INTERIM RELIEF AGAINST THE CROWN

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Interim and interlocutory injunctions are sought from the New Zealand High Court almost every day to maintain the status quo while actions are prepared and finally brought to full trial. Such interim or interlocutory relief does not, however, issue against the government because section 17(1)(a) of the Crown Proceedings Act 1950 prohibits the court from issuing injunctions against the Crown.[1] Instead, the court is empowered in section 17(1)(a) to "make an order declaratory of the rights of the parties".[2] For reasons which are discussed below this remedial alternative does not offer the potential of interim relief.[3]

The private litigant's rights cannot, therefore, be protected from irreparable interference pending the final determination of an action against the Crown. If interim remedies are found to be so useful in litigation between private legal persons then it follows that they would be similarly useful in litigation against the Crown. In section 12 of the Judicature Amendment Act 1977 parliament instituted a form of interim relief against the Crown, but limited this to administrative action taken pursuant to statutory authority. This innovation prompts the question, why should not interim relief be available to protect other public law and private law rights against the Crown?

The problem which the current immunity of the Crown can create is well illustrated by the recent decision of White J in *Codelfa-Cogefar (NZ) Ltd* v *Attorney-General*.[4] The High Court was asked to resolve a dispute which arose from a contract between a tunnelling contractor and the Ministry of Works. The plaintiff was seeking interim relief in the form of an "interim declaration" restraining the Crown as defendant from its alleged breach of contract "until such time as the Court or arbitrator decides whether a breach of contract is proved". The allegation of breach was founded on a unilateral reduction by the Crown of the rate paid per cubic metre for a certain method of tunnel drilling. White J granted a stay of the interlocutory proceedings as he thought it appropriate that the dispute should go to arbitration. After an extensive discussion his Honour concluded that under the present law interim relief could not be made available against the Crown in the contractual context. This means that there is no way a private litigant can use the legal system to

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1 See *Town Investments Ltd* v *Department of the Environment* [1978] AC 359, 380-381 per Lord Diplock for critical discussion of the use of the expression "Crown". Crown Proceedings Act 1950, s 2 specifies that "the Crown" means "Her Majesty in right of Her Government in New Zealand".

2 Similar statutory prohibitions on injunction issuing against the Crown can be found in the United Kingdom, Crown Proceedings Act 1947, s 21(1), and Tasmania, Supreme Court Civil Procedure Act 1932, s 69. Injunction may issue against the other state governments and the federal government in Australia See Spry, *The Principles of Equitable Remedies* (2nd ed 1980) 326ff.

3 Infra pp 93-100.

4 Unreported, High Court, Wellington, 10 September 1980, A614/79.

prevent the Crown from continuing to perpetrate a breach of contract pending the full hearing of the action for breach of contract. When one bears in mind that the object of the Crown Proceedings Act 1950 was to put the Crown in the same position as other litigants this result seems inconsistent and unfair.

The object of this article is to review the law with respect to the non-availability of interim relief against the Crown, to consider the arguments for and against narrowing the Crown's immunity from interim relief, and finally to float suggestions for reform in this area of Crown proceedings.

I The Present State of the Law in New Zealand

1 *Section 17 of the Crown Proceedings Act 1950*

Section 17(1)(a) prohibits the court from issuing an injunction against the Crown, but expressly empowers the court to "instead make an order declaratory of the rights of the parties".[5] Subsection (2) purports to ensure the completeness of the immunity by prohibiting the court from granting an injunction against "an officer of the Crown if the effect of granting the injunction . . . would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

The prohibition against the issuing of injunction prevents interim and interlocutory injunctions issuing against the Crown. The main judicial mechanism for maintaining the status quo pending the full trial of an action is not available against the Crown.

(a) The non-existence of the "interim declaration".

Enterprising litigants frustrated by the non-availability of the interim or interlocutory injunction have attempted to persuade the courts that the remedy of "interim declaration" exists and that such a remedy is permitted by section 17(1)(a) to issue against the Crown. This argument was unsuccessfully presented to White J in *Codelfa-Cogefar (NZ) Ltd* v *Attorney-General*.[6] It was hoped that the High Court would issue an interim declaration to the effect that "the defendant be restrained from its breach of contract until such time as the Court or arbitrator decides whether a breach of contract is proved". Expressed in this form the remedy sought appears to be in the nature of an interim injunction rather than an interim declaration which one would expect to be a declaration of the parties' rights for the time being.

This raises the problem which thwarts the declaration's existence as an interim remedy. The declaration is by its intrinsic nature a final declaration of rights and logically cannot issue in any temporary form. It either issues as a conclusive declaration of rights or it does not issue at all. A declaration of rights cannot issue as an interim declaration to be possibly

5 It would appear that at common law an injunction was not available in New Zealand against the Crown: *Timaru Harbour Board* v *New Zealand Railway Commissioners* (1895) 13 NZLR 417, 425 per Denniston J. Although there is some uncertainty the general view is that injunction would not issue at common law in England against the Crown. See *Hutton* v *Secretary of State for War* (1926) 43 TLR 106, 107 per Tomlin J; Street, *Governmental Liability* (1953) 140.

6 Supra n 4.

followed by a further inconsistent final declaration of rights when the action eventually comes to full trial. Many authorities support the proposition that there is no such "animal"[7] as an interim declaration.[8]

The effort to have the interim declaration accepted has been solely motivated by the litigant's desire to have the Crown held to the status quo pending the resolution of a legal dispute. However the declaration as a non-coercive statement of the parties' rights is not a remedy suitable for maintaining the status quo. It is often difficult to conclusively ascertain the respective rights of the parties at an interlocutory hearing. The interim remedy is required to maintain the status quo while such rights are finally determined. Logically if such rights were capable of being conclusively ascertained on the evidence and submissions before an interlocutory hearing there would be no need for a final hearing.[9]

(b) Actions against officers of the Crown in their private capacities.

Another method of securing interim relief against the Crown which has been explored is the action against officers of the Crown in their private capacities. As stated above section 17(2) provides that the court will not grant an injunction against an officer of the Crown if the effect of granting that injunction would be to grant relief against the Crown. It follows from the wording of section 17(2) that injunction will not lie against an officer of the Crown while acting within his conferred authority. In such circumstances granting relief against the officer would obviously have the effect of giving "relief against the Crown which could not have been obtained in proceedings against the Crown."[10]

The question which remains to be answered is whether injunction will issue against officers of the Crown when they are acting ultra vires. In these circumstances it is not the Crown against whom the remedy is sought, but rather the individual who is infringing one's rights without the authority to do so. If that individual were not an employee of the Crown no question of the non-availability of injunction would arise.

7 See *International General Electric Co of New York Ltd* v *Commissioners of Customs and Excise* [1962] Ch 784. 790 per Upjohn LJ.

8 See *Underhill* v *Ministry of Food* [1950] 1 All ER 591, 593 per Romer J; *International General Electric Co of New York Ltd* v *Commissioners of Customs and Excise* ibid; *Meade* v *Haringey London Borough Council* [1970] 1 WLR 637, 648 per Lord Denning MR; *Inland Revenue Commissioners* v *Rossminster Ltd* [1980] AC 952, 1000 per Lord Wilberforce, 1027 per Lord Scarman; *Codelfa-Cogefar (NZ) Ltd* v *Att-Gen* supra n 4. It is interesting to note how delicately White J in the latter case dealt with the decision of Chilwell J in *Harder* v *NZ Tramways and Public Passenger Transport Authorities Employees Industrial Union of Workers* [1977] 2 NZLR 162 where his Honour issued an interim declaration against a private legal person. Chilwell J's decision was made without discussion of any of the authorities above and in circumstances of relative urgency. The concept of an interim declaration has also been condemned by textbook writers, see eg *de Smith's Judicial Review of Administrative Action* (4th ed Evans 1980) 448.

9 It is possible for a final declaration to issue in interlocutory proceedings, however given the nature of the proceedings this would not be very likely. Such a declaration could only be reviewed on appeal. See *International General Electric Co of New York Ltd* v *Commissioners of Customs and Excise* supra n 7 at 789-790 per Upjohn LJ.

10 It should be noted that there is some old and questionable authority for the principle that injunction could issue against Crown officers acting in their official capacity in England: *Rankin* v *Huskisson* (1830) 4 Sim 13; 58 ER 6; *Ellis* v *Earl Grey* (1833) 6 Sim 214; 58 ER 574.

Why should the Crown servant enjoy immunity when he does something outside the authority of his employment which unlawfully interferes with another's rights?

It could be argued that it is misleading to allege that the Crown servant who acts outside his authority and interferes unlawfully with another's rights is in exactly the same position as the non-Crown servant who perpetrates such an unlawful interference. The reason is that in some circumstances, for example in the case of national emergency, the Crown servant, even though strictly acting outside his authority, will be doing so in his capacity as a Crown servant, believing himself to be acting in the interests of the Crown. This argument falls back on one of the alleged grounds for maintaining the Crown's immunity from injunction, namely, that the Crown should be free to exceed its authority where the public interest demands such action.[11] To take such an attitude is an affront to the Rule of Law. However it is possible to imagine circumstances where the public interest would be better served by non-observance of the Rule of Law, remembering that the government is ultimately responsible to parliament and the electorate, the latter assessing through the ballot box whether governmental actions are in the public interest. But many small governmental trespasses on rights can go unnoticed by the electorate and the sanction of the ballot box in such circumstances is academic. The basic problem underlying the whole question of interim relief against the Crown is raised: how does one balance the Crown's legitimate interest in maximum freedom of action to cope with unforeseen contingencies against the individual's interest in having his rights preserved from unlawful interference?

There are some authorities which suggest that an action for injunction will not lie against an officer of the Crown when acting in excess of his authority. But any proposition drawn from them is a qualified one because in each case the principle is only assumed to have been applied, there being no express discussion.[12] The assumption is even that officers of the Crown who may have been acting without legal authority are automatically beyond the reach of injunction.[13] As yet there does not appear to be any authority which *expressly* states that injunction will not issue against the individual officer in circumstances of ultra vires action.

In *Merricks* v *Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food*[14] the Minister was preparing to establish a scheme for the marketing of potatoes which the plaintiff alleged was outside the authority of the Agricultural Marketing Act 1931. The plaintiff sought to re-

11 It has been suggested that this was the intention of parliament when enacting the Crown Proceedings Act 1947, s 21 (UK): see (1947) 439 HC Deb (5th ser) 1749; Barnes, "The Crown Proceedings Act 1947" (1948) 26 Can Bar Rev 387-395.

12 See *Underhill* v *Ministry of Food* supra n 8; *Merricks* v *Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food* [1955] 1 Ch 567.

13 One commentator suggests that these cases may indicate that s 21(2) of the Crown Proceedings Act 1947 (UK) has brought to an end any right of action for an injunction which may have existed against an officer of the Crown in his private capacity; see Strayer, "Injunctions Against Crown Officers" (1964) 42 Can Bar Rev 1, 37.

14 Supra n 12.

strain the Minister from proceeding with the scheme. Upjohn J in delivering his judgment did not find it necessary to consider the allegation of ultra vires. The plaintiff conceded that he could not succeed in obtaining an injunction against the Minister if the court concluded that the Minister was acting as a representative of the Crown, but alleged that the Minister was acting as a person designated by parliament rather than as a representative of the Crown. Alternatively, counsel argued that the functions of the Minister were purely personal and did not involve any official capacity.

Upjohn J rejected this argument finding the Minister to be a servant of the Crown because as well as being designated under the Act to carry out the functions he was generally acting in his capacity as Minister of Agriculture. As Upjohn J stated:[15]

> It was his duty in his capacity as Minister of Agriculture and not merely as a delegated person, if he was satisfied—with the satisfaction which he had to feel in his capacity as Minister of Agriculture and an official of the Crown—that the scheme would conduce to the more efficient production and marketing of the regulated product, to lay a draft scheme before the Houses of Parliament, and ultimately in the same capacity to make an order bringing the scheme into effect.
>
> It seems to me that from start to finish he was acting in his capacity as an officer representing the Crown. That being so, it is conceded that no injunction can be obtained against him, and therefore the motion fails in limine.

The argument that should the Minister be acting ultra vires then he would cease to act as a servant of the Crown was not considered and one must assume that Upjohn J considered that the question of ultra vires was not relevant to the immunity he enjoyed as a Crown servant.

His Honour went on to comment as obiter dicta, that he had difficulty in seeing civil servants acting pursuant to statute in performing governmental functions as not being Crown servants.[16] The idea that a government employee acting under statutory authority is not a Crown servant is not new.[17] It is submitted that in the light of the current structure and functioning of government it is illogical and arbitrary to distinguish from the point of view of injunction immunity, between an officer acting pursuant to directions from Her Majesty under the prerogative and an officer acting pursuant to statutory direction.

The judicial support for injunction being available against an officer of the Crown in his individual capacity when acting ultra vires would appear to be stronger than that alleged to support the non-availability of the remedy. The Judicial Committee of the Privy Council held in *Nireaha Tamaki* v *Baker*[18] that "an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority." Similar authority can be found in the decision in *Bombay and Persia Steam Navigation Co Ltd* v *MacLay*[19] where Rowlatt J said:[20]

15 Ibid at 575. This passage was recently quoted with approval by Jeffries J in *Arataki Honey Ltd* v *Minister of Agriculture and Fisheries* [1979] 2 NZLR 311.
16 Ibid at 575-576.
17 See eg *Nireaha Tamaki* v *Baker* [1901] AC 561, 575ff per Lord Davey.
18 Ibid at 576 per Lord Davey.
19 [1920] 3 KB 402.
20 Ibid at 406.

> It has long been established that if an official of the State does something which if done by anyone else would be a tort, and there is no law authorising him, in virtue of his office, to do that particular thing, he must, notwithstanding his official position, answer for it in his own name. An action for an injunction or for a declaration that he must not do the thing again will lie against him.

In *Hutton* v *Secretary of State for War* Tomlin J stated[21] with reference to *Raleigh* v *Goschen*[22]:

> The judgment in that case seemed to make it perfectly clear that an officer of the Crown could not be sued as such, although he might be sued as an individual for any wrongful act proved to have been done or authorized by him. In the latter case, it was no answer to say that the act was done by virtue of his authority as a Crown official, if, in fact, the act was wrongful.

The above is the position at common law. Has this position survived the enactment of section 17(2)? In *Harper* v *Secretary of State for the Home Department*[23] Lord Evershed MR suggested, obiter, that the right to seek an injunction against an officer of the Crown in his personal capacity, should that officer have exceeded his authority, may have survived the enactment of section 21(2) of the Crown Proceedings Act 1947 (UK).

The Divisional Court in Ontario has recently held in *Maclean* v *Liquor Licensing Board of Ontario*[24] that injunction will issue against officers of the Crown acting outside their authority. Section 18 of the Proceedings Against the Crown Act, RSO 1970, is worded very similarly to section 17(1)(a) and section 17(2) of the Crown Proceedings Act 1950. However Lerner J in delivering the judgment of the court did not consider that it prevented injunction issuing against members and employees of the Liquor Licence Board of Ontario when they acted beyond their statutory authority. His Honour focused his reasoning on the words "if the effect of granting the injunction or making the order would be to give any relief against the Crown . . ." and impliedly suggested that these words were designed to confine the non-availability of injunction to exactly those circumstances. The important question is whether issuing the injunction against the Crown servant would amount to issuing the remedy against the Crown. This has to be determined as a question of fact in the context of each case. As Lerner J said[25] "even if [the immunity] is applicable in the case where the Crown servant whose authority is questioned is the designated official to carry out some policy of the Crown, it surely cannot apply where a minor civil servant is officiously abusing his apparent powers."

This passage suggests that the Ontario court was not willing to state a general principle similar to the common law rule that injunction will always be potentially available against the Crown servant in his individual capacity should he act ultra vires. His Honour preferred to confine the

21 Supra n 5 at 107. This decision was followed by the New Zealand Supreme Court in *Bird* v *Auckland District Land Registrar* [1952] NZLR 463, 466 per F B Adams J.
22 [1898] 1 Ch 73.
23 [1955] 1 Ch 238, 254.
24 (1976) 61 DLR (3d) 237.
25 Ibid at 250.

availability of the remedy to circumstances in which a "minor civil servant . . . officiously" abuses his apparent powers. In these circumstances it could be argued that granting the injunction does not have the effect of granting relief against the Crown.

Would the attitude of the court be different if the officer of the Crown were purporting to carry out a matter of high governmental policy, but he was found to be unwittingly acting beyond his conferred authority? In these circumstances it would be easier to argue that granting an injunction against the individual officer would have the effect of granting relief against the Crown as prohibited by section 17(2). The officer is involved in a bona fide but unlawful attempt to further the interests of the Crown.

Should the court's attitude be analogous to its attitude to civil proceedings taken against the judiciary? Recent authorities suggest that a civil action for damages will not succeed against a judge so long as he is acting judicially and in good faith irrespective of whether he is acting within or outside his authority.[26] Should a judge knowingly act beyond his jurisdiction in a non-judicial manner then he may be exposed to a civil action for damages. The justification for this judicial immunity is the preservation of the independence of the judiciary or more specifically the maintenance of a judicial environment in which judges can dispense justice without fear of their actions leading to litigation directed at them personally.[27] In an analogous way should the section 17(2) protection extend to circumstances in which the officer of the Crown, although acting outside his authority, does so bona fide, thinking that he is dispensing his Crown function? Perhaps the decision should not turn entirely on the finding of ultra vires but rather on the additional question of the state of mind of the defendant at the time of acting.

It is suggested that the court should ask the question whether the officer was acting in his capacity as an officer representing the Crown.[28] The question has to be asked from the officer's subjective point of view—did he honestly believe he was acting in his capacity as an officer representing the Crown? If he did then injunction should not be available. Obviously if his actions were motivated by malice he would not be acting in a capacity which would warrant immunity.

In the context of judicial immunity there is no doubt that a public interest justification supports the approach. However what is the justification for drawing the line as to the availability of injunction against Crown officers in this way? Justification could be derived from one of the alleged reasons for the non-availability of injunctive relief against the Crown. This is the idea that the government should be free to exceed its authority where circumstances necessitate without fear of coercive intervention by the courts.[29] The suggested approach would allow the Crown this freedom yet at the same time would allow injunction to be available to restrain unauthorised actions taken by officers of the Crown in the absence of bona fides, or without a legitimate Crown interest in mind. Such an approach still manifests the policy that the public interest in an

26 *Sirros* v *Moore* [1975] 1 QB 118 per Lord Denning MR and Ormrod LJ.
27 *Nakhla* v *McCarthy* [1978] 1 NZLR 291, 294 per Woodhouse J.
28 See *Merricks* v *Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food* supra n 12 at 573ff per Upjohn J.
29 Supra n 11.

individual having a remedy which allows maintenance of the status quo pending litigation, is overshadowed by the importance of the government being free to act beyond its authorised powers where necessary.[30]

Practical problems would arise because first, in some situations it would be difficult to ascertain the officer's state of mind and secondly, it would be difficult to draw a line between what is a legitimate Crown interest and what is not . The approach would not be satisfactory from the plaintiff's point of view as it would still allow the Crown to abuse the Rule of Law provided that the Crown could justify its unlawful action on the basis of a recognisable Crown interest. The broad object of the Crown Proceedings Act 1950 is to put the Crown as closely as possible in the same position as a private litigant. This objective would hardly be furthered should the immunity be allowed to extend to any action which is ultra vires.

Returning to the wording of section 17(2), one has to ask to what extent parliament intended to limit the scope of the immunity by including the words: "if the effect of granting the injunction . . . would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown." Did parliament intend that injunction could issue against officers of the Crown provided that the issuing of the remedy would not have the effect of granting relief against the Crown? Obviously Crown officers will be vulnerable to injunction in their private lives. For example if an officer of the Crown were using his suburban residential property in such a way as to give rise to a nuisance it would be absurd for the courts to allow the fact of his being employed by the Crown to provide a defence to an action for an injunction to restrain the continuation of that tort.

Some would argue that once an officer acts outside his authority, issuing an injunction only restrains him, rather than the Crown.[31] In other words the Crown and its interests extend only to the limits of the powers conferred by parliament or the boundaries of the prerogative as recognised by the courts. In support of this approach the point can be made that parliament, had it wished to render injunction not available against Crown servants acting ultra vires, would have drafted section 17(2) so as to more clearly manifest this intention. The right of a litigant to injunctive relief for ultra vires action is so important that parliament should only be able to take the right away with clear language.

Should the courts accept either of the two approaches to the availability of injunctive relief against officers of the Crown in their private capacity, this mechanism will not eliminate all the undesirable consequences some would see as flowing from section 17. For example, not all unlawful Crown actions will be regarded by the courts as being ultra vires. If the Crown is empowered to enter contracts then it does not necessarily follow that all actions in breach of contract will be ultra vires. Further, it will not always be possible to isolate a Crown officer against whom, as an individual, an injunction may appropriately be sought.

As for the concept of the interim declaration discussed earlier, this is obviously a device for getting around section 17. The idea of seeking injunction against an officer of the Crown in his individual capacity is

30 See Street, supra n 5 at 142 for condemnation of this approach.
31 See eg Hogg, *Liability of the Crown* (1971) 26.

less in the nature of a device and more a matter of construction of section 17(2). The amount of thought and discussion which has gone into exploring these two avenues is evidence of dissatisfaction with section 17. If such dissatisfaction is well-founded then surely parliament should reassess and rewrite the law with respect to injunction and the Crown rather than leaving lawyers and the courts to develop means of achieving results which are inconsistent with the object of section 17.

The practical conclusion with respect to these devices would appear to be that the "interim declaration" avenue around section 17 does not exist. The action against the officer may succeed, however it is uncertain as to how far the section 17 immunity extends to ultra vires actions, if at all.

2 *Interim Relief Against the Crown under the Judicature Amendment Act 1977*

The other aspect of the current New Zealand law with respect to interim relief against the Crown is section 12 of the Judicature Amendment Act 1977 which inserted a new section 8 in the Judicature Amendment Act 1972, authorising the court to issue an interim order pending the hearing and determination of an application for review under the Judicature Amendment Act 1972. The Judicature Amendment Act 1972 instituted an alternative procedure in New Zealand for obtaining relief in the nature of certiorari, prohibition, mandamus, injunction and declaration.[32] The major limitation is that its operation is confined "to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power".[33]

Section 8(1) provides:

> Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
>
> (a) Prohibiting any respondent to the application for review from taking any further action that is or wou'd be consequential on the exercise of the statutory power:
>
> (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:
>
> (c) Declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.

The interim order is a flexible mechanism for preserving the status quo pending the full hearing and determination of the application for review. The interesting words in section 8(1) are those which limit the court's

32 Judicature Amendment Act 1972, s 4.

33 Judicature Amendment Act 1972, s 4(1). See also s 4(2) which refers to "statutory power of decision".

powers to make interim orders to circumstances where "if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant".[34]

The interim order as now provided for in section 8(1) is very similar to the interim or interlocutory injunction. Both remedies are discretionary. Currently there is debate as to which principles should guide the court in exercising its discretion whether to issue an interim or interlocutory injunction.[35] To oversimplify, the court has to weigh the interests in having an action stopped by interim injunction even though at the final trial it may be found to be quite lawful, and the interests in allowing that action to continue while the final rights of the parties are determined. The remedy can be justified where the interference or injury caused by the continuation of the alleged wrongful action pending the trial is incapable of being adequately compensated in damages should the action be found to be unlawful at the trial.

The exercise of the discretion to issue an interim order under section 8 of the Judicature Amendment Act 1972 (as amended) involves the balancing of analogous factors. Does the plaintiff's interest in maintaining the status quo pending the determination of the application for review outweigh the injury inflicted in the event that the defendant is prevented from continuing a possibly lawful activity pending a full hearing? One major difference in the context of judicial review of administrative action is that the mechanism of damages is not appropriate to compensate the defendant should an interim order be made which curtails his activities and those activities be later found by the court to be quite lawful. In the interim injunction context the plaintiff gives an undertaking to the effect that he will compensate the defendant in damages in these circumstances.[36]

The New Zealand High Court in exercising its powers under section 8 has already been willing to look for assistance to the principles which are

34 In *John Bull & Co (Brooklyn) Ltd* v *Licensing Control Commission of New Zealand* unreported, Supreme Court, Wellington, 27 February 1979, A50/79, Beattie J discussed the presence of the word "necessary" in s 8(1): "Is it necessary for me for the purpose of preserving the position of the applicant to make the interim order? The word is 'necessary' with its imperative overtones rather than 'desirable'." His Honour concluded: "In my opinion the affidavit evidence falls short of demonstrating the financial tragedy that is expected and certainly in my opinion does not impel me to say that it is *necessary* to make the interim order for the purpose of preserving the position of the applicant." In *Movick* v *Att-Gen* [1978] 2 NZLR 545, 548 Woodhouse J noted that s 8(1) referred to "preserving the position of the applicant"; see also Richardson J at 551. The interim order sought in this case required the court to go beyond preserving the position of the applicant to improving his position. The Court of Appeal did not think the applicant's position needed protection because the applicant was unlawfully in New Zealand. Another reason for the remedy not issuing was that the interim order would not affect the outcome of the hearing of the application for review under the Judicature Amendment Act 1972, s 4.

35 See Harris, "Interim and Interlocutory Injunctions: Assessment of Probability of Success" [1979] NZLJ 525.

36 Rule 468B of the Code of Civil Procedure (NZ) provides: "Every interlocutory or interim order made upon any such motion shall contain an undertaking by the plaintiff to abide by any order which the Court may make as to damages, in case the Court shall thereafter be of the opinion that the defendant shall have sustained any by reason of the order which the plaintiff ought to pay."

emerging with respect to the issuing of an interim injunction.[37] Barker J in *Young* v *Bay of Islands County*,[38] however, was hesitant to adopt the interim injunction approach. His Honour said with respect to section 8:

> I think it desirable that this procedure be left as flexible as possible. I do not think it desirable to import into applications for interim relief on motions for review under the Judicature Amendment Act, the authorities on interim injunctions. . . I think that the chief inappropriateness of the interim injunction approach is the necessary consideration of damages as an appropriate remedy either to the applicant if successful, or to the defendant if the applicant is unsuccessful. Such considerations are usually inappropriate in administrative law matters such as the present.

This caution has been heeded by subsequent courts.[39] So the position would appear to be that the High Court in exercising its discretion under section 8 will look for assistance by analogy to principles with respect to interim and interlocutory injunctions, but at the same time the court will not wish to sacrifice the flexibility inherent in the establishment of a new discretionary remedy by wholeheartedly adopting the approach with respect to injunctions.

Under section 8(1)(a) and (b) the court is empowered to make interim orders which have coercive effect. The power to make an order under section 8(1)(a) "[p]rohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power" amounts to a prohibitory interim injunction. The power under section 8(1)(b) is a little more unusual in that an order may be made "[p]rohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates."

Section 8(2) dramatically qualifies the nature of interim orders which can be made against the Crown. Rather than being coercive the interim order is a declaration of what the Crown "ought not to do" in the interests of preserving the status quo pending the determination of an application for review. The court has a discretion by interim order to:

> (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the statutory power;

37 See *Wilson* v *Hughes and the New Zealand Racing Conference* unreported, Supreme Court, Auckland, 15 September 1978, A809/77, Casey J; *Gourlie* v *Dunedin City Council* unreported, Supreme Court, Dunedin, 15 February 1979, M15/79, Perry J; *Fitzgerald* v *Commission of Inquiry into Marginal Lands Board* [1980] 2 NZLR 368, 374 per Hardie Boys J.

38 Unreported, Supreme Court, Whangarei, 13 December 1977, A83/77.

39 See eg *Fitzgerald* v *Commission of Inquiry* supra n 37, in which Hardie Boys J said; ". . . questions of the balance of convenience are not necessarily appropriate to an application for an interim order under s 8 of the Judicature Amendment Act 1972. I respectfully agree with the view expressed by Barker J in the unreported case of *Young* v *Bay of Islands County* . . . that it is necessary to preserve flexibility in exercising the discretion conferred by the section and it is thus undesirable to attempt to lay down any definitive criteria or guidelines other than that contained in the section itself, namely the preservation of the position of the applicant."

(b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.[40]

Such a declaration is not a declaration of rights but rather a statement by the court as to what it thinks the Crown should not do pending the final determination of the application for review. The Crown is technically free to follow or disregard the advice. As is the case with the remedy of declaration there would in many circumstances be great public pressure on the government to comply with such an interim order. Disobedience of the interim order would seldom occur and only in circumstances in which the government could later publicly verify the wisdom of its decision to disregard the court order.

Notwithstanding the non-coercive nature of the remedy against the Crown it does in practice allow interim relief against the Crown. The context is limited to the judicial review of administrative action involving the exercise or purported exercise of a statutory power. This is however an expanding area of litigation in which the availability of the remedy will prevent unjustified continuation of interference with litigants' rights while the matters in dispute are resolved by the High Court.

The innovation in the 1977 Amendment Act cleverly maintains the Crown's immunity from coercive control pending litigation, thus allowing the Crown freedom to disobey an interim order should the Crown feel it could later justify such disobedience as being in the public interest. This satisfies one of the traditional reasons for the Crown's immunity from injunction. However at the same time the individual litigant's interests will be protected in the absence of a publicly justifiable reason for non-compliance. This should be contrasted with the situation in which section 17 of the Crown Proceedings Act 1950 applies and no interim relief is available against the Crown. In the latter context the public

40 This interim remedy against the Crown is similar to that suggested by the Law Commission in England in its *Report on Remedies in Administrative Law* (1976 Cmnd 6407). The Law Commission expressed concern at the non-availability of interim relief against the Crown (see para 51). The Law Commission suggested that s 21 of the Crown Proceedings Act 1947 (UK) should be amended to provide the court with power "to declare the terms of an interim injunction which would have been granted between subjects". The Law Commission saw little likelihood of the Crown disregarding such a court order. The suggested remedy is very similar to that provided for in s 8(2) in the sense that it is a statement of what the Crown ought to do or ought not to do in the circumstances without in any way being expressly coercive. The amendment however, in contrast with s 8(2), would make the interim order available well beyond the sphere of judicial review of administrative action. It would be potentially available in all circumstances in public and private law in which one could get an interim or interlocutory injunction against a private litigant. The Law Commission's recommendation that s 21 be amended has not yet been implemented. The New Zealand Public and Administrative Law Reform Committee in the draft Judicature Amendment Bill which it presented to parliament (see the *Eighth Report of the Public and Administrative Law Reform Committee*) provided for interim relief against the Crown in a new s 8 similar to the enacted s 8 but without s 8(2), combined with a new proviso to s 14(2) of the Judicature Amendment Act 1972 which stated that nothing in s 17 of the Crown Proceedings Act 1950 should be construed to prevent the interim orders provided for in s 8 issuing against the Crown. If this suggested Bill had been enacted in full then the coercive remedies provided for in s 8(1) would have been available against the Crown just as they are available against other litigants. Parliament did not adopt this suggestion but rather inserted the non-coercive interim order in s 8(2).

interest in the freedom of governmental action is indiscriminately allowed to prevail over the public and private interest in restraining an allegedly unlawful interference with the plaintiff's rights.

Another aspect of the section 8(2) relief which should not be overlooked is the fact that the court has a discretion as to whether or not to issue the interim order. It is submitted that the court, as well as employing an approach analogous to that with respect to the discretion to issue interim and interlocutory injunctions, will also balance the competing public interests—the possible public interest in the government being able to act free from court restraint in the circumstances and the public interest in the applicant being protected from possible further interference with his rights pending the final determination of the application. If one is a critic of the law under section 17 of the Crown Proceedings Act 1950 then section 8(2) of the Judicature Amendment Act 1972 (as amended) can be seen as allowing a more just relief against the Crown in the public law context.

II The Case for Maintaining the Crown's Immunity from Interim Relief

The Crown's immunity from interim and interlocutory injunction invites the question: what makes the Crown different from other defendants? The reason for the immunity must arise from this difference.

The difference is the fact that the Crown governs the country. Because of the responsibility associated with this pre-eminence the Crown may in some circumstances be compelled by the public interest to infringe individual rights without fear of court intervention. The other distinguishing feature is the fact that the Crown is the elected government accountable to parliament and the electorate.

A traditional justification for the statutory immunity from injunction is the policy that the government should be free in times of emergency to act beyond its authority or in other ways to infringe the rights of individuals without fear of coercive intervention by the courts.[41] In an emergency situation the government may have to act swiftly in an unorthodox and technically unlawful manner infringing individual rights. The government will be forced to weigh such infringements against the public interest in taking the emergency action. Few would deny the necessity for a government to be free to act as emergency circumstances require as long as such action can be retrospectively justified. But why should the protection extend beyond the emergency situation? The arbitrary application of section 17 to all circumstances in which interim injunction is sought against the Crown must cause injustice. For example this justification for immunity would hardly be relevant to a commercial non-emergency situation such as that which arose in *Codelfa-Cogefar (NZ) Ltd* v *Attorney-General*.[42] The arguments for freedom of government action in times of emergency should be assessed in the light of the wide scope for legitimate government action in emergency circumstances under such statutes as the Public Safety Conservation Act 1932 and the Economic Stabilisation Act 1948. It is even possible that regulations

41 Supra n 11.
42 Supra n 4.

could be enacted under the latter statute which may have the effect of suspending the operation of statutes, thus allowing government activity that would have otherwise been contrary to statute to be lawful.[43]

Lord Scarman recently presented a more general defence of the Crown's immunity from interim relief in *Inland Revenue Commissioners* v *Rossminster Ltd*[44] when he said:

> I gravely doubt the wisdom of interim relief against the Crown. The state's decisions must be respected unless and until they are shown to be wrong. Judges neither govern nor administer the state: they adjudicate when required to do so. The value of judicial review, which is high, should not be allowed to obscure the fundamental limits of the judicial function.

This passage strikes directly at the relationship between the judiciary and the executive. Lord Scarman is asserting the dominant place of the executive in our society. He is saying the decisions of the executive should be complied with until found to be wrong in a full trial. Interim relief is normally available at a point in time prior to it being ascertained conclusively that action is wrong. Therefore interim relief should not be available against the executive. The court in the interim setting should not be able to obstruct or more rarely compel state activity. For the law to be otherwise is to allow the courts to be involved in governing and administering the state and that is beyond the judicial function. To allow the courts to grant coercive interim relief against the Crown is giving them undue power. They should not have the power to halt the machinery of government in its tracks. It is implicit in this view, some might argue, that it is better to have the power of decision-making reside with the elected government rather than with the appointed judiciary. The government is answerable to parliament and the electorate. The government is charged with putting the will of parliament into effect. The magnitude and importance of this function has to be contrasted with the nature and role of the courts. The courts are indirectly answerable to the people and arguably the individual judges are indirectly responsible to parliament through the mechanism of dismissal. However the accountability of the government is more onerous than that of the judiciary. The scrutiny of government activity is closer than that of judicial activity. To a large extent scrutiny of the judiciary is self-scrutiny through the mechanism of appeal. If this is the thrust of Lord Scarman's thinking however, then it could be rebutted by pointing to the judiciary's impeccable record of absence of arbitrary action.

It is more likely that Lord Scarman was directing his concern to the nature of the decision-making involved. The government is supposedly

43 See *New Zealand Shop Employees Industrial Association of Workers* v *Att-Gen* [1976] 2 NZLR 521, 535-536 per Richmond J. Cf *Auckland City Corporation* v *Taylor* [1977] 2 NZLR 413, 417-418 per Perry J.

44 [1980] AC 952, 1027. Lord Wilberforce at 1001 and Viscount Dilhorne at 1007 also appeared to oppose any attempt to modify the Crown's immunity from interim relief. These views should be contrasted with those of Lord Diplock (at 1014-1015) who accepted that the scope for interim relief against the Crown should be broadened: "My Lords, this serves once again to draw attention to what, for my part, I regard as a serious procedural defect in the English system of administrative law: it provides no means of obtaining interlocutory relief against the Crown and its officers. . . . Such legislation has been recommended in the *Report* of the Law Commission on which the revision of Order 53 was based. It is greatly to be hoped that the recommendation will not continue to fall upon deaf parliamentary ears."

skilled in making decisions which have as their background policy, domestic and foreign, and other political factors. Should the courts be involved in decisions as to whether interim relief should be granted against the Crown then they could lack the capacity to appreciate the weight of "political" factors relevant to their decision-making. Arguably the judiciary will not be capable of appreciating the background factors and general political climate which may be relevant to a particular decision. The vehicle of judicial evidence may not be able to convey to the court the complete political context of a particular decision. Factors beyond the cognisance of the court may make the award of the particular interim injunction inappropriate. If the courts begin to make decisions on the basis of these policy or political factors then they are expanding out of the judicial realm into that of the executive. The argument is that only those who are more directly responsible to parliament and the electorate should participate in the executive realm. If the judiciary were to do so then it would be exceeding the fundamental limits of the judicial function.

It could be further argued that the courts' involvement in such decision-making would threaten the essential constitutional independence of the judiciary and undermine public confidence in its functioning. No matter who makes them, decisions which involve weighing policy loaded public interests in continued government action against private interests in curtailing alleged unlawful interference with rights have the inevitable potential of being exposed to forceful public criticism and debate. If the courts become involved, public respect for the integrity and independence of the judiciary will not be enhanced.

In the passage quoted Lord Scarman is, in effect, arguing that to make interim relief available against the Crown is to invoke the courts' adjudication process prematurely. This argument can be countered by saying surely a judicial balancing of interests approach should be invoked if a governmental decision is suspected of being wrong. Although the criterion of probability of success in the full trial is currently being questioned as a factor which should influence the courts when deciding whether or not to issue an interim or interlocutory injunction, it would have to be considered when interim relief was sought against the Crown.[45] Consideration of this factor would be justified on the basis that the government is a body whose activities are so intertwined with the public interest that a high probability of the existence of the alleged wrong should be put before the courts before an interim remedy is issued to halt the government machine in its tracks.

The present state of the law under section 17 can also be supported from the practical point of view since difficulties may arise in enforcing a coercive remedy against the Crown. Disobedience of an interim or interlocutory injunction amounts to contempt of court and this can lead to imprisonment or fine. Would it be practical to use these mechanisms against the Crown in the event of non-compliance with an interim or interlocutory injunction? It is submitted that imprisonment of government officers would not be appropriate. It would be difficult to isolate an appropriate officer or officers to imprison when the decision to disobey the injunction is collective in nature. It may even be made at the highest

45 Supra n 35.

collective level, namely by Cabinet. Further, it can be argued that imposing fines on government officers or departments will not supply a coercive element because these fines would be met out of public funds, the spending of which would have little effect on an individual officer or government department. Secondly the fines would eventually end up back in public funds.

However the lack of an effective means of making an interim remedy coercive against the Crown is not the main problem. It is possibly not a problem at all because of the Crown's consistent record of complying voluntarily with declaratory orders from the courts. The main problem is the lack of interim relief against the Crown, that is the absence of an order from the court advising the Crown to maintain the status quo pending the determination of an issue at a full trial. Once such an order was made it would be complied with. This is why the interim order under section 8(2) of the Judicature Amendment Act 1972 (as amended) and the interim remedy suggested by the English Law Reform Commission[46] are attractive even though they are not coercive in nature.

III The Case for Narrowing the Crown's Immunity from Interim Relief

The arguments for removing, or at least narrowing the Crown's immunity from interim relief are the same as those justifying the remedies of interim and interlocutory injunction in litigation where the Crown is not the defendant. These discretionary equitable remedies prevent irreparable unlawful interference with rights pending the final determination of an action in a full trial. The remedy is drastic but can be justified by the fact that the injury complained of will not be adequately compensated by an award of damages should the matter be resolved in the plaintiff's favour at the trial. A plaintiff in an action against the Crown should have this protection. Such a person should not unnecessarily have to bear the burden of irreparable injury which is incapable of being compensated should that interference later found to be unlawful.

Today the Crown is involved in a multitude of activities ranging from some simply regulatory to others quite commercial, often in competition with private companies. The trend is towards the government becoming more and more involved in the commercial sector. In these circumstances where the government is carrying out commercial activities in the market place alongside private firms why should the government be immune from an interim injunction to prevent continuation of an alleged breach of contract? It is difficult to find any reason why the Crown should enjoy an immunity from a remedy to maintain the status quo in these circumstances. The Crown's interest in being free to continue the breach of contract would not appear to be any different from that of the private company. Indeed, the immunity could give the Crown an unfair bargaining advantage. A party may make a compromise with a government operation simply to stop the continuation of a breach of contract. In the hands of unscrupulous government officers a potential for extortion exists.

On the other hand it could be argued that the Crown is performing no less a "governmental" function when carrying out what are regarded as

46 Supra n 40.

more "commercial" activities. The government may be in the market place for a legitimate public interest reason such as to provide effective competition for private operations. It may be possible to argue that because it is still a governmental function in the public interest the Crown's traditional immunities should continue to be available.

The continued existence of the immunity can also be attacked on the ground that it is not consistent with observance of the Rule of Law. The Rule of Law and its fundamental precept that all government action should have a foundation in law is abused if governmental activity unsupported by authority at common law or by statute is allowed to continue inflicting irreparable damage pending determination of its legality at the final trial. In these circumstances the court should be able to act as a check on the executive, otherwise a serious detraction from the ideal of government under law remains.

A narrowing of the immunity would be consistent with the object of the Crown Proceedings Act 1950 which was to put the Crown in the same position as private litigants in a court action. Further, the potential of interim relief issuing against the Crown would cause the Crown to be more careful to ascertain the existence of legitimate authority before taking action.

IV Suggested Reform

The need for reform of the law with respect to the availability of interim relief against the Crown has been widely recognised.[47] As a policy conclusion the interests of the individual in having the potential to gain interim relief against the Crown can in some circumstances have a higher priority than the government's freedom of action. The suggested concept of the "interim declaration" and the seeking of interim injunctions against government officers in their private capacities are devices argued in an attempt to get around section 17 of the Crown Proceedings Act 1950. If the law is unsatisfactory then it should be changed rather than left to be circumvented by ingenious devices.

It is submitted that section 17 of the Crown Proceedings Act 1950 should be rewritten to allow discretionary interim relief to issue against the Crown. This could be done by amending section 17 in the manner the Law Commission (UK) suggested section 21 of the Crown Proceedings Act 1947 (UK) should be amended:

> Provided that—
>
> (a) Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may instead:—
>
> (i) *in a case where the court is satisfied that it would have granted an interim injunction if the proceedings had been between subjects, declare the terms of the injunction that it would have made; or*
>
> (ii) *make an order declaratory of the rights of the parties.*[48]

47 See *Report on Remedies in Administrative Law* supra n 40 at para 51; Street, supra n 5 at 142; Wade, *Administrative Law* (4th ed 1977) 494; *de Smith's Judicial Review of Administrative Action* supra n 8 at 448.

48 See *Report on Remedies in Administrative Law* ibid at 36. The italics indicate the suggested new wording derived from the *Report*. This wording could be improved by referring to interim or *interlocutory* injunctions in proviso (a) (i).

The English *Report* offers little discussion of the suggested reform, but it is submitted that the considerations already mentioned in this article provide ample justification. The proposed interim relief would not take the exact form of an interim injunction because of the difficulty of devising a mechanism which would make the remedy coercive. Obviously proceeding against the Crown on a writ of attachment leading to a fine or imprisonment for contempt of court is not, as discussed above, an appropriate way to enforce an interim order against the Crown.[49] The suggestion is that the court should declare what kind of interim or interlocutory injunction it would have issued had the defendant been some legal person other than the Crown.[50] To put the suggested reform another way the court could declare what the Crown *ought to do* in the circumstances in a way analogous to that provided for in section 8(2) of the Judicature Amendment Act 1972 (as amended).

As discussed above the Crown would inevitably comply with such an order from the court, although technically the Crown could choose not to comply with it. Should the Crown take this course of action then it would be throwing open to the public the wisdom of its decision. Should the public interest be assessed to be best served by disobedience of the interim order then the government would escape unscathed from the non-compliance. However should the public find the argued public interest allegedly justifying disobedience not convincing then the government would be subject to political criticism and its consequences from the opposition and the electorate.

In an effort to give greater respectability to its actions the government may influence parliament to retrospectively validate through legislation the action taken in contravention of the interim order. This would expose the appropriateness of the government's action to debate in parliament and indirectly in the electorate. Disobedience of an interim order by the government and retrospective validation of that action by parliament would tend to undermine public confidence in the courts.

If the interim remedy were used with restraint such a situation would not arise. The new remedy, like the interim and interlocutory injunction, would be discretionary. Where the public interest in a particular case made it inappropriate to give interim relief against the Crown, the court could exercise its discretion to deny relief. The presence of the discretion would allow justice to be done in each individual case.

No doubt the court would be closely influenced in exercising the discretion by the principles which have developed with respect to interim and interlocutory injunctions. These principles are currently in a state of confusion. The confusion surrounds the influence which probability of success in the final trial should have on the court's decision as to whether or not to grant interim relief. Some courts through insisting on the establishment of a prima facie case as a threshold requirement for the issuing of an interim injunction are forcing the best analysis, on the necessarily incomplete argument and evidence, of the plaintiff's probabil-

49 See *de Smith's Judicial Review of Administrative Action* supra n 8 at 448.

50 Such declaratory relief would be quite different from a declaration of rights and should not be confused with the ill-conceived concept of the "interim declaration".

ity of success in the final trial.[51] Other courts only require "that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried".[52] The latter threshold requirement may mean that the plaintiff's probability of success is not thoroughly examined before an interim remedy issues.

Once the chosen threshold requirement is satisfied then the court considers the "balance of convenience". In determining where the balance of convenience lies the court has to weigh the injury incapable of compensation which the plaintiff will suffer, should the alleged wrong be allowed to continue and should the court at the full trial find the alleged wrong to be an actual wrong, against the injury, incapable of compensation, the defendant will suffer should he be prevented from acting pending the trial and the trial find his actions to be legitimate.

In exercising the discretion with respect to the interim remedy against the Crown the court should in determining the balance of convenience take into account, if it is ascertainable, the plaintiff's probability of success as suggested above.[53] Probability of success need not be regarded as a threshold factor, but rather should be another factor to be considered along with the consequences of issue or non-issue of the remedy in deciding where the balance of convenience lies. The degree of probability of success which the plaintiff will be required to show would vary according to the seriousness of the consequences of halting the government activity pending the determination of its legality at the full trial. The greater the public interest in the continuation of the government action the higher the probability of success the applicant would have to show.

The suggested reform might be criticised on the ground that the court will not always be capable of appreciating the public interest in allowing an alleged wrong to continue pending a trial. More specifically it may be argued first, that the courts will not always be able to gain access to all the information on which the government has based its assessment of what the public interest requires in the particular circumstances. Secondly, even if the court could gain access to all the relevant information it is not an appropriate body to make such a decision coloured by political factors. Thirdly, the suggested reform will be criticised on the basis of the difficulty in weighing a private interest in having an alleged unlawful interference with rights halted against a public interest in allowing the alleged wrong to continue pending trial. The two interests are on different planes. The problem is analogous to comparing a textbook with a novel. The concepts although apparently similar are different and have little in common which can be exposed to profound comparative scrutiny.

Considering the first likely criticism—the limited access to relevant information. In many cases the Crown may be happy to disclose all relevant information, however in other cases for the same reasons which justify public interest immunity the Crown may not wish to disclose to the court the relevant documents or information. The Crown may argue for the non-disclosure of such information on the grounds that it belongs

51 See eg *J T Stratford & Son Ltd* v *Lindley* [1965] AC 269, 331 per Lord Pearce, 338 per Lord Upjohn; *Northern Drivers Industrial Union of Workers* v *Kawau Island Ferries Ltd* [1974] 2 NZLR 617, 621 per McCarthy P.

52 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396, 407 per Lord Diplock. See also *Philip Morris (New Zealand) Ltd* v *Liggett & Myers Tobacco Co (New Zealand) Ltd* [1977] 2 NZLR 35.

53 Supra pp 109-110.

to a class of information which should not be disclosed because of the effect disclosure would have on the quality of similar information in the future,[54] the candour of communication in the public service,[55] or the fact that disclosure of the class could lead to the premature revelation of government thinking still in its embryonic stages. Alternatively the Crown may argue that the specific content of the particular information is of a highly confidential or secret nature which it would not be in the public interest to disclose.[56]

The court would have to meet these claims as it does claims for public interest immunity by itself inspecting the documents and deciding the respective merits of disclosure and non-disclosure. This would be a preliminary determination of a public interest immunity claim. If the court were to decide that non-disclosure was justified then the court, since it had had the opportunity to examine the documents, could still evaluate the public interest in not making interim relief available. The only problem would be that counsel for the plaintiff would not have had access to the documents and would not have been able to cross-examine the Crown with respect to them. In some circumstances the court will not wish to examine the documents at all but will show almost complete deference to the Minister's certificate.[57] In such a circumstance the court may be effectively prevented from accurately ascertaining the public interest in interim relief not being available against the Crown. The court would have to either speculate as to the public interest in non-availability or defer to the Crown's petition that interim relief should not be available. Such a circumstance would not be satisfactory because it would be taking the balancing function away from the court and leaving it with the executive, which may not be able to appreciate fully the plaintiff's interest in having the interference with his rights cease pending the trial.

The second suggested criticism is based on the courts' alleged inability to evaluate political factors. This argument has already been discussed briefly above.[58] The criticism can again be countered by going back to public interest immunity. In deciding a claim for public interest immunity or "Crown privilege" the court is charged with balancing the public interest in non-disclosure against the public interest in disclosure. The public interest in disclosure is relatively easy to ascertain. It is the public interest in all relevant evidence being available to a court. However the public interest in non-disclosure may not be so easy to appreciate and may necessitate the evaluation of political factors of which the courts have had little experience in the past. This has not prevented the courts from developing the public interest immunity jurisdiction enthusiastically through the last decade. It must be doubted whether the courts will find performing the analogous role in the context of interim relief beyond

54 See eg *R* v *Lewes Justices, Ex p Secretary of State for Home Department* [1973] AC 388.

55 See eg *Konia* v *Morley* [1976] 1 NZLR 455.

56 See eg *Duncan* v *Cammell, Laird & Co Ltd* [1942] AC 624.

57 See eg *Elston* v *State Services Commission* [1979] 1 NZLR 193. Cf *Environmental Defence Society Inc* v *South Pacific Aluminium Ltd (No 2)* [1981] 1 NZLR 153.

58 Supra pp 105-106.

their capacity. The developing scope of judicial review of administrative action and public law generally has made inevitable the development of judicial expertise in taking account of policy and political factors.[59]

The third criticism concerning the balancing of a public interest and a private interest is difficult to meet. The difference between the two concepts makes comparison difficult. The comparison can be facilitated if one realises that the private interest can give rise to public interests. For example the private interest will more than likely give rise to the public interest in the executive being compelled to comply with the Rule of Law. The public interest requires that the executive should be confined to that which it has legitimate authority to do. By a process of abstraction the private interest in relief could be viewed as a broad public interest in the maintenance of the status quo pending the trial of what appears to be a reasonable and not vexatious cause of action against the Crown. However even if these public interests favouring the plaintiff are taken into account by the court, the plaintiff's case will not be complete without major account being taken of his particular reasons on the facts for the status quo being maintained.

The court's discretionary function would be limited and thus aided by the enactment of specific statutory exceptions to interim relief being potentially available against the Crown. For example, parliament could provide that in specific cases of emergency interim relief should not be available. This would allow the government freedom to act beyond what would otherwise be its legitimate authority in justifiable circumstances without being hindered by having to answer to court actions. Even if such blanket immunities were to exist in narrowly defined areas of government activity this would not prevent the court from exercising its discretion in other areas to refuse to grant interim relief against the Crown when the public interest in the government being permitted to continue its activity pending the trial outweighed the interest in the remedy being available.

Conclusion

If section 17 of the Crown Proceedings Act 1950 were amended to provide for a discretionary interim remedy whereby the court declares whether the Crown ought to maintain the status quo pending trial, then the High Court in a case similar to *Cogefar* would be free to consider the balance of convenience on the facts. The government does not appear to have put forward any persuasive public interest which would justify immunity from interim relief. Therefore the determination of the balance of convenience would be dominated by the Crown's ability to compensate the plaintiffs in damages should the Crown be found to be in breach of contract by the arbitrator or at the final trial. It is submitted that the

59 Contempt of court is another area where the court is forced to balance competing public interests. See eg *Att-Gen* v *British Broadcasting Corporation* [1980] 3 WLR 109; *Att-Gen* v *Times Newspapers Ltd* [1974] AC 273. It is interesting to note by way of contrast how the Committee on Official Information (Danks Committee) in its *General Report* (para 66-67) did not favour the involvement of the courts in making decisions about the release of information: "The criteria to be applied are very broadly stated and the resulting political judgments are, in the end, for ministers who are elected and accountable to Parliament rather than for the courts who are not elected and are not accountable."

court would find the amount of such damages capable of being ascertained and therefore may exercise its discretion not to issue an interim order to the effect that the Crown should pay the full rate until the arbitration or trial. Interim relief may not be justified by the possibility of irreparable injury pending the trial.

Finally the suggested reform should be surveyed from a distant constitutional hilltop. The reform would allow stricter compliance with the ideals embodied in the concept of the Rule of Law. However, allowing the court in the exercise of its discretion to weigh the public interest in the continuation of the government's activity against the public and private interests in not having individual rights unlawfully interfered with, is giving the judiciary tremendous power. It is power to bring the government machine to a sudden stop. Is it constitutionally correct that the appointed judiciary should make such decisions over the head of the elected government? Is the judiciary better suited than the government to making such decisions? Do the proposals for such a reform overestimate the ability of the judiciary? It is parliament's answers to these questions which should decide whether the suggested reform is adopted.