INJUNCTIONS AGAINST STRIKERS

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Resort to the interim injunction to defeat industrial action by trade unions is less common in New Zealand than in comparable common law jurisdictions. Perhaps the principal factor operating against the use of injunctions in this context is the availability of statutory disputes procedures under the Industrial Relations Act 1973 and parallel legislation. However, the availability of that machinery does not preclude employers, or other affected parties, from applying to the High Court for an interim injunction to restrain strike action in an appropriate case. Once such an application is made, the resulting interplay between common law principles and legislative policy raises many difficult questions. When the High Court comes to exercise its discretion in deciding whether or not to award an injunction, what importance should be attached to the provision of alternative remedies in industrial legislation? Should the High Court withhold a remedy whilst the Arbitration Court deals with the issues relevant to its own specialised jurisdiction? To what extent should breach of penal provisions in industrial legislation be treated as the basis for the award of an injunction at common law?

The industrial relations policy of the Labour Party during the election campaign of 1984 included a pledge to introduce an industrial code "embodying the principle of the UK Trades Dispute Act", a piece of legislation conferring significant immunities on trade unions which commit one or other of the economic torts in the course of a "trade dispute".[1] Following the general election of July 1984 the new Minister of Labour, Mr Stan Rodger, was more cautious. Suggesting that the Arbitration Court should make way for a new "Industrial Commission", Mr Rodger continued:[2]

> It can be argued that the existence of the remedy of the injunction in a civil court is inconsistent with the system of conciliation and arbitration of industrial disputes. While the parties will have different views on the question, I believe that a practical compromise would be to provide that no action shall be taken against unions or unionists unless the Industrial Commission gives a certificate that the processes of conciliation and arbitration have been exhausted and that there is no prospect of an immediate cessation of the industrial action.

Consideration of the role of the injunction in industrial relations may well have been prompted by a spate of injunction applications during 1983 and 19 . The issue is addressed in the Government's Green Paper on Indust.ial Relations, question 35 of which asks what role, if any, the common law should play in industrial relations.[3] This question has been

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1 New Zealand Labour Party *Manifesto* 1984.
2 Federation of Labour Bulletin No. 34, August 1984, 3.
3 *Industrial Relations: A Framework for Review,* Wellington, Government Printer, 1985.

canvassed extensively in legal writing.[4] The purpose of this note is more modest: it examines trends in the decisions which have been handed down over recent years and places them in the context of the decision of the Full Court of the Court of Appeal in *New Zealand Baking Trades Employees IUW and Church* v *General Foods Corporation (New Zealand) Ltd.*[5] In that decision the Court of Appeal was confronted for the first time in a decade with an application for an interim injunction to stop industrial action.

I THE THRESHOLD REQUIREMENT

What must the plaintiff prove in order to be granted an interim injunction? In *J T Stratford & Son Ltd* v *Lindley*[6] the House of Lords established that a plaintiff who applied for an interim injunction had to prove, as a threshold requirement, "a prima facie case of some breach of duty by the respondent to him".[7] Following this lead the New Zealand Court of Appeal also indicated, in *Northern Drivers' Union* v *Kawau Island Ferries Ltd,*[8] that the plaintiff must show "a strong prima facie case".[9] But in *American Cyanamid Co* v *Ethicon Ltd*[10] (a patent case) the House of Lords established a different test, more easily satisfied by the plaintiff: the claim, said the Law Lords, must simply be shown not to be frivolous or vexatious. In other words, there must be "a serious question to be tried"[11] and the court need not assess the probability of the plaintiff's being successful at full trial. In the United Kingdom, Parliament legislated to ensure that the "prima facie case" test remained the operative principle in trades dispute cases.[12] In New Zealand the choice between the two tests might be thought to pose an interesting problem in *stare decisis,* given the adoption of the "prima facie case" test by the Court of Appeal prior to the *American Cyanamid* decision.[13] At the very least, in the light of the *Island Ferries* case, it could have been argued that industrial cases are *sui generis* in this respect,[14] a point taken in two High Court decisions in 1984.[15] Nevertheless,

4 Davies and Anderman, "Injunction Procedure in Labour Disputes" (1973) 2 ILJ 213, (1974) 3 ILJ 30; Smith, "The Use of Injunctions in Industrial Law" (1974) NZLJ 432; Anderson, "The Disadvantages of Injunctions in Industrial Disputes" (1975) NZLJ 179 and Reid, "Injunctions and Industrial Relations" (1977) 7 NZULR 374.

5 [1985] 2 NZLR 110 (CA).

6 [1965] AC 269 (HL).

7 Ibid at 338, per Lord Upjohn.

8 [1974] 2 NZLR 617.

9 Ibid at 621 per McCarthy P per curiam.

10 [1975] AC 396 (HL).

11 Ibid at 406-7.

12 Trade Union and Labour Relations Act 1974, s17(2). This provision was in effect at the time the Court of Appeal (UK) applied the "prima facie case" test in *Camellia Tanker Ltd SA* v *ITWF* [1976] ICR 274, but in that case the Court's reasoning turned rather on the *sui generis* nature of the labour injunction.

13 For a comprehensive discussion of the case law see Harris, "Interim and Interlocutory Injunctions: Assessment of Probability of Success" (1979) NZLJ 525.

14 See the discussion in Mathieson, "The Lawyer, Industrial Conflict and the Right to Fire" (1981) NZLJ 216.

15 *Winstone Wallboards Ltd* v *Canterbury and Westland Stores Packing and Warehouse Workers IUW,* unreported, High Court, Christchurch, 30 November 1984, A 308/84; *R J Smillie & Co Ltd* v *Canterbury Clothing and Related Trades IUW,* unreported, High Court, Christchurch, 20 December 1984, A 341/84.

the Court of Appeal has signalled its firm acceptance of the approach in the *American Cyanamid* decision[16] and in the *Bakers Union* case no exception was made for industrial disputes.[17] This lowering of the hurdle for the plaintiff, when combined with the practical realisation that the granting of an interim injunction will usually mark the end of the litigation,[18] poses significant problems for the defendant union. In *R J Smillie & Co Ltd* v *Canterbury Clothing and Related Trades IUW*[19] Holland J recognised this factor and suggested that, where applications for interim injunctions effectively put an end to the action, the court should:[20]

> . . . approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party.

"Balancing the risk" might encompass, in an appropriate case, more detailed attention being given to the underlying cause of the dispute in settling the terms of any interim injunction.[21]

II THE BALANCE OF CONVENIENCE

Under the approach in *American Cyanamid,* once the plaintiff has established that there is a serious question to be tried, the court must weigh up the plaintiff's interests as against the defendant's interests and determine whether the "balance of convenience" lies in favour of issuing an injunction. Lord Diplock, who delivered the leading judgment in the *American Cyanamid* decision, declined to offer a definitive list of the relevant factors, but the principal components in the "balance of convenience" in industrial cases have proved to be two-fold. First, the court will ask whether the plaintiff could adequately be compensated by an award of damages if the injunction is not issued. Secondly, if the court is satisfied that an award of damages would not adequately compensate the plaintiff, the court must then consider whether the defendant – if ultimately successful at final trial – would be adequately compensated in damages for loss sustained as a result of the issuing of the injunction.[22] If, after considering these matters and all other relevant factors, the balance of convenience is evenly weighted between the parties, then the court must take "such measures as are calculated to preserve the status quo".

1 Adequacy of damages

In addressing the question whether a plaintiff could be compensated adequately by an award of damages in the event of an injunction not being

16 *Consolidated Traders Ltd* v *Downes* [1981] 2 NZLR 247.

17 In that decision only Richardson J drew attention to the difference between the two tests. Richardson J later went on to apply the *American Cyanamid* approach by referring to the need for the plaintiff to show a "seriously arguable issue".

18 See the comments of Lord Denning MR in *Hubbard* v *Pitt* [1975] ICR 308 at 320.

19 Unreported, High Court, Christchurch, 20 December 1984, A 341/84.

20 Applying *Cayne and Anor* v *Global National Resources PLC* [1984] 1 All ER 225.

21 See the discussion of *Winstone Wallboards Ltd* v *Canterbury and Westland Stores Packing and Warehouse Workers IUW,* unreported, High Court, Christchurch, 30 November 1984, A 308/84, under "The Status Quo" infra.

22 See Harris, supra n 13.

issued, the court is inevitably faced with a calculation of economic loss which is being inflicted or threatened. Since the aim of strikes is to inflict such loss, the raw material for such a calculation will usually be readily available. The loss need not be itemised. In *Flett* v *Northern Drivers' Union*[23] Speight J was willing to infer substantial loss in the absence of any calculation by the plaintiff in so far as "common sense" indicated that the plaintiff would sustain such damage. In some cases the very fact that loss cannot be itemised has led to a finding that damages will be an inadequate remedy. Thus, in *Mid-Canterbury Industries Ltd* v *Canterbury Stores etc IUW*[24] Roper J held that an embargo on a transport business which would result in, inter alia, a loss of goodwill "not readily measurable" could not adequately be compensated in damages. A potentially "serious effect" on the financial viability of a company has led to a similar conclusion.[25] When the court considers whether damages will be an adequate remedy for the plaintiff it becomes relevant to ask whether the defendant will be in a position to pay them. Often the magnitude of the alleged loss will suggest otherwise, particularly where penal payments or transferred loss are concerned. Two decisions delivered during 1984 illustrate this point. In the first,[26] a picket on a ship carrying the plaintiff's goods was alleged to be threatening the plaintiff with an extra $300,000 in charterage and $22,500 for every day on which the ship lay idle. In the second,[27] the Railways Corporation sued the New Zealand Railwaymen's Union alleging losses of $2,500,000 per day. But if the likely inability of the defendant union to meet an award of damages favours an injunction, the converse is not always true. In *Harder* v *New Zealand Tramways IUW*[28] a plaintiff who alleged loss of $7.45 per day expended on taxi fares during a bus strike succeeded in his application for an injunction. Chilwell J held that the unlawful character of the strike made it hard to advance any arguments on the union's behalf concerning the balance of convenience. Similarly, in *Hoeymans* v *Dawson,*[29] where eight scaffolders were blacklisted by the defendants, Hillyer J held that the prospect of damages could not compensate the plaintiffs for the loss of their right to work, particularly bearing in mind their need for an immediate regular income in order to meet their weekly commitments.

In considering whether defendant trade unions, if ultimately successful, will be adequately compensated in damages for loss arising from the issue of an injunction, the courts are faced with a perennial problem: how is a monetary figure to be placed on a non-pecuniary loss? Almost all of

23 [1970] NZLR 1050.

24 Unreported, High Court, Christchurch, 20 August, 1982, A 178/82.

25 *Johnston's Wholesale Wine and Spirit Co Ltd* v *Northern Industrial District Storepersons and Packers IUW,* unreported, High Court, Auckland, 1 September 1983, A 869/83. Chilwell J also mentioned potential loss of goodwill.

26 *Liquigas Ltd* v *New Plymouth Waterfront Workers IUW,* unreported, High Court, New Plymouth, 10 February 1984, A 2/84.

27 *NZ Railways Corporation* v *National Union of Railwaymen of NZ,* unreported, High Court, Wellington, 1 June 1984, A 165/84. A subsequent Committee of Inquiry, chaired by Mr Martin Finlay QC, condemned the application for this injunction as provocative.

28 [1977] 2 NZLR 162.

29 Unreported, High Court, Whangarei, 13 April 1984, A 22/84.

the losses to which a trade union can point when the balance of convenience is being weighed fall into this category. Intangible losses to the union, such as loss of morale and loss of bargaining power, will not readily translate into loss of income for the union (as opposed to its members) since the union membership clause effectively guarantees that income and the industrial framework in New Zealand ensures that the union maintains a monopoly position.[30] It follows that unions in New Zealand will rarely be able to direct the court's attention, in weighing the balance of convenience, to a threatened loss of membership or the formation of a "breakaway" union as a consequence of inability to apply industrial pressure. Further, the "loss" to the union's members arising from diminished bargaining power is, at best, a loss of expectation or "the value of the chance", a type of loss notoriously difficult to quantify.

We have reached the position in weighing the balance of convenience where the employer will probably be able to demonstrate substantial economic loss arising from strike action. The union, for its part, might point to less tangible losses such as loss of bargaining power. The extent of any disadvantage suffered by unions under the interim injunction procedure must ultimately depend upon the court's assessment of the union's loss as weighed against that demonstrated by the employer. Clearly, the court is not limited to a consideration of economic factors alone. Nothing in the *American Cyanamid* decision suggests that the court ought not to give full weight to "all the practical realities of the situation to which the injunction will apply".[31] Nor have the courts confined themselves to an examination of monetary loss in considering whether to grant an injunction. Yet when judges have considered non-pecuniary loss in the industrial context, their view of the harm likely to be suffered by unions once interlocutory relief has been granted is generally narrow. An analysis has shown that English judges have commonly stated that the effect of granting an injunction would "merely be to delay the imposition of the industrial action for a few months should the plaintiff fail to establish his case at full trial".[32] New Zealand courts adopt much the same approach. For example, in the *Bakers Union* case, Cooke J observed in considering the balance of convenience:[33]

> The company faced not only a cessation of business but also, according to the general manager's affidavit of 15 July 1985, the risk of a loss of customers which would make it uneconomic to reopen for business. At the date of the affidavit he estimated direct sales losses at $420,000 and lost profits at $95,000. Whereas the workers, assuming that they elected to remain working for the company rather than give notice terminating their employment, would at worst have lost the right to strike in support of the claims for a fairly short period. If they are ultimately held not to have the right to strike, they will have no lawful ground of complaint. If they ultimately succeed in establishing

30 Rare exceptions exist, such as demarcation disputes or disputes arising from the refusal of workers to join a particular union.

31 Casey J in *Finnigan and Recordon* v *NZ Rugby Football Union (Inc),* unreported, High Court, Wellington, 13 July 1985, A 164/85, citing Lord Diplock in *NWL Ltd* v *Woods* [1979] 3 All ER 614.

32 Davies and Anderman, supra n 4.

33 Supra n 5 at 116; see also *Northern Drivers Union* v *Kawau Island Ferries Ltd* [1974] 2 NZLR 617 at 624 per McCarthy P.

> that right, they will at the same time achieve a bargaining position of strength, which could result in retrospective increases.

Such an approach assumes the ability of the union to maintain the momentum of industrial action after an injunction has been granted. In practice it is well recognised that strikes present a "perishable issue": the longer the duration of a strike the more difficult it will usually be for the union to carry its members with it, even without the forced return to work which will follow the granting of an injunction.[34] It is difficult to resist the conclusion that, weighed against the measurable financial losses readily produced by most plaintiffs, the intangible loss of the "right to strike" will rarely count for much. Thus, in *Hoeymans* v *Dawson*[35] union members refused to work alongside the plaintiffs who had allegedly broken a site agreement. The defendants argued that if an injunction was granted union solidarity would be undermined and, further, that damages could not compensate members of the union who did not want to work alongside the plaintiffs. According to Hillyer J:

> The solidarity of members of the union clearly is a matter of great importance. Nevertheless, I must hold that on balance the disadvantage suffered by members of the union in having these men work on the site with them only pending the determination of this action is not as great as the disadvantage that will be suffered by the plaintiffs.

In the *Bakers Union* case, McMullin J was even prepared to hold that one factor outweighing the "right to strike" in the balance of convenience was the potentially harmful effect of the strike upon the strikers themselves. In that case the employer alleged that a strike of any length of time could lead to a complete closure of the factory as it would be uneconomic to reopen its business. On this basis McMullin J concluded that:

> When that loss is considered against the loss likely to be suffered by the workers, namely the right to strike pending the determination of the dispute, with the prospect that both they and the employer would suffer with the closing of the factory, the balance of convenience had to be resolved in favour of the employer.

Even where the courts have been willing to consider "tactical" losses which might flow from the grant of an injunction, the limitations of the injunction process itself may still weigh against the defendants. In considering the balance of convenience in *Liquigas Ltd* v *New Plymouth Waterfront Workers' IUW*[36] Davison C J took into account the possibility that a tactical advantage would accrue to the defendant union if an injunction was not granted but ultimately held that no such advantage would accrue: the demarcation dispute at the heart of that case would ultimately have had to be settled by the Arbitration Court and the complex issues involved could not be settled in time to deal with the immediate problem.

In conclusion, Roper J perhaps best expressed the predominant view of the courts on applications for interim injunctions when he held that

34 Mathieson, "The Lawyer, Industrial Conflict and the Right to Fire" [1981] NZLJ 216.
35 Unreported, High Court, Whangarei, 13 April 1984, A 22/84.
36 Unreported, High Court, New Plymouth, 10 February 1984, A 2/84.

"loss of face and restriction on the pressure the unions could bring to bear on employers do not impress me as heads of damage".[37] Yet, it is simplistic to assert that the union's disadvantage in applications for interim injunctions stems simply from a refusal by the courts to place a sufficient pecuniary value on the union's "right to strike". Even where judges have recognised that the harm caused to the effectiveness of a union as a negotiating force would be considerable, as in the *Mid-Canterbury Industries* case,[38] the difficulty of assessing that harm in damages remains. This is a functional problem rather than one created by individual inclination.

2 The availability of alternative remedies

In *Columbus Maritime Services Ltd* v *New Zealand Seamen's IUW*[39] Barker J, having decided the application on other grounds, listed among the factors which would have weighed against the plaintiff the existence of a speedy remedy through an application to the Arbitration Court under section 119C of the Commerce Act 1975. Under present circumstances, where the waiting time for an Arbitration Court hearing runs into months in most cases, this principle might be thought to be of little application in actions where a "fast track" procedure is not provided by the Act. Nevertheless, the Arbitration Court, in a press statement issued in April 1985, reiterated that urgent fixtures, when sought, will always be granted for matters of national importance and will always be considered when there is "serious industrial action" whether by strikes or by lockouts.

A broader approach than that adopted in the *Columbus Maritime* case was suggested by Holland J in *Winstone Wallboards Ltd* v *Canterbury and Westland Stores, Packing and Warehouse Workers IUW*:[40]

> . . . [T]here may well be an additional factor in the case of an industrial dispute whereby the court in its discretion will refuse to exercise its jurisdiction in relation to injunctions until all other actions have been demonstrated to be incapable of providing justice. This applies particularly where the dispute is one of a nature for which the High Court is ill-equipped to provide final solutions and in respect of which there is an Arbitration Court designated especially for the purpose.

In the *Winstone* case itself this argument was not pursued by counsel and, on the merits of the case, an injunction was awarded. But in *R J Smillie & Co Ltd* v *Canterbury Clothing and Related Trades IUW*[41] Holland J declined to grant an injunction to a plaintiff who had not attempted to use the disputes procedures under the Industrial Relations Act 1973, expressing himself to be "far from satisfied that it is necessary for this court to interfere when there are other means of resolving industrial disputes open". Holland J held that this approach was applied in relation to the

37 In the *Mid-Canterbury Industries* case, supra n 24.
38 Ibid.
39 Unreported, High Court, Auckland, 16 August 1983, A 730/83.
40 Unreported, High Court, Christchurch, 30 November 1984, A 308/84.
41 Unreported, High Court, Christchurch, 20 December 1984, A 341/84. Cf *NZ Meat Producers Board & Southland Frozen Meat Ltd* v *NZ Meat Processors etc IUW,* unreported, High Court, Invercargill, 17 August 1985, A 50/85.

balance of convenience test under the *American Cyanamid* principles, but that:

> . . . if it does not come fairly and squarely within them then it is nevertheless an appropriate principle to apply in the exercise of a discretion in relation to an industrial dispute.

The issue arose directly in the *Bakers Union* case, where the employer applied for an injunction against both workers who were on strike and their union.[42] In that case the award covering the striking workers came into force on 22 May 1985 and was expressed to remain in force until 11 January 1986. Two days before the award came into force, the union wrote to the company claiming three per cent above the agreed award rate and also an additional shoe allowance. When these claims were not met, a strike began on 18 June. The matter went before a disputes committee, where the chairman determined that no legal mechanism appeared to exist by which the dispute could be resolved. The decision of the chairman favoured the company. The strike continued and on 15 July the company commenced an action in the High Court against the union and the striking workers. The case against the union rested on allegations that it had instigated or become a party to the strike and that it had induced the workers to commit breaches of their contracts of employment. The company claimed as against the union and the striking workers alike that the "second tier" claims were unlawful, reasoning that they were contrary to the provisions concerning the duration of awards in section 92 of the Industrial Relations Act 1973 and that on that basis, and for other reasons, the strike was unlawful. Sinclair J granted the company injunctions against both the workers and their union.[43] The union and the workers appealed.

On the appeal, the case for the union and for the workers was presented on a different basis from that argued before Sinclair J. In particular, it was argued before the Court of Appeal that the "second tier" bargaining in which the union had sought to engage the employers had to be seen in the context of section 65 of the Industrial Relations Act 1973, which authorises voluntary settlements if parties to a dispute of interest jointly agree to negotiate a collective agreement. It was maintained that there was a right to make the claims under section 65 and to strike in support of those claims. The Arbitration Court clearly had jurisdiction to determine whether this was a correct construction of the Act and to order compliance with the award if it had been breached, both factors being central considerations in the employers' original application for the injunctions.[44] The defendants argued that, this being so, an interlocutory injunction should not be granted without consideration of alternative remedies. In the light

42 Supra n 5. The following summary of facts paraphrases the outline of facts in the judgment of Cooke J.

43 Unreported, High Court, Auckland, 26 July 1985.

44 The Arbitration Court subsequently determined these questions against the union (*NZ Baking Trades Employees' IUW* v *General Foods Corporation (NZ) Ltd,* unreported, Arbitration Court, Auckland, 12 December 1985, AC 211/85 DR 180/85).

of a pending appeal to the Arbitration Court on this point and bearing in mind the "specialised role" of that court, Cooke J agreed that the defendants' approach was "right in principle". In a statement supported by the remaining judges in the majority[45] Cooke J held that:

> The Arbitration Court is the primary court concerned with the interpretation of the Industrial Relations Act. Our own Court has ultimate jurisdiction in questions of law – a jurisdiction arising on appeals as of right under s.62A or on discretionary cases stated under s.51. But in my opinion both the Court of Appeal and the High Court should be slow to determine questions of industrial law which have not initially been considered in the Arbitration Court. It is in the public interest and of value to the ordinary courts of general jurisdiction that in these courts we should have the benefit of the views and experience of the Arbitration Court before giving rulings on the Industrial Relations Act. In general therefore questions arising under that Act should be left to be dealt with in the Arbitration Court, at least in the first instance, and the ordinary courts should be seen as having a reserve or supportive role in that special statutory field.

The injunction against the workers was discharged, bearing in mind that they were not then on strike and that an early fixture had been arranged in the Arbitration Court to determine whether they had that right. However, the injunction against the union was upheld in terms prohibiting the inducement, incitement or other procurement of breaches of contract. Cooke J conceded "some attraction" in the idea that the High Court should not intervene in any case which is pending in the Arbitration Court, even although a tort action is properly before the High Court. However, his Honour held that nothing in the pattern of the Industrial Relations Act justified such a major change, a change which should be left to the legislature. It was on this point that Richardson J dissented, holding that both injunctions should be discharged. Richardson J was prepared to assume that jurisdiction to grant the employer an interim injunction lay in the High Court although suggesting that it was "perhaps arguable" that, given the statutory scheme of the Act, the Arbitration Court was intended to have exclusive jurisdiction in such matters. According to Richardson J the first requirement for granting an interim injunction, that the applicant demonstrate an arguable case, was obviously satisfied in the case before the Court of Appeal. But in weighing other considerations relevant to the exercise of discretion, and given the imminence of a hearing in the Arbitration Court:

> . . . the dominating consideration is that the underlying industrial relations issues can and should be determined first in the Arbitration Court. That Court has the expertise and, more importantly, it has been entrusted with that responsibility. It is able to hear and determine these matters immediately and at the same time it can consider enforcement action under s.48(2)(d) if it finds for the employer. If it makes an order under that provision that compliance order can be enforced through the sanctions available in the High Court.

Richardson J isolated two interrelated and unsatisfactory aspects to the injunction process. First, it concentrates on the contractual and property rights of the employer, particularly in regard to accrued financial loss,

45 McMullin J, Somers J and Thorp J.

without giving "any obvious weight" to the provisions of industrial relations legislation which are designed to settle such disputes outside the ordinary courts. Secondly, the grant of an interim injunction in industrial matters "necessarily shifts the balance of advantage without resolving the underlying issues".[46] There is clearly some parallel in the reasoning of Richardson J and the suggestions by the Minister of Labour that confirmation from the Arbitration Court that all statutory procedures have been exhausted should be a condition precedent to the granting of an interim injunction.

In summary, in the *Bakers Union* case, Richardson J can be seen to have adopted a more policy-oriented course than that followed by the majority. The different treatment by the majority of the injunctions against the workers and the union respectively is based on a technical point of pleading: the injunction against the workers was discharged by the majority *inter alia* because the allegations against the workers were all within the potential jurisdiction of the Arbitration Court whereas the economic torts alleged against the union would necessarily fall to be dealt with by the High Court. Yet it was arguably open to the employer to allege that, by striking in breach of statute, the workers were committing the newly recognised tort of causing loss by unlawful means.[47] In this event, on the reasoning of the majority, both injunctions would have been upheld.

3 *Miscellaneous factors*

Whilst the adequacy of damages has tended to be accorded pre-eminence in weighing the balance of convenience, Lord Diplock recognised in the *American Cyanamid* decision that there may be many other special factors to be taken into account in the particular circumstances of individual cases. One such factor in industrial cases has been the offer by the defendants of "a reasonable and fair alternative to the retaliatory measures in respect of which they are being sued".[48] Thus, in *Pacific Continental Bakery Ltd* v *New Zealand Baking Trades Employees IUW*[49] an Employers' Association reneged on an agreement with the union reached in conciliation council. When the union imposed strike action, but offered a negotiated compromise, Mahon J refused to grant an injunction. Mahon J's refusal to grant an injunction was also influenced by a further "paramount" reason: the learned judge did not think it right that:

> . . . any member of the Employers' Association should be entitled to the discretionary remedy of an injunction when it is their act in taking part in the breach of a concluded bargain which has led to the litigation.

Clearly, general equitable principles such as that "those who come to equity must come with clean hands" may be applied.[50] Nevertheless, in

46 For academic development of this argument see Davies and Anderman, supra n 4.

47 *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd* [1984] 1 NZLR 354.

48 *Pacific Continental Bakery Ltd* v *NZ Baking Trades Employees IUW,* unreported, Supreme Court, Auckland, 25 November 1977, A 1436/77.

49 Ibid.

50 *Winstone Wallboards Ltd* v *Canterbury etc Stores Packing and Warehouse Workers' IUW,* unreported, High Court, Christchurch, 30 November 1984, A 308/84.

the frequently confused setting of an industrial dispute, an allegation that the plaintiff's conduct is such as not to merit relief will often be met by counter-allegations of breaches by the defendant union.

In some cases the public interest will tip the scales if an otherwise fine balance exists between the parties. Thus, in one case, picketing which had "degenerated into something which [was] more than unseemly" led to an injunction being issued because the public interest was affected.[51] Similarly, in the *Island Ferries* case, the Court of Appeal was influenced in granting the injunction by the union's disruption of a public service.[52]

A little remarked feature of interim injunctions in labour disputes is their obliterating effect on the defence of justification. Whereas in the tort of defamation injunctions are not issued where the defendant indicates an intention to defend the action by raising a plea of justification,[53] no such principle has been developed in the economic torts. In the context of defamation, the refusal to grant interim injunctions is based in part upon the courts' reluctance to predetermine questions which are essentially within the province of the jury at full trial. Yet the courts have emphasised also the dangers for the principle of "freedom of speech" if injunctions were issued on the basis of alleged defamation.[54] It might be argued that a similar clash of fundamental rights – say, between the plaintiff's right to uphold contracts and the defendant's "right to strike" – arises when an injunction is sought to prevent industrial action. It is perhaps indicative of the slow recognition of "collective rights" by the common law courts that protection of the employer's property rights in the economic torts have all but overwhelmed the less tangible rights of defendant unions. Even in *Kawau Island Ferries Ltd* v *Northern Drivers Union*[55] where Mahon J refused the plaintiff an injunction where there was a possibility that the defendant unions were justified in interfering with contracts of supply in order to enforce a Shipping Tribunal Order, the "justification" argument was described as being a "secondary" ground. The primary ground was that the plaintiff was seeking an injunction so as to facilitate the carrying on of an unlawful service. On appeal the Court of Appeal rejected consideration of justification at the interlocutory stage, holding that under the "prima facie case" test the appropriate question was whether it was "at least arguable that [the plaintiff's conduct] did not justify a disruption of his lawful contractual arrangements".[56] Bearing in mind that the Court of Appeal was applying a threshold test which at least allowed for consideration of the merits of the plaintiff's claim, the scope for consideration of justification must be

51 *Johnston's Wholesale Wine and Spirit Co Ltd* v *Northern Industrial District Storepersons and Packers IUW,* unreported, High Court, Auckland, 1 September 1983, A 869/83.

52 [1974] NZLR 617 at 624 per McCarthy P. The same approach is evident in *NZ Railways Corporation* v *National Union of Railwaymen of NZ,* unreported, High Court, Wellington, 1 June 1984, A 165/84.

53 *Bonnard* v *Perryman* [1891] 2 ChD 269; *Herbage* v *Pressdram Ltd* [1984] 1 WLR 1160.

54 Ibid.

55 Unreported, Supreme Court, Auckland, 8 April 1974, A 375/74.

56 [1974] 2 NZLR 617 at 623. McCarthy P did concede that "it may be that when a court has to decide the issue of a permanent, as contrasted with a temporary injunction, it is permissible to take into account a moral duty resting on an industrial union to protect the interests of its members".

correspondingly narrowed under the *American Cyanamid* approach. In the *Bakers Union* case, where counsel for the defendants did not rely on justification in opposing the injunctions, those judges of the Full Court who considered the defence[57] all held that the requirement of an arguable case was nonetheless satisfied.

III The Status Quo

In assessing the "status quo" to be preserved by the injunction the courts have usually taken as their starting point the situation at the date when the proceedings were issued.[58] Since, on an analysis of the cases, most union action is taken as a response to prior moves by the employer, the "status quo" preserved will thus be that which provoked the industrial action in the first place. Thus, in *New Zealand Railways Corporation* v *National Union of Railwaymen of New Zealand*[59] the dispute between the employers and the union centred on a controversial working roster imposed by the employer. Davison C J, after describing the "status quo" as a "slippery concept", held that:

> . . . [T]he status quo in this particular situation is to go to the last settled or peaceful position between the parties which could be said to be the application of the current master roster.

Whilst the courts' approach to the "status quo" reflects the basic principle of injunctive relief, in industrial relations terms it is open to the criticism that settlement of the dispute may thereby be hindered: "the situation does not wait in equilibrium awaiting judgment on full knowledge".[60]

But the precise identification of the status quo "will vary from case to case".[61] In many cases it will be appropriate to restore the parties to their respective positions before the dispute which caused the alleged wrongful act arose. Thus, in *Winstone Wallboards Ltd* v *Canterbury Stores IUW*[62] six workers, who wished to be represented by the defendant union rather than by the carpenters union, imposed a "load-in" and "load-out" ban. The plaintiff company dismissed the workers whereupon the Storeworkers' Union placed a picket on the company's premises. In granting the plaintiff an injunction to prevent picketing which would interfere with the plaintiff's contracts, Holland J imposed the condition that the plaintiff should re-engage the six workers who had been dismissed.

IV Conclusion

The factors giving rise to the sudden upsurge in applications for injunctions against strikes over the past three years have yet to be analysed.

57 Richardson J, Somers J and Cooke J.

58 *Northern Drivers Union* v *Kawau Island Ferries Ltd* [1974] 2 NZLR 617 at 624 per McCarthy P; *Hoeymans* v *Dawson,* unreported, High Court, Whangarei, 13 April 1984, A 22/84.

59 Unreported, High Court, Wellington, 1 June 1984, A 165/84.

60 Frankfurter and Green, *The Labor Injunction,* 201, quoted Anderson, supra n 4.

61 *Winstone Wallboards Ltd* v *Canterbury etc Stores Packing and Warehouse Workers' IUW,* unreported, High Court, Christchurch, 30 November 1984, A 308/84.

62 Ibid.

At a superficial level, the general response of the courts, measured in the results of the applications, might be seen simply to justify the criticisms levelled at English courts in this context: that individual property rights are commonly accorded greater significance than the collective interests of organised labour and that the courts are unsympathetic to, if not unable to comprehend, the underlying issues presented by strike action from the union's point of view. Undoubtedly the approach adopted in some of the decisions canvassed in this note bears out such criticisms, and the "politics of the judiciary" should not be overlooked. But to accept such an analysis as a complete explanation would be to ignore those cases, admittedly a minority, where applications for injunctions have failed. More importantly it would be to ignore the expressions of growing judicial impatience at the avoidance of legislative procedures which such applications entail, particularly given their practical – if not technical – finality. Such comments provide useful ammunition for those who argue in favour of legislative change, either in the form of a "trades disputes" clause or a more limited prohibition on the issue of injunctions until statutory disputes procedures have been exhausted.