IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1231/83

IN THE MATTER of the Declaratory Judgments Act 1908

A N D

IN THE MATTER of Section 3(1)(c) of the Plumbers, Gasfitters and Drainlayers Act 1976

BETWEEN NEW ZEALAND PLUMBERS, GASFITTERS & RELATED TRADES INDUSTRIAL UNION OF WORKERS, a union duly registered under the Industrial Relations Act 1973

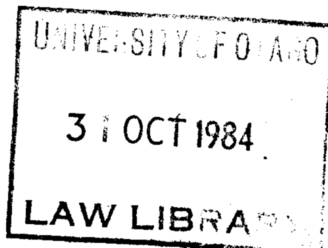
FIRST PLAINTIFF

A N D ARTHUR PAUL PACKWOOD of Tokoroa, Plumber and Gasfitter

SECOND PLAINTIFF

A N D THE ATTORNEY-GENERAL (sued in respect of the Department of Health)

DEFENDANT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Hearing 11 September 1984

Counsel M B O'Brien and McHardy for 1st and 2nd Plaintiffs
C T Young for defendant and Min.of Energy and Min. of Works and Dvpt.
W D Baragwanath, Q.C. and Miss J.Bygrave for Engineers Union
D G /Lee for N.Z.Steel
J.B.M.Smith for N.Z.Freezing Companies Assn
M.E.Perkins for N.Z.Forest Products
G.P.Curry and R.L.Towner for N.Z.Pulp and Paper Employers' Assn
J.S.Beattie for N.Z.Society of Master Plumbers
H.Fulton for N.Z.Engineers Employers Federation
Law for N.Z.I.G. (Given leave to withdraw)

Judgment 12 September 1984

(ORAL) JUDGMENT OF DAVISON C.J.

The Court of Arbitration has before it a demarcation dispute between the Southland Frozen Meat Company Limited

as the applicant and what I will refer to as the "Plumbers Union" and the "Engineering Union" as the first and second respondent respectively.

The Arbitration Court was asked to interpret the term "sanitary plumbing" as used in the Plumbers, Gasfitters and Drainlayers Act 1976 as amended in 1980. The Plumbers' Union, before the matter had been dealt with by the Arbitration Court, issued in this Court on 28 November 1983 an originating summons under the Declaratory Judgments Act 1908 seeking a determination of the interpretation of the words "sanitary plumbing" as contained in s 3 of the Plumbers, Gasfitters and Drainlayers Act 1976.

This is the self-same question as one of those before the Court of Arbitration. The Arbitration Court on 9 April 1984 in an interim decision said:

> " The (decision of) the Court has been sought to interpret generally what is meant by the term 'sanitary plumbing' as expressed in the Plumbers, Gasfitters and Drainlayers Act 1976 (as amended in 1980). The Court is informed that this self-same question of interpretation, which has only recently emerged in the Court's lengthy consideration of this dispute at Makarewa, is now the subject of an application to the High Court by the plumbers union by way of an originating summons seeking a declaratory judgment. That application, of which we have a copy, was filed in the Auckland High Court in November 1983."

The interim decision went on to say:

> " In short, the High Court is already seized with a question of interpretation of considerable general and national importance. Taking that situation into account and having considered the submissions made to us, we have decided that this Court should not now attempt to rule on the present question of interpretation which extends far beyond (even though it can affect) the Makarewa demarcation dispute. Therefore, we adjourn these proceedings sine die, reserving to each of the original parties the right to apply to have them brought on for hearing should the circumstances so warrant. "

Section 3(1)(c) of the Act provides that in the Act, unless the context otherwise requires, "sanitary plumbing" means - and then there are given various meanings. In subs (1)(c) as inserted by the 1980 amendment "sanitary plumbing" means:

> " (c) The work of fixing or unfixing any pipe that
> (i) Supplies or is intended to be a means of supplying water to any sanitary fitting or appliance; and
> (ii) Is within the legal boundary of the premises on which that sanitary fitting or appliance is or will be installed,-
> whether or not that sanitary fitting or appliance is there when the work is done. "

The question posed in the originating summons is this:

> " Does Section 3(1)(c) of the Plumbers, Gasfitters & Drainlayers Act 1976 mean that, provided the requirements of sub-paragraph (ii) are satisfied, and whether or not the sanitary fitting or appliance is there when the work is done, the work of fixing or unfixing any pipe through which it is intended water will ultimately flow or through which water does flow to a sanitary fitting or appliance is within the definition of sanitary plumbing whether or not the pipe on which the work is done will be or is actually fitted to a sanitary fitting or appliance?"

There are nine parties represented before this Court. They are the plaintiffs and eight defendants. As a preliminary point, counsel for five of the defendants have raised the question of the suitability of this Court to make the declaratory order sought. They submitted that this Court should not, in the exercise of its discretion under s 10 of the Declaratory Judgments Act 1908, make the order which the plaintiffs seek.

The two main grounds upon which it was said that this Court should refuse to make an order are:

1. The matter before the Court is essentially an industrial matter - a demarcation dispute between the Plumbers Union and the Engineers Union - and should be resolved by the Arbitration Court;

2. There are many disputed questions of fact in the evidence relevant to the interpretation of s 3(1)(c), which fact is highlighted by the contents of Mr Packwood's second affidavit, and the originating summons procedure is inappropriate.

Mr O'Brien for the plaintiffs submitted however that:

1. The issues do not involve a demarcation dispute;
2. The matters raised were ones of public health;
3. The question before the Court raises only a matter of statutory interpretation which this Court is well able to deal with.

PRINCIPLES GUIDING THIS COURT

The principles which will guide the Court are these:

1. The Court has, under the Declaratory Judgments Act 1908, a discretion as to whether or not it will deal with this matter by way of declaratory judgment.

2. Where in effect the Court is asked to interpret an award made by a Court of Arbitration it will decline to make such a declaratory order, that Court being the proper Court to interpret the award. In that regard I refer to Wellington Municipal Officers' Association v Wellington City Corporation [1951] NZLR 786;

and Wellington District Hotel, Hospital, Restaurant, and Related Trades' Employees' Industrial Union of Workers v Attorney-General /1951/ NZLR 1072 at 1076.

But the Arbitration Court, in addition to the interpretation of awards, also has jurisdiction to hear and determine any question connected with the construction of this Act and any Act relating to industrial matters. I refer in relation to that matter to the Wellington Municipal Officers Assn case and to the judgment of Gresson J. at p 788.

3. If mixed questions of fact and law will be raised, the Court will not exercise its discretion to make a declaratory order. I refer to New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd /1976/ 1 NZLR 84 at p 85, and to a passage from the judgment of McCarthy P.:

> " The jurisdiction to make orders under the Declaratory Judgments Act is wholly discretionary. The cases defining the attitude of the courts in the exercise of that discretion are numerous (see Sim's Practice and Procedure, 11 ed, vol 2, p 823) and they establish certain guidelines which will generally be followed. The Court will not answer purely abstract questions in anticipation of an actual controversy. It will not deal with mixed questions of fact and law. The procedure is designed to provide a speedy and inexpensive method of obtaining a judicial interpretation where the matter in dispute cannot conveniently be brought before the court in its ordinary jurisdiction and where a declaratory judgment would be appropriate relief. But the procedure should not be adopted where the party who institutes them can without real difficulty have the matter in dispute disposed of in an ordinary action. "

I also refer to Turner v Pickering /1976/ 1 NZLR

THE PRESENT APPLICATION (Arbitration Court jurisdiction)

The parties before the Arbitration Court are involved in a demarcation dispute. I do not accept the submission on behalf of the plaintiffs that that is not so nor do I accept that what is in effect involved in these present proceedings is a proceeding which will not have a bearing on that demarcation dispute. Both the Plumbers Union and the Engineers Union which have raised issues resulting in the proceedings before the Arbitration Court are parties to these proceedings. The Arbitration Court itself has referred to the proceedings in its interim decision of 9 April as a demarcation dispute.

A reading of the numerous affidavits filed in these proceedings satisfies me beyond doubt that there is in fact a demarcation dispute existing between the Plumbers Union and the Engineers Union.

These proceedings have been issued by the plaintiffs against the Attorney-General in respect of the Department of Health and what is sought is to raise this matter to one of health rather than an industrial matter. But, in my view, that does not disguise what is in effect the real purpose of the proceedings which is made clear by the affidavits which have been filed in the Court and the effect of those affidavits is to indicate to me quite clearly that the parties are using these proceedings as part and parcel of the endeavour to resolve the demarcation dispute.

Under the provisions of the Industrial Relations Act 1973 it is the awards which define the scope of the coverage to be given to members of particular Unions and those awards are framed taking into consideration the construction of any Acts which relate to the industrial matters covered by the awards. That is why the Arbitration Court is by s 48 of the Industrial Relations Act 1973 given the powers of construction that it has. Where therefore a demarcation dispute arises, such will almost invariably and of necessity involve the interpretation of awards of the disputing parties and the statutory provisions which are relevant to the particular

industry concerned. Section 119 of the Industrial Relations Act deals with demarcation disputes and it provides:

> " s 119 (1) Where a question arises as to the right of workers in specified callings to do certain work in an industry or industries to the exclusion of the workers in other callings, any union or employer who is a party to the award or agreement relating to the industry or industries may apply to the Arbitration Court to determine the question.
>
> (2) In determining which membership rule covers, or is deemed to cover, the work done by the workers concerned, the Court shall have regard to the following considerations:
>
> (a) The membership rule of each of the unions:
> (b) The work done by the workers whose union coverage is the subject of the dispute:
> (c) The substantial nature of the calling or occupation of those workers in terms of those membership rules:
> (d) Any relevant provisions of the awards or collective agreements operating in the industry or industries:
> (e) Any relevant decisions of the Court:
> (f) Long-established practice. "

There are therefore a number of matters and various circumstances to be taken into account by the Arbitration Court in dealing with a demarcation dispute and in interpreting awards. Any statutory provision bearing on the matter in dispute should not be looked at in vacuuo but rather be interpreted in the matrix of facts surrounding the dispute. To do this is a function of the Arbitration Court.

In Borthwick Ltd v Haeata /1965/ NZLR 957 at p 959 Tompkins J. said:

> " There are a number of cases where the civil Courts have held that it is for the Arbitration Court and not for the civil Courts to interpret an award. In New Zealand Harbour Boards Employers v Tyndall /1944/ NZLR 584; /1944/ GLR 241 Blair J. said: 'The Arbitration Court is

> the proper tribunal for the interpretation of awards, and this Court should not allow the provisions of s.105... to be so interpreted as, in effect, to provide an appeal to the Court of Appeal by way of case stated under s 105'. "

And in Point Chevalier Bakery v Tyndall /1962/ NZLR 178 at p 181 Gresson J. said :

> " Not only has the Arbitration Court jurisdiction to interpret its own awards, but it has in addition been given express power by the Industrial Conciliation and Arbitration Amendment Act 1947, s 9(1), now reproduced in s 33 of the Act, to pronounce upon any question connected with the construction of any award or industrial agreement, or on any particular determination or direction of the Court, or upon the construction of any Act relating to matters within the jurisdiction of the Court. "

The relevant provision in our Industrial Relations Act 1973 is now s 48(2)(a).

Where the Arbitration Court is given such powers and is a special Court created for their exercise, it would be wrong for this Court to enter upon an interpretation of a statute relevant to the construction of an award in isolation.

In New Zealand Educational Institute v Wellington Education Board /1926/ NZLR 615 at 617 MacGregor J. said:

> " Before proceeding to that determination, however, it appears to me that there is a previous question for the Court to consider, and that is whether the present summons is one on which I should make a declaratory order in the discretion vested in me under s 10 of the Declaratory Judgments Act 1908. That section has been construed and acted upon more than once in this Court, the last case on the subject being Dairy Proprietary Association v New Zealand Dairy-produce Control Board /1926/ NZLR 535. There the Supreme Court (Skerrett, C.J., and Reed J.), in a considered judgment, on several grounds refused to make a declaratory order as to

> the construction of a recent New Zealand statute. That case closely resembles the present application in more than one respect. One of the grounds on which the Court refused to make a declaratory order in the Dairy Control Board case was that if it granted the application it would be compelled to define statutory powers in the abstract without knowledge of the facts and circumstances under which such powers might be exercised. "

That passage is directly relevant to the consideration of the question in the originating summons by this Court. The construction of awards and the settlement of demarcation disputes are matters entrusted to the Arbitration Court and this Court should leave to the Arbitration Court the whole of the duty of making a decision and not choose to perform one part of that duty by giving a statutory interpretation which, when looked at in the light of the wider industrial scene, might cause problems and indeed prove an embarrassment to the Arbitration Court. If parties are dis-satisfied with a ruling of the Arbitration Court on a matter of interpretation, there are two courses open: (1) to ask the Court to state a case under s 51 of the Industrial Relations Act 1973; or (2) to appeal to the Court of Appeal by way of case stated under s 62A of that Act.

MIXED FACT AND LAW

An examination of the affidavits and the issues raised indicates to me that there are in fact mixed questions of fact and law raised in these proceedings.

Mr O'Brien for the plaintiffs acknowledged during argument that there were such issues of fact and law but he submitted that the disputed facts relate not to an interpretation of the statute but rather to the exercise by this Court of its discretion under s 10 of the Declaratory Judgments Act 1908. I do not take that view.

The issues relate directly to the interpretation of the relevant awards and to the extent that there may be any ambiguity in the provisions of the statute or room for alternative interpretations, they bear directly upon the matter. The disputed facts are, in my view, so intricately intertwined with the matters to be decided both by the Arbitration Court and this Court that it is not appropriate for this Court in these proceedings to endeavour to resolve those questions of fact.

STATUS OF PLAINTIFF

An issue was raised by counsel for some of the defendants of the status of the plaintiff Union to bring these proceedings, and reference was made to the New Zealand Educational Institute v Wellington Education Board case referred to earlier. I find it not necessary to consider that question as it does not need to be decided in view of the decision I have reached on the other issues.

EXERCISE OF DISCRETION

In the exercise of my discretion under s 10 of the Declaratory Judgments Act 1908, I refuse to deal with this matter under the provisions of that Act. My reasons for so doing will already be plain but for convenience I summarize them and they are these:

1. The matter in issue here is one which is within the jurisdiction of the Arbitration Court which is a specialist Court to deal with such matters, and they should more properly be dealt with in that Court where they can be considered with a knowledge of the facts and the circumstances in which the Act is sought to be interpreted. They can be dealt with as part of the overall process of construction of the relevant awards and the resolution of the demarcation dispute.

I am conscious of the fact that it is claimed, and may well be, that the issues raised in the present originating summons are wider than the issue or issues

before the Arbitration Court. Be that as it may, I cannot ignore the fact that in effect the resolution of the matter before this Court is intended to be a guide and no doubt to bind the Arbitration Court in its dealing with the demarcation dispute.

2. There are raised in these proceedings mixed questions of fact and law and the originating summons procedure is quite inappropriate to deal with issues so raised.

3. There is substantial opposition by a number of parties to the course presently being undertaken and I think that is something that I should also take into account, especially in relation to the disputed questions of fact which cannot, in my view be properly determined merely by cross-examination.

It is unfortunate that the matter has proceeded so far but that factor will not prevent the Court from following accepted procedures nor will it cause the Court to depart from principles which have been clearly established in relation to declaratory judgments over a period of many years.

What the parties now do about the matter is primarily for the plaintiff to determine. If it is desired to continue in this Court, the appropriate proceeding is by way of action when the disputed questions of fact can be determined along with such matters of law which may be relevant based upon whatever decisions of fact are made. The alternative is to proceed to return to the Arbitration Court. Those are matters that are in the hands of the parties.

In the result, I decline to make the declaratory order. So far as costs are concerned, I reserve the question of costs. The parties can make representations to me before

the end of the week either orally or by memorandum and I will deal with the question then.

[signature] C.J.

Solicitors for first and second plaintiffs	Wallace McLean Bawden & Partners (Auckland)
Solicitors for defendant	Crown Law Office (Auckland)
Solicitors for Engineers Union	Dickson & Co (Auckland)
Solicitors for New Zealand Steel	Butler, White & Hanna (Auckland)
Solicitors for N.Z.Freezing Companies Assn	Luke, Cunningham & Clere (Wellington)
Solicitors for N.Z.Forest Products	Macalister Mazengarb Parkin & Rose (Wellington)
Solicitors for N.Z.Pulp and Paper Employers' Assn.	Russell McVeagh McKenzie Bartleet & Co (Auckland)
Solicitors for N.Z.Society of Master Plumbers	Young Swan Morison McKay (Wellington)
Solicitors for N.Z.Engineers Employers Federation	Wilson Henry Martin & Co (Auckland)

LAW

D.475

IN THE COURT OF APPEAL OF NEW ZEALAND   C.A. 125/82

IN THE MATTER of the Industrial Relations Act 1972

AND

IN THE MATTER of a case stated by the Chief Judge of the Arbitration Court for the Court of Appeal on a question of law

BETWEEN THE NEW ZEALAND PRINTING AND RELATED TRADES INDUSTRIAL UNION OF WORKERS

Appellant

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AND McKENZIE AND WILLIS LIMITED; SMITHS CITY MARKET LIMITED and PRINT MARKETING CONSULTANTS LIMITED

Respondents

Coram: Richardson J. (presiding)
Ongley J.
Sir Thaddeus McCarthy

Hearing: 11 November 1982

Counsel: D.L. Mathieson for Appellant
J.H.C. Larsen for Respondents

Judgment: 3 December 1982

JUDGMENT OF THE COURT DELIVERED BY SIR THADDEUS McCARTHY

This appeal is by case stated by the Arbitration Court pursuant to s.62A of the Industrial Relations Act 1973. It seeks this Court's ruling on the right of a party to proceedings in that Court to appear by counsel on an application under s.82(6) for exemption from a collective agreement registered under that section, when not all the other parties consent to counsel appearing.

decision of the Court. He held that counsel could only appear with the consent of all parties. The Court was then asked to state a case on the point for the opinion of this Court and did so.

Representation of a party in proceedings before the Arbitration Court is covered by s.54. It is necessary to include this section in full:

> 54. Appearance of parties - (1) Subject to subsection (4) of this section, any party to any proceedings before the Court may -
> (a) Appear personally; or
> (b) Be represented by an agent; or
> (c) Be represented by a barrister or solicitor -
> and may produce before the Court such witnesses, books, and documents as the party thinks proper.
> (2) In any proceedings, other than arbitration proceedings, the Court shall allow to appear or to be represented as aforesaid any person who applies to the Court for leave to appear or be represented, being a person who in the opinion of the Court is justly entitled to be heard; and the Court may order any other person so to appear or be represented.
> (3) Any person appearing or represented in any proceedings pursuant to leave granted or an order made under subsection (2) of this section shall be deemed to be a party to the proceedings.
> (4) In arbitration proceedings, no barrister or solicitor who holds a practising certificate for the time being in force under the Law Practitioners Act 1955, whether he is acting under a power of attorney or

These disputes are to be contrasted with disputes of rights.

"Dispute of rights" means -
(a) A dispute concerning the interpretation, application, or operation of a collective agreement or award; or
(b) A dispute concerning a matter of the interpretation, application, or operation of an enactment or contract of employment, being a matter related to a collective agreement or award; or
(c) Any dispute that is not a dispute of interest, including any dispute that arises during the currency of a collective agreement or award; or
(d) A personal grievance.

As was emphasised recently in this Court in N.Z. Road Transport Association of Workers v. N.Z. Road Carriers Union (C.A. 130/82, judgment 22 October 1982) there is a broad and basic distinction between industrial arbitration and the determination of legal rights and the Arbitration Court has important responsibilities in both those areas. But whilst it is plain that arbitration proceedings in the context of s.82(6) must be proceedings coming before the Court under Part V, the definitions in s.2 give no positive guide in determining the effect of "arbitration". In its judgment the Arbitration Court disposed of the matter by holding, in effect, that all proceedings before the Court under Part V (in which Part s.86(2) occurs) are covered by the phrase.

Dr Mathieson says that is wrong and contends that arbitration proceedings are exclusively those where the Court is arbitrating upon an unsettled dispute which has

concilation. Section 79 permitted their appearance in proceedings before the Court if all parties agreed. This position was maintained in the 1954 Act of the same name.

But in 1973, by the Industrial Relations Act of that year, the situation was changed to allow the appearance of barristers and solicitors in any proceedings before the Court and the requirement of consent by the other parties was abandoned. S.54. Appearances in concilation proceedings were however still prohibited by s.78.

In 1977, the Industrial Relations Amendment Act brought about the current situation by producing s.54 as above detailed, including the exclusion of barristers and solicitors from "arbitration proceedings" except by consent. This was, of course, repeated in the Consolidated Reprint in the same year.

There can be little doubt that those concerned with the solution of industrial disputes have long favoured some form of tribunal where conciliation and arbitration are preferred to a more formal and traditional Court solution. Though since the begining in 1905 there has been a separate Court for the disposal of such disputes, it is signficant that that Court has been known as the "Court of Arbitration" or "Arbitration Court" (except between 1973 and 1977 when as "The Industrial Court" it had no jurisdiction in respect of Part V matters apart from under cases stated for its opinion by a conciliation council or conciliator (s.80)), and its

of an industrial dispute. Partial exemption from the award modifies the impact of the award on a particular group of workers in the industry. In either case it both affects the term and conditions of the workers involved and effects a modification of the conciliated settlement embodied in the collective agreement. And a timely application under that section provides the only means by which a union, an association or an employer can seek to be exempted. We would not be prepared to restrict the meaning of the term to proceedings when the Court is arbitrating on a dispute still generally unsettled. We see an application under s.82 as a means of disposing of a remaining but important aspect of a general dispute which has been largely settled by agreement. It is still a part of the arbitration process.

There is a consequence of our approach which should be mentioned. It is a possible contrast between its effect in relation to s.82(6) and the provisions of s.97. That section confers on the Court a power to amend, in certain circumstances, existing awards and collective agreements. But s.97 is not within Part V, and so on our view it would seem to follow that though barristers and solicitors can appear only with the consent of all parties on an application for exemption, nevertheless they may appear on an application to amend without such consent. This rather strange situation seems to be a consequence of the redesign of the Act in 1953 which separates into Part VI a number of

Solicitors:

Hogg Gillespie Carter & Oakley, Wellington, for Appellant

Luke Cunningham & Clere, Wellington, for Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND

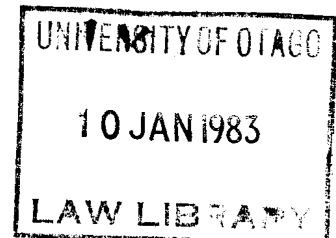
C.A.130/82

BETWEEN THE NEW ZEALAND ROAD TRANSPORT AND MOTOR AND HORSE DRIVERS AND THEIR ASSISTANTS INDUSTRIAL ASSOCIATION OF WORKERS

Appellant

AND THE NEW ZEALAND ROAD CARRIERS INDUSTRIAL UNION OF EMPLOYERS AND OTHERS

Respondent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Coram: Woodhouse P.
Cooke J.
Richardson J.
McMullin J.
Ongley J.

Hearing: 11-12 October 1982

Counsel: W. S. Shires Q.C. and G. L. Evans for appellant
B. D. Inglis Q.C. and C. H. Toogood for respondent
D. P. Neazor Q.C. and W. F. Flaus as amicus curiae

Judgment: 22nd October 1982

JUDGMENT OF WOODHOUSE P. AND RICHARDSON J.
DELIVERED BY WOODHOUSE P.

The Wage Freeze Regulations

On 22nd June 1982 the Wage Freeze Regulations 1982 (S.R. 1981/141) were promulgated and came into force on the following day. They contain the explicit statement that they "shall continue in force until the close of the 22nd day of June 1982, and shall then expire". As their name suggests, their purpose and indeed their undoubted effect, is to prevent (with certain very limited exceptions) any increase in wages or salaries until after 22nd June 1983.

The central purpose of the regulations is achieved by

reg.5 as follows:

> "(1) Notwithstanding anything in any enactment or in any instrument, no instrument which supersedes an instrument or is an amendment of another instrument shall fix a rate of remuneration that exceeds the rate of remuneration lawfully payable under the superseded or amended instrument.
>
> (2) For the purposes of this regulation, any instrument made at any time after the 22nd day of June 1982, purporting to increase any rate of remuneration payable under any instrument, or to provide for payment of any additional remuneration to a person (being a worker, a State employee, or any other person) whose rates of remuneration are fixed by any instrument, shall be deemed to be an amendment of the instrument by which those rates are fixed, whether the increase or payment purports to have effect before, on, or after the close of the 22nd day of June 1983."

It will be seen that in practical terms any pre-existing right to "fix a rate of remuneration that exceeds" one already lawfully payable has been suspended. Furthermore, it has been made impossible to "fix a rate of remuneration" that will exceed the earlier rate even if it is stated to take effect only after 22nd June 1983. And teeth are provided by reg.8 which defines offences against the regulations.

Those offences extend so far as to include any act done "with the intention of defeating or evading any provision of these regulations". Thus, by themselves, the regulations of 22nd June are totally effective to achieve their general

objective, an objective which is accurately stated in the accompanying explanatory note to be to "freeze rates of remuneration until the close of the 22nd day of June 1983".

Nonetheless on 20th August the Wage Freeze Regulations were given a new dimension by amendments including in particular a new regulation 5A. Its clear purpose is to prevent during the same period (expiring on 22nd June 1983) not simply wage increases of the kind already proscribed by reg.5 but any hearing or negotiation or determination of a claim for increased remuneration even though a formal determination, if it were made, must inevitably produce a nil award. It is this new regulation 5A which has precipitated the present proceedings. No attack has been or could be made upon the validity of the initial and effective bar to wage increases established by reg.5. It is properly conceded that these original regulations derive full authority from the Economic Stablisation Act 1948. What is in issue is the validity of the subsequent reg.5A suspending as it does the right of recourse, inter alia, to the Arbitration Court. A different and limited issue is also raised. It concerns the right in the particular circumstances of this case of the union concerned to proceed with an application already made to the Arbitration Court prior to the original regulations taking effect.

The Present Case

Any relevant facts are within a narrow compass. On 31st May 1982 a dispute of interest (as defined by s.2 of the Industrial Relations Act 1973) was created between the

New Zealand Road Transport & Motor & Horse Drivers & their Assistants Industrial Association of Workers ("the association") and the New Zealand Road Carriers Industrial Union of Employers & Others ("the employers"). The dispute of interest was created by a conventional exchange of correspondence and its purpose was to initiate the process of obtaining a new award to supersede an expiring one. The dispute of interest centred directly upon remuneration although some other matters concerning conditions of employment were raised.

By s.68(1) the Act provides that in such a situation application is to be made to the Arbitration Court for the dispute to be heard by a conciliation council. That step was taken by the association on 8th June 1982, and on 14th June a conciliator was duly appointed by the Court. On the same day the conciliator gave notice for the hearing of the dispute to commence on 9th August 1982. But such a hearing became impossible when on 5th August the employers stated that they would not nominate assessors. Because of that decision a conciliation council could not be formed as contemplated by s.68. On 10th August the conciliator informed the Arbitration Court that he considered such a council could not be set up, and following its usual practice the Court then arranged for the matter to be set down for a hearing on 6th September by a notice dated 11th August.

By then of course the background situation against which these procedural steps had been taking place had changed dramatically since they were first initiated. Everything now turned upon the Wage Freeze Regulations. Accordingly when the matter came before the Arbitration Court on 6th September

questions arose as to the scope and purpose of the regulations and particular attention was given to the recent amendment which incorporated reg.5A. The Court then heard submissions on behalf of the association and on behalf of the employers and also from the New Zealand Employers' Federation Incorporated which body had been granted leave to appear pursuant to s.228 of the Industrial Relations Act 1973; and during that hearing an attack was made by the association upon the validity of reg.5A. In the circumstances the Court decided to seek the opinion of this Court concerning that and other issues. The present case stated now comes forward on the motion of the chief Judge of the Arbitration Court.

The Issue of Exemption

It has been mentioned that in addition to the important public question as to whether or not reg.5A is within the powers provided by the Economic Stabilisation Act there is a particular question in this case as to whether or not the association initiated its own application for a new award at a time which enables the matter to be heard and determined in terms of the Industrial Relations Act by reason of an exemption contained in the Wage Freeze Regulations. It is convenient to deal with this more limited issue at once.

The question which arises under this head is whether the initial application by the association to the Court for the dispute of interest between the association and the employers to be heard by a conciliation council resulted in the dispute being "referred" to the Court for the purposes of reg.10(1). The application was made on 4th June 1982 and was

received by the registrar on 8th June before the regulations came into force on 23rd June. If the application itself had the effect of the dispute being so referred then in the events which have happened the savings provision of reg.10(2)(a)(i) will operate so as to enable the Court to fix a higher rate of remuneration than that which previously existed and create an instrument comprising or implementing its determination of that matter. If not then that part of the savings provision has no application.

In order to consider the question reg.10 should be set out in full. It reads:

"(1) This regulation applies to every dispute or question which involves a rate or rates of remuneration and which, before the commencement of these regulations, has been referred, pursuant to any enactment, to -

(a) A Court or tribunal; or

(b) A compulsory conference called under section 120 of the Industrial Relations Act 1973; or

(c) A committee of inquiry appointed under section 121 of the Industrial Relations Act 1973.

(2) In relation to any dispute or question to which this regulation applies, nothing in these regulations prevents -

(a) The creation or completion of an instrument comprising or implementing -

(i) The determination of the Court or tribunal; or

(ii) The decision of the compulsory conference; or

(iii) The results or findings of the committee of inquiry; or

(b) The registration, filing, certification, or lodging under any Act of any instrument to which paragraph (a) of this subclause applies; or

(c) The operation of any instrument to which paragraph (a) of this subclause applies."

The terms of reg.10(1)(b) and (c) make it clear that the framers of the regulations had the provisions of the Industrial Relations Act 1973 directly before them when drafting the regulation. Part V of that Act contains detailed provisions for the voluntary and conciliated settlement of disputes. The theme of the legislation is that such disputes should go to the Court for determination by the Court only if they cannot be resolved by agreement of the parties. Where a voluntary settlement is arrived at the Court's function is simply to register it as a collective agreement (s.55(3) and s.56(3)). The Act then goes on to provide for conciliation proceedings. They begin with the application to the Court for the dispute to be heard by a conciliation council (s.68(1)). The exclusion of the Court from this process is emphasized in s.67 which states -

> "No dispute of interest that is not the subject of a voluntary settlement under section 65 or section 66 of this Act shall be referred to the Court unless it has been first referred to a conciliation council."

Conciliation councils are entirely independent of the Court. The Court appoints conciliators but it plays no part

in the conciliation processes. Where a conciliated settlement is arrived at the conciliator notifies the terms of settlement to the registrar of the court and the Court is required to "embody the terms in a collective agreement and register it" (s.82(2)). But if a dispute of interest is not settled and is not withdrawn in the course of an inquiry before a conciliation council the conciliator is required to "refer the dispute to the Court for settlement" (s.84(1)). The Act itself is thus quite explicit. For its purposes a dispute of interest is not "referred" to the Court unless it has been first referred to a conciliation council. To put it in other words, an application to the Court for the dispute to be heard by a conciliation council is not for the purposes of that Act a reference to the Court.

However, Mr. Shires submitted that it does not necessarily follow that "referred" is used in the same specialized sense in reg.10. For example, clause 1 applies in a variety of situations, including in (b) and (c) circumstances where the Act does not speak at all of any statutory "reference" as such of the dispute. Accordingly, as the regulation applies to those situations, the qualifying words "has been referred, pursuant to any enactment" must obviously be read in a broad sense. On the face of it that is a powerful argument but when that important qualification is read in the context not only of clause 1 but the regulations as a whole (as it must be) we are satisfied that the present application to the Court for the dispute of interest to be heard by a conciliation council does not result in it being "referred" to the Arbitration Court for the purposes of

reg.10(1)(a). We say that for three principal reasons.

First, it would be surprising in a regulation so clearly influenced in other respects by the Industrial Relations Act if, contrary to the scheme and language of that Act in respect of reference to the Court, a request for a hearing before an independent conciliation council could be construed as such. Second, when read together with the parallel provisions of clause 2 of the regulations it is apparent that the kind of referral contemplated by clause 1 is the committing of the dispute to the particular body for decision on its part. Thus where clause 1(a) speaks of a dispute that "has been referred ... to the Court" that is a reference for the specific purpose of having the dispute determined by the Court in terms of clause 2(a)(i). A dispute of interest does not call for determination by the Arbitration Court unless and until that Court becomes seized of it under s.84 (and see, too, s.72A empowering the Court to treat a dispute as referred to it under s.84 where the conciliator is unable to constitute a conciliation council). So it can fairly be said that it is only at that point that the dispute can be said to have been submitted or committed to the Court for its decision. Third, reg.9 expressly provides limited protection in respect of earlier steps to achieve settlement of disputes as to rates of remuneration. Under its provisions voluntary settlements and conciliated agreements alike are protected and their terms implemented in an instrument if and only if a completed settlement of the dispute or question was arrived at before the commencement of the regulations. It would be inconsistent with reg.9 to treat an unsettled dispute

still in the process of conciliation after reference to a conciliation council as being at the same time referred to the Court and within the ambit of reg.10. For these reasons we consider that to hold that the application to the Arbitration Court for the hearing of a dispute by a conciliaton council constitutes a reference of the dispute to the Court itself would be contrary to the scheme and language of reg.10.

A conciliation council was not constituted in this case before the commencement of the regulations. Mr. Shires accordingly, and rightly in our view, accepted that he could not argue that the dispute had been referred to a "tribunal" within the meaning of reg.10(1)(a). That being so we are not called upon to consider the important question - not argued before us - whether a reference to conciliation council before the commencement of the regulations would come within the ambit of that paragraph. In other words, we are not asked to decide whether a conciliation council is a tribunal for the purposes of that regulation and reference to it creates a position parallel to that of a compulsory conference called under s.120 or a committee of inquiry appointed under s.121.

Whether Regulation 5A is Invalid

Turning now to what is the major public issue concerning the validity of the regulations, it is essential to re-emphasize that there has been no attempt by the association to contend that reg.5 is outside the regulation-making powers conferred upon the Governor-General in Council by the Economic Stabilisation Act 1948. Nor could such a challenge possibly have succeeded had it been made. In terms of s.3 of the Act

its general purpose "is to promote the economic stability of New Zealand"; and so in terms of s.4(2) the Minister is "charged with the general function of doing all things that he deems necessary or expedient for the general purpose of this Act, and in particular for the stabilisation, control, and adjustment of prices of goods and services, rents, other costs, and rates of wages, salaries, and other incomes". To support that responsibility the Governor-General in Council is empowered by s.11 to make such stabilization regulations "as appear to him to be necessary or expedient for the general purpose of this Act and for giving full effect to the provisions of this Act and for the due administration of this Act". Regulation 5 undoubtedly falls squarely within those statutory provisions. Accordingly it is not open to challenge and its undoubted validity and wide-ranging effect is of crucial importance in the whole case.

The special importance of reg.5 lies in the fact that, given the powerful support of reg.8, it is by itself totally effective to produce an absolute wage freeze during the whole relevant period that the regulations are intended to remain in force, that is until the close of the 22nd day of June 1983 when the regulations themselves declare that they are automatically to expire. In that situation it becomes necessary to consider whether the new reg.5A adds anything at all in terms of economic stabilization to those absolute controls on remuneration which already were operating. It is the answer to that kind of question which is relied upon to mount an attack upon the validity of the new regulation 5A. In effect the complaint is that reg.5A has no added purpose which can

reasonably be regarded as promoting the economic stability of the country. And it must be accepted that this is the correct test to apply in a case of the present kind. Only twelve months ago this Court said no less in Brader v. Ministry of Transport (1981) 1 N.Z.L.R. 73. So it will not be good enough if the new regulation, by placing an embargo upon the negotiation or hearing or determination of claims to new awards, merely aims at shooting down targets which (in any economic terms that really matter) have already been given the quietus by reg.5.

Despite its detail it is desirable to include that part of reg.5A which affects proceedings under the Industrial Relations Act and an example of its effect upon two other statutes which are concerned with wages and salaries -

> "5A. (1) Notwithstanding anything in any enactment or in any instrument, in the period beginning with the commencement of this regulation and ending with the close of the 22nd day of June 1983, -
>
> (a) No dispute of interest shall be heard by a conciliation council constituted under the Industrial Relations Act 1973 and no hearing of such a dispute, if that hearing has been commenced but not completed before the commencement of this regulation, shall be continued:
>
> (b) No dispute of interest shall be determined by the Arbitration Court and no proceedings in relation to any such dispute which have been commenced but not completed before the commencement of this regulation shall be continued:

(c) No dispute of interest shall be negotiated under section 65 or section 66 of the Industrial Relations Act 1973 and no negotiations of such a dispute which have been commenced but not completed before the commencement of this regulation shall be completed:

(d) No collective agreement that records a voluntary settlement arrived at under section 65 of the Industrial Relations Act 1973 in contravention of paragraph (c) of this subclause shall be registered under that section as a collective agreement:

(e) No composite agreement that records a voluntary settlement arrived at under section 66 of the Industrial Relations Act 1973 in contravention of paragraph (c) of this subclause shall be registered under that section as a collective agreement:

(f) No agreement (being an agreement to which section 141 of the Industrial Relations Act 1973 applies) which relates to a dispute in the nature of a dispute of interest shall be entered into:

(g) No agreement entered into in contravention of paragraph (f) of this subclause shall be filed under section 141 of the Industrial Relations Act 1973:

(h) No application made under section 23 of the State Services Conditions of Employment Act 1977 by any service organisation shall be negotiated, and no determination shall be issued in respect thereof, and no such application forwarded to the Public

Sector Tribunal or to a Single Service Tribunal shall be heard or determined; and no proceedings in respect of any such application which have been commenced but not completed before the commencement of this regulation shall be continued:

(i) No application made under section 219B of the Post Office Act 1959 by any service organisation shall be negotiated, and no determination shall be issued in respect thereof, and no such application forwarded to the Public Sector Tribunal or to the Post Office Staff Tribunal shall be heard or determined; and no proceedings in respect of any such application which have been commenced but not completed before the commencement of this regulation shall be continued:"

In following paragraphs there are similar provisions affecting proceedings under the Police Act, the Waterfront Industry Act and other statutes.

It will be seen that the various provisions of reg.5A are directly concerned not with possible increases in remuneration but with the kind of process that ordinarily is used to seek such a result. Of course, removal of access to the process will not merely avoid the airing of any claim that might otherwise be made; it will also remove all opportunity of a favourable answer. In that sense it could be said that reg.5A can indirectly support the general purposes of the wage freeze regulations. That, however, cannot be a sufficient justification for inclusion of s.5A in the regulations. Its presence is something that must be assessed against the power-

ful operation of reg.5 already in force. If it should happen that several different weapons were at hand, each able to achieve precisely the same purpose of economic stabilization but only by impinging in different ways upon important individual rights, it could not be reasonable let alone necessary to adopt them all. To do so would add nothing to the level of economic stability already achieved by a single choice. In other words the test of invalidity depends on the purposes authorized by the parent statute; and if added regulations could not be shown to reasonably promote one or more of those purposes they would have to be regarded as invalid. Thus the regulation-making power contained in s.11 of the Economic Stabilisation Act cannot be interpreted on the basis that regulatory restrictions could be piled for good measure upon an achievement amply produced by earlier restrictions. To do so would be gratuitous and the unnecessary regulations ultra vires. So the real question is not whether reg.5 or reg.5A is effective when assessed in isolation from one another but whether, given the wage freeze climate imposed by reg.5, it can be said that reg.5A has added anything at all in terms of economic stabilization.

The only answers we were given during the hearing were speculative; and considered beside the existing impact of reg.5 any economic significance they conveyed was minimal. As a subsidiary point the Solicitor-General mentioned something which he himself regarded as a modest argument at best. He pointed to the possibility in the absence of reg.5A of some non-remuneration conditions of employment being negotiated which might involve expense for employers: protective

clothing, sick leave, safety precautions, jury service, gumboots, were mentioned. The short answer to those who might feel able to grasp at those straws must surely be that the economic stability of New Zealand or inflation as an enemy which may threaten to undermine it can hardly be related to peripheral changes of a social welfare character or sensible precautions aimed at the avoidance of industrial accidents.

A different argument was advanced on the basis that pressures may build up during the wage freeze until midnight on 22nd June 1983 which ought not to be released in some explosive fashion on the 23rd. So that a legitimate economic purpose, it was said, must be to prevent any hearings of wage claims before that day in order to ensure that they would be processed gradually afterwards with results slowly percolating through during a lengthy period ahead. But that argument depends upon a wholly improbable premise. It involves the presupposition that numerous applications would be dealt with during the period of the freeze and attended to in such a way that immediately the freeze were lifted new applications in respect of the same subject matter could be made and dealt with at once, almost by the stroke of a pen. In this regard it needs to be appreciated that by reason of reg.5 any determination during the period of the wage freeze must necessarily avoid fixing an increase in remuneration, even if qualified to take effect only after the wage freeze is lifted; and also that unless the Court were prepared to consent in terms of s.92(2) of the Industrial Relations Act to the award (or collective agreement) continuing in force for less than one year no further application could be made for at least that

period of time. In that statutory situation it is hard to understand how a "log-jam" effect could possibly arise. Furthermore, it could hardly be argued that the Arbitration Court would lend itself to some system of sine die adjournments which would enable almost completed applications for awards to be taken off a whole series of convenient pegs immediately after 22nd June 1983. Indeed if such a quaint and unlikely use were to be made of the proviso to s.86(1) of the Act it could well offend the avoidance provisions of reg.8(2).

It is possible that the continued use of a statutory forum for a discussion of wage claims might prove embarrassing or awkward for those given the responsibility of administering the wage freeze regulations. But political considerations of that kind are not sheltered by the Economic Stabilisation Act and obviously could not authorize reg.5A. They have no relation to economic stability. Indeed when attention is given to the long history in New Zealand of ready access to the processes of arbitration and conciliation as a trusted means of enabling open discussion of wage and employment problems and so the promotion of good industrial relations, there would seem to be strong economic reasons in favour of allowing that situation to continue. To put that matter in another way, it could well be thought that with the wage freeze already firmly established by the original regulations the new regulation 5A will be if anything counter-productive: that the suspension for ten months of settled statutory procedures for resolving award disputes must undermine to some degree the important purposes of economic equilibrium (apart altogether from the

social objectives) reflected in the Industrial Relations Act.

When attempting to assess regulations in the context of economic stability the significance and importance of other national interests at stake cannot of course be ignored. These other values and interests which themselves have statutory protection must be given due weight when considering the validity of delegated legislation pursuant to the Economic Stabilisation Act. Not the least of these values in the present context must be what the Industrial Relations Act characterizes as the establishment and maintenance of harmonious industrial relations: s.64(3). It is in futherance of that overriding objective that this Act sets the highest store on "the fair and amicable voluntary settlement of such disputes": s.63(1). It is the foundation on which Part V, providing for settlement of disputes of interests, rests. Yet when they are read together paragraphs (a), (c) and (f) of reg.5A preclude any resort to the statutory procedures for voluntary and conciliated settlement of disputes of interest in the industrial relations field.

Considered simply in terms of the public policies reflected in the Industrial Relations Act it certainly cannot be assumed that procedures to promote economic stabilization by regulation require the extreme step to be taken which is indicated by those paragraphs of reg.5A. Then there is paragraph (b) which denies access to the Arbitration Court for hearing of disputes of interest during the relevant period of ten months. There are distinct differences between the conventional judicial functions of a traditional Court and the industrial arbitral functions of the Arbitration Court. And

there can be no doubt that the impact upon the ordinary citizen of its decisions concerning disputes of interest is considerable. In a contrary sense equally considerable must be the impact upon the New Zealand society of a regulation aimed at shutting down all that part of the Arbitration Court's jurisdiction during the period of the wage freeze.

Against the inflexible situation created by the earlier wage freeze regulations which place an absolute ban upon the power of the Court to fix wage increases (except for the few exceptions already mentioned) we find it impossible to take the view that reg.5A could fairly be upheld in the name of economic stabilization.

The formal questions posed by the case stated together with the relevant answers now follow. The Court being unanimous concerning questions (a), (c), (d) and (f), each is answered No. In accord with the judgment of Cooke, McMullin and Ongley JJ. the same answer is given to question (b); and accordingly (as indicated) no answer is required to questions (e), (g) and (h).

(a) Whether the Wage Freeze Regulations 1982 S.R. 1982/141 (the principal Regulations) are ultra vires the Economic Stabilisation Act 1948?

Answer: <u>No</u>

(b) Whether the Wage Freeze Regulations 1982 Amendment No.2 S.R. 1982/194 is ultra vires the Economic Stabilisation Act 1948?

Answer: <u>No</u>

(c) Whether, for the purposes of regulation 10(1)(a) of the Wage Freeze Regulations 1982 S.R. 1982/141 the dispute of interest was referred to the

Arbitration Court when application was made by the association on 8 June 1982 for the dispute to be heard by a conciliation council pursuant to section 68(1)? Answer: No

(d) Whether for the same purposes the dispute of interest was referred to the Arbitration Court on 10 August 1982 when the conciliator informed the Court of his inability to convene a conciliation council pursuant to section 72A(1)?

Answer: No

(e) If the principal Regulations are held to be intra vires but Amendment No.2 S.R. 1982/194 is held to be ultra vires, does regulation 5 of the principal Regulations apply to this dispute of interest so as to prevent rates of remuneration in the superseding instrument being greater than those in the superseded instrument? No answer required

(f) (i) Has the Arbitration Court power lawfully to act in the dispute of interest pursuant to section 72A of the Industrial Relations Act or otherwise?

Answer: No

(ii) Has the conciliator power lawfully to act in the dispute of interest pursuant to section 72A of the Industrial Relations Act or otherwise?

Answer: No

(g) If the principal Regulations are held to be intra vires but Amendment No.2 is held to be ultra vires, does an agreement reached in conciliation between the association's assessors and the employers' assessors constitute an 'instrument' as

defined in regulation 2(1) of the Wage Adjustment Regulations 1974 as follows:

'(d) Any agreement, whether in writing or not, made between a worker and an employer, or between a group of workers and an employer or an employers' Union or a society or body of employers.'

<u>No answer required</u>

(h) Can the employers' representatives lawfully join in or continue with negotiations instituted by the association's representatives where such negotiations have been instituted by the association's representatives with the objective (whether the sole, main or a subsidiary objective) of increasing rates of remuneration payable to any person represented by the association's representatives, such proposed rates of remuneration exceeding rates lawfully payable under an instrument in force at the time of the principal Regulations coming into force?

<u>No answer required</u>

As to costs, the case is of considerable public importance and the association acted reasonably and responsibly in bringing it before the Courts. If we had jurisdiction to do so, we would certainly order that the association's costs be paid out of public funds. The employers too would then be entitled to costs. But we do not have that power. The Crown was not a party to the proceedings and the Solicitor-General appeared only to assist this Court.

M. Woodhouse P

SOLICITORS:

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