 May the Minister of Labour in a televised interview said that the Government had closed down the industry because of the Union's course of action in that dispute."[77] This is in fact all that we do learn from the judgment for this is all that he tells us about the facts. In particular, he said, "it is as well to make it perfectly clear that, on the form of the procedings as brought by the plaintiff, the

75 [1970] N.Z.L.R. 158.
76 This was changed in February 1969 to include September: [1970] N.Z.L.R. 158, 159.
77 *Ibid.*, 159.

Court is not concerned in any way with the rights or wrongs or the deterioration of any industrial dispute between the Union and the Government. The issue that this action puts before the Court is simply the narrow legal question—was Amendment No. 3 validly made or was it not?"[78] This indeed was the legal question which Wild C.J. was asked to decide but whether it was as "narrow" a question as he thought is perhabs more debatable. In any event, because this article is attempting an evaluation of the part which litigation plays in the settling of industrial disputes, I believe that it is legitimate to reveal (from the transcript) a few more pertinent facts about the case.[79]

Until 1963 the oyster fishing industry had been licensed but was then delicensed and replaced with a system of regulation of oyster fishing boats which operated by authority of permits issued without limit as to number. In 1968 twenty two boats fished within a maximum total allowable quota of 156,000 sacks of oysters. In January 1969 the Minister of Marine announced that the 1969 season would be shortened by one and a half months,[80] the minimum size of oyster permitted to be taken would be increased[81] and, most importantly, the total seasonal quota would be reduced to 121,500 sacks from the Foveaux Strait beds. Union members fishing on the oyster boats were paid on a piece-rate basis and, therefore, these moves inevitably meant a decrease in their earning ability, even if the number of boats fishing in the area remained constant. It had been apparent to fishermen for some time that the beds were becoming depleted and the Union had officially asked the Government to re-licence the industry over a year before the 1969 reduced quotas were announced. The Government, however, had refused to do so and, no doubt, the requirements of conservation could have been achieved simply by reducing the total quota, which is of course what it did.

Unfortunately, this measure on its own did not alleviate the problem which the seamen on the fishing boats faced of a reduced income—in fact it aggravated it. The Union was concerned enough at this situation but when it was discovered that three extra boats which had taken out permits for the 1969 season were preparing to fish, it decided to act. The owners of the boats were approached and the position explained to them from the Union's point of view. Two of the boat owners, who were already operating four or five boats each under existing permits, agreed not to operate the extra boats but the third owner, who was an entirely new operator, refused and began fishing notwithstanding union protests. This owner was a newly formed company appropriately entitled Enterprise Fishing Company and, according to the President of the Union, it had been asked in 1968 not to begin operations for the reasons that were concerning the Union about the state of the industry. The Union was particularly worried that, if the Enterprise Fishing Company were seen to be fishing successfully, then the holders of seven further permits would also have decided to put to sea, thus worsening the problem considerably. As a result, an embargo was placed on the

78 *Ibid.*

79 Largely taken from leading questions put to (and agreed to by) the President of the Seamen's Union by counsel for the Crown during cross-examination of the former by the latter and from letters and telegrams put in in evidence.

80 Running from 1 March to 31 August (or until the seasonal quota had been reached, whichever came first) instead of 15 February to 30 September: see footnote 76 above.

81 From $2\frac{3}{8}$ inches to $2\frac{1}{4}$ inches.

company's boat and on fuel supplies as well as on its oyster outlets. The Southland Trades Council co-operated in what proved to be a successful embargo and eventually the Union entered into discussion with the Minister of Marine as to a solution to the problems in the oyster industry.

The solution proposed by the Minister of Marine was for the Bluff oyster industry to be examined independently by a panel of three experts selected by the Minister (after consultation by him with the industry) provided that the Union would agree to lift its embargo until the result of the examination was known.[82] The Union, for its part, was apparently unhappy with the proposed composition of the committee and, after a further discussion, the Minister of Marine sent the Union a telegram dated 9 May 1969 repeating his proposal for a settlement of the dispute and concluding:

> I have been instructed to inform you that failing acceptance of this offer Government will on Monday consider closing the Oyster season forthwith.

The Union having refused to accept the offer, this remarkable threat was then implemented by the passing of Amendment No. 3 to the Regulations closing the season. Then followed the alleged television comment previously refered to by the Minister of Labour that "the Government had closed down the industry because of the Union's course of action in that dispute."[83] The Minister of Labour thereafter continued to negotiate with the Union and a draft memorandum of agreement between the Government and the Union was even drawn up. The first three clauses gave the Union what it had originally asked for—a restricted licensing system—while protecting the position of the Enterprise Fishing Company, and left no doubt whatever as to the reason for the passing of Amendment No. 3 to the Regulations:

1. Conditional upon mutual assurances being given by the parties that the following course will be followed, the Government for its part agrees to revoke the regulation closing the oyster season as from 21 May 1969 and restore the previous position in which the season was open until 31 August 1969 and the Union agrees that the Writ issued by the President of the Seamen's Union is to be discontinued.
2. The Government further agrees that the oyster fishing industry will again be subjected to restricted licensing under the authority of a Licensing Authority to be set up by way of amendment to the Fisheries Act 1908.
3. Oyster dredging operations will be restricted initially to those boats (23) oyster fishing immediately prior to the date of closure (21 May 1969).

This agreement was sent by the Minister to the Union for approval with the comment: "If you can give me an assurance that your men will accept these conditions then I can arrange immediately for the restrictions to be lifted."[84] Unfortunately, some detailed disagreement remained and so the writ issued by the President of the Union testing the validity of Amendment No. 3 came on for hearing.

Wild C.J. held that Amendment No. 3 was made under section 5(1)(h) of the Fisheries Act 1908. That provision read:

82 Telegram dated 9 March 1969 from the Minister to the Seamen's Union. The Minister also agreed to accept and if necessary act on the committee's recommendations.
83 [1970] N.Z.L.R. 158, 159.
84 Letter dated 4 June 1969.

5(1) The Governor-General may from time to time, by Order in Council gazetted, make regulations, which shall have force and effect either throughout New Zealand and New Zealand fisheries waters or only in such waters or places as are specified in the regulations, for any of the following purposes, that is to say:

. . .

(h) In respect of all or any species of fish, oysters, or marine mammals . . . respectively, —

(i) Prescribing a close season in any year, month, week, or day, as may be most suitable for the whole or any part or parts of New Zealand and New Zealand fisheries waters, during which it shall be unlawful for any person to take, buy, sell, or have in possession any fish, oysters, or marine mammals . . . of such species respectively, or, in any way to injure or disturb the same; or

(ii) Extending or varying any close season so prescribed, or varying any close season so extended: or

(iii) Prescribing in any part or parts of New Zealand and New Zealand fisheries waters a close season over any term not exceeding three years, and, before the expiration of such term, further extending the same:

The learned Judge adopted as the basic test of the validity of the regulation that proposed by Ostler J. in *Carroll* v. *Attorney-General*:[85] " . . . (the courts) merely construe the Act under which the regulation purports to be made giving the statute . . . such fair, large, and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered,[86] it is ultra vires and void."

Wild C.J., in upholding the validity of the regulation according to this test, showed a talent for circular reasoning: "What determines this case," he said, "is that s.5(1)(h) of the Act authorises the making of regulations if the purpose is to prescribe a close season. That, quite plainly, is what Amendment No. 3 did. In my opinion, therefore it is valid."[87] The argument advanced by counsel for the Union had been that the purpose of the Act in giving the power to make regulations prescribing a close season in respect of fish, oysters and sea mammals was a conservationist one (and indeed a reading of the Act *as a whole* would appear to bear him out). Any regulation having a political or industrial object, such as Amendment No. 3 clearly did have, would therefore not be within the "objects and intention of the Act". Not so, said the Chief Justice: " . . . the prescribing of a close season is itself the purpose for which the regulation can be made."[88]

The distinction between the *objects* of a statute (to which regulations made or action taken under it must conform) and the *powers* conferred by the statute (whether to make regulations or to take some specific action) is one which is fundamental to jurisprudence and it is sad to see them confused in this way.[89] It is sad also to see a case where the Judge

85 [1933] N.Z.L.R. 1461, 1478.

86 For a decision where a regulation was successfully attacked on the grounds that it was not reasonably necessary, see *Reade* v. *Smith* [1959] N.Z.L.R. 996, but cf. *Hackett* v. *Lander* ([1917] N.Z.L.R. 947, and *Hewett* v. *Fielder* [1951] N.Z.L.R. 755.

87 [1970] N.Z.L.R. 158, 160.

88 *Ibid.*

89 See, for example, de Smith, *Judicial Review of Administrative Action*, 2nd ed., 436 generally as to the exercise of powers for improper purposes; and see *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 694, 699.

felt so constrained by what he saw as the Law that he was not able to correct an outrageous act of political abuse of legal powers by a government. In both these respects, *Martin* v. *Attorney-General* thus forms a notable contrast with the gutsy decision of Sinclair S.M. in the infamous case of *Police* v. *Gapes*.[90] In this case, the Minister of Marine had used his powers under the Shipping and Seamen Act 1952 relating to unseaworthy ships to detain the pirate radio ship "Tiri" in Auckland Harbour and prevent her putting to sea. The real reason for the issue of the detention order was not, however, unseaworthiness, as it stated on its face, but was as a means of preventing the "Tiri" commencing broadcasting operations from outside territorial limits. Sinclair S.M., in a decision which deserved a better fate than to lie in unreported limbo, held that the Minister's detention order was invalid. The purpose, he said, "for which the Minister issued the detention order was not for the purpose of survey in the interests of safety but to serve the dominant purpose of preventing the 'Tiri' from putting to sea and being used as a pirate radio ship."

Conclusion

The aim of this article has been to throw some light on to the operation of Law as a means of regulating industrial relations. In this respect, I have been largely confined to an examination of the use of the ordinary law courts as an instrument for settling industrial disputes. The problem, as I have seen it, is principally one of the Judge, within the permissible limits of the relevant rules of law, giving a decision which will accord with the industrial realities of the case and which will therefore satisfy not just Justice in some abstract legal sense but rather Industrial Justice in a real sense. My criticism of some of the legal reasoning in Speight J.'s judgment in *Pete's Towing* should not override the fact that he did show a remarkable appreciation of the industrial issues involved in the dispute and the result of the case is certainly Industrial Justice. Then, too, the result of the *Ford Motor Company case* is Industrial Justice for another reason—namely, that it advances one of the most basic goals of industrial relations, viz., the continuous communication and dialogue between employer and worker at the level where it really counts: on the factory floor.

But even liberal Judges cannot always do Industrial Justice, or smooth the settlement of industrial disputes. In the absence of a Trade Disputes Act in New Zealand, the nineteenth century economic protection given by the common law remains firm and in *Flett* v. *Northern Drivers'* Union Speight J. had little choice but to allow his court to be used as a crude instrument for settling a political and industrial dispute which bore little relationship to any issues that might have been called truly justiciable. The remedy of the old common law—the injunction—was about as appropriate to the modern age as the horse and buggy. Speight J. saw this clearly and subsequent events proved him right. True, a legal solution was eventually imposed in that dispute but the Price Tribunal's action and Wild C.J.'s judgment are hardly likely to advance either the union's liking for the Law or its respect for it. This therefore pinpoints the need for a thorough examination of the laws, whether statutory or common law, which are relevant or which are potentially

90 Unreported: Auckland, 7 November 1966.

relevant to the regulation of industrial relations. Where a law is found to be at variance with the industrial norms which describe and govern industrial relations and their realities, the question must seriously be asked whether that law ought not to be changed. Can the continued existence of statutory strike penalties be justified, for example, when the industrial convention has become that neither employers nor the Government will enforce them?[91] In a vital field like this, unless the industrial laws do fit the industrial norms, there is a very real danger that the Rule of Law will become a meaningless and derisory term. And, unless the Judges administering the industrial laws are aware of the industrial norms, there is a danger that all Law, whether good or bad, will be eschewed as a regulatory force in favour of another, more direct, kind of force. In this respect, it is to be hoped that the memory of *Pete's Towing* remains in the minds of the trade unions longer than that of *Martin* v. *Attorney-General* and the outcome of the beer boycott.

91 See footnote 72 above.