THE INHERENT JURISDICTION IN NEW ZEALAND

by

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I INTRODUCTION:

A The Issues:

This paper concerns a particular aspect of the law of procedure with respect to civil and criminal litigation. There is one source of procedural law about which we know relatively little. This is the inherent jurisdiction of the court. As the title to this work suggests the primary focus will be on the state of the inherent jurisdiction in New Zealand.

The inherent jurisdiction is a residual power possessed by the court. Generally it arises when the court is faced with some difficulty that it cannot satisfactorily deal with using only the powers conferred on it by statute or the High Court Rules. In such a situation the court will appropriate the necessary power citing the inherent jurisdiction as the source. However, only very rarely will the court describe precisely what it perceives the inherent jurisdiction to be and what sorts of cases it is designed to deal with and then go on to say why the case before it is a proper one to be dealt with under the inherent jurisdiction. Instead the court will usually cite the inherent jurisdiction in a rather superficial way as the

answer to the problem before it and the judgment will draw to a rapid close. A good example of this is the case of Donselaar v Mosen[1]. The facts of this case were as follows. The plaintiffs wanted an ex parte order allowing them to enter the defendant's premises to seize accounting records relating to work done by the plaintiff for the defendant on the basis that there was a grave risk that the defendant would destroy the records when the proceedings were served. The plaintiff applied under R478 of the Code of Civil Procedure which allowed the Court to

> make any order for the detention... of any property which is the subject of the action or in respect of which any material question may arise in the action.

The Supreme Court granted the application despite the fact that R478 said nothing about ex parte orders and also that it was doubtful that the wording of R478 covered the case at all. The Court of Appeal upheld the earlier decision not on the basis of R478 but on the inherent jurisdiction. The Court said simply that,[2]

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1 [1976] 2 NZLR 191.

2 Above n1,192.

> we have no doubt at all that the court had an inherent jurisdiction to make the appropriate order to preserve evidentiary material in circumstances such as pertained here if that were necessary in the interests of justice.

The result of this case was a sensible one. The Court saw that there was a grave risk that the defendant would destroy vital evidence and thereby neutralise its ability to bring the defendant to justice. It looked as if HCR 478 did not provide the necessary power so the Court appropriated the power through the inherent jurisdiction. But what we are not specifically told is what the inherent jurisdiction is, what it is designed to achieve and why the circumstances of the case were able to justify its intervention with reference to the answers to the first two issues. This problem is alluded to by I H Jacob[3] who was Master of the Supreme Court in England. In 1970 he produced the closest

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[3] IH Jacob "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23.

thing we have to a definitive work on the subject.[4] He had this to say:[5]

> The inherent jurisdiction of the Court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits.

In an attempt to meet the challenge mentioned by Jacob I propose to focus on three questions. First, where does the inherent jurisdiction comes from? The more we can discover about its origins hopefully the more we will learn about what it really is. Second, what it is used to achieve? What are its goals? If we can

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[4] The article was used extensively by SA Cohen in Due Process of Law (The Carswell Co Ltd, Toronto, 1977) and has been cited by the New Zealand High Court in King v Blackwood & Wayman Unreported, 26 August 1985, High Court Auckland Registry A 663/85 and Champtaloup v Northern Districts Aero Club Inc [1980] 1 NZLR 673 and in the Court of Appeal in Taylor v Attorney General [1975] 2 NZLR 675.

[5] Above n3.

discover what purpose(s) the court must have in mind before the inherent jurisdiction is available to it we will therefore know in what types of case the inherent jurisdiction can be used. Third, in what circumstances it is definitely not available? In other words, what are its limits?

These questions will be looked at using two vehicles. The first will be a general review of the uses to which the inherent jurisdiction is put to in New Zealand. The second will be an investigation of the question whether the District Court possesses an inherent jurisdiction. Before this, however, it will be helpful to look further at what was said about the inherent jurisdiction by Master Jacob in 1970.

B <u>The Jacob Analysis:</u>

At this point, the following reservations should be made. Jacob provides an English view of the inherent jurisdiction. But as we will see shortly the inherent jurisdiction is developing in an indigenous fashion in New Zealand. The main object of this paper is to look at the

actual cases on the subject decided in New Zealand to discover what the inherent jurisdiction is. It will be useful to begin this work with the Jacobean view so that the reader will get a feel for the basic ideas behind the inherent jurisdiction. But it must be remembered that this view must remain subservient to the reality of what the courts in New Zealand are actually doing. With this thought in mind we will proceed.

1 The character of the inherent jurisdiction.

Jacob identified five basic characteristics of the inherent jurisdiction:

(a) It is part of the procedural law, not the substantive law and therefore can only be invoked in relation to the process of litigation.

(b) It is exercisable by summary process ie. without having to wait for a hearing.[6]

(c) It may be invoked in relation to anyone whether a party to the proceedings or not and in relation to matters that are not at issue in the proceedings.

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[6] Jacob described this as the "distinctive and basic feature of the inherent jurisdiction..." (above n3,24).

(d) It is not the same thing as judicial discretion.[7]

(e) It is available even if rules of court regulate the area in question. These two powers are cumulative. The same can be said for statute.[8] However the inherent jurisdiction can not contravene statute or rules of court.

2 The history of the inherent jurisdiction.

The inherent jurisdiction developed along two paths, namely, "[b]y way of punishment for contempt of court and of its process, and by way of regulating the practice of the Court and preventing the abuse of its process.".[9]

The power to summarily proceed against and punish contempt of court was exercised from the earliest times and inherited by the common law judges from the practice of the Star Chamber when it was abolished in 1641.[10]

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7 Jacob fails to elaborate on this, or explain the importance of the distinction.

8 Above n3,24.

9 Above n3,25.

10 Above n3,26.

So far as regulating court practice and preventing abuse of process is concerned Lord Blackburn put it like this when delivering his speech in Metropolitan Bank v Pooley:[11]

> But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing - the court had a right to protect itself against such an abuse, but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the court; and in a proper case they did stay the action.

The inherent jurisdiction is preserved for the High Court of New Zealand by the first part of

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[11] (1885) 10 App. Cas.210,220-221.

the Judicature Act 1908, s.16. The entire provision reads as follows:

> The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

The second part of section 16 seems to confer even broader powers on the Court, to enable the laws of New Zealand to be administered. An alternative view is that the words "shall continue" also apply to this second part, and that the second part is therefore a description of the inherent jurisdiction.[12] I submit that this view is not the case as the words of the second part are totally inadequate as a description of the inherent jurisdiction. This is evident from all that Jacob had to say.

3 The rationale behind the inherent jurisdiction.

When considering this question Jacob began like this:[13]

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12 This was assumed to be the case by the Supreme Court in Re Jones (Deceased) [1973] 2 NZLR 402.

13 Above n3,27.

> The answer is, that the jurisdiction to exercise these powers was derived, not from any statute or rule of law but from the very nature of the Court as a superior court of law, and for this reason such jurisdiction has been called "inherent".

This description has been said to be "metaphysical"[14] which is quite accurate as a consideration of the inherent jurisdiction does go towards the question of what the real nature of the court is. Jacob continues:[15]

> For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life blood, its very essence, its imminent attribute. Without such a power, the court would have form but would lack

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14 "Civil and Criminal Contempt in the Federal Courts" 57 Yale LJ 83,85. The author adds (n15) "the doctrine receives more than metaphysical support however, from the principle of separation of powers.". Because of this principle the court must have the power to protect its existence and authority.

15 Above n3,27.

> substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.

As authority for this Jacob quotes the classic statement of Lord Morris of Borth-y-Gest in Connelly v Director of Public Prosecutions:[16]

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

Jacob then makes his definitive conclusion:[17]

> The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice

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16 [1964] AC 1254,1301.

17 Above n3,27,28.

according to law in a regular, orderly and effective manner.

C Development in New Zealand:

As has been mentioned already the inherent jurisdiction is developing in an indigenous manner. Certainly the Court of Appeal sees the New Zealand judiciary as having greater powers under the inherent jurisdiction than their United Kingdom counterparts. The contrast is strikingly shown by comparison of the House of Lords decision in Rank Film Distributors Ltd v Video Information Centre[18] with the New Zealand Court of Appeal decision in Busby v Thorn EMI Video Programmes Ltd.[19]

1 Rank Film Distributors Ltd v Video Information Centre.

This case involved a civil action for breach of copyright. The defendant was copying the plaintiff's video tapes. The plaintiff obtained an Anton Piller order allowing it to seize video tapes and documents and requiring the defendant to disclose who had supplied the pirate cassettes and the whereabouts of the master copies. The

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18 [1981] 2 All ER 76.

19 [1984] 1 NZLR 461.

defendants feared that if they provided the documents and information they would be exposed to the criminal charge of conspiracy to defraud. The House of Lords held that the privilege took precedence and that the defendants were not required to disclose the evidence. Their Lordships did not accept that they had the power to declare the evidence admissible in the criminal court if the defendants were required to disclose it. They felt powerless to interfere with the discretion of the Judge in the criminal trial.[20]

Their Lordships had another reason for their decision. Lord Wilberforce put it like this:[21]

> That the civil court has not the power to declare evidence inadmissible is strikingly shown by s31 of the Theft Act 1968 which contains an express provision by which a person is obliged to answer questions put in proceedings for the recovery of property ...

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20 Lord Fraser of Tullybelton said "it can hardly be suggested that [such an order] would be effective to prevent...an English criminal court...from admitting the information in evidence at a trial.". (Above n18,84).

21 Above n18,81.

> and which states that no statement or admission so made shall be admissible in evidence against the person concerned in proceedings for an offence under the Act.... The Appellant's submission amounts to a request to the courts, by judicial decision, to extend this statutory provision to civil proceedings generally or at least to these proceedings. But this, in my opinion, the courts cannot do.

2 Busby v Thorn EMI Video Programmes Ltd

This case had facts very similar to those in Rank. The plaintiff obtained an Anton Piller order against the defendant which required the defendant to disclose information that the defendant feared would expose him to the criminal charge of conspiracy to defraud. The Court of Appeal's solution was simply to hold that the defendant had to obey the Anton Piller order and that any incriminating evidence disclosed would be inadmissible in a criminal court. One of the major reasons advanced by Cooke P for not following Rank was that,[22]

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[22] Above n19,471.

> A rather wider judicial control over criminal trials is recognised in this country. It is seen as part of the inherent jurisdiction of the Court to prevent abuse of process by the avoidance of unfairness.

He reaches this conclusion by contrasting a number of English and New Zealand cases which demonstrate that the New Zealand judiciary engage in more judicial activism than their English counterparts. Two of these contrasts concern the inherent jurisdiction. The first is that between the English case of Leveller Magazine Ltd v Attorney General[23] and the New Zealand case of Taylor v Attorney General[24] which deal with the inherent jurisdiction of the court to suppress the names of witnesses. According to Cooke P Taylor established an "apparently wider"[25] discretion to do so. The second contrast is between the English case of R v Sang[26] and the New Zealand cases of Police v Lavalle[27] and R v

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23 [1979] AC 440.

24 [1975] 2 NZLR 675.

25 Above n19,471.

26 [1980] AC 402.

27 [1979] 1 NZLR 45.

Loughlin.[28] Cooke P said the New Zealand cases "show that as New Zealand law on entrapment stands at present there is a wider judicial control over prosecutions than is accepted in England under R v Sang [1980] AC 402."[29]

One wonders how the New Zealand courts can have greater powers under their inherent jurisdiction than the United Kingdom courts do if as Jacob asserts the courts derive their inherent jurisdiction simply from their nature as courts of law.

Somers J dissented claiming that the inherent jurisdiction was not as wide as was claimed by the majority. The basis for his dissent can be summed up in three points:

1 The privilege against self incrimination is a "fundamental cornerstone of our law".[30]

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28 [1982] 1 NZLR 236.

29 Above n25.

30 Above n19,481.

2 Parliament has recognised the privilege and specified the circumstances in which it does not apply.[31]

3 Therefore to extend those statutory provisions to this case would be to "pass beyond that which is truly adjudicatory to that which is truly legislative".[32] This the courts cannot do.

Before going on we should note two issues raised by the Busby decision. The first is that the Court of Appeal seems to have seen itself as the filler of a gap left by the combination of statute and the High Court Rules. However the House of Lords and Somers J seemed to say that the courts have no power under the inherent jurisdiction to fill "gaps", at least not when the power is provided in other situations. The second issue concerns the limits of the inherent jurisdiction. It has always been thought that a judge in a criminal trial had an absolute discretion as to the evidence admitted at the

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[31] eg. Customs Act 1966,s.297; Insolvency Act 1967,s.70; Inland Revenue Department Act 1974,s.18; Companies Act 1955,s.262; Merchandise Marks Act 1954,s.24.

[32] Above n19,482.

trial subject to statutory rules. The fact that in Busby another court in an entirely separate civil proceeding used its inherent jurisdiction to fetter that discretion says a lot about the potential power stored in that jurisdiction.

II CLASSIFICATION OF POWERS IN NEW ZEALAND

When dealing with such a fluid concept it is impossible to divide it up into categories and to feel totally satisfied with the end result. The categories will always overlap. However the following is an attempt to do just that specifically with a regard to the ways in which the inherent jurisdiction has been recognised and/or used in New Zealand. I have used five categories. They are as follows:

A Ensuring convenience and fairness in legal proceedings.

B Preventing the parties taking steps that would render the proceedings useless.

C Control over persons.

D Control over inferior courts and tribunals.

E Preventing abuse of process.

A Ensuring Convenience and Fairness in Legal Proceedings.

The New Zealand judiciary has appropriated a wide range of powers to enable them to control their own processes. The majority of them will be described briefly but I propose to use as the first example of a power under this heading a power that was established in a Court of Appeal case in which the Court looked at the nature of the inherent jurisdiction in an in-depth way. This examination resulted in two of the Judges coming out with sharply differing views of the inherent jurisdiction. By looking at this case first, we will be able to see which one of the two approaches are followed by the courts when we look at the other powers under this heading.

1 Power to suppress a witnesses name:

The power to suppress a witnesses name was used in Taylor v Attorney General.[33] The case arose from the prosecution of Dr Sutch under the Official Secrets Act 1951. Two key witnesses were members of the New Zealand Security Intelligence Service, and the Supreme Court used its inherent jurisdiction to order that their names not be published. Taylor was a reporter who breached this order. He was fined for contempt of court and he appealed to the Court of

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[33] Above n24.

Appeal. His argument was that the Supreme Court had no power to order name suppression.

The majority of the Court dismissed the appeal. The contrast between the opinions of Richmond J and the dissenter, Woodhouse J, provides the greatest interest.

Richmond J looked to the will of Parliament as expressed in the New Zealand Security Intelligence Service Act 1969 that the Service be allowed to effectively protect national security. According to him the "interests of justice, as a continuing process, required the effectiveness of the service to be preserved."[34] Richmond J was certainly looking a long way ahead in his search for how he could establish that the order in question promoted the interests of justice. What he was saying was that the order would preserve an effective SIS, which would then be able to freely prevent some of the unjust activities going on in New Zealand. His other explanation of how the order promoted the interests of justice was as follows:[35]

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[34] Above n24,684.

[35] Above n24,684.

> It is, I think, in accordance with the requirements of justice that the Courts should be able to give members of the service a limited degree of protection when they are called on to give evidence at a trial under the Official Secrets Act 1951 which, in the interests of justice being administered in public, is held in open Court rather than in camera.

Here Richmond J was really talking about fairness to the witnesses although he called it a requirement of justice. His analysis comes down to the proposition that the inherent jurisdiction is available whenever "justice" in the widest possible sense of the word would be promoted by its exercise.

However he also made it clear that the Court could not have made such an order if the officers had not been involved in the trial. The Court has no general power to uphold the will of Parliament in a situation unrelated to proceedings before it.[36]

The appellant argued that certain statutory provisions excluded the inherent jurisdiction.

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[36] Above n24,684.

Richmond J considered only the Criminal Justice Act 1954,s.46(1) which empowered the Court to suppress the name of any "person connected with the proceedings". He said such a provision does not abrogate an "[i]nherent power of the Court unless the statutory provision is in some way repugnant to the continued existence of this statutory power...".[37] Instead he considered that section 46 provided an "alternative remedy"[38] only.

His Honour also attempted to conceptualise the inherent jurisdiction by contrasting it to the general jurisdiction of the court:[39]

> When the word "jurisdiction" is used in relation to Courts of Justice what is ordinarily meant is the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision: 9 Halsburys Laws of England(3rd ed)p350.... But when one speaks of the inherent jurisdiction of the Court to make

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37 Above n24,687.

38 Above n24,687.

39 Above n24,681,682.

> orders of the kind now in question the problem really becomes one of powers ancillary to the exercise by the Court of the jurisdiction in the primary sense just described. Many such ancillary powers are conferred by statute or by rule of Court, but insofar as they are not inferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense.

As authority for this statement Richmond J cited the classic quote of Lord Morris in Connelly v Director of Public Prosecutions[40].

Woodhouse J dissented adopting a more restrictive view of the inherent jurisdiction. He had three reasons for his decision. First section 46 of the Criminal Justice Act 1954 which has already been mentioned excludes the inherent jurisdiction. His Honour considered this section to be a total substitution for the inherent jurisdiction so far as it extended. Therefore because the order in question could have been made under section 46 it could not be made under

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[40] Above n16.

the inherent jurisdiction. An interesting point was also made about section 375 of the Crimes Act 1961 which provides for a prohibition on the publication of the evidence adduced in a trial. This provision was seen as wider than the inherent jurisdiction because it can operate on the grounds of public morality.

Second, the order was worded too widely. Most people would think it was attempting to preserve the secrecy of the witnesses identities as SIS agents irrespective of whether the information communicated concerned the proceedings in Court.[41] Richmond J did not talk about the wording of the order but if he had interpreted it in the same way as Woodhouse J we have seen that he would also have decided that it was too wide to be supported by the inherent jurisdiction.[42]

Third, and for us most significantly, even if the order had been worded narrowly enough the inherent jurisdiction would not support it. He

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41 Above n24,690.

42 Above n24,684.

noted that the order attempted to exert control over the general public. He continued:[43]

> That sort of judicial power could not be used for purposes of individual or group convenience or even for the public interest in general. Instead as one experienced officer of the Court in England has said, "The juridical basis of [the inherent] jurisdiction is... the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner: Master Jacob, 'The Inherent Jurisdiction of the Court', Current Legal Problems 1970 23,27-28.". Thus it is the due administration of justice - at the time and not for the future - that is the concern and province of the Court: not the personal but extraneous problem that may face the individual litigant witness or judge in some particular case. Keeping the identity of the witnesses secret had no effect on whether or not justice was done in the trial of Dr Sutch. Therefore an order to that

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[43] Above n24,689.

> effect could not be supported by the inherent jurisdiction.

Thus we have our contrast. According to Woodhouse J, the inherent jurisdiction is only available to ensure a just resolution of the dispute before the court. But according to Richmond J it is available whenever its exercise would promote the "interests of justice" in the broadest possible sense of that term. The approach of Woodhouse J is the narrower one so we may safely assume that any purported exercise of inherent jurisdiction that complies with this approach is indeed a proper exercise of inherent jurisdiction. However, purported exercises of inherent jurisdiction that do not fall within the scope of the Woodhouse J formulation, but that need to be justified on the broader approach of Richmond J are the ones that may provoke the most thought as to whether they are proper exercises of inherent jurisdiction. Both Judges agree however that what the inherent jurisdiction is all about is bringing about justice. We will now go on to see whether that is the case, and which of the two Judges came closest to describing the role of the inherent jurisdiction.

2 Ordering further particulars.

The power to order further particulars of the cause of action from the plaintiff or of the grounds of defence from the defendant on its own motion was recognised in an obiter statement by the Supreme Court in 1901 in Hickson v Scales.[44] This power, being designed to allow both parties to be adequately prepared for the hearing, has as its aim a just result in the proceedings before the court and therefore satisfies the test of Woodhouse J.

3 Altering a judgment.

The power of a court to change an oral judgment until the judgment is perfected by being drawn up and sealed was used by the Supreme Court in Hickford v Tamaki[45] and recognised in Re A's Application for Legal Aid.[46] This power is also designed to allow justice to be done in the particular proceedings before the court and therefore satisfies the test of Woodhouse J.

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44 (1901) 19 NZLR 202,206.

45 [1962] NZLR 786.

46 [1973] 2 NZLR 444.

4 Granting letters of administration.

In the case of Re Jones (Deceased)[47] the only two people entitled to letters of administration over the deceased's estate by the Administration Act 1969,s.6 were unwilling to administer the estate. They both consented to the deceased's brother being granted letters of administration. The Supreme Court held that under its inherent jurisdiction pursuant to the Judicature Act 1908,s.16 which conferred upon it the power "which may be necessary to administer the laws of New Zealand" the application by the brother could be granted. The tests of Woodhouse J and Richmond J are irrelevant to this power because it is not related to the process of litigation, although it is a matter of procedure in that the decision did not affect any substantive rights. However, this case was decided under the second part of section 16, which as we have seen, may mean that the case had nothing to do with the inherent jurisdiction.

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47 [1973] 2 NZLR 402.

5 Giving a party more time.

In Champtaloup v Northern Districts Aero Club Inc[48] the plaintiff's time limit for bringing the action had elapsed, but the Court granted an extension because that was the just thing to do in the circumstances.[49] This decision allowed a just claim to be pursued and therefore the exercise of inherent jurisdiction in this case satisfied the test of Woodhouse J.

6 Ordering security for costs[50]

In Wilkinson v Johnston[51] the Supreme Court ordered security for costs against the plaintiff even though R541 of the Code of Civil Procedure which at the time governed the awarding of security for costs did not apply. The Court did this because in the circumstances (the plaintiff was an undischarged bankrupt) it was "right that

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48 [1980] 1 NZLR 673.

49 Today the same result could be reached using High Court Rule 6 which is wider than the former Rule 594 of the Code of Civil Procedure.

50 The awarding of security for costs is now governed by HCR 60.

51 (1889) 7 NZLR 369.

security should be given".[52] It is hard to see how the awarding of security for costs could have helped to bring about a just result in this case and therefore it would not satisfy the test of Woodhouse J. It could be justified using the ideas of fairness of Richmond J in that it would have discouraged the plaintiff from bringing an unmeritorious case, thereby saving the defendant all the trouble and expense of defending the action.

7 Setting aside null judgments.

The power of the Court of Appeal to set aside a judgment of its own that is for some reason a nullity was recognised in an obiter statement in R v Nakhla (No.2).[53] This power satisfies the test of Woodhouse J as it aims at bringing about a just result of the proceeding before the court.

8 Allowing non-qualified advocates to appear.

This power was recognised in Re GJ Mannix Ltd[54] but was not extended to the particular litigant in question. It was thought that the power could

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52 Above n51,372.

53 [1974] 1 NZLR 453.

54 [1984] 1 NZLR 309.

be exercised when there was an emergency and counsel was unavailable or when the matter was straight forward or in other situations where an insistence on qualified counsel would be "unduly technical or burdensome".[55] This power would only satisfy the test of Richmond J as the issue is merely fairness to one of the parties. Its exercise would do nothing to bring about a just resolution of the actual dispute unless counsel could not be obtained at all.

9 Correcting the court record[56]

Twice the inherent power of the District Court to do this without the need for any application from the aggrieved party has been affirmed on appeal. In Salaman v Chesson[57] an extra conviction was mistakenly entered against the accused. The Magistrate deleted the conviction from the record when the mistake was discovered. The District Court Judge in Rolton v Seeman[58] corrected an incorrectly recorded sentence. This power is

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55 Above n54,314.

56 This power is additional to the power contained in HCR 12 to correct an accidental slip or omission in any judgment or order.

57 [1926] NZLR 626.

58 [1982] 1 NZLR 60.

obviously justifiable under the approach of Woodhouse J.

10 Holding a hearing in camera

The leading case is that of Scott v Scott.[59] The House of Lords made it clear that the ground for granting an in camera hearing was the aim of justice in the particular case. Therefore this power is definitely supportable by the inherent jurisdiction. This case is fully accepted in New Zealand as is apparent in Taylor v Attorney General.[60]

11 Consolidating proceedings.

This power was used in Clark v Sutton; Christy v Sutton.[61] In that case there had been a road accident with two people being injured by the same person. They filed separate actions against that person. The Court consolidated the proceedings to save the expense and delay involved in two separate trials and also to stop the oppression which would be suffered by the defendant. This decision had nothing to do with

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59 [1913] AC 417.

60 Above n24.

61 [1960] NZLR 829.

the bringing about of a just resolution of the disputes, but rather with the broader principles of fairness. The same power was used in McKnight v Davis; Davis v McKnight[62] where the parties had been involved in a car collision with each other and they both filed suits against the other. The mechanism of a counterclaim was unavailable. This time the court was primarily concerned with obtaining the just result therefore meaning that the inherent jurisdiction could definitely support the action the Court took.

12 Making rules of court

That this power is vested in the judges of the High Court of England was recognised in Connelly v Director of Public Prosecutions.[63] This power is also expressed in the form of Practice Notes. These are issued by the High Court and Court of Appeal. The most well known one is probably the one made by the House of Lords which announced that the House would no longer consider itself

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62 [1968] NZLR 1164.

63 [1964] AC 1254.

bound by its own judgments.[64] Practice Notes do not have the force of law,[65] but if they are not complied with the court can stay or dismiss the proceedings, impose conditions or make orders for the payment of costs.[66] Here the inherent jurisdiction is being used in a legislative manner, not as part of the process of litigation, therefore Richmond J would say Practice Notes are not supportable by the inherent jurisdiction.

13 Setting aside consent orders.

The power of the court to set aside a sealed consent order in the interests of justice was recognised by the Court of Appeal in Waitemata City Council v MacKenzie.[67] According to the High Court in Jones v Borrin[68] this jurisdiction may be exercised in four situations:

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64 Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

65 Birmingham Citizens Permanent Building Society v Caunt [1962] Ch.882; London Permanent Benefit Building Society v De Baer [1968] 2 WLR 465.

66 E Campbell Rules of Court (The Law Book Co, Sydney,1985),42.

67 [1988] 2 NZLR 242.

68 Unreported, 21 August 1989, High Court Auckland Registry M54/86.

i) The order is based on a mistake made by the court.

ii) The order is based on a mistake by both parties.

iii) The order was consented to by counsel without the authority of the client.

iv) The order was based on a unilateral mistake by one of the parties.

This power is designed to bring about a just result in the dispute before the court and therefore the inherent jurisdiction definitely supports this power.

Conclusion

At this point we must ask what light this summary has shed on the questions we asked initially. The New Zealand judiciary has asserted a wide range of powers.[69] They can certainly be exercised on the basis that the justice of the case requires it for that is the test of Woodhouse J in Taylor v Attorney General[70] who

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69 These powers are in addition to HCR 9 which says that when a case arises that the rules have not provided for at all the Court shall deal with the case according to any rules affecting a similar case, or if there are no such rules, in the manner that will best promote the interests of justice.

70 Above n24.

took the most restrictive view of the inherent jurisdiction. However, the powers to suppress witnesses names, to grant letters of administration, to order security for costs, to allow non-qualified advocates to appear, to consolidate proceedings and to make rules of court all seem to be based on wider ideas of convenience, fairness and efficiency in the administration of justice in line with the approach of Richmond J. This approach has the disadvantage that it renders the inherent jurisdiction a vague concept without easily definable limits. This is convenient for judges who want to be able to justify anything they do under the inherent jurisdiction. However this may be a dangerous state of affairs because as we saw in Busby v Thorn EMI Video Programmes Ltd[71] there is a tremendous amount of power stored in the inherent jurisdiction. Having said that I submit that no action taken under the inherent jurisdiction that we have examined in this section has been unreasonable. The inherent jurisdiction has been exercised in a controlled and sensible manner. This is fine while we have a judiciary who act responsibly, but if the day

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[71] Above n19.

comes when that is not the case we will want to have an inherent jurisdiction with real limits. This is certainly not the case today, under this heading at least.

B Preventing the Parties Taking Steps that Would Render the Proceedings Useless.

The courts have developed two remedies to prevent the defendant in the proceedings neutralising the court's ability to enforce the substantive rights of the plaintiff, both of which have a drastic effect on the defendant. They have both attracted considerable notoriety. They are the Anton Piller order and the Mareva injunction.

1 Anton Piller orders[72]

This remedy is designed to meet the situation where the prospective defendant is holding vital evidence that it could easily destroy if it realised that proceedings against it were being considered. The order can be obtained ex parte which is its most valuable feature. It compels the defendant to allow the plaintiff to search its premises for documents and articles and it

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72 Equivalent remedies are provided by High Court Rules 331 and 322.

can also require the defendant to provide certain information.[73] Failure to comply with the order is a contempt of court.

As we saw in the introduction, the order was first made in Donselaar v Mosen.[74] It is a controversial remedy and is seen in some quarters as "a rather draconian device for use in a civil case.".[75] There is a strong argument that the courts usurped Parliament's sovereign law making power by creating the order. Parliament had specifically created such a remedy for the criminal law, namely the search warrant. When doing so it was also able to specify the preconditions to the granting of one and

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73 The order considered in Busby (above n19) was in these terms. However the power to extract information may not be traceable to the inherent jurisdiction. Cooke P at p466 considered that this power came from the courts equitable jurisdiction to order interrogatories.

74 Above n1.

75 Hon. J K McLay in a speech to the Record & Video Association, 25 March 1983. The potential danger in such orders has been noted with concern by other authors eg. A Staines "Protection of Intellectual Property Rights: Anton Piller Orders" (1983) 46 MLR 274; J E Hodder, 'National Business Review', 13 June 1983.

the safeguards to be observed in its exercise. Parliament did not create such a device for the civil law but the courts have taken it upon themselves to create it and in doing so have made themselves the arbiters of the preconditions and safeguards to be observed with the result that the preconditions and safeguards are being developed on a case by case basis, which is much less satisfactory than legislation because the law becomes less certain. This is an especially strong argument in this sort of area, which deals with the curtailment of people's individual liberties. However I submit that this is a proper role for the inherent jurisdiction. The court should not have to stand back and watch its process being thwarted because Parliament has for some reason not provided the power required. The Court in Donselaar v Mosen[76] saw that the defendant was likely to attempt to evade the course of justice so it acted to prevent this. Such action is definitely supportable by the inherent jurisdiction. The problem that arises is

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76 Above n1.

that we must rely on the judiciary to grant Anton Piller orders responsibly, and to impose appropriate safeguards. If we find they cannot be so relied upon, specific legislation curtailing the use of Anton Piller orders will be necessary.

2 Mareva injunctions

This remedy is designed to meet the situation where there is a real danger that the defendant may remove all its assets from the jurisdiction of the court to another country and/or dissipate the assets within the jurisdiction. The injunction freezes the major assets of the defendant and again its value is found in the fact that it can be obtained ex parte. The jurisdiction to grant a Mareva injunction was confirmed in Hunt v BP Exploration Co (Libya) Ltd.[77] The Court of Appeal based its decision upon the Judicature Act 1908,s.16 which we have already examined. In 1982 the Court of Appeal of New South Wales was of the opinion that the Court in Hunt was in effect basing

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77 [1980] 1 NZLR 104. See also Wilsons (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd [1985] 2 NZLR 11.

its decision on the inherent jurisdiction.[78]

The effect of a Mareva injunction is often drastic for the defendant. When one is granted the defendant must apply to the court to be able to deal with it's assets in any way and may have to disclose their whereabouts.[79] The court can order discovery and interrogatories against the defendant[80] and can order cross-examination of the defendant on affidavits filed in purported compliance with a discovery order made ancillary to a Mareva injunction.[81] Mareva injunctions have even been granted in conjunction with Anton Piller orders.[82] It is apparent from this brief summary that Mareva injunctions can be oppressive to the defendant to say the least. However, I

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78 Riley McKay Pty Ltd v McKay [1982] 1 NSWLR 264.

79 PCW (Underwriting Agencies) Ltd v Dickson [1983] 2 All ER 158.

80 A v C [1981] QB 956.

81 Campbell Mussels v Thompson (1984) 87 LS Gaz 2140; House of Spring Gardens Ltd v Waite [1985] FSR 173.

82 CBS United Kingdom Ltd v Lambert [1982] 3 All ER 237; Johnson v L & A Philatelics Ltd [1981] FSR 286.

submit that they are as justifiable under the inherent jurisdiction as Anton Piller orders are. The Court in Hunt[83] was faced with the danger that the defendant, a wealthy man with assets in many countries, was easily able to remove all his assets out of its jurisdiction. By granting a Mareva injunction, the Court ensured that the defendant would not be able to escape his legal liability. Therefore a just result was secured in the proceedings before the Court making the decision definitely supportable by the inherent jurisdiction. Again, our only problem is that we must rely on the judiciary to lay down the appropriate preconditions to the granting of a Mareva injunction and the safeguards to be observed in its exercise.

C Control Over Persons:

There are two principal powers under this heading.

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[83] Above n77.

1 Power over officers of the court:

This power was described by Jacob[84] as a very broad one being held over lawyers, receivers, sequestrators, bailiffs, jurors and witnesses. The power also allows the court to punish any person hindering those officers in the execution of their duty as a contempt of court. In New Zealand this power manifested itself in Re C(A Solicitor)[85] where the High Court ordered a lawyer to honour an undertaking made in anticipation of the possibility of court proceedings. This decision severely tests the principle that the inherent jurisdiction moves in the realm of the procedural law only as proceedings had not yet officially begun and were by no means certain to occur. The decision is analogous to the enforcement of a contractual promise which takes us into the substantive law.

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84 Above n3,46.

85 [1982] 1 NZLR 137.

2 Wardship:

The High Court has an inherent jurisdiction to protect all minors within its jurisdiction.[86] The classic scenario for its operation is the case of a child that is being mistreated by its natural parents. On an application for wardship being made to the High Court the Court can take the child from its natural parents and appoint foster parents. The High Court has overall responsibility for the child from that point on. Again it is very hard to see how this power can be justified on a procedural basis because its exercise has nothing to do with the process of litigation. We now seem to have two exceptions to our idea of a "procedural only" inherent jurisdiction.

D Control Over Inferior Courts and Tribunals:

An "inferior court" is any court with jurisdiction inferior to that of the High Court.[87] This jurisdiction of the High Court over inferior courts is best illustrated in the field of

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86 Chapman v Chapman [1954] AC 429; In re P (Infants) [1967] 1 WLR 818.

87 Judicature Act 1908, s.2.

contempt of court. The general rule is that an inferior court can punish the offender for contempt committed in the face of the court but only the High Court can punish for contempt of the inferior court committed outside of the inferior court.[88] Thus in Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union[89] the Court of Appeal held that the High Court had the power to punish a company for its refusal to comply with an order of the Arbitration Court by sequestration of its assets. This went beyond the powers given to the Supreme Court by the Code of Civil Procedure in two ways. First the Code did not provide the for punishment of a company. Second, the Code did not provide the power of sequestration.[90] The result of this case is definitely justifiable under the inherent jurisdiction as the Supreme Court was enforcing what the Arbitration Court had deemed to be the just result in the proceedings. An analysis of the entire area of contempt of court may reveal powers that are more difficult to justify under

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88 R v Lefroy (1873) 8 QB 134.

89 [1983] NZLR 612.

90 Today HCR 610 provides the power of sequestration.

the inherent jurisdiction. Such an analysis is however beyond the scope of this paper.

The High Court also has the power to set aside consent orders made in inferior courts which were induced by mistake. This was the situation in Jones v Borrin[91] which we have already looked at.

This section shows that inferior courts have less inherent jurisdiction than the High Court in certain areas. This observation raises the question we will examine in detail later, namely whether the inherent jurisdiction is possessed by the District Court.

E Preventing Abuse of Process:

This is a power often used in criminal trials. Therefore we will examine the civil and criminal jurisdictions separately for the purposes of clarity even though there may be no logical compulsion to do so.

1 Civil litigation:

As early as 1841 Alderson B in Cocker v Tempest[92] was of the opinion that:

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91 Above n68.

92 (1841) 7 M & W 502,503-504; 151 ER 864,865.

> The power of each Court over its own processes is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.

The modern authorities are also quite clear that this power is possessed by inferior courts as well as superior courts.[93]

Today High Court Rule 186 provides as follows:

> Without prejudice to the inherent jurisdiction of the Court in that regard, where a pleading -
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> (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

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93 Hunter v Chief Constable of the West Midlands Police [1982] AC 529,536 per Lord Diplock; Mills v Cooper [1967] 2 QB 459,467 per Lord Parker CJ; McMenamin v Attorney General [1985] 2 NZLR 274,276 per Somers J; Rourke v The Queen (1987) 76 DLR (3d) 193,206 per Laskin CJC, approved in Moevao v Department of Labour [1980] 1 NZLR 464,476 and also in Bryant v Collector of Customs [1984] 1 NZLR 280,284.

(b) is likely to cause prejudice, embarrassment, or delay in the proceeding; or

(c) is otherwise an abuse of the process of the Court, -

the Court may at any stage of the proceeding on such terms as it thinks fit order that the whole or any part of the pleading be struck out.

The power to dismiss or stay proceedings summarily on basically the same grounds[94] is contained in HCR 477.

Rule 186 is obviously intended to be an alternative remedy to the inherent jurisdiction the classic formulation of which is that the court can strike out a pleading that discloses no cause of action or that is frivolous, vexatious and an abuse of the process of the court.[95] It seems that the difference between R186 and the inherent jurisdiction is "more apparent than

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94 It has been stated that the differences between Rules 186 and 477 are more apparent than real: R A McGechan High Court Rules (Booker & Friend Ltd, Wellington, 1988) para 477.04 (1).

95 Reichel v Magrath (1889) 14 App.Cas.665.

real".[96] The rule suggests that it can be used fairly often but it has been judicially stated that the rule can only be used sparingly and in a clear case because that was the practice under the inherent jurisdiction.[97] We shall now look at each ground of dismissal contained in R186.

(a) No reasonable cause of action defence or other case.

This power can only be exercised where the case is "so clearly untenable that [it] cannot possibly succeed.".[98] However this does not have to be immediately obvious. Determining whether the case can possibly succeed may require extensive argument.[99] This ground has been used by the Court of Appeal to strike out actions under the

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96 R A McGechan High Court Rules (Booker & Friend Ltd, Wellington, 1988) para 186.04(1).

97 MacKenzie v Waitemata City Council Unreported, 17 June 1986, High Court Auckland Registry CP123/86, p8.

98 Takaro Properties v Rowling [1978] 2 NZLR 314,317.

99 Gartside v Sheffield Young [1983] NZLR 37,45.

inherent jurisdiction without mentioning R186.[100]

(b) Prejudice embarrassment or delay

Such problems may be caused by a party attempting to plead evidence (as opposed to facts and issue which is what should be pleaded).[101] Such problems may also be caused when irrelevant material is pleaded.[102]

(c) Abuse of process

This is the miscellaneous category. The words "is otherwise" show that the circumstances contemplated in paragraphs (a) and (b) are also an abuse of process. This category has expressed itself most often in the dismissal of attempts to relitigate matters that have already been determined. When substantially the same action is brought for a second time the plea of res judicata is available and is a conclusive

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100 New Zealand Social Credit Political League v O'Brien [1984] 1 NZLR 84; Reid v New Zealand Trotting Conference [1984] 1 NZLR 8.

101 Meikle v New Zealand Times Co (1904) 23 NZLR 893; Public Trustee v McArley [1942] NZLR 13. Both cases were decided without any reference to any rule of court or statutory provision.

102 Meikle v New Zealand Times Co (1904) 23 NZLR 6893.

defence. This plea has its origins in the inherent jurisdiction.[103] However sometimes it may not be available and the court must resort to its general power to prevent abuse of process. A leading case is that of Hunter v Chief Constable of the West Midlands Police.[104] This is a House of Lords decision that is often cited by New Zealand courts. It concerned members of the Irish Republican Army who were serving life sentences for their alleged roles in a bombing campaign. They had been convicted on the basis of confessions they claimed were forced from them by police violence. They then brought a civil action against the police. The action was struck out in the courts below and the House of Lords dismissed their appeal with the leading speech being given by Lord Diplock. The main reason for the decision was that a civil action cannot be used to attack the decision of a criminal court of competent jurisdiction unless a major piece of

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103 K Mason "The Inherent Jurisdiction of the Court" 57 ALJ 449,451.

104 [1982] AC 529.

evidence has been uncovered since the criminal trial. The "dominant purpose"[105] of the action was seen to be to disturb the original finding and thereby put pressure on the Home Office to release the plaintiffs from their life sentences. From the fact that the plaintiffs had failed to seek judgment against the Home Office for assaults by prison officers (which had been admitted by the Home Office), it was apparent that the plaintiffs were not really interested in damages. The "public scandal"[106] a contrary decision would create was also mentioned. In this decision we see the Court looking to criteria that goes beyond its authority to administer justice in the proceedings before it. The main ground for the decision was the respect one must have for the previous decisions of other courts which is quite a different matter, although one can appreciate the necessity to ensure that court decisions can only be attacked by way of appeal and not by another set of proceedings. However the

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105 Above n104,541

106 Above n104,542.

inherent jurisdiction does not support such an approach according to Woodhouse J. Lord Diplock also hinted at an "improper purpose" ground on which to dismiss proceedings and seemed to think the public image of the House of Lords was a proper ground on which to exercise the inherent jurisdiction.

The improper purpose approach also seemed to come through in the criminal case of Amery v Solicitor General.[107] This case concerned the "Rainbow Warrior" saboteurs, Alain Mafart and Dominique Prieur. They were about to depart for Hao Atoll in accordance with the arbitration of the Secretary General of the United Nations which had been an attempt to solve the international dispute resulting from the heavy sentences imposed by the New Zealand High Court upon French agents acting under orders. Mr Amery attempted to prevent this by charging the two agents with minor summary offences based on the same incident. The Solicitor-General stayed the proceeding. Mr Amery then brought an application for review of

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107 [1987] 2 NZLR 292.

his decision. The Court of Appeal agreed with the High Court that this application should be struck out as the charges were an abuse of process. The Court purported to base its decision on the principle that to lay charges lesser than those which have already been prosecuted and which are based on the same facts is an abuse of process. This may be true, however the ground is stated so bluntly and without elaboration that one cannot help but think that it is a distaste for the alleged use of the courts by the plaintiff to achieve political ends that is the primary basis for the decision. This "improper purpose" ground is open to question. If a party has a real legal claim, what right does the court have to deny that party its right to enforce its claim merely because the court dislikes the motive behind the proceedings? The result of this case was the one required in the public interest but this does not mean the inherent jurisdiction could support it. Mr Amery was attempting to bring about what he perceived as the just result. Was it not the Court of Appeal that was acting with

political motives in this case? However as a general rule it cannot be denied that to charge someone with regard to an incident for which that person has already served their sentence is oppressive and will be rightly dismissed as an abuse of the court process.

2 Criminal litigation[108]

According to Lord Devlin in Connelly v Director of Public Prosecutions[109]

> "Nearly the whole of the ... criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.".

His Lordship was of the opinion that the pleas of autrefois acquit and autrefois convict and the Judges Rules owe their existence to the inherent jurisdiction.[110] The major power we will consider

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108 Important cases dealing with the court's power to prevent abuses of its process not mentioned here include R v Davis [1982] 1 NZLR 584; R v Moore [1974] 1 NZLR 417, and in the civil context Tamworth Industries Ltd v Attorney General Unreported, 26 June 1987, Court of Appeal 181/86.

109 Above n63.

110 Above n63,1348.

here is the general one to dismiss prosecutions as an abuse of process when the pleas mentioned above do not apply. The court's power to do this was finally established by the House of Lords in Connelly v Director of Public Prosecutions[111] and the Queen's Bench Division in Mills v Cooper.[112]

The thing that distinguishes this section from civil litigation is that criminal trials always involve a powerful party as the prosecutor and a weaker party as the defendant. The Court of Appeal has stated that fairness to the accused is an important consideration, "[b]ut the focus is on the misuse of the Court process by those responsible for law enforcement.".[113] Prosecutions have been dismissed in the following situations:

- The police flagrantly breach the law in apprehending the accused.[114]

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111 Above n63.

112 [1967] 2 QB 459.

113 Moevao v Department of Labour [1980] 1 NZLR 464,482 per Richardson J.

114 R v Hartley [1978] 2 NZLR 199.

To be justified under the inherent jurisdiction the wider approach of Richmond J must be used to justify such a ground of dismissal as the reason for the dismissal has nothing to do with attaining the just result in the actual proceedings.

- The accused was charged and acquitted of an offence and then charged by the police with a closely related offence who use the same evidence as that used in the first trial.[115]

Again the wider approach of Richmond J has to be used to justify such a ground of dismissal under the inherent jurisdiction, possibly on the ground of the injustice caused to the defendant by having to undergo two trials.

- The police entice the accused to commit an offence he or she would not otherwise have committed.[116]

This ground of dismissal is definitely justifiable under the inherent jurisdiction as it leads to the just result in the proceedings.

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115 Bryant v Collector of Customs [1984] 1 NZLR 280; Ferris v Police [1985] 1 NZLR 314.

116 Police v Lavalle [1979] 1 NZLR 45; R v Loughlin [1982] 1 NZLR 236.

- The police charge the accused in breach of an agreement they had previously made with the accused.[117]

The wider approach to the inherent jurisdiction is necessary to justify this ground of dismissal as the "just" result (in the narrowest sense) would be to convict the accused, as the accused was guilty of the offence. It is a wider idea of justice that leads to the conclusion that the prosecution should be dismissed.

- The prosecuting authorities delay the prosecution unreasonably.[118]

Again the wider approach to the inherent jurisdiction is necessary to justify this ground of dismissal as the accused does not become any less guilty (if he or she is guilty at all) due to the delay by the prosecuting authorities. But the wider idea of justice leads to the conclusion that it is more important to alleviate the prejudice suffered by the accused because of the delay, than the public interest in the prosecution of the accused.

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117 Delellis v Police Unreported, 25 September 1989, High Court Auckland Registry.

118 Russell v Stewart Unreported, 29 September 1988, High Court Auckland Registry AP153/87; Watson v Clarke Unreported, 12 October 1988, High Court Dunedin Registry AP55/88.

In exercising their power to dismiss prosecutions as an abuse of process the New Zealand judiciary seem to be consistently acting in a way that is not supportable by the inherent jurisdiction according to the approach of Woodhouse J. Therefore it is the opposing view that holds sway. I submit that this approach has resulted in a satisfactory situation. None of the examples mentioned above seem unreasonable in any way.

Other factors that will be considered by the court in deciding whether to dismiss the prosecution include the public interest in the fair use of the court's process[119], promoting public confidence in the administration of justice[120], preventing the police prosecuting people for ulterior purposes.[121] These

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119 Moevao v Department of Labour [1980] 1 NZLR 464,481 per Richardson J; Bryant v Collector of Customs [1984] 1 NZLR 280,282 per Richardson J; Re Arnold [1977] 1 NZLR 327,336.

120 Moevao v Department of Labour [1980] 1 NZLR 464,482 per Richardson J; Bryant v Collector of Customs [1984] 1 NZLR 280,282 per Richardson J.

121 Moevao v Department of Labour [1980] 1 NZLR 464,482 per Richardson J; Kumar v Immigration Department [1978] 2 NZLR 553,558

considerations are all balanced by the public interest in punishing those who breach the laws of the land.[122] These principles are far too broad to sit within the narrower analysis of the inherent jurisdiction advanced by Woodhouse J. It is obviously the broader approach that is currently preferred by the New Zealand judiciary. As is mentioned above, this approach seems to have resulted in quite a satisfactory situation. However, this again puts us in the position of having to rely on the judges to exercise their inherent jurisdiction responsibly instead of having the safeguard of a satisfactorily defined and limited inherent jurisdiction.

Two limits to the power to dismiss prosecutions as an abuse of process can however be identified. The power cannot be exercised when the offence is an absolute one[123] or when the problem that occurs has nothing to do with the conduct of the

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per Richardson J.

122 Bosch v Ministry of Transport [1979] 1 NZLR 502,510.

123 Moevao v Department of Labour [1980] 1 NZLR 464,482 per Richardson J.

prosecuting authorities.[124]

III THE DISTRICT COURT

In this section we will consider whether the District Court has an inherent jurisdiction and if not whether it has powers that arise elsewhere.[125] It is necessary to this point to briefly describe the District Court. It is called a "creature of statute" because it was created by the District Courts Act 1947. In its civil jurisdiction powers are conferred on it by the 1947 Act and the District Court Rules. In its criminal jurisdiction it enjoys the powers conferred by the Summary Proceedings Act 1957.

The controversy regarding the inherent jurisdiction in the District Court began with the statement of

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124 McMenamin v Attorney General [1985] 2 NZLR 274,276 per Somers J.

125 One such power is District Court Rule 7(2) which provides that if a situation arises which is not provided for by the District Courts Act 1947 or the District Court Rules the case should be dealt with according to any provisions of the same affecting a similar case, or if there is no such provision in accordance with the High Court Rules or, if there are no appropriate High Court Rules then in such a manner as the Court deems best calculated to promote the ends of justice.

Chilwell J in 1978 in Henderson v The Police[126] that,[127] all Magistrates have inherent jurisdiction...arising out of the control by them of their Courts and their procedures and their duty to ensure that Court procedure is not used to harass any individual.

Soon after this, Somers J, then in the Supreme Court also indicated that the Magistrate's Court had an inherent jurisdiction, in Bosch v Ministry of Transport.[128] After this several High Court Judges went out of their way to assert that the District Court does not have an inherent jurisdiction but merely some inherent powers.[129] Two recent High Court decisions purport to clear the situation up. They are Russell v Stewart[130] a decision of Wylie J and Watson v Clarke[131]

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126 Unreported, 24 February 1978, Supreme Court Dunedin Registry M11/78.

127 Above n126,3.

128 Above n122.

129 Rapana v The Police Unreported, 20 September 1979, Supreme Court Invercargill Registry M87/79; Kettle v Basil Unreported, 28 November 1979, Supreme Court Wellington Registry M558/79; Williams v Patterson & Pearson Unreported, 1 October 1980, High Court Masterton Registry M9/79; Attorney General v Bradford & McMenamin Unreported, 25 October 1984, High Court Christchurch Registry A263/84; King v Blackwood & Wayman Unreported, 26 August 1985, High Court Auckland Registry A663/85.

130 Unreported, 29 September 1988, High Court Auckland Registry AP153/87.

a decision of Robertson J - both decided in late 1988. They are both summary criminal cases and the crux of both decisions is that the District Court Judge in each case did have the power to do what he did namely dismiss the charges due to the delay caused by the prosecution. However both Judges made strong obiter statements about the question before us. Wylie J prefaced his judgment in the following way after identifying the issues before him:[132]

> Before embarking on a consideration of these two distinct questions it is desirable to endeavour to distinguish between "inherent jurisdiction" and "inherent power". The summary criminal jurisdiction of the District Court is conferred on that Court by section 9 of the Summary Proceedings Act 1957. The District Court itself is constituted by the District Courts Act 1947 and its jurisdiction in both civil and criminal matters is exclusively statutory. There is nothing in either statute to compare with section 16 of the Judicature Act 1908 in relation to the High Court or sections 4 to 6 of the Supreme Court Act 1860 from which the High Court has

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131 Unreported, 12 October 1988, High Court Dunedin Registry AP55/88.

132 Above n130,4.

> derived the jurisdiction which the Superior Courts in England had at that time. So, in the strict sense, the District Court has no inherent jurisdiction. That does not mean to say however, that it does not have inherent powers.

Robertson J paraphrased this in the following way:[133]

> The Learned Judge made the distinction between "inherent power" and "inherent jurisdiction". The former connotes an original and universal jurisdiction not derived from any other source, whereas the latter connotes an implied power such as the power to prevent abuse of process, which is necessary for the due administration of justice under powers already conferred. Thus the High Court has an inherent jurisdiction as confirmed by section 16 of the Judicature Act 1908 whereas the District Court has a inherent power within that jurisdiction as conferred by statute. It is not an inherent jurisdiction but a power which exists within that statutory jurisdiction.

Two questions arise:

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[133] Above n131,9. To make sense of this passage "former" must be read as "latter" and vice versa.

(1) If this view is correct what are the inherent powers of the District Court?

(2) Is this view correct in light of (a) principle; and (b) authority?

A The Inherent Powers of the District Court

First we should make it clear what powers the District Court definitely does have. For the moment we will assume that the District Court does have inherent powers only. The Court of Appeal in McMenamin v Attorney General confirmed the existence of two powers[134]:

> An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process. All this is well understood. See eg Moevao v Department of Labour [1980]1NZLR 464; New Zealand Social Credit Political League Inc v O'Brien [1984]1NZLR 84; and Bryant v Collector of Customs [1984] 1NZLR 280. The latter case and Bosch v

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134 Above n124.

Ministry of Transport [1979] 1NZLR 502 were both concerned with inferior Courts.

The duty to prevent an abuse of process must be an "inherent power" of the District Court. The power to do what is necessary in order to exercise its statutory functions is obviously not an inherent power but a result of statutory construction.

The other three recognised inherent powers are as follows:

1. To regulate the proceedings of the Court: Clifford v Commissioner of Inland Revenue[132];
2. To correct an incorrect record (as we have seen): Salaman v Chesson[133]; Rolton v Seeman[134];
3. Power to change a judgment until it has been sealed: Re A's Application for Legal Aid[135].

These powers come under the heading of ensuring convenience and fairness in legal proceedings.

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132 [1966] NZLR 201,203. This power is collateral to District Court Rule 7(3) which empowers every District Court Judge to make rules for the conduct of proceedings in his or her court.

133 Above n57.

134 Above n58.

135 Above n46.

It has also been suggested that the District Court may in a summary trial be able to determine as a preliminary question, the accused's rights under the Official Information Act 1982, by-passing the procedure of that Act.[136]

It is also quite certain that the District Court does not have the power to punish for out of court contempt because it is simply one of the powers of the High Court to do this on behalf of the District Court[137].

B Principle

To deal with this question we must go back to Jacob. His analysis came down to the idea that the inherent jurisdiction has no "source" as such. It simply exists as a fundamental attribute of what he called a "superior court of law"[138]. As we have seen the District Court is an inferior court by definition[139]. The inherent jurisdiction exists because the judiciary have the authority to uphold, to protect and to fulfil

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136 Pearce v Thompson Unreported, Court of Appeal 37/85.

137 Above n88.

138 Above n3,27.

139 Judicature Act 1908,s.2.

the judicial function of administering justice according to law in a regular, orderly and effective manner.[140] How do we know that they have this authority? Apparently because it is unthinkable that they do not.

When Jacob specifically considered inferior courts he observed that the inferior courts of England exercise inherent jurisdiction, but he suspected that the power was derived from statute.[141] This view is at variance with the opinion of the English Court of Appeal in R v Bloomsbury & Marylebone County Court, Ex parte Villerwest Ltd.[142] That the County Court has an inherent jurisdiction merely because it requires it was made obvious in the judgment of Lord Denning MR[143] and Roskill LJ who said that "a county court judge has an inherent jurisdiction,

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140 Above n3,28.

141 The County Courts Act 1959,s.103 provides: "In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court.".

142 [1976] 1 WLR 362.

143 Above n145,365.

for it is necessary for him to possess it in order to do justice between the parties...".[144]

K Mason provides an Australian viewpoint:[145]

> [O]ne would have thought that inferior courts would have as wide an inherent jurisdiction as that of superior courts. After all, "'inherent jurisdiction' is the power which a court has simply because it is a court of a particular description, [it] is not something derived by implication from statutory provisions conferring particular jurisdiction"[94] Judges of inferior courts should have the same concern to prevent abuses, delays and injustices as judges of superior courts. Generally speaking, the authorities support these propositions.

These authorities include Overton v Loukides[149], R v Rawson; Ex parte Moore[150] and Bogeta Pty Ltd

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144 Above n145,366.

145 K Mason "The Inherent Jurisdiction of the Court" 57 ALJ 449,456. Footnote 94 reads "Menzies J in R v Forbes; Ex parte Bevan (1972) 127 CLR 1,at 7".

149 [1970] VR 462,465.

150 [1976] Qd.R. 138,143.

v Wales[151]

S A Cohen provides an in depth Canadian analysis of this question in the particular context of abuse of process.[152] He argued that a provision of the Canadian Criminal Code bestowed the inherent jurisdiction upon inferior courts. However he also argued that if that provision did not exist they would not have inherent jurisdiction. He described the sentiment that any court must be able to prevent an abuse of its process as "laudable"[153] but was unable to agree that it was the case. His problem was that he could not see any "legal basis"[154] for ascribing an inherent jurisdiction to inferior courts. Cohen seems have been looking for a legal supply line between the superior courts of England and the inferior statutory courts of Canada or in other words a "source". However as we have seen the inherent jurisdiction does not have a source, it just exists as an inherent attribute of the

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151 [1977] 1 NSWLR 139.

152 S A Cohen Due Process of Law (The Carswell Company Ltd, Toronto, 1977).

153 Above n152,397.

154 Above n152,396.

courts. To this Cohen would surely reply that it is only an inherent attribute of superior courts as "[t]he statutory court derives its powers and existence from statute while the superior court under our law has an essence which has been described as 'almost metaphysical'[197]".[155]

Cohen mentioned the contrary argument of D W Roberts:[156]

> The argument is that once the doctrine has been developed it becomes part of the common law, by all of the courts - statutory and non-statutory; its origin is therefore unimportant. Common law principles form an important part of criminal trials and it is expected that all Courts will apply them, not just some of them.

In reply Cohen had this to say:[157]

> Professor Roberts arguments have a certain appeal. But in asking us to ignore the origin of the doctrine he, in essence, is

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155 Above n149,395. Footnote 197 reads: "D W Roberts, 'The Doctrine of Abuse of Process in Canadian Criminal Law' (1972, Report of the First Annual Conference of the British Colombia Judges Association, 39 at p.46.

156 D W Roberts article, p47.

157 Above n152,397,398.

> urging upon us a situation involving moral justice, but not law. The very lifeblood of the doctrine is its origins in the inherent jurisdiction of superior courts. Sever that link and you kill the doctrine.

This argument also has a "certain appeal". However it is submitted that the inherent jurisdiction exists to serve the justice system and ultimately society as a whole. It is the servant and not the master. This seems to be the current attitude of the New Zealand courts to technical legal arguments cited by counsel in an attempt to hamstring the Court's ability to bring about a fair resolution of the dispute between the parties. This approach has recently been seen in the fields of administrative law[158]

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158 See Bulk Gas Users Group v Attorney General [1983] NZLR 129 where the Court of Appeal decided it could review all findings of law by statutory tribunals even if they are questions within the jurisdiction of the tribunal.

and also in the law of evidence.[159] Once the High Court has recognised the existence of a power to stop justice being defeated it is surely preposterous to then withhold that power from the District Court, the forum where the majority of legal disputes in New Zealand are decided. The District Court is also the forum for the first instance trial which may lead to an appeal to the High Court. To have the inherent jurisdiction residing only in the appeal forum is unacceptable. Procedural remedies are necessary at the trial because the appeal may well be too late.

C Inherent Jurisdiction and Inherent Powers

It was stated in Russell v Stewart[160] and Watson v Clarke[161] and a number of previous High Court

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159 See R v Baker Unreported, 20 April 1989, Court of Appeal 27/89. If the judgment of Cooke P in this case is followed the hearsay rule will be of no further practical effect. See also Busby v Thorn EMI Video Programmes Ltd [1984] 1 NZLR 461 where the rule that the judge in a criminal trial has absolute control over the evidence admitted in the trial, was compromised to permit a just result in a previous civil action.

160 Above n130.

161 Above n131.

decisions that the District Court does not have an inherent jurisdiction but inherent powers. It is the possession of these inherent powers that explains why it can prevent an abuse of process, correct an incorrect record and change an unsealed judgment and yet not have an inherent jurisdiction. This distinction raises a number of questions.

First, how can the District Court have inherent power to prevent an abuse of process and yet not have the other powers of the inherent jurisdiction that also exist to see that justice is done? The only answer seems to be that the District Court "really needs" this power and does not need the other powers quite so much. However this "degree of necessity" argument is quite out of place. All aspects of the inherent jurisdiction must meet the same test to be considered valid. This sort of reasoning certainly does seem to be taking place. It was seen in a statement by District Court Judge Gilbert in R v Vis[162] when the Judge was considering whether he had an inherent

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162 [1989] DCR 38.

jurisdiction when sitting in a jury trial. He said:[163]

> For my part, I accept that I have the same inherent jurisdiction as the High Court as in my view to effectively sit in this jurisdiction continually requires reference to such matters.

If indeed a District Court Judge has inherent jurisdiction whenever it is necessary for him or her to have inherent jurisdiction, I submit that the District Court has an unqualified inherent jurisdiction. In every example of the inherent jurisdiction we have looked at, the judge or judges exercising the power have said (or if they did not say, they surely would have said so if they had been asked) that what they were doing was "necessary" to further some end, be it justice in the proceedings or justice in a more general sense. If the District Court has inherent jurisdiction whenever it is necessary for it to have inherent jurisdiction, then it has inherent jurisdiction to the same extent that the High Court does.

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163 Above n162,39.

Another question is what precisely are the powers inherent in? The answer seems to be the District Court's statutory jurisdiction. In Kettle v Basil Jefferies J put it like this:[164]

> It is clear law that the exercise of the Magistrate's Courts criminal jurisdiction is governed by the Summary Proceedings Act 1957 and it follows that Act provides a complete code for dealing with informations laid within the terms of that Act and that except to the extent that it is necessary to enable it to act effectively within its jurisdiction, has no jurisdiction beyond that expressly or impliedly conferred by Statute, that is, the Court has no inherent jurisdiction.

The first point to be made is that we are not told by the Judges who say this the basis on which they have decided that Parliament intended to provide a complete code. The second point is that this talk of powers necessary to enable the court to act effectively within its jurisdiction is precisely the same principle expressed by Lord

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164 Unreported, 28 November 1979, Supreme Court Wellington Registry M558/79. This statement was quoted with approval in King v Blackwood and Wayman Unreported, 26 August 1985, High Court Auckland Registry A663/85.

Morris in Connelly v Director of Public Prosecutions[165] which as we saw at the beginning is regarded as the classic judicial statement of the principle behind the inherent jurisdiction.[166] Possibly it is the realisation of this point that has led some judges[167] to claim that Lord Morris was not talking about the inherent jurisdiction at all but the inherent powers of all courts. It follows that the entire power to prevent abuse of process is not part of the inherent jurisdiction either as we had always thought.[168] I submit that this approach, if correct, rips away from the inherent jurisdiction its founding

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165 Above n16.

166 Above n3,27; above n152,361; K Mason "The Inherent Jurisdiction of Court" 57 ALJ 449,454.

167 Above n131,4; King v Blackwood & Wayman Unreported, 26 August 1985, High Court Auckland Registry A663/85, p8.

168 That the power to prevent abuse of process is part of the inherent jurisdiction is apparent from what Jacob, Mason and Cohen had to say and also see above n24,682; above n113,465 per Richmond J and 473 per Woodhouse J; Bryant v Collector of Customs [1984] 1 NZLR 280,282 per Richardson J; Daly v Ministry of Transport [1983] NZLR 736,742; Reid v New Zealand Trotting Conference [1984] 1 NZLR 8,9; New Zealand Social Credit Political League Inc v O'Brien [1984] 1 NZLR 84,96; above n27,48; Re Arnold [1977] 1 NZLR 327,331,333.

principle and a substantial portion of the powers that have been exercised under it. If the Judges of the High Court are going to persist with this line of reasoning they will need to totally redefine the inherent jurisdiction instead of just talking about it as if we all know what it means.

I submit with all due respect, that the Judges of the High Court have become confused by the term "inherent jurisdiction" itself. Lord Morris' talk of powers inherent within the jurisdiction of the court[169] have simply become shortened to the term "inherent jurisdiction", and there has been no change of meaning.

Another problem with this reasoning is as follows. For the moment we will assume that the basis for the inherent powers of the District Court is the principle that all courts have the power necessary to act effectively within their

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169 An example of an early description of the inherent jurisdiction in these terms is provided by Lord Selbourne LC in Metropolitan Bank v Pooley (above n11,220): "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure.".

jurisdiction. However if a District Court Judge is faced with a grave danger that the defendant in a civil case may destroy vital evidence, for the Court to be able to act effectively within its jurisdiction it must be able to grant an Anton Piller order. The same reasoning would apply to every example of the inherent jurisdiction that we have looked at. The logical conclusion of the High Court's reasoning is that the District Court has inherent jurisdiction as we understand it. I say again, the vital question is what the High Court means by "inherent jurisdiction".

The criticisms do not end there. The inherent powers of the District Court are said to be narrower than the inherent jurisdiction because the inherent powers are tied to the Court's statutory jurisdiction.[170] If this does not mean the powers are necessary to exercise the statutory jurisdiction effectively, it must mean that they are necessary to enable specific powers conferred by statute to be exercised. However

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170 Attorney General v Bradford & McMenamin Unreported, 25 October 1984, High Court Christchurch Registry A263/84,p8; Watson v Clarke (above n131,9).

our definitive statement from McMenamin v Attorney General[171] shows that this is not inherent power but a matter of statutory construction. So we are still lacking a satisfactory conceptual description of the District Court's inherent powers. We know the inherent powers go beyond the power to prevent an abuse of process but have no idea where they stop or how the preconditions for the exercise of them differ from the preconditions to the exercise of the inherent jurisdiction.

D District Courts Act 1947, Section 42

Cohen's final conclusion was that even though in principal an inferior statutory court does not have inherent jurisdiction a provision of the Canadian Criminal Code conferred inherent jurisdiction upon the inferior courts of Canada.[172] In my opinion the District Courts Act 1947,s.42 plays the same role in New Zealand but only in civil proceedings. It reads as follows:

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171 Above n124.

172 The Canadian Criminal Code,s.40 "Every judge or magistrate has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.".

> A judge shall have jurisdiction in any proceedings pending to make any order or to exercise any authority or jurisdiction which, if it related to an action or proceeding pending in the High Court, might be made or exercised by a judge of the High Court in Chambers.

This provision does not apply to the criminal jurisdiction of the District Court by virtue of s.2(2) of the same Act.

Section 42 was used to obtain a Mareva injunction in the Auckland District Court in Western Motors Ltd v Noakes[173]. As we have seen a Mareva injunction is one of the most radical and drastic creations of the inherent jurisdiction.

The section was also invoked in the case of Cooper-Smith v Menner[174] which involved a personal injury action. The Defendant applied for an order that the Plaintiff undergo a medical

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173 Unreported, July 1981, Auckland District Court.

174 6 MCD 186.

examination which is one of the powers of the inherent jurisdiction.[175] The order was granted.

A caveat is provided by the case of Hata v Hata[176] which held that s.42 is overridden by statutory provisions that specifically confer a certain jurisdiction on the High Court.[177]

The vital question is however what are the powers of "a Judge of the High Court in Chambers"? The answer at present is provided by High Court Rules 234 and 3. Rule 234 deals with interlocutory applications. It says:

> Every interlocutory application shall be made by motion to the Court and shall be heard in Chambers unless the Court otherwise directs.

Therefore section 42 applies to all interlocutory applications. What is an interlocutory application? Rule 3 says it means,

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175 Edmeades v Thames Board Mills Ltd [1969] 2 QB 67.

176 11 MCD 222.

177 The provision in question empowered the Supreme Court to state a case for the Maori Appellate Court.

> any application to the Court in any proceeding or intended proceeding for an order or direction relating to a matter of procedure or for some relief ancillary to that claimed in a pleading.

Therefore section 42 applies to all matters of procedure and applications for ancillary relief. The conclusion must be that the District Court has an inherent jurisdiction in civil proceedings subject to the requirement in Rule 3 that there by an application by one of the parties.

IV CONCLUSION

The first part of this paper dealt with Jacob's analysis in the hope of revealing a principled view of the inherent jurisdiction, a view that had definable limits and a reasonably specific central rationale. Such a view may have been threatened even in the very next section when the respective approaches of the House of Lords in Rank Film Distributors Ltd v Video Information Centre[178] and the New Zealand Court of Appeal in Busby v Thorn EMI Video Programmes Ltd[179] were contrasted. The learned President of the Court

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178 Above n18.

179 Above n19.

of Appeal openly asserted a "wider"[180] inherent jurisdiction than that assumed by the House of Lords and then proceeded to override one of the most basic principles of our procedural law, namely the trial judge's absolute control over the evidence submitted in his or her court, all to allow the controversial device of the Anton Piller order (itself a creation of the inherent jurisdiction) to retain its effectiveness. The suspicion that the inherent jurisdiction was beginning to break out of Jacob's conceptual bounds was confirmed in the next section which covered the inherent jurisdiction to ensure convenience and fairness in legal proceedings. That revealed a wide ranging arsenal of powers that could not be boiled down any further than the wording of the heading. Indeed the High Court felt free to exercise the powers whenever it would promote convenience and fairness. The only judge who attempted to get us back to first principles (quoting Master Jacob in the process[181]) was Woodhouse J in Taylor v Attorney

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180 Above n19,471.

181 Jacob's statement was as follows: "The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner." (above n3,27,28).

General.[182] It must be said that the approach of Woodhouse J is even narrower than that of Jacob, who based his view on the idea of the court maintaining its authority to administer justice. If Jacob had added the words "in the proceedings before the court", only then would his analysis truly be as narrow as that of Woodhouse J. Of course Woodhouse J was overruled by the majority of the Court of Appeal which stuck with the broader criteria of Richmond J.

The section dealing with Mareva injunctions and Anton Piller orders may have been a little more reassuring in one sense as the remedies are prime examples of the court asserting its authority to do justice in the case before it, refusing to allow one party to render the proceedings useless. However the remedies do reveal the awesome inventive power of the inherent jurisdiction and cause us to realise the effects of the inherent jurisdiction on the structure of our law and on the individual liberties of prospective defendants. In fact we may have preferred Parliament to have created these remedies instead of the courts, as Parliament would have been able to comprehensively regulate the area. At present, things develop on a case by case basis which is much less satisfactory.

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182 Above n24.

The section dealing with the courts general power over its officers and over minors severely challenged our principled view of the inherent jurisdiction. The decision in Re C(A Solicitor)[183] and court's power of wardship seem to be matters of substantive law, and they certainly knock a hole in our Jacobean view of the inherent jurisdiction.

The section dealing with the High Court's power over inferior courts is a less controversial one. However it did foreshadow the single major problem area dealt with in this paper, namely the inherent jurisdiction (or lack of it) in the District Court.

In the abuse of process section we saw how the court could refuse to hear proceedings it considered not worthy of the court's time. The cases of Hunter v Chief Constable of the West Midlands Police[184] and Amery v Solicitor General[185] showed that the courts will look to the real purpose behind litigation and can stay the proceeding even is there is a real legal claim involved. Also proceedings can be dismissed to

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183 [1982] 1 NZLR 137.

184 Above n104.

185 Above n107.

ensure that respect for previous court decisions is preserved. Possibly the best way to justify these cases under inherent jurisdiction theory is that people must be discouraged from using litigation to re-open matters that have already been settled by a court. This will prevent the oppression and injustice that would be suffered by the other party. The criminal cases in which prosecutions were dismissed as an abuse of process again demonstrated that the courts will look to much more than merely the correct determination of the substantive issues in the proceedings. In this area, the courts primarily see the inherent jurisdiction as a device with which they can control the behaviour of the police, in the public interest.

Then the paper moved on to consider the question of the inherent jurisdiction in the District Court. The weight of authority is firmly of the view that the District Court does not have an inherent jurisdiction but inherent powers. However, I argued that the District Court should have inherent jurisdiction on basic principles and on policy grounds. I also attempted to show that the jurisdiction/powers distinction is a logically unsustainable one and that if we are going to say the District Court has the

inherent power to prevent abuse of its process we must admit that it has inherent jurisdiction. Our only alternative is to say that it has no power to prevent the abuse of its process. The assertion that the doctrine of abuse of process is not even part of the inherent jurisdiction is quite unsustainable.

My final point was that if all I had previously argued regarding the inherent jurisdiction of the District Court had been wrong the inherent jurisdiction of the High Court is conferred on the District Court in respect of civil proceedings by the District Courts Act 1947,s.42. This assertion is supported by the decisions in Western Motors Ltd v Noakes[186] and in Cooper-Smith v Menner[187].

Finally, we should attempt to answer the questions with which we began. First, where does the inherent jurisdiction come from? The answer seems to be, from the very essence of the court itself. To ensure that the New Zealand courts were seen to contain this basic attribute as well as the English courts, Parliament enacted section 16 of the Judicature Act 1908.

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186 Above n172.

187 Above n173.

Second, what is it used to achieve? We have discussed a number of different possible answers to this question. Woodhouse J said the aim has to be justice in relation to the result of the actual proceedings. As has been made obvious throughout this paper, his position is a narrower one than many of the reported decisions. I submit, with respect, that this fact necessarily renders his opinion incorrect. The law is what the courts are in fact doing. Who then best described what the courts are doing? The approach of Richmond J was essentially that if you can perceive any way in which some sort of justice will result from the action the court takes, the action can be supported by the inherent jurisdiction. I submit that this proposition is able to justify every exercise of inherent jurisdiction we have looked at, with the exception of Re Jones (Deceased)[188] (granting letters of administration), but as this case was decided on the basis of the second part of the Judicature Act 1908,s.16, it may be irrelevant to the inherent jurisdiction anyway. Lord Morris' idea of the inherent jurisdiction as a set of powers to enable the court to use its general jurisdiction effectively is also a useful one. It also seems to justify every power we have looked at

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188 Above n47.

and probably better describes what is actually going through a judge's mind when he or she contemplates an exercise of inherent jurisdiction. Jacob's concept of the court using its inherent jurisdiction to uphold its ability to administer justice in a regular, orderly and effective manner, was used by Woodhouse J as support for his narrow approach. However the support it lends is difficult to see. It really says that the court can do anything that will bring about justice. There is no limitation as to the kind of justice it can be and therefore seems to support Richmond J.

Third, what are the limits to the inherent jurisdiction? At the beginning of this paper, we noted two principle limits. Namely that the inherent jurisdiction moves in the realm of the procedural law only and that it must not contravene statute or rules of court. The former limit severely dented our examination of the court's inherent jurisdiction to make a child a ward of court. The latter limit has appeared to hold although it was pushed in Busby[189] in relation to the statutory provisions that in other contexts authorised exceptions to the privilege against self-incrimination and declared evidence

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189 Above n19.

obtained to be inadmissible in a subsequent criminal trial. The shakiness of this limit is shown by an example from the administrative law. The courts refuse to submit to privative clauses in the way Parliament obviously intended, and will interpret them so narrowly that they come to have almost no meaning.[190] If there ever does come a time when Parliament tries to stop the courts exercising their inherent jurisdiction in a certain way, and if the courts really feel it is important to keep exercising that power, it is not easy to predict which institution would eventually prevail.

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190 Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 166.

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