Finnigan v NZRFU
Judicial handling of political controversy

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Judges are traditionally seen as impartial arbiters of the law. However, they are often called upon to give decisions in highly charged political matters. Simon Watt examines the role of the Courts in stopping the 1985 All Black Rugby Tour of South Africa. In analysing the decision of the Court of Appeal allowing the plaintiffs standing to challenge the decision to tour, he is concerned that the Court blurred the distinctions between public and private bodies. In analysing Casey J's decision to grant an injunction preventing the tour he is concerned that his Honour was influenced by his own impression of the effect such a tour would have on New Zealand society. His major concern however is that the failure of conventional politicians to make a hard decision meant that the courts were put in a position where they inevitably would lose a little of their aura of impartiality.

I INTRODUCTION

On occasion litigants will call upon judges to decide cases of a highly political nature. In entertaining such actions judges may have the opportunity to indulge their perceptions of what amounts to the "public interest". However they may have difficulty reconciling these perceptions with the concept of judicial impartiality. A polarised public might have even more difficulty. This type of case will raise questions as to how appropriate it is for litigants to use the court room as a forum to resolve essentially political disputes; questions as to the manner in which the parties conduct the litigation; and as to the role of the judge in determining politically volatile disputes. *Finnigan* v *The New Zealand Rugby Football Union*[1] ("NZRFU") is a case which draws these questions sharply into focus.

II LEGAL BACKGROUND

The New Zealand Law Reports contain a trilogy of legal challenges to John Minto's[2] nemesis, a Springbok/All Black test series. The first occurred in 1971 when in *Parsons* v *Burk*[3] a private citizen invoked the ancient writ "ne exeat regno" to prevent a team of All Blacks leaving for South Africa. Hardie Boys J found that the writ did not issue on the application of a private citizen.[4] It was originally a state writ usually issued in time

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1 [1985] 2 NZLR 159 (No 1); 181 (No 2); 190 (No 3).

2 In 1985 Mr John Minto was leader of the anti-apartheid group "HART" ("Halt All Racist Tours").

3 [1971] NZLR 244.

4 The interests of brevity do not permit fuller discussion.

of war to prevent people leaving the kingdom to engage in conduct prejudicial to the public welfare. It had long fallen into disuse. In fact it was debatable even in 1788 for what purposes, if any, it still existed.[5] It is interesting to note that in discussing how the writ was designed to protect major political objects of the realm, Hardie Boys J observes:[6]

> How far away from this conception of the great purposes of the Sate have we come as we consider the position of a Rugby Football Team.

Without wishing to read too much into it, one might contrast this judicial pronouncement of 1971 with the view of several judges that, in the context of the proposed tour of South Africa in 1985, rugby had become much more intimately bound up with the national interest.

In *Ashby* v *Minister of Immigration*,[7] judicial review was sought in 1981 of the Minister's decision to grant entry permits to the Springbok rugby team. The Court of Appeal rejected the application. It found as a matter of clear statutory interpretation that the Minister was not required to take account of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 in the exercise of a very general discretion under section 14 of the Immigration Act 1964. Cooke J described that Convention as having doubtful bearing on the subject.[8]

Although the decision challenged in *Ashby* was materially different from the one opposed in *Finnigan* - in particular it involved the exercise of a broad statutory discretion by a member of the Executive - it is worth recording two clear indications of judicial hesitancy at treading on this politically treacherous terrain:

- Immigration is a subject linked with foreign policy. In that sense it falls within a sphere where the Courts are very slow to intervene (per Cooke J[9]).

- Immigration policy is a sensitive and often controversial policy issue ...
  ... I am not persuaded that the content of the national interest ... is a matter for determination by this Court in this case (per Richardson J[10]).

In 1985, however, it was different. In *Finnigan* the key substantive issue again involved judicial review of an administrative action. The plaintiffs' essential claim was that the NZRFU's decision to allow an All Black team to tour South Africa did not comply with the primary object articulated by Rule 2(a) of the NZRFU's rules, namely

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5 Above n 3, 246.
6 Above n 3, 246.
7 [1981] 1 NZLR 222. See Elkind and Shaw "The Municipal Enforcement of the Prohibition against Racial Discrimination: A Case Study on New Zealand and the 1981 Springbok Tour" (1984) 55 British YBIL 189.
8 Above n 7, 226.
9 Above n 7, 226.
10 Above n 7, 231.

"To control, *promote, foster* and *develop* the game of amateur Rugby Union Football throughout New Zealand".[11]

It is common knowledge that the official tour was cancelled. But that was not because the essential substantive issue was determined in favour of the plaintiffs, Messrs Finnigan and Recordon. In fact that question was never fully considered. Before we turn to *Finnigan* there are particular issues relevant to the case which we should firstly explore.

III ISSUES

A Political Decisions in our Court Rooms?

One foreign commentator has described *Finnigan* as "a striking example of courts intervening as a better arbitrator of the public interest rather than allowing autonomy to the private sporting body".[12] This raises the question posed at the outset: is the court room an appropriate forum to decide essentially political disputes which involve a determination of the public interest?

In the view of Lord McLuskey, judges have "no responsibility to determine the greatest good for the greatest number".[13] His Lordship believes that in a representative democracy, judges should resist the urge to step beyond their training. To take a more active role is not their mandate. Of course, there will be times when the judiciary are asked to determine legal actions which may in fact be side-shows for wider social or political disputes. Lord McLuskey's view is that in making decisions which will have these broader ramifications, the judges' role is simply to apply the relevant legal principles as "bricklayers", not as "architects".[14]

Indeed, if the judiciary are too ready to tackle political problems then Sir Ninian Stephen is entitled to suggest, as he has, that Parliament will find it very convenient to leave certain policy matters to the judiciary in order to avoid the electoral backlash of making unpopular decisions itself.[15] Certainly the courts should not abdicate their responsibility to determine a case which is brought on a proper legal basis. But at the same time the court room must remain a judicial and not a political forum.

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11 Emphasis added.

12 K Foster "Sporting Autonomy and the Law" from L Allison (ed) *The Politics of Sport* (Manchester University Press, Manchester, 1986) 63.

13 "Law, Justice & Democracy", extract from the BBC Reith Lecture Series, 1987.

14 Above n 13.

15 Shetreet and Deschenes (eds) *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff Publishers, Dordrecht, 1985) 54.

B Litigating the Public Interest

Given their choice of venue the litigants may risk bringing the court process into disrepute by the manner in which they use it to pursue political ends. Richardson J adverts to one of the dangers when he says that judges must exercise:[16]

> particular care in reaching conclusions as to social policy and the public interest on the information and arguments furnished by the parties to the litigation where there are social and economic value judgements involved.
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> Litigation under the adversarial process is not an ideal vehicle for conducting an extensive social enquiry ... the problem ... lies not so much in an inherent inability on the part of the Courts to assess social data as in the difficulty of ensuring that the relevant material is before the Court.

The fuller the evidence before the court, the less will be the input to the final decision of the adjudicator's own value judgements.

A second danger is that substantive justice may take a back set to the litigants' tactical exploitation of court processes to secure their desired ends. The obtaining of an injunction is a good example of where the potential for abuse arises. Given the time constraints operating, the decision whether to grant an injunction must be made on cursory evidence of the substantive issue between the parties. Yet despite this paucity of evidence an interim injunction has a very significant impact on the case. Lord Denning MR has observed that:[17]

> Nearly always, however, these cases do not go to trial. The parties accept the prima facie view or settle the case. At any rate in 99 cases out of 100 it goes no further.

Consequently, although it may work either way. A plaintiff might for instance have an interest in employing subtle tactics of delay until it is "forced" to seek an injunction to prevent the defendant taking threatened actions. It is not suggested that this was what happened in *Finnigan*. To speculate on what occurred behind the scenes would not be fair. Indeed so far as judicial comments in the case go, they are reluctant to attribute fault to one or other party for the near impossible pressure under which Casey J was placed. Nonetheless one might approach with scepticism the use of interim injunctions in any context, given that they require the courts to make decisions without a full consideration of all the relevant evidence. There is a high risk of misinformed preemptive "justice". This risk is accentuated in a case where a judge's views on the public interest have a substantial input. But in any case a liberal approach to the granting of injunctions suggests a lack of faith in the capacity of our court system to redress wrongs; whether that capacity should act as a deterrent to potential defendants, or as a compensatory recourse for injured plaintiffs.

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16 "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46, 49.

17 *Fellowes & Son* v *Fisher* [1976] QB 122.

C The Role of the Judge

In a lecture entitled "The Courts and Public Controversy"[18] Cooke J considered what approach judges should take to cases akin to *Finnigan*. He spoke specifically of *Ashby* v *Minister of Immigration*, noting "the need for both realism and restraint in the approach of the Courts to litigation touching major public controversy".[19] He described the judicial quality of "calm and objective factual judgment on evidence"[20] and suggested that judges should try to be "neither too far ahead nor too far behind general community opinion"[21] when making decisions directly concerned with matters of public controversy. Cooke J concluded that:[22]

> In the end judicial creativeness, social engineering and so forth, is of secondary moment. What remains, and will always remain, the most important judicial quality of all is an understanding impartiality.

How should one approach a case such as *Finnigan* in light of these sentiments? Richardson J's discussion on "The Role of Judges as Policy Makers"[23] suggests three ways in which one might assess whether a judge has succeeded in being impartial when making a decision which, one way or the other, will be controversial:

(a) Where a judge articulates one set of values in reaching a decision and rejects another, failure to articulate the alternatives may reflect a disguised preference for the set of values adopted.

(b) To protect all concerned, a judge must especially in this context give adequate reasons for the decision.

(c) A judge who articulates public policy should rely on low-key rational argument drawing where possible on commonly held values and on overriding social goals with which readers of the judgment can identify.

It is worth bearing these tests in mind when we come to consider the question of judicial impartiality in *Finnigan*.

IV POLITICAL VOLLEY

Why then did the issue eventually come to court? The parliamentary debate on 28 March 1985 offers a political insight.[24] The debate concerned what signal Parliament should send to the Rugby Union, before the latter decided whether to accept the South

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18 Reprinted in (1983) 5 Otago LR 357.
19 Idem 365.
20 Idem.
21 Idem.
22 Ibid 366.
23 Above n 16, 52.
24 New Zealand Parliamentary Debates, Vol 462, 28 March 1985: 4036-4059.

African Rugby Board's invitation to tour. On that day the House of Representatives passed a motion unanimously urging the NZRFU to reject the invitation. As proposed by the then Prime Minister, the Rt Hon D Lange, MP, the motion read as follows:[25]

> That the House, noting that an All Black tour of South Africa would seriously harm New Zealand interests at home and abroad, noting statements by senior rugby administrators that a tour would hurt the game itself, and reaffirming New Zealand's commitment to the principles of the Commonwealth Statement on Apartheid in Sport - The Gleneagles Agreement - strongly urges the New Zealand Football Union to reject the invitation for the All Blacks to tour South Africa in 1985.

The National Party Opposition suggested an amendment to the motion, by adding:[26]

> [and] further recognises that the decision whether to tour or not is one for the NZRFU alone, and accepts that the Government must always preserve the right of all New Zealanders to act without intimidation, provided their actions are within the law.

This amendment was accepted by the Labour Government as reflecting its own position, and became part of the final resolution. In proposing the amendment the Hon J Bolger, MP stated that the National Party wanted:[27]

> a statement that reflects also the commitment of New Zealanders towards civil liberties. The right of New Zealanders to make decisions and take actions that are within the law is an important principle.

These sentiments were echoed by the various participants in the debate. From statements made on behalf of all three parties in the House, the NZRFU's ultimate right to decide itself whether to accept the invitation was something akin to a fundamental freedom. This is despite the fact that all speakers trenchantly condemned apartheid and immodestly tendered advice to the Union as to how it should exercise its decision-making power.

Articulating the law so far as it is related to the issue at hand the then Deputy Prime Minister, the Hon G Palmer, MP concluded that the Government had no legal capacity to prevent All Blacks travelling overseas.[28] The question was whether they could be denied passports. Mr Palmer cited section 3 of the Passports Act 1980, which provides:[29]

> Except as provided in this Act, every New Zealand citizen is entitled as of right to a New Zealand passport.

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25 Above n 24, 4036.
26 Above n 24, 4039.
27 Idem 26.
28 Above n 24, 4041.
29 Idem 28.

This reflects the common law right described in *Parsons* v *Burk*,[30] according to which every person is at liberty to leave the country.

Certain categories of persons would be denied this right pursuant to the Passports Act; for instance those currently under arrest. None of the exceptions, however, would cover the touring All Blacks. Thus, in the words of the Hon P Tapsell, MP "the Government has no intention of withholding passports - even if it had the power to do so, which it has not".[31] Consequently the Government painted itself as powerless to prevent a tour should the Union decide to accept the invitation. Of course it was always open to the Government to use a "legislative measure", as J Banks, MP phrased it, to withhold passports and prevent a tour; although that was hardly a move he would have favoured.[32]

Compliance with the Gleneagles Agreement appears not to require a government to legislate, if that is what it would take, to prevent a sporting team travelling to South Africa. Under that Agreement the New Zealand Government's obligation is to take "every practical step" to discourage its nationals from competing at sport against South Africa. That phrase was strongly relied on as indicating that the Government need not make the decision for the Rugby Union. The spirit of the Gleneagles Agreement, as New Zealand has approached it, is perhaps best expressed by one of its architects, and Prime Minister at that time, the Rt Hon Sir Robert Muldoon, MP:[33]

> What most Commonwealth Leaders wanted at Gleneagles was an agreement to ban sporting contacts. What they found difficult - indeed, impossible - to understand was that any Government could not say to its sportsmen: "You must not go to South Africa. You must not have South Africans here". The Deputy Prime Minister read the New Zealand Law on passports. That law had no influence on my brothers from the other Commonwealth countries. They said: "But, Rob, you are the Government" and I said: "I am not the Government. I am a member of a Westminster-style Government".

Sir Robert made it clear that no agreement would have been reached at Gleneagles had the Government's obligation been to "ban" sports team from competing with South Africa, rather than simply to "persuade" them not to.

To round off the political commentary it is worth briefly exploring the perceptions of S Upton, MP of this issue. He felt that if the Government were to make the decision of the Union, that would leave the question unresolved. He appealed to an earlier example:[34]

> ... by stopping the tour back in the Kirk years the Government of the day left the issue unresolved in a most unfortunate way. Those who wanted that tour felt cheated; those who were against it claimed a victory; and the issue rankled with many. Governments

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30 Above n 3, 245.
31 Above n 24, 4048.
32 Above n 24, 4049.
33 Above n 24, 4041.
34 Above n 24, 4055.

> should not decide for people on a conscience matter. People have to make the decision for themselves. We do not want to see again those winners and losers. I want the Rugby Union to make that decision.

The decision was of course left to the Union, but ultimately a judge was compelled to decide what was in some measure a "conscience matter". The end result meant again that some claimed victory while others felt cheated. It is perhaps difficult to see how this can be avoided where the issue involved permits of little middle-ground.

Mr Upton would be content however that at least legal principles were invoked to prevent the All Blacks touring. In his view, "It is the right to decide for oneself *within the law* and then be confirmed in that lawful decision by the State the distinguishes us from South Africa ..."[35] Mr Upton continued: "Once Governments start to impose State-inspired morality on behalf of some - not all - citizens, we are starting down a slippery slope and I do not know where we stop".[36]

One is forced to consider in the present context what happens when the courts start to impose judge-inspired morality. It may be more appropriate for Parliament to attract the criticism rather than the judiciary. Although the argument for allowing the Rugby Union to make its own decision was strongly put, one is entitled to recall Sir Ninian Stephen's comment, and suggest that it was certainly very convenient for Parliament to volley this awkward and divisive issue back across the net, before it even really touched the ground in the House.

In any event, on 17 April 1985 the Rugby Union accepted the South African Board's invitation to tour. Since the Government stopped short of actually preventing the tour proceeding, opponents turned to the courts as the one effective avenue of recourse.

V FINNIGAN V NZRFU: JUDGMENT OF DAVISON CJ IN THE HIGH COURT

The stage has been set to launch into a discussion of *Finnigan* v *NZRFU* tracing the stages in which the case progressed through our domestic courts, so far as it is relevant to our present purposes.

Hearing the parties on the preliminary question of whether Finnigan and Recordon had standing to bring an action for judicial review against the Rugby Union, Davison CJ rejected their claims. He found that their individual membership of local rugby clubs did not give them membership of the New Zealand Union sufficient to allow them a cause of action against the NZRFU. They needed to have contracts directly with the

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35 Above n 24, 4056 (emphasis added).

36 Above n 35.

Union. His Honour's reasoning has been described by one commentator, Michael Bowman, as:[37]

> [a] completely sound application of the law relating to sporting and other voluntary organizations ... Such law provides that standing to challenge the decision of the private organization's governing body, is founded upon either a proprietary or contractual right.

In reaching his decision, the Chief Justice cited a passage from Casey J's judgment in *Turner* v *Pickering* as representing the state of the law on this topic:[38]

> It seems to be now established that the plaintiff can have enforceable rights of a contractual nature brought about by his membership of a voluntary association ... It is no longer necessary for him to be protecting a private right of a proprietary character before he can ask the court to intervene; but *public policy* still suggests some limitation to exclude interference with associations of a wholly social nature, or where it is clear that no legal relationships of any sort were intended between members.

It is implicit in the Chief Justice's decision that public policy did not suggest to him that the plaintiffs' should have a right to question the New Zealand Union's decision. Here the judge exercised an element of discretion which left the sacred cow still to be slaughtered.

VI JUDGMENT OF COOKE J IN THE COURT OF APPEAL

The Court of Appeal overturned the Chief Justice's decision on standing after considering a wider range of authorities in support of an alternative approach than were cited in the court below. Essentially the Court of Appeal's approach blurred the more traditional administrative law distinction between private and public bodies with respect to matters of standing. The Chief Justice had applied the more stringent private law test for standing, given that the Rugby Union was an incorporated association. That approach would not take into account the public interest. In contrast Cooke J had this to say:[39]

> While technically a private and voluntary sporting organisation, the Rugby Union is in relation to this decision in a position of major national importance ... in this particular case, therefore, we are not willing to apply to the question of standing the narrowest criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far ... we are not holding that, nor even discussing whether the decision is the exercise of a statutory power - although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.

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37 M R Bowman "Standing to Challenge the Tour" (1985) AULR 387.

38 [1976] 1 NZLR 129, 141 cited by Davison CJ at 170 in *Finnigan* (No 1), above n 1, (emphasis added).

39 *Finnigan* (No 1) above n 1, 179.

Bowman described this approach as "radical and entirely unorthodox".[40]

In pursuing this line Cooke J relied partly on the case of *R* v *Inland Revenue Commissioner, ex parte National Federation of Self-Employed and Small Businesses Ltd*,[41] as authority for the proposition that:[42]

> it is well settled that in some cases the sufficiency of an applicant's interest has to be judged in relation to the subject-matter of his application.

However, Bowman points out that the *Small Businesses* case clearly involved a public body decision. It was then a secondary question as to what account should be taken of the "gravity" of the case, and of the whole legal and factual context, in determining whether a particular plaintiff had standing. Bowman contrasts this with Cooke J's reasoning: His Honour uses gravity and context factors in relation to the primary question of whether the decision was made by a private or a public body. Bowman sees this as a radical leap of faith.[43] At least Cooke J acknowledged that the authorities on which he was relying, "are helpful rather as suggesting or confirming a general approach than as precedents exactly in point".[44]

In any event, Cooke J listed in full the range of factors which led to this decision. For instance he noted that:

- The plaintiffs as local club members were linked to the parent union by a chain of intermediate contracts.
- The plaintiffs were the type of players, at grass roots level, for whom the organisation basically exists; they were not mere followers of the game or other members of the public.
- Unless persons such as the plaintiffs were accorded standing then there may be no effective way of establishing whether or not the Union was acting within its lawful powers.

A number of more controversial factors were, however, also taken into account; in particular the effect of the Union's decision on the New Zealand community as a whole, which was divided over the merits of a tour. Moreover it was observed that just as the courts had applied the law impartially to prosecute normally law-abiding citizens who protested in 1981, so it was now,[45] "no less appropriate that the lawfulness of the Union's decision under its own Constitution to arrange the proposed tour should be open to test in the Courts". By this latter comment Cooke J makes a notable statement about his views as to the role of the courts in the South African issue: he seems

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40 Above n 37.
41 [1982] AC 617.
42 Above n 1, 179.
43 Above n 37, 390.
44 Above n 1, 178.
45 Above n 1, 179.

concerned that the judiciary should be perceived as balanced and impartial in its treatment of the controversy.

VII JUDGMENT OF CASEY J IN THE HIGH COURT

A Procedure

The substantive action - as to whether the Rugby Union's decision to tour complied with its object of promoting fostering and developing the game - commenced in the High Court on 8 July 1985, a little over a fortnight after the Court of Appeal judgment on standing. The All Blacks were due to assemble on 14 July, and to depart for South Africa three days later. The plaintiffs applied for an interim injunction on 10 July, it being certain by then that the action could not otherwise be determined before the All Blacks were due to leave. The injunction hearing lasted until Saturday 13 July, on which day the injunction was granted.

As a logistical matter, the manner in which the High Court trial proceeded meant that the plaintiffs were able to present part of their case during the two and a half days before the injunction was applied for, an opportunity not shared by the defendants. Indeed during the actual injunction hearing, the defendants strongly criticised counsel for the plaintiffs, Mr EW Thomas QC, for taking a full one and a half days on his opening address, in light of the time constraints already operating. Counsel for the defendants, Mr DJ White, argued that Mr Thomas knew full well that his case would not be completed before the All Blacks were due to assemble, and that the trial would certainly not be completed before the departure date.[46] During the balance of the two and a half days, Finnigan and Recordon were called as witnesses, as well as a Mr Stofile, a black cleric imported to testify on the strength of his long association with rugby in South Africa. Counsel for the defendants were able to cross-examine these witnesses, but the defendants had no opportunity to call oral evidence in support of their case.

The injunction hearing itself was considered purely on affidavit evidence submitted by both parties. The Rugby Union tendered considerably more affidavits than the plaintiffs. Pondering his predicament, Casey J fairly characterised the material on the basis of which he was called upon to gauge the strength of the plaintiffs' case as "sketchy and untested evidence"; although this was quite usual in such interim injunction applications.[47]

On balance as a whole, it is not difficult to see that the plaintiffs had an advantage. They had a greater opportunity than does the ordinary plaintiff to establish that there was a serious question to be tried: they had the benefit of oral testimony from the two plaintiffs and Mr Stofile, and of affidavit evidence; the Union's evidence came simply from affidavits. In these circumstances it is suggested that, pedantic as it might at first

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46 *The Evening Post*, Wellington, New Zealand, 12 July 1985, 183 report on submissions of Mr White, counsel for the respondents, before Casey J.

47 *Finnigan* (No 2) above n 1, 183.

seem, a separate judge should have heard the injunction application, in the interests of achieving a fair evidential balance between the parties.

As a further practical matter, Casey J remarked on the time frame within which the case ran. Only four days before the substantive hearing was to begin, counsel for the plaintiffs had indicated that they anticipated the case would take three days. If so, the plaintiffs must have assembled the evidence to be gleaned from their more than thirty witnesses[48] at a late stage. His Honour was later to regard this as a "gross underestimate" once it emerged that the trial was likely to take at least two weeks.[49]

At the injunction hearing Mr White made much of the delays which he attributed to the plaintiffs. In doing so he argued that the Rugby Union had been prejudiced, so that the equitable injunction remedy should not be granted. Mr White pointed to what he considered was a string of delays by the plaintiffs:[50]

- on 17 April, the Rugby Union's decision was made and widely publicised;
- on 1 May, lawyers met in Auckland to consider the decision;
- on 14 May, lawyers Mr Thomas and Mr Hansen decided proceedings should be issued against the Union and approached Finnigan and Recordon to be plaintiffs;
- on 20 May the plaintiffs issued proceedings;
- on 23 May the Union was served with the proceedings.

Mr White argued that without this five week "delay" between the decision and the issue of proceedings, the time difficulties would not have arisen. In addition he argued that Mr Thomas' drawn-out opening and the leaving of the injunction application until the last minute, put the Union under intolerable pressure. Indeed Mr White went so far as to suggest that the defendants' impression was that the plaintiffs were "playing games".[51] This meant that the Union had little time to prepare for the crucial injunction hearing.

The critical aspect in having the injunction application determined as late as possible was that if the applicants were successful, they increased the chances of the tour not only failing to proceed in its original form, but failing to proceed at all. Mr Thomas argued for the plaintiffs that were an injunction granted, that would entail a further delay of only two weeks before the substantive action was decided; at which point the defendants could simply continue with a slightly foreshortened tour if the Court found

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48 *Finnigan* (No 3) above n 1, 194.
49 *Finnigan* (No 2) above n 1, 182.
50 Report on submissions of Mr White, before Casey J, *The Evening Post*, Wellington, New Zealand, 12 July 1985, 26.
51 Above n 46.

in their favour.[52] However the Union was at pains to point out that this would not be the case. The Union contended that if an injunction were granted this would decide the matter finally, and there would be no tour to South Africa in 1985.

Mr White argued that the earliest judgment could be expected would be 2 August. The Union could not make alternative arrangements until then. That would be very short notice at which to arrange the travel and accommodation required. Furthermore, the police would need fourteen days' notice of the team's departure date to take appropriate security measures. There were also rugby-related reasons why such delays would prohibit a tour. These essentially involved the hindrance to players' preparation and the disrupted itinerary and build-up, which together would make the winning of test matches even more difficult.

Although these matters were the defendants' practical arguments for objecting to the grant of an injunction, the Rugby Union would not assert on affidavit that an injunction would decide the case finally; in which case pursuit of the substantive action would be somewhat academic. Casey J was right to point out that it therefore appeared that the Rugby Union was keeping its options open, so that the arguments suggesting the tour would have to be cancelled were not conclusive.[53] On the other hand one can understand the Union's reluctance to commit itself to a hypothetical decision, which could in effect deny it the opportunity to have the main action heard.

More generally, Casey J was unimpressed by the "delay" arguments. His response was essentially as follows:[54]

> It is clear that neither side in the early stages appreciated the complexities of the case nor the time likely to be involved. Having regard to the novelty of the action and the circumstances under which the plaintiffs came to sue, I cannot regard the delay of four and a half weeks in issuing the writ as unreasonable. Indeed, by any standards it was expeditious ... the plain fact is that through no fault on either side relevant to this application, the parties have simply run out of time. One or other must suffer.

Without doubt his Honour was in a better position to assess the question than this writer. But one cannot deny the significance of logistical and procedural factors in determining the outcome of this case. This highlights the issues canvassed at the outset, under the heading "Litigating the Public Interest". Given the controversial subject-matter, the imbalance of evidence able to be put forward by each party suggests (to repeat an earlier quotation) that in this context one needs to exercise:[55]

> ... particular care in reaching conclusions as to ... the public interest on the information and arguments furnished by the parties to the litigation where there are social and economic value judgments involved.

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52 Above n 50, 5.
53 Above n 1, 187-8.
54 Above n 1, 187.
55 Above n 12, 63.

Does substantive justice take a back seat to the litigants' tactical exploitation of court processes to secure their desired ends? One cannot of course detect the inner machinations of the parties' minds. But it would be idle to deny that a case like *Finnigan* held the potential for this sort of exploitation. While it is naive to suggest that litigators will not or should never exploit procedural law to their clients' advantage, there is cause for particular concern in a case such as the present, for two reasons. Firstly, where the case concerns an injunction, the likelihood that the decision will determine the whole issue is high. There is a risk of preemptive justice, based as much on process as on substance. Secondly, where the case concerns a highly charged political issue involving some value judgment, the judge must be all the more alert to any cynical exploitation of procedure, which would only bring the judge and the court process into disrepute.

Again, in light of judicial pronouncements in *Finnigan* which were reluctant to attribute fault for delays or logistical shortfalls to either party, it is unfair to speculate. But this does not alter the fact that procedural and - without being pejorative - "tactical" factors had a critical bearing on the final result.

B Substance

When he considered the legal principles applicable to the grant of interlocutory injunctions, Casey J applied the reasoning of Lord Diplock in *American Cyanamid Co v Ethicon Ltd.*[56] A key passage from his Lordship's judgment which sets out his approach, is as follows:[57]

> The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a "probability", a "prima facie case" or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words, that the evidence before the Court discloses that there is a serious question to be tried.

Dealing with the threshold question, Casey J in fact persisted with the older terminology and found there to be a "strong prima facie case" that the decision to tour would not "promote, foster and develop the game of rugby in New Zealand".[58] The interest of the community seems to have played a large part in his Honour's view of this point. Casey J spoke of the 1981 Springbok tour being a "disaster" for both rugby and the community. From the evidence before him, the judge perceived a similar split in the community over the 1985 tour. The opposition of major churches, of Parliament

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56 [1975] AC 396.
57 Above n 56, 37.
58 Above n 1, 185.

and of the Auckland and North Harbour Rugby Unions was noted. The judge then suggested that:[59]

> ... the case [is not] answered by counting the heads of those who support the tour and suggesting they may be in a majority.
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> The inescapable fact is that a very substantial number - perhaps even approaching half - of all New Zealanders are opposed or upset about this tour on *grounds which appear to include the good of rugby*, New Zealand's international standing or trade, the interests of other sports likely to be affected, or moral reasons connected with the hatred of Apartheid. *Most of the reasons may have no direct connection with benefiting local rugby.* But taken together they must result in a groundswell of public opinion exasperated or angry with the Union's stance, and very concerned about re-opening the scars of 1981.

As the italicised phrases indicate, these statements seem to venture well beyond the question of what is in the interests of rugby. True, if the Union's decision to tour South Africa attracted the odium of large sectors of the population, this suggests that the decision may not promote the game. But the judge had great difficulty dissociating the good of rugby from his perception of the good of New Zealand. This recalls two of the issues discussed at the outset.

Firstly, is the judge really qualified to assess the nation-wide effect and opinion of the Union's decision? Determining that issue provides wide scope for value judgment. To repeat Lord McLuskey's view recorded above, judges have "no responsibility to determine the greatest good for the greatest number". If this is so, why is the judge here going further, and in effect acknowledging that his view of the greatest good may not even derive from the opinion of the greatest number? It could be interpreted as anti-democratic to adopt the view of only "approaching half" of New Zealanders. Therefore, what his Honour really appears to be saying is that it is detrimental to all New Zealanders to suffer the sort of division which a Springbok tour engenders. At least that line accords more closely with democratic principle and perhaps even prompts one to admire the judge's insight. But again, one must wonder why this sort of essentially political decision has been made in a court room.

The second issue harks back to what has been said earlier about judicial impartiality. It concerns the manner in which the judge has couched his view. We read that:

- "The 1981 Springbok tour of this country was a disaster both for rugby football and for the community ..."[60]

- "The Courts encountered ... otherwise perfectly respectable people at odds with the law for the first time".[61]

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59 Above n 1, 184-185 (emphasis added).
60 Above n 1, 184.
61 Above n 60.

- "... those opposed cannot be brushed aside as irresponsible troublemakers or publicity seekers, as some of the evidence and opinions from the Union suggests".[62]

- "... a hatred of Apartheid".[63]

- "... re-opening the scars of 1981".[64]

This is emotive language. It reflects what Cooke J later described as the judge's "strong statements".[65] It raises the question of whether Casey J has appeared to be impartial. It is interesting to note that the strongest statements in the case occur largely in the context of the judge's discussion of the public interest. In that domain Casey J was able to let his opinions roam more freely, without the constraints imposed when one is required simply to apply legal principles. In contrast, the judge's discussion of the balance of convenience question for instance is more even-handed.

In terms of the Richardson "tests" discussed above, one might question whether Casey J's lack of balance in his public interest discussion suggests a "disguised" preference for one set of values over the other. He has not articulated with equal or indeed any strength the values or the opinions of those who supported the tour. Certainly the values which the judge appears to favour are commonly held ones with which readers can at least identify. But has he expressed these values with "low-key rational argument"? It is the writer's submission that the tenor of a substantial part of the judgment does not accord with what Cooke J would describe as "calm and objective factual judgment on evidence".

On its application of the substantive law, the judgment is not devoid of further controversy. Casey J considered there were two possible tests for deciding whether the NZRFU Council had acted properly in reaching its decision; this as part of the broader issue of whether there was a serious question to be tried.

The first test was unremarkable. It required the Council members to have acted honestly and in good faith in furthering the Union's objects when they made their decision. This is the ordinary test applicable to decisions of voluntary and incorporated societies. Applying this test, Casey J found there was an arguable case essentially that the Council members were so concerned to maintain their freedom to choose, and not to play into the Government's hands, that they were "deliberately shutting their eyes to the reality of the widespread and responsible public concern over the tour".[66] This

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62 Above n 60.
63 Above n 1, 185.
64 Above n 63.
65 *Finnigan* (No 3) above n 1, 195.
66 Above n 1, 185.

apparently may have precluded "any genuine consideration of its effect on the welfare of rugby".[67] It was somewhat contradictory for Casey J then to remark:[68]

> I reach this conclusion acknowledging that questions of the good of rugby were certainly raised at meetings, and both the Council and Mr Blazey received a great volume of submissions and met delegations.

For his second and alternative test, Casey J drew expressly on Cooke J's blurring of the public/private law distinction in the decision on standing, radical as that was. Casey J decided that the Rugby Union must in fact exercise the degree of care applicable to statutory bodies in making their decisions. In other words the Council must have acted reasonably as well as honestly. His Honour found an "arguable case" that on this stricter test also, it had not. He applied this test despite his recognition that Cooke J urged that the public law analogy for purposes of standing was not to be pressed too far. Cooke J had stated "[w]e are not holding that, nor even discussing whether, the decision is the exercise of a statutory power ...".[69] The rationale for this novel approach to administrative decision-making was once more "the unique importance of this decision in the public domain and the effect it could have on New Zealand's relationships with the outside world and on our community at large".[70]

From this it follows that the precise nature of an administrative body may vary depending on the nature and the context of the decision it makes. In any event, David Baragwanath QC for one described it as a "long step to treat the NZRFU as having become generally subject to civil public law remedies".[71]

Having found the threshold test to be satisfied, the judge turned his mind to the balance of convenience. Essentially he found that any injury to rugby should the tour go ahead - the interest the plaintiffs sought to protect - was "speculative and long-term".[72] In contrast, damage to the respondents would be more direct, immediate and materially quantifiable, should the tour in effect be stopped by the grant of an injunction. Therefore Casey J found that the balance of convenience weighed in favour of the Union. However this was not decisive. His Honour continued:[73]

> But it is in the wider sphere of the exercise of my overall discretion that the problem for the defendants arises. The interest of the public and of the nation in not having the tour go ahead is a most potent factor.

Lord Diplock acknowledged in the *Cyanamid* case that after the balance of convenience has been dealt with, there may be other special factors to be taken into consideration in the particular circumstances of individual cases. The writer of one text

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67 Above n 66.
68 Above n 66.
69 *Finnigan* (No 1) above n 1, 179.
70 Above n 1, 186.
71 D Baragwanath QC, "The Tour" [1985] NZLJ 221, 226.
72 *Finnigan* (No 2) above n 1, 187.
73 Above n 1, 188.

on injunctions, David Bean, cites an American example where the public interest was properly considered as decisive: *Roussel-Uclaf* v *GD Searle & Co.*[74] In that case the plaintiffs alleged that a drug marketed by the defendants infringed the plaintiffs patent. The defendants were able to avoid an injunction on the basis that this drug had life-saving qualities. So it was very much in the public interest not to restrain the sale of the drug at an interlocutory stage.[75]

That does not alter the vexed question of a judge's qualifications and ability, particularly on scant evidence, to determine what constitutes the public interest. There must be a large element of value judgment. Yet as we have seen, that public interest factor pervades each step of the High Court's decision. It arose at the threshold stage of whether there was a serious question to be tried; it was invoked in support of a novel approach to administrative decision-making; and it overrode the *Cyanamid* "guiding principle" - the balance of convenience. Finally, the public interest was the critical factor which led Casey J to conclude that:[76]

> In the responsible exercise of my discretion I consider the only order I can make is one which will preserve the position existing at the date of [the NZRFU's] decision.

VIII POLITICAL FALL-OUT

At this point it is interesting to step outside the court room, to see how Parliament reacted to the High Court's decision. On 16 July 1985 then Leader of the Opposition, the Rt Hon JK McLay, MP was anxious to debate the ruling. In particular, he was concerned with "the implications of the decision [on] the rights of ordinary New Zealanders to travel overseas".[77] It appears that he may have initially misconstrued the judgment, publicly taking the view that it restrained individuals from being able to leave New Zealand.[78] However it is clear that the injunction did not prevent players from travelling overseas as individuals. It simply stopped them leaving the country to tour South Africa as All Blacks, pursuant to the NZRFU's decision of 17 April to accept the South African Board's invitation.

Indeed Members of Parliament placed a range of interpretations on the decision, no doubt partly motivated by their partisan interests. Hon J Bolger, MP cited passages from Casey J's judgment, noting in particular his view that the Union:[79]

> must also exercise that degree of care which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectations of the public.

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74 [1977] PSR 125.
75 *Injunctions* (4 ed, Longman, London, 187) 24.
76 Above n 1, 188.
77 New Zealand Parliamentary Debates, vol 464, 16 July 1985: 5595.
78 New Zealand Parliamentary Debates, vol 464, 17 July 1985: 5658.
79 *Finnigan* (No 2) above n 1, 186.

Mr Bolger concluded that:[80]

> The Council of the Union - which sees as its direct and only brief the promotion of the best interests of rugby - now has imposed on it a wider brief to act as a statutory body. That is an unusual expectation to impose on a sporting organisation; it could not have been one considered when it made its decision to tour. The objective of the Rugby Union is to promote, foster and develop rugby in New Zealand. Through the interim injunction it has been informed that it has a wider responsibility, as well.

Strictly speaking, the requirement that the Union act as a statutory body only alters the manner in which the Union should make its decision - it must act not only honestly, but reasonably as well. In Casey J's words, this meant that the Council must show:[81]

> regard to relevant considerations for the benefit of New Zealand rugby and must not be influenced by irrelevant matters in its decision.

His Honour does not specify what would be irrelevant matters. It is not clear whether the Union would be required to consider the public interest, perhaps only so far as it affected the good of rugby. If the public interest as the Union perceived it had been a major factor in the Union's decision, one could be forgiven for wondering whether the decision would have been challenged by another group on the grounds that the Council had taken account of irrelevant matters in making its decision. Strictly, it is only required to determine what is in the best interest of rugby. Yet the whole thrust of the High Court judgment suggests that the Union should have paid greater heed to public opinion. Mr White argued during the injunction hearing that while the Rugby Union would have been within its rights to make its decision on the basis of the interests of rugby, untrammelled by wider community interests, nevertheless the Council had not ignored those interests.[82] The High Court judgment is inconclusive as to precisely what factors would properly have been within the Union's brief in making its determination.

Mr Peters, MP took issue with the comment of Dr W Hodge of the University of Auckland Law School to the effect that the purpose of the injunction was that "the parties be stopped in their tracks to preserve the opportunity to do justice".[83] Mr Peters stated:[84]

> The tour was off the moment that decision was given. I presume the decision on cancellation was appreciated by the Court as being the inevitable consequence of the Court's finding. One assumes that the Court understood that the tour was not like a video game and could not be turned off and on at will. If the Rugby Union wished to make the tour, how was justice preserved for its members? The tour is off, and nothing can be set

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80 Above n 78, 5657.
81 Above n 1, 186.
82 Report on submissions of Mr White before Casey J, *The Evening Post*, Wellington, New Zealand, 13 July 1985, 28.
83 Above n 78, 5661.
84 Above n 83.

> right now if the Court decides in its final conclusion that the tour should be allowed to proceed ... The opportunity to do justice is not preserved. One party has lost and has lost forever.

The Court of Appeal was later to emphasise that it was the Rugby Union which alone decided to cancel the tour, following the injunction, and by inference the Court would distance itself from Mr Peters' comments. However in practical terms there is some substance to these allegations. Even if the Rugby Union had appealed the injunction decision, that would necessarily have delayed the tour, so that it is difficult to see how that decision preserved the status quo. Indeed, what was the "status quo"? The concept seems somewhat artificial. Bean suggests that where a defendant has proceeded a long way with a course of action, he or she may be able to claim that preservation of the status quo involves allowing the challenged conduct to continue.[85] On that basis one might argue that the Rugby Union's plans to tour were so far advanced, and the injunction application came so late, that to preserve the status quo would really have required the tour to go ahead. Of course that would sweep the ground from underneath the applicants' feet. But then injunctions are invariably "win-lose" situations.

In contrast, according to Towner in a commentary on injunctions for New Zealand practitioners, it appears to be generally accepted that the status quo is that state of affairs which exists immediately before the questionable conduct was implemented or commenced; which approach clearly favours the plaintiff.[86] That approach perhaps provides greater certainty.

In any event, by stopping the parties in their tracks in the present case, Finnigan and Recordon were able to preserve their position, or interest, whereas that of the Union was compromised. This suggests that maintaining the status quo does not really "preserve the opportunity to do justice", as if the parties will be in equilibrium pending a final determination. Instead, the grant or refusal of an injunction should be recognised for what it is: an unequivocal vote in one party's favour, at the other's expense.

By way of contrast with the sceptics, one should consider the Prime Minister's views on the High Court decision. Mr Lange painted a picture of victory for parliamentary democracy and for the separation of powers, as the following comments illustrate:

- "The Government stood back and did not use the power of the State to stop the tour. That is to its credit".[87]

- "The Government believes in the right of the Court to determine the state of the law. The Government is not in the business of heavying the judiciary. The judiciary has in no way been influenced by the Government".[88]

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85 Above n 75, 25.
86 RL Towner "Interim Injunctions - A Practitioner's Guide" [1983] NZLJ 107, 110.
87 Above n 78, 5661.
88 Above n 78, 5660.

> "The judgment is a triumph for society in New Zealand because the Government did not 'heavy' people by force of law. The judgment is a triumph for New Zealand because the Government did not change the Passports Act. The judgment is ultimately a triumph for rugby. Two rugby people said in Court that they, as Rugby Union members, required the Rugby Union to act within the law".[89]

In fact, the Prime Minister described his reaction to the High Court decision as one of "exquisite relief".[90] This is a remarkable statement. Parliament is the law-making body. It has a mandate to act in New Zealand's interests. Parliamentarians unanimously believed it was in New Zealand's interests for the tour not to go ahead. Lofty civil libertarian principles aside, one might expect Parliament to take direct action on an issue where it is convinced that there was one right answer for New Zealand. Parliament intervenes daily in many areas of our lives and with major impact. Yet it chose not to here. The legislative and the executive stood back and let events unfold around them. In the end the judiciary made what were, in effect, political decisions and the Prime Minister's reaction was one of "exquisite relief". Is that a monument to democracy or instead a remarkable display of Parliamentary impotence?

IX PUBLIC REACTION

The media were quick to pick up and run with the controversial political football which the injunction decision turned out to be. Perusal of Wellington's Evening Post editorials during the period following the High Court decision, indicates that interpretation and misinterpretation of its effect were rife. On one hand, there were some with a legal background who were able to respect the decision in its administrative and injunction law context. All Black tour party member Jock Hobbs was one of those.[91] On the other there were the like of the Hon Mr Jones, MP who considered that the decision reflected how "when lawyers got hold of an issue like this, anything could happen".[92] He thought the decision had serious implications, for instance that there might now be a case for someone seeking an injunction against the Government for harming the ANZUS Treaty.[93] Clearly much was read into the High Court's edict.

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89 Above n 88.
90 Above n 78, 5661.
91 *The Evening Post*, Wellington, New Zealand, 15 July 1985, 4.
92 Above n 91, 3.
93 Above n 92.

An Evening Post editorial of 16 July indicates the turn which the tour debate now took. Four passages merit quotation:[94]

- "Just as the cancellation of the Hamilton Game in 1981 changes the nature of the argument about the Springbok Tour from one of morality to one of law and order, Mr Justice Casey's injunction could change the direction of 1985 argument to one about the role of the Courts".

- "... for many New Zealanders the most interesting aspect of the case is that the Courts were able to do something that Parliament and years of street protests were unable to do - that is to force the Rugby Union to reconsider the South Africa Tour".

- "... the tour is one of the hottest political issues in this country. It is one that is reasonably credited with having swung elections before ...".

- "Already there are some grounds for concern that Mr Justice Casey's decision could be misinterpreted or misrepresented. Efforts may be made to say that the freedom of individual New Zealanders was limited by a clever manipulation of the law. This could have a political fallout and affect how the average person perceives the Court system".

The third quotation above may indicate why the Government chose not to stop the tour out-right, adopting the approach that it was powerless to do more than persuade. More generally, the injunction certainly did focus public opinion on a number of questions. Firstly, there were suggestions that despite the Parliamentary volley of the issue into the court room, political influence had somehow been exercised over the result. Secondly, many questioned how the courts could intervene in the affairs of an independent sporting organisation. Thirdly, the decision was widely perceived as having denied New Zealanders the right to travel overseas, as the above editorial suggests. This prompted the broader question of what properly was the role of the judiciary when it entered the domain of individual rights. These issues will be dealt with in turn.

Mr Lange was anxious to refute the public perception that the court's decision, "stopped something the Court had no power to stop, and that the Court was somehow a tool of the Government".[95] He emphasised that the Union's decision to cancel the tour arose from actions taken by a court, not by a politician.

In support, his Deputy, Mr Palmer, MP stated that, "[w]e have not sought to intervene in those proceedings or have anything to do with them".[96] Mr Palmer made it clear that he had not discussed the proceedings with counsel involved, and that the only way the Government had been touched by the proceedings was that several public

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94 *The Evening Post*, Wellington, New Zealand, 16 July 1985, 6.
95 Above n 91, 1.
96 Above n 91, 3.

servants had been subpoenaed to give evidence.[97] It is not entirely clear what the nature of any political interference in the court's decision would have been, in the minds of the proponents of this view. Baragwanath QC implied that on the face of his judgment, Casey J came in for criticism for having closely heeded the Government's views, given the importance attributed to the parliamentary resolution, and a letter from Mr Palmer to the Union urging it not to accept the tour invitation.[98] It appears also that evidence was tendered to the High Court as to the Government's responsibilities under the Gleneagles Agreement. For in responding to the criticism of Casey J, Baragwanath QC states:[99]

> Far from paying undue respect to the views of the Government, the judge was bound by constitutional convention to accept its advice as to what are New Zealand's international obligations; specifically as a result of its being party to the Gleneagles Agreement. It would be both indecorous and unlawful for Her Majesty's judges to adopt some policy at odds with the policy of Her Majesty's Ministers whose function is to make and administer such policies.

Law Society President Mr Peter Clapshaw was even more offended by this criticism of Casey J. He observed that:[100]

> The decision had been construed as a decision by the Court that there would be no tour, that the state was interfering in people's rights and that the Court was used as a medium for the State.

It seems that allegations of political influence arose really from the fact that the decision and consequent cancellation of the tour was simply consistent with the result which the Government wanted. Mr Clapshaw no doubt accurately pointed out that this particular attack on the judge was fuelled by the emotion with which the tour issue was charged.

Consequently some were ready to jump to conclusions. However Mr Clapshaw is reported to have suggested, somewhat prudishly that:[101]

> The Courts were not beyond criticism and people were entitled to express their disagreement but it had to be in a moderate way and not in a way that reflected on the integrity of the Court.

Whilst one should appreciate the near inability of judges publicly to defend themselves, it will not suffice to say that criticism of a court should to some extent be stifled even if criticism is due. Nevertheless the "political influence" attack seems groundless. Commonwealth Secretary General Shridath Ramphal was quite correct to

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97 Above n 96.
98 Above n 71, 227.
99 Above n 98.
100 Above n 94, 3.
101 Above n 100.

have concluded that the injunction decision was the result of "an assessment by an independent judiciary".[102]

The second popular attack on the High Court judgment was that the courts should not meddle in the affairs of a private sporting organisation. Critics seemed to think that once Parliament had unanimously resolved that this was a decision for the Union to make itself, then that was the end of the matter.[103] For instance, there was Mr Wayne Zander, computer programmer of Titahi Bay whose view on the injunction was, "I really don't see that the Court has any place in deciding that. It's an internal situation (for the Union)".[104] Another reported comment was that of Mr Peter Brocklehurst, a public servant who was pleased that the tour would not go ahead, yet did not think it was a matter for the court to decide.[105]

Mr Palmer was anxious to allay this sort of public misconception. He was reported as stating that court involvement in disputes between members of sporting organisations had occurred many times before and there was no doubt that the courts had authority to resolve such disputes.[106]

Professor K Keith (now Sir Kenneth) of Wellington's Victoria University Law School also sought to clarify the question, pointing out that any organisation with a set of rules could be taken to court to test those rules, and that one way of enforcing rules was by injunction.[107] Professor Keith also addressed that part of the decision which said that the rugby union was not to be seen as a private body, but as a body that had in some degree moved into the public arena.[108] He said that this approach was tentative as the issue had yet to be argued in a full hearing.

To this writer it is not a simple matter to explain to a lay person how an "independent" organisation such as the rugby union may in law be treated as a public body, having to exercise in its decision-making for instance, that degree of care that is imposed on statutory bodies. It is perhaps not surprising that popular misconceptions should have arisen out of the case. Certainly this suggests that when dealing with so controversial an issue, a judge should be especially careful about the reasoning he or she employs in the judgment, and the manner of its expression. A novel approach to administrative decision-making in this context, will be all the more difficult to justify to the wider public.

This leads in to the third and most widely held misconception about the High Court injunction; that it denied individual New Zealanders the right to travel overseas. This

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102 *The Evening Post*, Wellington, New Zealand, 18 July 1985, 8.
103 Above n 91, 4.
104 Above n 94, 1.
105 Above n 104.
106 Above n 94, 3.
107 Above n 94, 10.
108 Above n 107.

criticism was not only made from within our shores. Not surprisingly, the reported editorial comment in the Afrikaans-language daily in Johannesburg was to this effect:[109]

> It is very ironic that one of the main criticisms thrown at South Africa is that we take away peoples' freedoms - to go where they want to, when they want to and how they want to.
>
> Some New Zealanders are so indignant about these sins that they've taken from their rugby team the freedom to come and play rugby here.

Even within the sombre confines of the House of Lords, a strong view is expressed by Lord Chalfont who said:[110]

> There is something very abhorrent about 30 New Zealanders being told by the Court they cannot visit South Africa. There must be no precedent for that at all.
>
> It must be very worrying. I thought it was only in places like the Soviet Union that people were forbidden to leave their country.

The misconception that the injunction decision prohibited individuals from travelling overseas has already been dealt with, although it is interesting to see just how difficult it was to explain the true position to the public. In a broader vein we have the view of tour party member Mike Clamp, who said, "I'm just bewildered. My right to form my own opinion on a country has been taken away".[111]

There were politicians too who stated publicly that the injunction decision went beyond merely stopping a rugby tour. Sir Robert Muldoon said:[112]

> It reflects immediately on the proposed Bill of Rights which will create by law a situation in which judges who are not elected representatives of the people will have the last word on a range of human rights.

Similarly the Democrats Party leader, Mr Beetham, MP, stated that he was "extremely concerned" to see that the judicial system was being used to interfere with what he saw as an area of individual rights.[113]

From non-lawyers these sentiments are perhaps not surprising, particularly when one considers the importance attached in the parliamentary resolution to the need for the Rugby Union to make the tour decision itself. However one should recall that in placing the responsibility on the Union, the amendment to that resolution had

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109 Above n 94, 2.
110 Above n 109.
111 Above n 91.
112 Above n 111.
113 Above n 111.

emphasised, "the right of all New Zealanders to act without intimidation, provided their actions are *within the law*".

As a test of administrative decision-making, *Finnigan* was really a case brought on the basis that the Union's decision was not "within the law". It was strictly not a case about individual rights, although the whole South African issue has always been an issue about rights. That does not alter the fact that a high degree of judicial positivism was displayed in the case. It was therefore a perceptive editor who wrote on 16 July 1985 that Mr Justice Casey's decision could change the nature of the debate to one about the role of the courts, and that the case would indeed affect how the average person perceived the court system.

X APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL

The Court of Appeal was finally called upon to consider whether it should grant leave to the Rugby Union to appeal to the Privy Council its earlier decision on standing. Although the court accepted that the issue was a matter of great public interest, any aspirations for appeal were frustrated by the well-established rule that an appeal would not lie when the particular issue was no longer a live one; the question of standing being purely academic given the agreement between the parties after the injunction was granted, that the substantive action would be abandoned.

The Court of Appeal judgments also used this opportunity to traverse more generally the issues raised by the controversial High Court decision. The Court of Appeal was at pains to point out that when it had taken account of the wider public interest in its approach to standing, it had made no suggestion that the tests for standing and for lawfulness of the Rugby Union's decision were linked.[114] Casey J had invoked the Court of Appeal's approach in support of his second test discussed above, which would require the Union to have made its decision reasonably, as if it were a statutory body. Cooke J stated that whether Casey J had been correct in applying the reasonableness test to this decision was "fairly open to argument".[115] Cooke J went on to acknowledge that so far as determining the appropriate test applicable to the decisions of sporting bodies was concerned, "[t]o some extent these questions call for value judgments as to the principles to be adopted in New Zealand law".[116]

That being the case, it is perhaps unfortunate that the value judgments were required in so controversial a context. Casey J's approach on the administrative law point makes it difficult for him to appear impartial on the wider issue of sporting contact with South Africa. Moreover, to look at it in reverse, the unanswered question is how the judge's views on South Africa and apartheid may have influenced his approach to the decision-making test. The concern must be that administrative law as it relates to the decisions of sporting bodies may have moved in a new direction partly because of the scope

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114 Above n 1, 193.
115 Above n 114.
116 Above n 114.

permitted for value judgment in this particular case. The fact, however, that all five judges in the Court of Appeal stressed the exceptional nature of the case, hence its limited precedent value, provides some comfort.[117]

As far as the tone of Casey J's judgment is concerned, Cooke J remarks on his statement that in the "responsible exercise" of his discretion, the only order he could make was to grant an injunction. Cooke J referred to this and other forceful remarks as "strong statements" by the judge, and said somewhat ambivalently:[118]

> As his decision was not appealed against and as we have seen none of the evidence before him except to the extent it is quoted or summarised in his judgment, the only assumption that we can make, in my view, is that these strong statements were not unfounded. Obviously no judge would make them lightly.

In light of this, it is interesting to observe that Cooke J later employed similar terminology to that of the High Court Judge when he stated:[119]

> ... this Court would have acted less than responsibly, in my opinion, if we had ruled that the plaintiffs could not have their claim that the Union was acting against its objects heard in the High Court. It would have been a discredit to the law not even to have allowed them a hearing.

The public interest/national importance rationale for first hearing the litigants crops up again as the Court of Appeal judges discuss what bearing the particular national circumstances surrounding the case should have on how well qualified the Privy Council would be to deal with the dispute. The discussion on whether such appeals should be heard by a body unfamiliar with the New Zealand context is somewhat inconclusive. Nevertheless all five judges implicitly recognised that the decisions made in the case were influenced by the inflamed and volatile community feeling which was the backdrop to the court action. Cooke J stated for instance:[120]

> No hearing by the Privy Council in London in 1986 could reproduce the situation or the background ... there can be no doubt that local conditions have a bearing on the case. It may be thought to call for some sense of New Zealand traditions, the impact of events of 1981 on New Zealand society, the intensity of opinions focussed here on the tour choice, the values which New Zealand Courts try to recognise as to rights of access to the Courts and the exercise of freedoms in accordance with law.

Without wishing to engage in debate on the merits of retaining the Privy Council, it is difficult to reconcile this passage with the ideal which Cooke J would have every judge aspire to: that most important judicial quality of impartiality.

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117 See, for example, Cooke J at 198.
118 Above n 1, 195.
119 Above n 1, 198.
120 Above n 1, 199.

Sir Thaddeus McCarthy developed one thread from this passage in Cooke J's judgment; the one relating to the values New Zealand courts recognise as to rights of access to the courts. His Honour saw that particular issue as being "more fundamental and of longer importance than a conflict of attitudes towards a proposed rugby tour".[121] He believed that to be able to deal effectively with this question, a judge needs to be aware of the country's social thinking:[122]

> Who should have access to the Courts of a country, and in what circumstances, and subject to what conditions, are not solely legal questions but ones in which historical background, the racial make-up, and the trends in social aims and cultural perspectives of the particular country should be given great weight. Indeed, some argue that in essence they are not legal questions at all.

On this basis, one can see why New Zealand judges are in a better position than English peers to decide this type of question. But to entrust a judge per se with a brief which might better suit the social historian, turns our judges into architects rather than bricklayers. The judiciary are well placed to decide questions of access to our courts, but we must also be satisfied that they are equally well trained and equipped to do so.

XI POLITICIANS - TAKE NOTE

Of course the question of access to the courts need not have arisen had Parliament truly tackled the Springbok issue itself. The whole experience of the *Finnigan* case contains a broader lesson. This is perhaps borne out by a statement made by Lord Diplock in the course of a judgment which dealt with the problem of how far judges are entitled to go in "interpreting" legislation. He said quite simply that, "... public confidence in the political impartiality of the judiciary ... is essential to the continuance of the rule of law ...".[123]

Public confidence is largely based on public perception. *Finnigan* illustrates the difficulty which many lay people will have in grasping fine legal distinctions and reasoning. Thus it will be very easy for the public to perceive the judiciary as partial when judges are called upon to determine what are popularly considered to be "political" issues. Judges will likely come down on one side or the other. Many will interpret this as indicating a political leaning. That will undermine public confidence in judicial impartiality, whether or not the perception is justified. That in turn must pose some threat, in greater or lesser measure, to respect for the rule of law.

Finnigan provides a useful case-study of what may happen when our politicians dodge the hard political issues, if those issues reach the court room. The scenario could occur again in other contexts. If it does there will be no Lange-esque triumph for the separation of powers, since in fact the constitutional balance between the respective

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121 Above n 118, 208.

122 Above n 121.

123 *Duport Steels Ltd* v *Sirs* [1980] 1 All ER 529, 542, cited by Cooke J in his article "Fundamentals" [1985] NZLJ 158, 161.

roles of judge and politician is confused and disturbed; at least in the public mind. Our politicians ought to take note that should they abdicate their own role, the judiciary too may slip down a rung on the ladder of repute.

XII CONCLUSION

This paper has no doubt raised more questions than it has answered. One is entitled to be sceptical of the manner in which for a few heady days in 1985, the High Court in particular became as much a political as a judicial forum. One is entitled to be sceptical as to why the Springbok Tour issue even came to a court room. Once it had, the Court of Appeal's readiness in its standing decision to cast off more traditional notions of administrative law in order to take account of the public interest, set the scene for the ensuing injunction debate. At least the Court of Appeal's approach seems to have sprung partly from a concern after 1981 that the courts be seen to treat both sides of the tour debate even-handedly. Yet one may well question whether *Finnigan* was the type of case where those more novel applications of administrative law were appropriate. It was too easy for a volatile public to misconceive the reasons for the Court of Appeal's and the High Court's decisions. The effect was that the integrity of the judiciary was for a time undermined. That was to some extent inevitable since the courts were called upon to determine a highly charged political issue permitting of little middle-ground.

The time constraints in the case highlight the serious flaws in the adversarial process when litigating the public interest; particularly by way of injunction, where the procedure risks overriding the substance. As for the crucial public interest factor, one should be concerned at how well qualified the judges are to determine it, and with the free rein it allows to less inhibited value judgments. Lastly one is compelled to question whether all in all the case of *Finnigan* v *NZRFU* is a reflection of judicial impartiality, or simply a judicial reflection of the perceived state of New Zealand society in 1985.