LEGISLATION

DECLARATORY JUDGMENTS IN NEW SOUTH WALES

THE OLD AND THE NEW

New South Wales has become used to the non-judicature system and the process of reform on which the legislature has embarked may tend to have little immediate impact. A profession born and bred into what the common law world regards as a quaint anachronism in New South Wales may be expected to be slow to take advantage of procedural benefits contemplated by reforms in the system already made or which are yet to be made. Fear of "Bolshevism" led at least one American judge to regard the declaratory judgment as unconstitutional early in its life in the United States,[1] but it is to be hoped that the procedural adjustments in this respect in New South Wales will encourage its legal profession to realise the remedial potential of the declaratory judgment, relatively free as it is of technical requirements. The Law Reform (Miscellaneous Provisions) Act, 1965, is a pot pourri of widely welcomed, protractedly anticipated, reform. Part V of the Act[2] deals with "declaratory orders" and is possibly more far reaching in its scope, if less controversial, than the other parts of the Act.

Section 10 of the Equity Act, 1901-1965, is replaced so that the body of the section now reads:

> In addition to the jurisdiction which is otherwise vested in it the Court shall have jurisdiction to make binding declarations of right whether or not any consequential relief is or could be claimed and whether or not the suit in which the Declaration is sought is a suit for equitable relief or a suit which relates to equitable rights or titles. No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby.[3]

Subsection 2 is expansionary, setting out the circumstances in which a declaratory judgment may be appropriate but without limiting the generality of sub-section 1. The court may declare the nature, quality and extent of the estates, interests, powers, rights, liabilities or duties of any person in respect of any real or personal property or arising under any disposition of real or personal property or under any agreement or option for or relating to any such disposition.[4]

The court may declare the interests, powers, rights and liabilities of any persons arising under any partnership,[5] the memorandum or articles of any company,[6] the rules or constitution of any unincorporated association,[7] any trade mark, patent or copyright agreement,[8] any guarantee or indemnity

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[1] *Antways* v. *Grand Rapids R. Co.* 211 Mich. 592 at 597.
[2] Proclaimed on 15th April, 1966.
[3] Equity Act, 1901-1965, s. 10(1).
[4] *Id.* s. 10(2)(a).
[5] *Id.* s. 10(2)(b)(i).
[6] *Id.* s. 10(2)(b)(ii).
[7] *Id.* s. 10(2)(b)(iii).
[8] *Id.* s. 10(2)(b)(iv).

agreement[9] or generally any contract or agreement.[10]

The court may also make such declarations with respect to any Act, ordinance, rule or regulation or by reason of any executive, ministerial or administrative act done in pursuance of any Act or delegated legislation.[11]

A suit for a declaration may be commenced by statement of claim or by originating summons.[12]

The legislature was no doubt impressed by the fact that commercial people naturally prefer to bring proceedings in the Commercial Causes Court and as the procedural segregation in New South Wales is apparently to remain, at least for the time being, the necessity for reform to the Commercial Causes Act, 1903-1965, must have been apparent. The unique care of draftsmanship that this reform demanded was predicted by his Honour, Mr. Justice Wallace in 1957.[13] And so it is that what his Honour so lucidly advocated nine years ago and what has been the subject of vigorous debate at most Australian legal conventions[14] came to pass in 1966 when Part V of the Act was proclaimed.

Section 7A is added to the Commercial Causes Act, 1903-1965, enabling a judge in commercial causes to make binding declarations of right with respect to the subject matter of the cause being tried as well as or in substitution for any verdict or judgment for debt, damages or return of goods. The judge's power in this respect is limited only by the notion of subjective appropriateness.

Section 7B is an innovation entirely. Where a commercial dispute has arisen concerning the construction of a document or its application to certain facts, a disputant may apply to a judge in chambers for a determination of the dispute.[15] No commercial cause need in fact be commenced and businessmen are no longer compelled to engage in full scale actions to ascertain whether or not a contemplated course can be safely undertaken.[16] However, there must be a "commercial dispute" or a dispute which would give rise to a commercial cause before this declaratory procedure can be invoked.[17]

The judge under the section is obliged to refrain from making a determination where, to settle the dispute, he has to decide questions of fact and if this should arise he should settle the issues for trial in a convenient manner and make suitable orders for an expeditious trial.[18]

Any determination that the judge does make is binding on the disputants in the same way as a verdict or judgment would be if the matter were a commercial cause.[19]

The application to the judge under the section is by summons returnable on two days' notice supported by affidavit evidence deposing the relevant facts and annexing the relevant documents.[20]

This new legislation has thrust into historical relevance the celebrated series of New South Wales and High Court decisions that decided that, to invoke the old s. 10 of the Equity Act, the suit claiming declaratory relief should relate to a claim for equitable relief or to equitable estates or titles.[21]

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[9] *Id.* s. 10(2)(b)(v).
[10] *Id.* s. 10(2)(b)(vi).
[11] *Id.* s. 10(2)(b)(vii).
[12] *Id.* s. 10(3).
[13] "Miscellaneous Comments", paper to Xth Legal Convention in Melbourne 1959 as in (1957) 31 *A.L.J.* at 295-6.
[14] E.g., (1951) 25 *A.L.J.* 344 at 351-2; (1957) 31 *A.L.J.* at 295-6; (1961) 35 *A.L.J.* at 129.
[15] Commercial Causes Act, 1903-1965, s. 7B(1).
[16] (1957) 31 *A.L.J.* at 296 and see also "Report of the Attorney-General's Committee on Administrative Procedure" (1941) (U.S.) 30-33 as in K. C. Davis, *Cases on Administrative Law* (1951) 257.
[17] Commercial Causes Act, 1903-1965 s. 7B(2).
[18] *Id.* s. 7B(4).
[19] *Id.* s. 7B(5).
[20] *Id.* s. 7B(3).
[21] *David Jones Ltd.* v. *Leventhall* (1927) 40 C.L.R. 357 at 368; *Hume* v. *Munro*

The sensitivity of Starke, J. is seen when in *David Jones* v. *Leventhall*[22] he said:

> Actions for declarations were, however, commonplace in its (that is the Supreme Court's) equitable jurisdiction, and the jurisdiction to declare rights extended even to legal rights if incidental to some equitable claim. There is no reason in the nature of things why that power should not be extended to declare rights generally.

But, his Honour went on to say, that the jurisdiction so extended would be exercised only in appropriate cases and would be subject to wide judicial discretion. The method would be expeditious, inexpensive and thoroughly useful. But the words of the old s. 10 were interpreted restrictively by the court having regard to what Isaacs, J. in the same case considered to be the fearsome injustice of a judge alone determining every-day issues by an informal and discretionary procedure.[23]

The legislature has now reversed these early decisions which were accepted in New South Wales as beyond further judicial argument.[24] In doing so the Parliament, for the time being, has had to work within the existing non-judicature framework and the resultant reforms can be expected to raise at once peculiar problems in New South Wales. It will, however, be necessary for New South Wales judges and the profession as a whole to have regard to the English experience and the experience of other Australian States and the High Court in the field of declaratory judgments. This, in itself, will give rise to problems of application and interpretation, for the New South Wales reforms, while parallel in concept to the English equivalent Order 15 Rule 16 of the Supreme Court Rules, are expansionary in such a way as possibly to invite wider and more appropriate application.

It will also be necessary for the New South Wales legislature to consider carefully the peculiar advantages that the 1965 legislation in this area may have introduced. No doubt there will be an early attempt to introduce a fully operative "judicature system" in this State and it can be anticipated that, to this end, the Parliament will look to existing legislation in other Australian States for a model.[25] If this is the case it will mean that the Equity Act, 1901-1965, and the Commercial Causes Act, 1903-1965, will be repealed and the 1965 legislation concerning declaratory relief will become something of a quaint interlude. However, such a rash innovation could mean the abandonment of something worthwhile and the wide utility of the declaratory remedy after the 1965 reform could conceivably be narrowed before the remedy has really had a chance to reveal its true potential.

It is now the intention of this note to discuss the role of the declaratory judgment in New South Wales under the following broad areas of concern:

1. Problems of Interpretation of the New Sections.
2. The Reforms in the Light of English and Australian Experience.
   (a) The availability of the declaratory judgment.
   (b) The function of the declaration in administrative law.
3. The Likely Scope of the Declaration in New South Wales.
   (a) Potential in private law.
   (b) Potential in public law.
   (c) The effects of the imposition of a judicature system.

(1941) 65 C.L.R. 351 at 363-4; *Hume* v. *Munro (No. 2)* (1943) 67 C.L.R. 461 at 478; *Tooth & Co.* v. *Coombes* (1925) 42 W.N. (N.S.W.) 93 at 94-5; *Harvey* v. *Walker* (1945) 46 S.R. (N.S.W.) 180; *Prescott Ltd.* v. *Perpetual Trustee Co. Ltd.* (1928) 28 S.R. 324.

[23] (1927) 40 C.L.R. 357 at 391-3.

[24] *Id.* at 380 and see also Harvey, C.J. in Eq. in *Tooth & Co. Ltd.* v. *Coombes* (1925) 42 W.N. (N.S.W.) 92 at 94.

[24] *White* v. *Pacific Acceptance Corporation Ltd.* (1961) 78 W.N. 559 at 580. See also C. McLelland, K.C. (as he then was) (1951) 25 *A.L.J.* 344 at 351-2.

[25] The N.S.W. Government has set up a Law Reform Commission and one of its specified areas of concern and enquiry has been publicly stated to be "the fusion of law and equity" in N.S.W. It can be anticipated that any legislation to this effect will not reach Parliament until 1968.

1. Problems of Interpretation of the New Sections

(a) Jurisdiction

The Judicature Acts in England transferred the Chancery Court's jurisdiction to the High Court and enabled the making of rules relating to the practice of the court.[26] Order 25 r. 5 (now o. 15 r. 16) empowered the court to make binding declarations of right[27] but it was argued in *Guaranty Trust Co. of New York* v. *Hannay & Co.*[28] that this rule did not confer new jurisdiction on the court and that the Chancery Court had always had this jurisdiction. The elasticity of this attitude has given rise to considerable comment[29] and it was noted in several of the early post-judicature cases that the freedom to make declaratory judgments was "a great innovation".[30] The rule received a relatively liberal judicial interpretation.

Section 10 of the Equity Act in New South Wales is more clearly a jurisdictional innovation. The legislature is explicitly conferring additional jurisdiction on the Equity Court and specifying new powers to be exercised by Equity judges (and this applies also to the Commercial Causes Court). It may be argued that under the old s. 10 the Equity Court had always had this jurisdiction and if the natural meaning of words[31] is relied upon, this would be so. But now, judicial reluctance to broaden the scope of the jurisdiction has been overcome and the arguments that may have concerned English lawyers in 1883 as to the jurisdictional substantiveness of the Judicature Acts[32] would not, so it seems, concern contemporary lawyers in New South Wales as this State takes tentative steps towards a "judicature system".

(b) The interdependent trilogy upset

Section 9 of the Equity Act limits the granting of damages by the Equity Court. A plaintiff in Equity who seeks damages in what he might describe as a "suit for negligence", could logically rely on the final words of s. 8 which provide that ". . . no action so transferred shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction". Such reliance, however, would make nonsense of the restrictive intent of s. 9 despite the difficult addendum to that section which provides that ". . . nothing in this section shall be construed as limiting the operation of any other section of this Act". Such reliance would also be contrary to the very existence of a non-judicature system. The argument has, therefore, evolved that s. 8 should be narrowly interpreted and that this necessarily dictated a restrictive view of s. 10 which, of course, provided that "no suit shall be open to objection on the ground that a merely declaratory decree is sought thereby . . . ."[33] More persuasively, prior to the 1965 reform, the essence of a non-judicature system demanded a view of s. 10 as strongly expressed by Isaacs, J. in *David Jones* v. *Leventhall*.[34]

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[26] Judicature Act, 1873, ss. 16 and 23; Judicature Act, 1925, s. 17.

[27] Order 15 r. 16 reads: "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed." For a review of the English position see I. H. Jacobs, P. Adams, J. S. Neave, K. C. McJuffie, 1 *The Supreme Court Practice* (1967) at 191.

[28] (1915) 2 K.B. 536 at 558 and 569-72.

[29] S. A. de Smith, *Judicial Review of Administrative Action* (1959) at 372.

[30] *Chapman* v. *Michaelson* (1908) 2 Ch. 612 at 370 *per* Farwell, L.J. and (1909) 1 Ch. 238 at 243 and *Ellis* v. *Duke of Bedford* (1899) 1 Ch. 494 at 515 and *West* v. *Sackville* (1903) 2 Ch. at 393 *per* Stirling, C.J.

[31] See Harvey, C.J. in Eq. in *Tooth & Co. Ltd.* v. *Coombes* (1925) 42 W.N. (N.S.W.) 92 at 94.

[32] S. A. de Smith, *op. cit.* 369-72. E.g., *Langdale* v. *Briggs* (1856) 8 De G.M. & G. 391.

[33] See *Hume* v. *Munro* (1941) 65 C.L.R. at 362-63 and *Tooth & Co. Ltd.* v. *Coombes* (1925) 42 W.N. (N.S.W.) 92 at 94.

[34] (1927) 40 C.L.R. at 380-81.

Now s. 10 has had a broad expansive application forced upon it by the legislature, and the delightful argument of interdependence has been cut short, and still, at the same time, further confused. Section 8, which allows the Equity Court to determine basic legal titles or rights as a foundation for equitable relief, is now amended to recognise the court's new jurisdiction to make declaratory decrees where only legal rights or titles are involved. It is to be presumed that as regards other suits in equity the narrow approach will prevail if any sense is to exist in the system of duality of law and equity that is preserved, for the present at least. The determined advocate might say that the judicature flavour of the new s. 10 has coloured s. 8 in respect of all suits in Equity and that, for all intents and purposes, the more obvious practical inhibitions of a non-judicature system have at last been removed. In the result, it would be argued, the legislature is following a policy directed towards the substantial integration of a judicature system, while maintaining procedural separation.[35] Judicial reaction to such deductive fancy is perhaps predictable. The functional separation of law and equity will be adhered to until comprehensive "Judicature Act" legislation is introduced and the intrusion of the new s. 10 will be seen as a preliminary gesture by releasing a practical remedy in recognition of the court's essential role in review of administrative action and in addition (but more obviously in the reform to the Commercial Causes Act) in recognition of commercial demand for convenient judicial determinations which would establish quickly the rights of parties.

(c) Declaratory decrees by an Equity Court

It is possibly appropriate that to seek a declaration a party will institute "a suit in equity" and have a decree made by a judge of an Equity Court. The Equity Court is traditionally a court of discretion and the declaratory judgment is of its nature a discretionary remedy—in fact the limits and extent of this discretion are what determine the role and the application of the remedy. The legislature has recognised the court's discretion in s. 10(2); the court "shall" have the jurisdiction but "may" declare in general and in certain specified areas.

There is old authority that suggests that the English Order 25 r. 5 in the wake of the Judicature Acts created a novel practice which could not be limited by old equitable practice.[36] However, it seems that basic equitable maxims will apply where declaratory judgments are made by a court exercising an equitable jurisdiction even though in a judicature system the remedy may be categorised as "*sui generis*".[37] In the latter case the court in considering the application of equitable principles might attempt to identify the subject matter of the action,[38] but this could be artificial and difficult. This problem of identification seems, however, no longer to concern English judges and the maxim, for instance, that "he who seeks equity must do equity" will not now be "seen as an impediment to the High Court's jurisdiction to make declarations of right".[39]

In New South Wales, if the full extent of the English forerunner, as adopted verbatim by the other Australian States, is to receive parallel interpretation then logically the Equity Court would be in the position of making

[35] *Cf.* C. McLelland, K.C. (as he was then) *loc. cit.* at 352.

[36] *Per* Farwell, L.J. in *Chapman* v. *Michaelson* (1909) 1 Ch. 238 and *per* Neville, J. in *Thomas* v. *Moore* (1918) 1 K.B. 555. See *Hordern Richmond Ltd.* v. *Duncan* (1947) K.B. 545 at 552 where the declaration is regarded as essentially an equitable remedy and see also Stark, J. in *David Jones Ltd.* v. *Leventhall* (1927) 40 C.L.R. at 391.

[37] See S. A. de Smith *op. cit.* 404-5; see also "Developments in the Law—Declaratory Judgments—1941-1949" (1949) 62 *Harv. L.R.* 787 at 799.

[38] *Id.* at 801.

[39] See D. G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (1966) at 240.

decrees in situations where the maxims of equity are disregarded. Thus, the rare creature now existing in New South Wales of a "judicature innovation" established within the framework of a non-judicature system, has created something of a dilemma for New South Wales Equity judges. A similar problem flourished in New Jersey in the United States until the separate court system was finally abolished there in 1948.[40] Of course, the adoption of a judicature system in New South Wales would remove this dilemma and this would be an obvious advantage of such a change.

Meanwhile it is probably reasonable to anticipate that the spirit of *Langman* v. *Handover*[41] and *Mayfair Trading Co. Pty. Limited* v. *Dreyer*,[42] which requires at least some equitable framework for an action in equity, will continue in New South Wales while a separate equitable jurisdiction remains, despite the concession to reform in the new s. 10. The present Chief Judge in Equity in New South Wales, however, in a recent case held the view that the Privy Council's attitude in *Kasumu* v. *Baba Egbe*[43] put an end to the view that in New South Wales, as the Judicature Act had not been adopted, equitable principles remained applicable where title to specific relief was governed by a Court of Equity. But the Chief Judge felt obliged to follow the contrary conclusions, though *obiter*, of Dixon, C.J. in the *Mayfair Trading Case*.[44] It may be that the inclination that the Chief Judge has revealed will now be sustainable in New South Wales and the declaratory decree as a remedy in equity and in fact as a jurisdictional innovation will be given the same scope as if a pure judicature system existed in New South Wales. The words of the new s. 10 in fact suggest that an additional jurisdiction is being conferred on the Equity Court even though still involving "a suit in equity". This additional jurisdiction, it could be argued, is sufficient basis for independent judicial attention. It may, however, be too much to expect the Equity Court as a court of separate equitable jurisdiction, to abandon the accepted maxims of equity in granting declarations and in the result there would at least be this distinguishing restriction on the availability of the declaratory judgment in New South Wales.[45] The implications of this conclusion will be discussed in the final section of this note.[46]

At all events, insofar as the remedy is available in the Commercial Causes Court the question of the application of strictly equitable maxims would not arise. It is arguable that the whole problem could be overcome if an approach of identification is adopted. Thus, if the subject matter of the action is legal, rather than equitable, the transfer provisions would enable the action to proceed at law.[47] But in New South Wales there has been no reform of the

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[40] "Developments in the Law—Declaratory Judgments—1941-1949" *loc. cit.* at 799.

[41] (1929) 43 C.L.R. 334 where Isaacs, J. at 345 approved the decision in *Lodge* v. *National Union Investment Co. Ltd.* (1907) 1 Ch. 300 where in a money-lending transaction relief was given to the borrower but only on the condition that the borrower repaid to the lender the balance of loan moneys and certain premiums.

[42] (1958) 101 C.L.R. 428 in which Dixon, C.J. at 454 assumed that *Langman* v. *Handover* would continue to govern the Supreme Court of N.S.W. in its equitable jurisdiction and at 450-52 Dixon, C.J. confirmed that "there must be some ground, some particular situation giving an equity to the party to the form of relief sought".

[43] (1956) A.C. 539 at 551-2 where the Privy Council refused to impose terms of repayment as a condition for making an order for relief in a money lending transaction.

[44] *White* v. *Pacific Acceptance Corporation Ltd.* (1961) 78 W.N. 559 at 580: "Should I follow my own view or the result of what was decided in *Kasumu* v. *Baba Egbe* or should I follow the views expressed by the Chief Justice?"

[45] See *Great Lakes Dredge & Dock Co.* v. *Huffman* 319 U.S. at 300: "The Declaratory Judgments Act was not devised to deprive Courts of their equity powers or of their freedom to withhold relief upon established equitable principles. It only provided a new form of procedure for the adjudication of rights in conformity to those principles." Also *Colegrove* v. *Green* 328 U.S. 549 at 552: "The Declaratory Judgments Act merely permitted a freer movement of the Federal Courts within the recognised confines of the scope of equity."

[46] *Infra.* 472ff.

[47] "Developments in the Law—Declaratory Judgments—1941-1949" *loc. cit.* at 799.

Common Law Procedure Act[48] to make the declaratory judgment available at common law generally. Rather the remedy has been introduced by way of reform to the Commercial Causes Act which in practical terms appears logical at first sight. However, if, as the *Mayfair Trading Case*[49] suggests, the availability of the remedy in certain circumstances depends on the jurisdiction in which the action is brought,[50] the peculiar limitations that the Commercial Causes Act reform incorporates may in the result lead to an unnecessary stultification of the remedy's general availability. This aspect will also be referred to at a later stage.[51]

(d) Declarations by the Commercial Causes Court

Section 7A of the Commercial Causes Act gives a judge in Commercial Causes power to make binding declarations of right in a commercial cause, subject only to the remedy's appropriateness in the circumstances of a particular case. What is meant by "appropriate" is hard to predict and it can only be surmised that the same factors and limitations affecting the notion of "discretion" where declaratory judgments in general are sought, will affect "appropriateness".

The traditional attitude of the judiciary to avoid deciding hypothetical questions[52] is very often nullified by the pressing demands of the business community which may regard such questions as far from hypothetical. Ambiguities in instruments should not be left for clarification to protracted litigation and so it is that s. 7B of the Commercial Causes Act should prove to be a valuable innovation.

Some of the classical English cases on declaratory judgments have involved "a commercial situation".[53] In *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.*[54] for instance, it was alleged that a mortgagor by bringing an action for a declaration in the Commercial Court was using a device to avoid the obligations of a redemption action in Chancery but this was countered by the argument that commercial people wanting to know where they stand would naturally come to the Commercial Court.[55] Here the interpretation of a commercial contract would settle the real dispute between the parties and the Court said that it was accepted practice to bring a dispute before the Commercial Court so that "the parties may know what business course to take without having to run the risk of acting and finding themselves liable in damages when at last the matter is brought before the Court".[56]

The commercial scope and convenience of the declaration was referred to in dicta of Lord Sterndale, M.R. in *Hanson* v. *Radcliffe U.D.C.*,[57] where

[48] As suggested by H. Whitmore in "An Argument for the Declaratory Order in N.S.W." (1962) 36 *A.L.J.* at 10 but also Wallace, J. in "Miscellaneous Comments" (1959) 31 *A.L.J.* at 296 and in "Speedier Justice" (1961) 35 *A.L.J.* 124 at 129.

[49] (1958) 101 C.L.R. 428.

[50] H. Whitmore *loc. cit.* at 10.

[51] *Infra.* 472ff.

[52] L. C. B. Gower, "The Future of the English Legal Profession" (1946) *Mod. L.R.* at 222 and see also Wallace, J. *loc. cit.* at 296.

[53] E.g., *Guaranty Trust Co. of New York* v. *Hannay* (1915) 2 K.B. 536; *London Association of Shipowners & Brokers* v. *London & India Docks Joint Committee* (1892) 3 Ch. 242; *Ruislip-Northwood U.D.C.* v. *Lee* (1931) 145 L.T. 208; *Jacobs* v. *Aveling-Barford Ltd.* (1936) 1 All E.R. 297; *Odhams Press Ltd.* v. *London & Provincial Sporting News Agency (1929) Ltd.* (1936) 1 All E.R. 217; *Societe Maritime et Commerciale* v. *Venus Steam Shipping Co.* 9 Comm. Cas. 289; *Rhyl U.D.C.* v. *Rhyl Amusements Ltd.* (1959) 1 W.L.R. 465; *Union of India* v. *Compania Naviera Aelous S.A.* (1961) 2 W.L.R. 659. See also the extensive reference to cases in H. H. Glass and R. P. Meagher, "Summary Determination of Commercial Disputes in New South Wales" (1966) 40 *A.L.J.* at 232.

[54] (1921) A.C. 438.

[55] *Id.* at 442.

[56] *Id.* at 452.

[57] (1922) 2 Ch. 490 at 507 and see also *per* Neville, J. in *Thomas* v. *Moore* (1918) 1 K.B. 555.

it was noted that a declaration could be granted as to the rights of parties under a contract without waiting for some event to happen ("for example a ship to arrive at its destination"),[58] in order to determine the result of the contract and what the exact cause of action might be. Such determination would only be limited by judicial exercise of the court's wide discretion.

Many English cases have demonstrated the advantages of a summary determination of a commercial dispute.[59] The most attractive advantage as far as the business community is concerned has been the remedy's speed.[60] A party can establish at the outset what his rights or obligations are under a contract so as to avoid committing a breach. In New South Wales, Macfarlan, J. in the first major judgment he delivered on a s. 7B application summed up the rationale of the enactment in the following words:

> I would think that the general object that Parliament intended to achieve by the enactment of s. 7B was clear. The course of dealings by members of the business community with one another must from time to time generate frictions and possibly disagreements which, if not promptly resolved, may result in disruption to commercial transactions and in financial loss. The Commercial Court has, therefore, always recognised the importance of promptness in becoming seized of disputes which fall within its cognizance.[61]

In the Commercial Causes Court in New South Wales a declaratory determination may not be made as liberally as at first sight might be supposed. There are several inbuilt restrictions in the legislation and some of these have recently been commented upon by Macfarlan, J. in *Concrete Constructions Pty. Limited* v. *Government Insurance Office of New South Wales*.[62] This case involved an application by summons under s. 7B for declarations that the applicant was entitled to be indemnified by the Government Insurance Office. The applicant had subcontracted certain building work and the subcontractor had a clear right of indemnity against the G.I.O. The broad question for determination was whether a policy of insurance between the G.I.O. and the subcontractor could extend to the applicant who had been joined as a third party in an "industrial accident" action commenced by an employee of the subcontractor against the subcontractor. It was argued by the respondent that there was no power under s. 7B to make a determination and this argument was upheld by the Court on the basis that the applicant had no legal right under the insurance contract but merely a benefit. Thus a party seeking to use s. 7B must have "a right" so that the court can make a determination in aid of that legal right. A benefit which is unenforceable at law cannot be the subject of a determination defining that benefit.

In the course of his judgment Macfarlan, J. specifically noted that procedures provided by s. 7B and the powers conferred thereby, were suited to prompt determinations.[63] At the same time his Honour canvassed the statutory limitations on the exercise of power under s. 7B. There must be a dispute that "shall have the character which an action at law must have if it is to be a commercial cause".[64] There must therefore be a situation where the applicant seeking the determination has a cause of action which he could invoke against the other party if he so desired.

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[58] E.g., see *Hanson* v. *Radcliffe U.D.C.* (1922) 2 Ch. 490 at 507.

[59] *Supra* n. 53.

[60] See Wallace, J., "Speedier Justice" (1961) 35 *A.L.J.* 124 at 129 and *cf.* Stark, J. in *David Jones* v. *Leventhall* (1927) 40 C.L.R. at 393.

[61] *Concrete Constructions Pty. Ltd.* v. *Government Insurance Office of N.S.W.* (1967) 85 W.N. (N.S.W.) 104 at 109 *per* Macfarlan, J. in Commercial Causes 13.10.66. Also *British Imex Industries Ltd.* v. *Midland Bank Ltd.* (1958) 1 Q.B. 542 at 549; *J. H. Vantol Ltd.* v. *Fairclough Dodd & Jones Ltd.* (1955) 1 W.L.R. 642.

[62] (1967) 85 W.N. (N.S.W.) 104.

[63] See n. 61 *supra.*

[64] *Concrete Constructions Case supra* at 110.

It has been clearly established in England that while a dispute must exist the requirement of a demonstrable cause of action to base an application for a declaration, is not necessary.[65] The authority for this is well known as *Guaranty Trust Co. of New York* v. *Hannay*[66] and in this case Pickford, L.J. said that if Order 25 r. 5 only authorised a declaration where it is founded on facts which show a cause of action, it would sterilize a most valuable procedure in commercial matters where an immediate decision might be required which otherwise would have to be delayed at great inconvenience and expense.[67]

The New South Wales legislature has been at pains to specify the need for a cause of action and clearly the Commercial Causes procedure is not open where a party to a disputed commercial instrument merely wishes to ascertain whether, in fact, there is a cause of action. In these circumstances there would, however, appear to be nothing to prevent the disputant proceeding in the Equity Court for a declaration of rights under a written instrument and this is anticipated by the commercial flavour of much of the new s. 10(2)(b) of the Equity Act.

The other apparent restrictions on the operation of s. 7B are that the dispute must relate to a matter that concerns the parties.[68] The dispute must be commercial and this involves reference to the definition of a "commercial cause" in s. 3 of the Commercial Causes Act, 1903-1965. Further, the commercial dispute must concern "the construction of a document or its application to any facts".[69] Thus some s. 7B applications will involve straight questions of construction and others will require the determination of issues of fact ancillary to the documents. There is here a reflection of the old Order 25 r. 5 in conjunction with Order 54A r. 1 of the English Supreme Court Rules.[70] Under the latter, any person interested under "a deed will or other written instrument" could apply by originating summons for a determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.[71] It was recognised that this procedural Order, in association with Order 25 r. 5, which empowered a court to make binding declarations of right generally, gave rise to a jurisdiction for the making of a declaration where one party to a contract claimed a right under it and the other party denied this and sought a determination to this effect. But the latter party could not, if the other party remained silent as to his rights, obtain a declaration that the other party had no rights—in other words, there must be a dispute under the contract.[72]

However, the New South Wales counterpart to this English procedure has the unique advantage of being speedily available as a summary remedy not only where a question of construction is involved but where a dispute has arisen as to certain facts to which the relevant document must apply.

At this point, however, there is some confusion of terminology in the legislation. There cannot be a determination to decide any question of fact (s. 7B(4)) yet "a determination of any issue of fact or of any question of law . . . shall be binding . . ." (s. 7B(5)). It has been suggested that "the exercise of the new jurisdiction will not be perplexed" by problems such as the "allocation of a question of construction to its proper category of fact or law".[73] It may have been expected that the judge would decide all questions

[65] In early cases a cause of action was insisted upon, e.g., *Offin* v. *Rochford Rural Council* (1906) 1 Ch. 342 and *Jenkins* v. *Price* (1907) 2 Ch. 229.
[66] (1915) 2 K.B. 536.
[67] *Id.* at 557.
[68] S. 7B(1).
[69] S. 7B(1).
[70] This is noted by H. H. Glass and R. P. Meagher *loc. cit.* at 232.
[71] See generally S. A. de Smith *op. cit.* at 409-11 and 413-16.
[72] *In re Clay; Clay* v. *Booth, In re a Deed of Indemnity* (1919) 1 Ch. 66 at 71.
[73] H. H. Glass and R. P. Meagher *loc. cit.* at 233.

of fact and/or law and that appeal would lie to the Court of Appeal. However, in *Legion Cabs (Trading) Co-op. Society Ltd.* v. *Shell Company of Australia Ltd.*[74] the judge relied on s. 7B(4) to require an applicant to proceed by way of a commercial cause with pleadings, after deciding that matters of fact were involved in at least one of the issues for determination. There could not be a determination of a factual dispute as to the terms of an agreement. But it had been held in an early English case[75] that questions of fact pertaining to the question of construction could be determined under Order 54A r. 1. Furthermore it is difficult to see how a judge could avoid deciding a question of fact where he is specifically empowered to make a determination of "the questions involved" in a commercial dispute—a dispute which can arise from a document's application to "any facts". The judge, it is noted, makes a "determination" and Macfarlan, J. in the *Concrete Constructions Case* regarded this as empowering the judge to do whatever is necessary to make a determination of the dispute.[76] There is quite clearly some confusion of logic in this area and any future legislation to introduce a Judicature Act system could well be used as the vehicle of solution.

Finally it should be noticed that the legislature has ascribed special effectiveness to declarations made by the Commercial Causes Court, to the extent that the Court's determination will influence the parties presumably in the same way as if a verdict were given in a commercial cause.[77] This is extending the accepted scope of declaratory judgments which rely for their effectiveness on the mutual respect of the parties for the decision.[78]

2. The Reforms in the Light of English and Australian Experience

It is not possible here to trace the development and present application of the declaratory remedy in England and Australia[79] but rather an attempt will be made to gather together some of the factors and limitations affecting the remedy, in particular as regards the exercise of the court's discretion and the specific role of the remedy in the field of administrative law. This is done with a view to revealing the significance of the reform in New South Wales and indicating the new areas opened by it.

(a) The availability of the declaratory judgment

(i) Generally

The declaratory judgment is a judicial determination of a dispute between parties whereby the rights and obligations of the parties are denoted, but lacks imposition of a sanction. The remedy being non coercive may be appropriate where no wrongful act as such has been committed[80] or where parties are primarily anxious to establish their respective rights and duties arising under some dispute. Declaratory relief can be sought in disputes involving private law relationships[81] (for example, under written instruments or in

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[74] Not yet reported; Macfarlan, J. in Commercial Causes (N.S.W.) 7th November, 1966.

[75] *Nicholls* v. *Nicholls* (1890) 81 L.T. 811. But note the new s. 7B(4) in conjunction with s. 7B(1) on determination of "a question of fact".

[76] (1967) 85 W.N. (N.S.W.) 104 at 111.

[77] S. 7B(5).

[78] S. A. de Smith *op. cit.* at 367. Note also U.S. Restatement of Judgments 1942 Topic 5 "Declaratory Judgments" No. 77.

[79] See S. A. de Smith *op. cit.* at 367-74 and M. E. Foster, "The Declaratory Judgment in Australia and the United States" (1957-58) 1 *Melb. U.L.R.* 207 and 347 which compares the role of the declaratory judgment as used by the High Court of Australia and the U.S. Supreme Court and contains a concise statement of the English background. See also Halsbury, 22 *Laws of England* (3 ed.) 746-52 for a useful summary of the English development. Also, E. M. Borchard, *Declaratory Judgments* (2 ed.) 137.

[80] S. A. de Smith *op. cit.* at 366.

[81] E.g., the situation in *Harvey* v. *Walker* (1945) 46 S.R. (N.S.W.) 180 in which a

relation to title to or disposition of property) or in the field of public or administrative law where necessary grounds exist (for example, breach of rules of natural justice or an *ultra vires* act) to involve judicial review of an administrative body which has acted quasi judicially or even in a purely ministerial way. The remedy's potential in the latter field has been revealed after *Dyson* v. *Attorney General*[82] in 1911 but this potential has remained somewhat academic in the judicature States of Australia where the lack of reported cases could be taken to indicate a failure by practitioners fully to appreciate the value of the declaratory judgment as a remedy in public law. As a means for judicial supervision over administrative action, where the latter is quasi-judicial, the declaratory judgment is clearly preferable to the recognised procedures of the prerogative writs which are burdened with exacting technicalities and frustrating incongruities.[83]

The declaratory judgment enables judicial supervision where a dispute arises over the application of a statute or delegated legislation;[84] where the decision of a non-statutory domestic tribunal is challenged on certain grounds[85] and furthermore the remedy is available against the Crown (or public authorities).[86]

In the new s. 10(2) of the Equity Act the remedy's availability in private and public law is clearly recognised. Case law in the United Kingdom has largely established the areas of application to which the subsection refers although s. 10(2)(b)(vii) in general, and especially in its reference to administrative acts done pursuant to a statute or regulation, appears to invite a more far reaching application.

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lessee sought a declaration on which to rely on the assignment of his tenancy where the lessor had withheld consent. Also in *Young* v. *Ashley Gordons Proprietors Ltd.* (1903) 2 Ch. 112; *Sivyer* v. *Amies* (1940) 3 All E.R. 285.

[82] (1911) 1 K.B. 410—where it was held that the court had jurisdiction to make a declaratory order against the Attorney-General as the Crown's representative and thus opened the way for private citizens to attack in certain circumstances the invalid acts of public bodies or individuals.

[83] Recognition of the declaratory judgment's role in public law is clearly stated by Denning, L.J. in *Taylor* v. *National Assistance Board* (1957) 101 at 111: "It is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determination in accordance with the law; and this is so no matter whether the determinations are judicial or disciplinary or administrative determinations." The advantages of the declaratory judgment are discussed in S. A. de Smith *op. cit.* at 372-74 and 405 ff. See also I. Zamir, "The Declaratory Judgment v. The Prerogative Orders" (1958) *Public Law* 341 at 344; G. J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law" (1955) 18 *Mod. L.R.* 138; *Barnard* v. *National Dock Labour Board* (1953) 2 Q.B. 18 at 48 demonstrated in a practical way the advantage of the declaratory judgment particularly in enabling discovery. In the recent case of *Gregory* v. *Camden London Borough Council* (1966) 2 W.L.R. 899 at 903-6 Paull, J. distinguished between an order for *certiorari* which quashes an order and a declaration which merely declares the rights of the party to the action and does not affect the rights of all persons who might be governed by the order. The clear advantage of the declaratory judgment over *certiorari* and prohibition (which can only issue in respect of judicial or quasi judicial decisions) is demonstrated in the conflicting attempts to distinguish judicial and administrative acts (*Ridge* v. *Baldwin* (1963) 2 W.L.R. 935 as against *Testro Bros.* v. *Tait* (1963) 37 A.L.J.R. 100) in order to establish whether *certiorari* will lie. If Denning, L.J. in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* (1958) 1 Q.B. 554 at 572 is correct when he says that the declaratory judgment "applies to administrative as well as judicial acts wherever their validity is challenged because of denial of justice or for any other good reasons", the need for elaborate prerequisites as a basis for the declaratory judgment is obviously nullified.

[84] See S. A. de Smith *op. cit.* at 376 and also I. Zamir, *The Declaratory Judgment* (1 ed.) 151. In the Federal sphere declaratory action has often been used as a practical means of intervention to challenge the constitutionality of legislation including subordinate legislation, e.g. *Attorney-General (Vic.)* v. *The Commonwealth* (1945) 71 C.L.R. 237; *Crouch* v. *The Commonwealth* (1948) 77 C.L.R. 339; *Hughes & Vale* v. *Gair* (1954) 90 C.L.R. 203 and see generally M. E. Foster *loc. cit.* at 207 and 347.

[85] See *Lee* v. *Showmen's Guild of Great Britain* (1952) 2 Q.B. 329; *Davis* v. *Carew-Pole* (1956) 1 W.L.R. 833.

[86] *Dyson* v. *Attorney-General* (1911) 1 K.B. 410 and see also in N.S.W. *ex p. McWilliam* (1947) 47 S.R. (N.S.W.) 401 and *McLean* v. *Rowe* (1925) 42 W.N. (N.S.W.) 87.

(ii) The need for a justiciable controversy

Reference has already been made to *Guaranty Trust Co. of New York* v. *Hannay & Co.*[87] which is taken to have decided that power to make a declaration existed whether there was a cause of action or not. The comments of Bankes, L.J.[88] in the same case have recently been referred to with approval in *Cox* v. *Green*[89] where Plowman, J. noted that a person who seeks a declaration must seek some relief.[90] In the same case it was said that although Order 15 r. 16 was very wide, there must be at least a justiciable dispute between the parties to bring it into operation.[91] Thus, what is referred to as "a gentleman's agreement" cannot be sued upon as a contract and this rule should not be circumvented by the remedy of a declaration. The judiciary has sometimes found assistance in formulating a test by relation to the old Scottish action of "declarator" where the plaintiff must have a real interest in a real question which is contradicted by another party.[92]

In Australia the requirement of a justiciable dispute for a declaration has received most attention in the constitutional sphere where the High Court requires a "matter"[93] before entertaining any case—a requirement that, however, has been leniently interpreted.[94]

The declaration claimed must confer some recognisable advantage on the plaintiff[95] and must relate to some legal right.[96] There is no need now for any consequential relief to be sought[97] (such as an injunction), although the courts tend to exhibit greater caution[98] when purely declaratory relief is sought.

(iii) The standing of the parties[99]

The plaintiff must have sufficient personal interest[100] so as to enable a

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[87] (1915) 2 K.B. 536.
[88] *Id.* at 569-72.
[89] (1966) 2 W.L.R. 369.
[90] *Id.* at 374.
[91] *Id.* at 373.
[92] *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.* (1915) 2 K.B. 536 at 448: *In Re Clay; Clay* v. *Booth, In Re A Deed of Indemnity* (1919) 1 Ch. 66 at 76; *Vine* v. *National Dock Labour Board* (1957) A.C. 488.
[93] *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.
[94] *Attorney-General* (Vic.) v. *The Commonwealth* (1945) 71 C.L.R. 237 and *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (1954) 90 C.L.R. 246 esp. Dixon, C.J. (dissenting) at 45; *Bruce* v. *Commonwealth Trade Marks Label Association* (1907) 4 C.L.R. 1569. See generally, Foster *loc. cit.* at 366 ff. and de Smith *op. cit.* at 391 ff. For U.S. experience in this area, i.e., "the ripeness of the dispute", see Foster *supra* on requirements of justiciability in the U.S. Supreme Court, 350-66 and see K. C. Davis, 3 *Administrative Law Treatise* (1958) section 23; 310-14. Note esp. *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.* 312 U.S. 270 at 273 where it was stated that to determine if a declaratory judgment would lie the court must see whether the facts alleged under all the circumstances show that there is a substantial controversy between the parties having adverse legal interests of immediacy and reality.
[95] *Maerkle* v. *British & Continental Fur Co. Ltd.* (1954) 3 All E.R. 50 ff.; *Condon* v. *Ryder* (No. 2) (1953) Ch. 423. Some relief should be sought by the plaintiff or a right to material relief must be established. In this regard see *Guaranty Trust Co. of New York* v. *Hannay* (1915) 2 K.B. 536 at 572; *Thomas* v. *Moore* (1918) 1 K.B. 555 and *London Association of Shipowners & Brokers* v. *London & India Docks Joint Committee* (1892) 3 Ch. 242.
[96] *Nixon* v. *A.G.* (1930) 1 Ch. 566 at 574 and (1931) A.C. 184 at 193.
[97] *Chapman* v. *Michaelson* (1909) 1 Ch. 238; *Jacobs* v. *Aveling-Barford Ltd.* (1936) 1 All E.R. 297. In Australia see *Colman* v. *Miller* (1906) V.L.R. 622; *Tuckett* v. *Brire* (1917) V.L.R. 36; *H. A. Warner Pty. Ltd.* v. *Williams & Ors.* (1946) 73 C.L.R. 421; *Emery* v. *Commonwealth of Australia* (1963) V.R. 586.
[98] *Austen* v. *Collins* (1886) 54 L.T. 903; *Grey* v. *Spyer* (1921) 2 Ch. 549; *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332 at 344.
[99] See generally Benjafield and Whitmore (1966) *op. cit.* at 230-34; de Smith (1959) *op. cit.* at 394-98; Foster *loc. cit.* at 381-89.
[100] *Stockwell* v. *Southgate Corporation* (1936) 2 All E.R. 134 at 135. But note that in *Dyson* v. *A.G.* (1911) 1 K.B. 410 and *Prescott* v. *Birmingham Corporation* (1954) 3 W.L.R. 990 it is difficult to isolate the personal interests of the litigants.

real dispute to exist.[101] The individual before the court must be specially affected and not just affected as a member of the public.[102] Furthermore, the defendant to be competent must be sufficiently affected in his legal interests by the plaintiff's claim.[103] It is worth noting that where a declaration is sought on the construction of a contract a court would be reluctant to make a determination unless the parties have sufficient interest under the document concerned. It seems that such a determination would have to be in furtherance of a party's legal right and that if the party seeking the declaration could claim only some unenforceable benefit under the contract, the court would not exercise its discretion.[104]

There appears to be no unqualified rule of practice precluding a declaration in the absence of some of the interested parties although the particular circumstances of each case would no doubt affect a court's attitude in this regard, and a court would no doubt hesitate before making a declaration of right in the absence of an interested party who is directly concerned.[105]

The role of the Attorney-General as a plaintiff for a declaration at the relation of some member of the public which is affected generally in some way, is uncertain[106] (for example, if a public authority commits an *ultra-vires* act which has public, as distinct from private, repercussions).

Certainly the Attorney-General may be sued at the instance of an individual for a declaration and it is this that has given the remedy its powerful administrative scope.[107]

At all events, the wide discretion of the court which, it appears, will be exercised so as to make the remedy available where the particular case before the court itself establishes "good reason"[108] for its use will no doubt attach standing to private plaintiffs if a substantial dispute exists.

(iv) The discretion of the court[109]

The declaration is a valuable remedy and the courts have shown reluctance to put unnecessary limitations on its use.[110] The English rule has been described as "almost unlimited in defining the rights of the parties"[111]—only limited by the court's discretion which should be exercised judicially[112] but

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[101] The question of justiciability and standing overlap. This is adverted to in Benjafield and Whitmore (1966) *op. cit.* at 237 and Foster *loc. cit.* at 348 where *Australian Boot Trade Employees Federation* v. *Commonwealth* (1954) 90 C.L.R. 20 is discussed in this regard.

[102] *Anderson* v. *Commonwealth* (1932) 47 C.L.R. 50 where it was said at 50-52: "The plaintiff has no interest in the subject matter beyond that of any other member of the public . . . the right to bring an action does not exist unless he establishes that he is more peculiarly affected than other people." See also *Gregory* v. *Camden London Borough Council* (1966) 1 W.L.R. 899 at 906-7 and 909-10 where the question of status to claim a declaration is fully discussed.

[103] *Powell & Thomas* v. *Evan Jones & Co.* (1905) 1 K.B. 11 at 24.

[104] *Concrete Constructions Pty. Ltd.* v. *Government Insurance Office of N.S.W.* (1967) 85 W.N. (N.S.W.) 104.

[105] *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332 at 345; *Thomas* v. *A.G.* (1937) Ch. 72. See *Ikebife Ibeneweka & Ors.* v. *Peter Egbuna & Anor.* (1964) 1 W.L.R. 219 at 225-26; *Lion White Head Ltd.* v. *Rogers* (1918) 25 C.L.R. 533; *Dairy Farmers Co-operative Milk Co. Ltd.* v. *Commonwealth* (1946) 73 C.L.R. 381.

[106] *L.P.T.B.* v. *Moscrop, supra.* See *Ramsay* v. *Aberfoyle Manufacturing Co.* (1935) 54 C.L.R. 230; *Attorney General (Victoria)* v. *Commonwealth* (1945) 71 C.L.R. 237 at 272.

[107] *Dyson* v. *A.G.* (1911) 1 K.B. 410.

[108] *Per* Denning, L.J. in *Pyx Granite Case* (1958) 1 Q.B. 554 at 571.

[109] See generally S. A. de Smith (1959) *op. cit.* 398-405.

[110] *Punton & Anor.* v. *Ministry of Pensions & National Insurance* (No. 2) (1964) 1 All E.R. 448 at 452; *Howard* v. *Pickford Tool Co. Ltd.* (1951) 1 K.B. 417 at 420 and see also *Slee & Anor.* v. *Warke* (1952) 86 C.L.R. 271 at 279-86.

[111] *Hanson* v. *Radcliffe U.D.C.* (1922) 2 Ch. 490 at 507.

[112] *Ibid.* and see Stark, J. in *David Jones Ltd.* v. *Leventhall supra* at 393; also *Civil Service Association of W.A.* v. *Minister for Justice* (1925) 27 W.A.L.R. 143 at 148-49.

which is very wide. The facts of each case[113] will necessarily justify or otherwise, the exercise of jurisdiction to make a declaration. But a court should exercise great care and jealousy and show extreme caution in the exercise of discretion.[114] This cautious attitude may to a certain extent have been broken down even in cases where no consequential relief is sought.[115] Lord Denning has perhaps expressed the extreme limit of the remedy's utility by stating that "the Court has a discretion to resolve it ('a substantial question') by a declaration which it will exercise if there is good reason for so doing".[116] This broad discretion will, of course, be limited by any specific statutory requirements as for instance those which have been incoporated in s.7B of the New South Wales Commercial Causes Act, 1903-1965.

Discretion will not be exercised to make a declaration which would amount to an abuse of process,[117] be against public policy,[118] frivolous,[119] embarrassing or serving no useful purpose.[120] The relief claimed must be just and equitable and within the accepted jurisdiction of the court.[121] Declarations will not be made with respect to hypothetical or purely academic questions.[122] Various judges in exercising the discretion have referred to the practical convenience[123] of the remedy which can be seen in the circumstances of a case as more helpful to disputants than what could be expensive and protracted litigation. The fact that the declaratory relief sought may have a far reaching effect on many people other than the plaintiff has been material in influencing judicial exercise of discretion for a declaration.[124]

Declarations will rarely be made where future rights are involved[125] although in a "commercial dispute" situation this may not be the case.[126] Such a declaration can be made if, for instance, all parties are *sui juris* and able to argue the case,[127] but if the plaintiff could have no relief against the

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[113] *Re Berens, Berens* v. *Berens* (1888) W.N. 95; *Ikebife Ibeneweka* v. *Egbuna* (1964) 1 W.L.R. 219 at 224; *Punton (No. 2) supra* at 455.

[114] *Ibid.* Also *West Hampshire Corp.* v. *Sharp* (1907) 1 K.B. 445; *Sweeton* v. *A.G.* (1920) 1 Ch. 85; *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd.* (1921) 2 A.C. 438 at 448 and 461; *Vine* v. *N.D.L.B.* (1957) A.C. 488; *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332 at 344.

[115] *Austen* v. *Collins* (1856) 54 L.T. 903; *A.G.* v. *Colchester Corp.* (1955) 2 Q.B. 207 at 217. Here cautionary phrases were used in conjunction with claims for declarations where consequential relief was not or could not be claimed.

[116] *Pyx Granite Case* (1958) 1 Q.B. at 571.

[117] *Argosam Finance Co. Ltd.* v. *Oxby* (1964) 3 W.L.R. 774 at 780-84; *Munnich* v. *Godstone Rural District Council* (1966) 1 W.L.R. 427 at 428 and 438.

[118] *British Assoc. of Glass Bottle Manufacturers* v. *Foster* (1917) 86 L.J. Ch. 489 at 494.

[119] *Maerkle* v. *British & Continental Fur Co. Ltd.* (1954) 3 All E.R. 50.

[120] *A.G.* v. *Colchester Corporation* (1955) 2 All E.R. 124.

[121] *Guaranty Trust Co. of New York* v. *Hannay* (1915) 2 K.B. 536 at 572 which was discussed in *Cox* v. *Green* (1966) 2 W.L.R. 369 at 374, also *Garthwaite* v. *Garthwaite* (1964) 2 All E.R. 233.

[122] *Howard* v. *Pickford Tool Co. Ltd.* (1957) 1 K.B. 417 at 421; *Tindell* v. *Wright* (1922) 127 L.T. 149; *Argosam Finance Co.* v. *Oxby* (1964) 3 W.L.R. 774. For the High Court's attitude to "hypothetical questions" see n. 94 *supra.*

[123] *Thomas* v. *Moore* (1918) 1 K.B. 555; Stark, J. in *David Jones Ltd.* v. *Leventhall supra* at 392; *Ibeneweka* v. *Egbuna* (1964) 1 W.L.R. 219 at 225; *West Hampshire Corporation* v. *Sharp* (1907) 1 K.B. 445.

[124] *Dyson* v. *A.G.* (1911) 1 K.B. 410; *H. A. Warner Pty. Ltd.* v. *Williams & Ors.* (1946) 73 C.L.R. 421 at 431.

[125] *Curtis* v. *Sheffield* (1882) 21 Ch. D. 1. *Re Staples Owen* v. *Owen* (1916) 1 Ch. 322; *re Clay* (1919) 1 Ch. 66; *McIntosh* v. *Lambley* (1903) 20 W.N. (N.S.W.) 88; *Public Service Commission* v. *Wycoff Co.* 344 U.S. 237, 241-3.

[126] *Concrete Constructions Pty. Ltd.* v. *Government Insurance Office of N.S.W.* (1967) 85 W.N. (N.S.W.) 104 at 111 where Macfarlan, J. said: "Obviously if a dispute has arisen between two parties to a commercial contract which requires performance of the contractual obligations over a period of time in the future, the need of those two parties is to be told the meaning of their contract document and what their obligations under it are for the future."

[127] *Per* Pickford, C.J. in *Guaranty Trust Co. of New York* v. *Hannay supra* at 565; *Curtis* v. *Sheffield* (1882) 21 Ch. D. 1.

defendant at all, or if the declaration would be "in the air" and immediately useless then discretion will not be extended.[128]

One of the most significant limitations on the use of the declaration is where an appropriate remedial procedure has been otherwise provided by the legislature[129] or, perhaps in Australia, even where it would be possible to use a writ of *certiorari* as a means of judicial supervision of administrative action.[130] Thus where exclusive jurisdiction[131] is given to another tribunal, declaratory relief will not, except in exceptional circumstances, be entertained and where a mode of procedure is set out by statute, a declaration cannot be used to test the validity of such procedure.[132] The court by the making of a declaration will not, for instance, act as an information bureau for a taxpayer by advising on how to pursue a claim for recovery of tax when this problem could be resolved at the outset within the exclusive province of the taxation machinery set up by statute.[133]

Another restriction on the exercise of discretion by a court to make a declaration arises where the matter in dispute is placed within the exclusive jurisdiction of another tribunal. Even where the language conferring jurisdiction on the other tribunal is permissive, a superior court is prevented, impliedly, from determining the issue by declaration. This proposition established in *Barraclough* v. *Brown*[134] has to some extent been cut down by the views expressed by Viscount Simonds in the *Pyx Granite Co. Case*.[135] However, more recently in *Punton* v. *Ministry of Pensions and National Insurance (No. 2)*[136] the different fact situations of the two earlier cases was considered sufficient to distinguish them and to leave *Barraclough* v. *Brown* with continuing potency. Thus, if to allow a declaration the court would be enforcing statutory rights by a procedure not envisaged by the legislature as distinct from seeking to ascertain the extent of statutory liability, then a declaration would apparently be refused.

A further factor which may influence a court in deciding whether to make a declaration is whether the applicant merely seeks a tactical advantage by using the remedy during the course of substantial litigation in another court. In a recent English case[137] the parties admitted that the declaratory proceedings were nothing more than "a staging post in litigation" and the object of these proceedings was to enable the parties to reach a stronger tactical position before starting "the next round of county court litigation". In these circumstances the judge "after much hesitation" decided it was a proper case for a declaration but in doing so he reminded other potential

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[128] *Berens, Berens* v. *Berens* (1888) W.N. 95; *Odhams Press Ltd.* v. *London & Provincial Sporting News Agency* (1929) *Ltd.* (1936) 1 All E.R. 217. Also, see *Dairy Proprietary Association (Inc.)* v. *N.Z Dairy Produce Control Board* (1926) N.Z.L.R. 535.

[129] See generally S. A. de Smith (1959) *op. cit.* 399-404, and 388-90; *Barraclough* v. *Brown* (1897) A.C. 615; *re Birkenhead Corp.* (1952) Ch. 359.

[130] *Toowoomba Foundry Pty. Ltd.* v. *Commonwealth* (1945) 71 C.L.R. 545 at 571 and 583.

[131] But note that a finality clause will not necessarily give a tribunal exclusive jurisdiction: *Taylor* v. *National Assistance Board* (1956) P. 470, (1957) 1 All E.R. 183 at 185.

[132] *Punton* v. *Ministry of Pensions & National Insurance (No. 2)* (1964) 1 All E.R. 448 at 455; *Healey* v. *Ministry of Health* (1954) 3 All E.R. 449 at 451-52. In Australia: *Emery* v. *Commonwealth* (1963) V.R. 586 at 588 and *Civil Service Association of W.A.* v. *Minister for Justice* (1925) 27 W.A.L.R. 143 at 148-49. But "in special circumstances" e.g., *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1898) 2 Ch. 331.

[133] *Sweeton* v. *A.G.* (1920) 1 Ch. 85; *Argosam Finance Co.* v. *Oxby* (1964) 3 W.L.R. 774 at 780.

[134] (1897) A.C. 615 at 622 and 624.

[135] (1960) A.C. 260 at 286 and see also *Francis* v. *Yiewsley & West Drayton U.D.C.* (1957) 2 Q.B. 136 at 148 where it was said that a citizen's right to a determination of his rights should not be excluded except by clear words.

[136] (1964) 1 All E.R. 448 at 455.

[137] *Byrne* v. *Herbert* (1966) 2 W.L.R. 19 at 22.

litigants that the power to make declarations was a discretionary one to be exercised with caution.

A declaration will definitely not be made where to do so would amount to an exercise of matrimonial jurisdiction or involve questions of legitimacy. It has been said by English judges in support of this that Order 15 r. 16 did not, in its original form, create a jurisdiction that did not otherwise exist but related only to practice and procedure.[138]

It is clear from *Barnard's Case*[139] that declarations will be granted pronouncing on the validity of decisions by statutory tribunals. If, for instance, a minister's decision is challenged as invalid and the proponent has a sufficient interest then declaratory relief is conceivable. If, however, it is sought to establish by way of a declaration some fundamental fact that would in effect nullify the ministerial decision and open the matter for rehearing, the court will not exercise its discretion on the grounds that the matter has already been decided by the minister as provided for by statute[140] and that if a declaration were granted anyone disappointed with an administrative decision could start proceedings for a re-hearing which in turn could lead to conflicting duality and great inconvenience.[141]

To substitute an effective decision for what an administrative body, acting judicially, has decided, an aggrieved party in Australia may have to be satisfied with the prerogative writs if the High Court's view in *Toowoomba Foundry Pty. Limited* v. *The Commonwealth*[142] prevails. Such English authority as *Barnard's Case* and *Pyx Granite Case*[143] might indicate a reappraisal of the High Court's attitude so as to release, as it were, the declaration as a convenient remedy and the more recent decision in *Punton's Case* would probably not affect such a liberal development. The intrusion of the action for a declaration as a supervisory remedy in administrative law at the expense of *mandamus*, prohibition and *certiorari*[144] has revealed the advantages of the remedy which centre around the welcome idea of diminishing technicality and greater scope of application. If a party, however, obtains other relief by a remedy which the court considers sufficiently deals with the matter, any declaratory relief which is also sought, could be refused.[145]

(b) The function of the declaration in administrative law[146]

In Australia particularly, the declaration has been used to challenge federal legislation thought to be *ultra vires* and the High Court's attitude

[138] *Knowles* v. *A.G.* (1950) 2 All E.R. 6; *Garthwaite* v. *Garthwaite* (1964) 2 All E.R. 233 at 238 and 246.

[139] (1953) 2 Q.B. 18 and see *Healey* v. *Minister of Health* (1954) 3 All E.R. 449 at 451.

[140] *Healey* v. *Minister of Health* (1954) 3 All E.R. 449 at 451-2 where Denning, L.J. thought that a declaration in these circumstances was "going too far". And see *Punton No.* 2 (1964) *supra* which confirmed Denning, L.J's. view.

[141] *Id.* at 452. See also *Connelly* v. *Director of Public Prosecutions* (1964) A.C. 1254 at 1353 *per* Lord Devlin: "It is absolutely necessary that issues of fact that are substantially the same, should, wherever practicable, be tried by the same tribunal and at the same time. . . . No system of justice can guarantee that every judgment is right but it can and should do its best to ensure that there are no conflicting judgments in the same matter."

[142] (1945) 71 C.L.R. at 571-2 and 583-4 which held that a statutory tribunal's decision could not be attacked by way of an application for a declaration only and in so doing, distinguishing *Cooper* v. *Wilson* (1931) 2 K.B. 309.

[143] In *Pyx Granite Case* (1960) A.C. 260, Lord Goddard at 290 said that the remedies of declaratory judgment and *certiorari* were "not mutually exclusive".

[144] For a concise discussion of this aspect see H. Whitmore in *loc. cit.* at 7-9.

[145] *Vine* v. *National Dock Labour Board* (1957) A.C. 488 which suggests that damages for breach of contract of service, if available and a sufficient remedy, would be preferred to a declaratory action. See also *Barber* v. *Manchester Regional Hospital Board* (1958) 1 All E.R. 322 at 329-31 and *Francis* v. *Municipal Council of Kuala Lumpur* (1962) 3 All E.R. 633.

[146] See generally S. A. de Smith (1959) *op. cit.* Ch. 11 366-416 and Benjafield & Whitmore (1966) *op. cit.* at 229-39. See n. 79 *supra.*

regarding the remedy's role in the supervision of the decisions of statutory tribunals has already been referred to.[147] Section 10(2)(b)(vii) of the Equity Act clearly contemplates declaratory relief so as to determine the rights and interests of any persons under any Act or under delegated legislation.[148] It can be presumed that the High Court's tests of justiciability and standing[149] as well as the general experience of the English development of the remedy would guide New South Wales judges. The discretionary nature of the remedy, especially in a court exercising equitable jurisdiction, would be sufficient to balance any fear of rash litigation.

As a challenge to purely administrative action the remedy of declaratory judgment has been well established in England.[150] If an administrative body acts in disregard of the rules of natural justice or acts outside its jurisdiction then a declaration will lie assuming the factors affecting justiciability, status and discretion, referred to above, are appropriate. The New South Wales reform explicitly extends the remedy to administrative acts done or purported to be done pursuant to any Act or subordinate legislation.[151] The development of the declaration in this role, as reflected in the *Delta Properties Case*,[152] has been clarified by categorical legislative action. It is to be assumed that the New South Wales reform, which on the face of it, entitles any person to a declaration of his rights, pursuant to any administrative act, in its operation requires an established basis for a suit[153] (for example, breach of the rules of natural justice) and is limited by the factors already discussed.

The function of the declaration as a judicial control over statutory tribunals acting judicially, has been widely discussed.[154] It has recently become clear from English experience and from what can reasonably be expected to be the attitude in Australia,[155] that where a statutory tribunal is acting judicially, whether or not a controlling statute states that the tribunal's decision is to be final,[156] an aggrieved party can, instead of having to rely on the prerogative writs, bring an action for a declaration where the tribunal has not exercised or has exceeded its jurisdiction,[157] denied natural justice to a party,[158] possibly where an error of law appears on the face of the record and where the tribunal's decision has been motivated by fraud.[159]

The actual wording of the new s. 10(2)(b)(vii) is such as to invite the use of the declaration for review of decisions of statutory tribunals but no attempt is made in the legislation to distinguish between "administrative acts" which amount to purely executive decisions and those which involve administrative bodies acting under a duty to act judicially.[160] It is perhaps unfortunate

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[147] See n. 138 *supra*.

[148] This area of operation is recognised in S. A. de Smith (1959) *op. cit.* at 376 though its relevance in England is restricted.

[149] *Supra* n. 90, n. 95, n. 97. See also *Totalizator Agency Board* v. *Wagner & Cayley* (1963) W.A.R. 180.

[150] E.g., *Prescott* v. *Birmingham Corporation* (1958) Ch. 210; *Taylor* v. *National Assistance Board* (1957) P. 101; *Pyx Granite Case* (1958) 1 Q.B. 554 and (1960) A.C. 260; *Hall & Co. Ltd.* v. *Shoreham by Sea U.D.C.* (1964) 1 W.L.R. 240.

[151] S. 10(2)(b)(vii) of the Equity Act.

[152] *Delta Properties Pty. Ltd.* v. *Brisbane City Council* (1955) 95 C.L.R. 11 at 18. N.B. also *Sydney Corporation* v. *Harris* (1912) 14 C.L.R. 1; *Patton* v. *A.G.* (1947) V.L.R. 257.

[153] If the reform is literally applied a vast range of purely administrative action would become susceptible to the remedy. The inconsistencies of the writ of mandamus as a remedy and the shortcomings of collateral action would be overcome if the wide interpretation of declaratory action (as expressed in *Hanson* v. *Radcliffe U.D.C.* (1922) 2 Ch. 490 at 507 and by Denning, L.J. in *Pyx Granite Case* (1958) *supra*) is adopted.

[154] S. A. de Smith (1959) *op. cit.* at 380-81 and 405-13; H. Whitmore *loc. cit.* 7-9.

[155] Despite *Toowoomba Foundry Pty. Ltd.* v. *Commonwealth* (1945) 71 C.L.R. 545.

[156] *Taylor* v. *National Assistance Board* (1957) 1 All E.R. 183 at 185.

[157] E.g., *Barnard* v. *N.D.L.B.* (1953) 2 Q.B. 18 at 38, 42-3 and 46-7. See also *Howes* v. *Gosford Shire Council* (1962) 78 W.N. (N.S.W.) 981

[158] *Cooper* v. *Wilson* (1937) 1 K.B. 309; *Ridge* v. *Baldwin* (1963) 2 W.L.R. 935.

[159] See S. A. de Smith (1959) *op. cit.* at 408.

[160] *Cf.* uncertainties on the application of certiorari to review of administrative action,

that there has not been a clear legislative statement in this area of continuing vagueness and developing interpretation. Assuming the way is now clear for the New South Wales Equity Court to supervise the decisions of statutory tribunals the problem remains of identifying a sufficient basis for judicial review. If one looks simply at the natural meaning of the words in the section it appears that it is open for the court to review, in effect, any administrative act. Thus, anyone disappointed with a tribunal's or a minister's decision could conceivably obtain a determination of his rights which could lead to what amounts to a rehearing and the threat of conflicting decisions.

In England, this development has been avoided in *Healey's Case*[161] and recently in *Punton's Case*.[162] But an argument was developed which made use of the old Order 54A r. 1 (enabling action for declarations by originating summons on construction of written instruments) whereby this rule was seen somewhat as a rival to Order 25 r. 5.[163] Thus a party would seek to have the true construction of the relevant statutory provisions affecting the tribunal determined irrespective of the lack of a sufficient basis to allow an action under Order 25 r. 5 to impugn the tribunal's decision. The potential difficulties in this area have, it seems, been removed by the new English rules whereby Order 54A has been superseded in a general way by the procedural Order 5 r. 4 which simply says, in effect, that certain types of declarations presumably made pursuant to Order 15 r. 16 (that is, as to the construction of instruments) can be instituted by originating summons. No mention is made of "declarations" as such, so that the problem of rivalry as envisaged in *Taylor* v. *National Assistance Board* will no doubt be avoided in future.

While English legislation has to this extent restrained the remedy's utility, reaffirming, in essence, the conservative interpretation seen in *Punton's Case*[164] the New South Wales legislation enables pure questions of construction as a basis for a declaration and this is extended beyond documents to "any acts" done in an administrative way, pursuant to a statute or subordinate legislation. The legislation on its face would allow the court to put a true construction on relevant statutory provisions thus inviting the potential difficulties referred to in *Taylor's Case*, and possibly allow the court to look directly at the act alone by way of making a determination on the correctness or otherwise of the administrative body's decision.[165]

It can be anticipated, however, that judicial interpretation will be guided by the English experience of guarded development, and that a restrictive attitude will influence the application of the new legislation. It is perhaps ironical to recall that the old s. 10 was given a meaning apparently contradictory to legislative intent. The new section insofar as it at least contains potential for more widespread application may be subjected to a similar fate. Of course, if the Equity Act is repealed and replaced by general legislation to end the duality of law and equity, the value of this potential significance would certainly be lost. The legislature would do well to consider the retention of the section in its present form. The present significance is, of course, that even if the reform does not open the way for any citizen disappointed with

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arising from the possible effect of decisions such as *R.* v. *Metropolitan Police Commissioner; ex. p. Parker* (1953) 1 W.L.R. 1150 on the decision in *R.* v. *Electricity Commissioners* (1924) 1 K.B. 171.

[161] (1955) 1 Q.B. 221.

[162] (1964) 1 All E.R. 444.

[163] *Taylor* v. *National Assistance Board* (1956) P. 470 at 494-5.

[164] (1964) 1 All E.R. 448. In this case it was sought by using declaratory action to circumvent the procedure set out by statute. *Pyx Granite Case* was distinguished as there it was sought to ascertain the extent of the parties' statutory liability rather than to enforce statutory rights as such. This decision in conjunction with *Healey* v. *Minister of Health* (1955) 1 Q.B. 221 probably puts an end to attempts to extend the declaration to a role of quashing decisions which are simply wrong in law (n. 136 *supra*).

[165] *Cf.* n. 160 *supra*.

an administrative decision to seek a declaration,[166] it will still achieve what is and has been available in England and in other Australian States for over half a century. An anachronism, at least, has been removed.

What has been referred to as the English and Australian experience in this area has no doubt been largely a review of English case law development. The Australian experience has been limited to High Court decisions tainted with questions of constitutionality[167] and a few decisions in the other States which in general do no more than reaffirm the English position.[168] In fact, the extensive potential of declaratory relief does not seem to have been realised in other Australian States[169] and it is to be hoped that this will not be the case in New South Wales.

3. *The Likely Scope of the Declaration in New South Wales*

(a) The potential in private law

It has already been seen that the scope of the suit for declaratory relief in New South Wales will embrace private and public law. The expansionary character of the new s. 10(2) clearly anticipates widespread application for the remedy. Of particular value to potential litigants should be the provision enabling declarations of rights with regard to ownership of property and disposition of property.[170] Mention has already been made of the declaration's role in questions of construction (especially mercantile documents)[171] and specific mention is made in the section of the memorandum or articles of association of corporations[172] and of the rules or constitutions of unincorporated associations.[173] In the latter field there is authority to suggest that the procedure as set out in such rules should be followed if a member is dissatisfied with a decision.[174] However, the New South Wales section plainly states that a determination of rights arising under the rules can be made and a determined disputant may feel more secure in an action for a declaration, rather than by adhering to any inbuilt appeal procedure.

Declarations have been made in such diverse fact situations as, whether a clergyman was entitled to hold services on the seashore without the consent of the local council,[175] the directional flow of sewage,[176] disputed questions of personal status,[177] the validity of a mortgage under the Money Lenders Act,[178] the validity of a Turkish judgment[179] and whether the owner of a dominant

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[166] As was attempted in *Healey* v. *Minister of Health, supra.*

[167] See M. E. Foster *loc. cit.* at 366 ff.

[168] E.g., *Civil Service Association of W.A.* v. *Minister of Justice* (1925) 27 W.A.L.R. 143. Western Australia has an identical provision to the English Order 25 r. 5 (as it was)—as do the other Australian States except N.S.W. In this case *Grey* v. *Spyer* (1922) 2 Ch. D. at 27 was discussed and *Barraclough* v. *Brown* (1897) A.C. at 622 was applied.

[169] *Per* Pape, J. in *Emery* v. *Commonwealth of Australia* (1963) V.R. 586 at 587-8.

[170] S. 10(2)(a) of Equity Act. In this regard note *The Manor* (1903) P. 95; *West* v. *Lord Sackville* (1903) 2 Ch. 378; *Armstrong* v. *Currie* (1934) 2 D.L.R. 747 (Canada); *Thornhill* v. *Weeks* (1913) 1 Ch. 438; *London* v. *Ryder* (No. 2) (1953) 2 W.L.R. 863.

[171] *Societé Maritime et Commerciale* v. *Venus Steam Shipping Co. Ltd.* (1904) 9 Com. Cas 289; *Chapman* v. *Michaelson* (1908) 2 Ch. 612; *re Clay* (1919) 1 Ch. 66; *Guaranty Trust Co. of N.Y.* v. *Hannay* (1915) 2 K.B. 536; *Russian Bank Case (supra)* (1921) 2 A.C. 438; *Odhams Press Ltd.* v. *London & Provincial Sporting News Agency (1929) Ltd.* (1936) 1 All E.R. 217.

[172] S. 10 (2)(b)(ii) of Equity Act. See *Cyclists Touring Club* v. *Hopkinson* (1910) 101 L.R. 848; *Re Williams Thomas & Co.* (1915) 1 Ch. 325; *Morgan's Brewery Co.* v. *Crossbill* (1902) 1 Ch. 898.

[173] S. 10(2)(b)(iii) of Equity Act. See *Lee* v. *Showmen's Guild of G.B.* (1952) 2 Q.B. 329 at 346; *Eastham* v. *Newcastle United Football Club Ltd.* (1963) 3 All E.R. 139.

[174] *White* v. *Kuzych* (1951) A.C. 585.

[175] *Llandudno U.D.C.* v. *Woods* (1899) 2 Ch. 705.

[176] *Islington Vestry* v. *Hornsby U.D.C.* (1900) 1 Ch. 695.

[177] *Har-Shefi* v. *Har-Shefi (No. 1)* (1953) P. 161; *Knowles* v. *A.G.* (1950) 2 All E.R. 6; *Hulton* v. *Hulton* (1917) 1 K.B. 813.

[178] *Chapman* v. *Michaelson* (1908) 2 Ch. 612.

[179] *Ellerman Lines Ltd.* v. *Read* 44 T.L.R. 7.

tenement had lost his right to light by making alterations to the tenement.[180]

The potential range of questions falling within the jurisdiction of the Commercial Court exercising its power under s. 7B of the Commercial Causes Act is almost limitless. Any difference of opinion between parties to a document concerning its contents and its effect in any factual situation can be the embryo of "a commercial dispute" that may have to be resolved by way of the summary procedure provided by s. 7B. Is a contract void as contrary to public policy? What effect does a later oral warranty have on the operation of a written agreement? What is the effect of an exemption clause in a contract as far as a bailee or subcontractor is concerned? These and many more are typical of the areas of concern that can be anticipated for the new jurisdiction.[181]

The court has demonstrated the remedy's potential to a limited extent since April, 1966. Reference has already been made to the *Concrete Constructions Case* and to the *Legion Cabs Case*, both of which decided that the power to make a determination did not exist but, of course, for different reasons. Another recent case *Ormide (Australia) Pty. Ltd.* v. *E. J. Hart Pty. Ltd.*[182] was concerned purely with a question of construction. The court made a determination to the effect that an alleged option in an agreement could not be enforced as there was in fact no basic agreement at all (there being no firm agreement as to the price to be paid for goods or a method of ascertaining it).

There have also been some interesting decisions in the New South Wales Equity Court on applications for declaratory orders under the new s. 10, but only tentative use has been made of the remedy in the first twelve months since the amendment.[182a] There is some suggestion that the declaratory remedy has attracted a "last resort" label so that litigants tend to try to exhaust all litigious avenues before directing their attention to declaratory relief. This is, of course, to be regretted, and the onus will well and truly be on the legal profession to be fully acquainted with the remarkable utility of the remedy and to advise the public accordingly. Some recent examples of applications in equity for declaratory orders will demonstrate this point. In the recent Qantas pilots' dispute the Equity Court was to some extent a substitute arbitration tribunal concerned with, fundamentally, an industrial master-servant dispute. In these circumstances declaratory relief was requested but the issues in dispute were sufficiently resolved by negotiation to prevent what could have been a most influential decision in this area. Another instance of significance which likewise did not reach judgment was the litigation involving the New South Wales Government's dispute with the Perini Corporation concerning construction of the State Government Office Block. Here the basic issue was what contract was applicable and what effect variations would have on its operation. Declaratory relief was accordingly sought in what was, in effect, a "building case".

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[180] *Aukerson* v. *Connelly* (1906) 2 Ch. 544.

[181] For a review of situations that may fall within the jurisdiction of the Commercial Court see H. H. Glass and R. P. Meagher *loc. cit.* at 233-4.

[182] Not yet reported; Macfarlan, J. in Commercial Causes (N.S.W.) 3rd March, 1967.

[182a] See *N.S.W. Mining Company Pty. Ltd. & Thomas Day* v. *A.G. for N.S.W.; The Electricity Commission of N.S.W. & Leslie K. Downs*, not yet reported — N.S.W. Court of Appeal 18.4.67. Declaratory relief against the Crown could be given by the Court on reference of a question of law from an Equity Judge (in vacation). *Per* Wallace, P.J.: "The wording of the new s. 10 of the Equity Act is extremely wide and is clearly enough designed to overcome the previously existing difficulties confronting the grant of declaratory relief . . . to adopt and adapt the words of s. 10(2)(b)(vii), it can be said that the declarations sought relate to interests and rights of the plaintiffs arising under the Mining Act and also under the Ministerial acts being the quoted letters sent. . . ." *Per* Jacobs, J.A. (dissenting): "If the Governor in Council has manifested an intention of acting in some way actually contrary to law then the Court can interfere . . . since the amendment to s. 10, relief by declaration can be given." But Holmes, J.A. referred to the declaratory relief sought as "theoretical" and in the nature of "advisory opinions".

Street, J. has recently delivered a significant, though unreported, decision in this field. In the case of *Ex parte Wintle re South Sydney Junior Rugby League Club*[183] three declaratory orders were sought in equity. A declaration was requested that associate members of the respondent company were entitled to vote at general meetings. It was held that any shareholder of the company had sufficient interest to seek such a declaration which would involve interpretation of the constituting document. Any member had a right to have the articles of association observed in respect of another member. Thus an applicant need not be a direct party to a dispute as is required in a s. 7B application in the Commercial Court. On interpretation of the article giving power to the Board to create different classes of members it was held that associate members would have their rights and obligations specified by the Board and as one of the specified conditions of associate membership was that such members could not vote, the declaration sought could not be made. A declaration was, however, made to the effect that the applicant, though suspended, was entitled to vote at an extraordinary general meeting and this also involved interpretation by the court of the articles of association.

(b) The potential in public law

In the area of public law, apart from what has already been adverted to, the declaratory judgment has been used to indicate a public authority's duty to act,[184] to enable a public authority to delimit the extent of its own powers[185] and settle disputes with other public authorities,[186] to allow public servants to ascertain their rights[187] (as distinct from rights flowing pursuant to termination of a private contract of service)[188] and to allow individuals to test a public authority's refusal to permit certain activities to be carried on.[189]

Perhaps the most potentially difficult area in which the declaratory judgment will tend to operate in New South Wales is the field of review of decisions of statutory tribunals and other administrative bodies. But the usefulness of the remedy in public law may be reduced by reason of inbuilt procedures of review that accompany many of the statutory boards and tribunals that exist in New South Wales.[190] Where a satisfactory apparatus of administrative review is set up it seems that there would be room for operation of the principle in *Barraclough* v. *Brown*[191] and for the court, in the result, to exercise its discretion so as to refrain from declaratory action.

If it is correct to say that, irrespective of whether the board or tribunal concerned is acting judicially, the new s. 10(2)(b)(vii) invites a determination of a party's rights under a statute or regulation or under an administrative act done pursuant to a statute or regulation, then in a fact situation such as existed in the case of *ex parte Moss*,[192] the disappointed party could con-

[183] Not yet reported; Street, J. in Equity (N.S.W.) 8th July, 1966. Also a recent decision *Sunkist Holdings Limited & Ors.* v. *Associated Products & Distribution Pty. Ltd. per* Street, J. in Equity (N.S.W.) 17th April, 1967. In the latter case a declaration pursuant to s. 10 of the Equity Act was made as to the true construction of an agreement between the parties concerned with a "takeover" arrangement.

[184] *Mills* v. *Avon & Dorset River Board* (1955) Ch. 341.

[185] *Ruislip Northwood U.D.C.* v. *Lee* (1931) 145 L.T. 208; *Central Electricity Generating Board* v. *Jennaway* (1959) 1 W.L.R. 937.

[186] *Litherland U.D.C.* v. *Liverpool Corporation* (1958) 1 W.L.R. 913.

[187] *Cooper* v. *Wilson* (1937) 2 K.B. 309; *Hanson* v. *Radcliffe U.D.C.* (1922) 2 Ch. 490.

[188] *Vine* v. *N.D.L.B.* (1957) A.C. 488.

[189] *Piggott (J.H.) & Son* v. *Docks & Inland Waterways Executive* (1953) 1 W.L.R. 94; *Mills* v. *Avon & Dorset River Board* (1955) Ch. 341.

[190] For a classification of N.S.W. administrative tribunals and discussion of administrative procedures see Benjafield & Whitmore (1966) *op. cit.* Ch. XII.

[191] N. 125 and n. 130 *supra.* E.g., *Civil Service Association of W.A.* v. *Minister of Justice* (1925) 27 W.A.L.R. 143.

[192] *Ex p. Moss; re Board of Fire Commissioners of N.S.W.* (1961) 78 W.N. (N.S.W.) 282 where the Crown Employees Appeal Board pursuant to s.3(5) of the Crown Employees Appeal Board Act, 1944-62 refused to entertain a complaint by an officer of

ceivably seek a declaration. Thus, if the Crown Employees Appeal Board refused to entertain a complaint as to seniority for promotion, the aggrieved party could seek a declaration to determine his rights arising under the administrative act, which would be the finding by the Board.

Under the Boards of Appeal, set up under the Local Government Act (N.S.W.), 1919[193] the legislature has sought to direct dissatisfied citizens to strictly administrative action. Presumably if a declaration were sought against a local council, it would be refused and the more convenient administrative structure of appeal would be left with exclusive domain.

The discretion of the Milk Board, which has been categorised as legislative rather than judicial, has tended to stand supreme, unaffected, so it seems, by apparent breaches of the rules of natural justice. However, insofar as the new s. 10(2)(b)(vii) gives a person a right to a declaration stating his rights under an administrative act (for example, the Board's decision) done pursuant to a statute or subordinate legislation, a milk producer or retailer could conceivably seek a declaration further to the Board's finding under its price fixing power,[194] provided the necessary basic elements to substantiate an action for a declaration existed. In such circumstances the court, affected by a tradition which regards the Board's decisions as unreviewable,[195] may be reluctant to exercise its discretion even though a real dispute may exist and the producer or retailer may be peculiarly affected.

If the court is prepared to make a declaration in those circumstances, the decision in *ex parte McCarthy*[196] would be substantially modified. It must be conceded perhaps that as a privilege and not a right was involved in that case *mandamus* would lie (although this decision must be placed alongside the decision in *Ridge* v. *Baldwin*).[197] But a declaratory judgment might be obtainable if the opinion of the Board, as to the necessity for an agency so as to justify the grant of a licence,[198] were reached in such a way as merely to dissatisfy the applicant. Thus the plaintiff would seek a declaration as to his rights or interests arising under an administrative act ("opinion") done pursuant to the statute (Milk Act, 1931-1942).

However, the court may well say that it must look for a breach of natural justice, and that there was no duty to act judicially or as no right to a hearing is given by the statute, questions of natural justice do not arise or, again, even if rights might be affected and natural justice is a relevant consideration, in this particular instance only a privilege is involved.[199] This approach would tend to disregard the liberal ambit of *Ridge* v. *Baldwin* (as the High Court appears to have done of late).[200] But bearing in mind that the difficult distinction between right and privilege was not really affected by *Ridge* v. *Baldwin*, in the result *ex parte McCarthy* may still find judicial favour in New South Wales.

This conservative approach could conceivably be maintained despite the opening that the new s. 10(2)(b)(vii) of the Equity Act seems to provide by way of declaratory relief for "the dissatisfied milk vendor".

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the Public Service who alleged that he was next in seniority and should have been promoted ahead of another officer. Kinsella, J. at 283-87 based his decision on the fact that the Board's finding of no jurisdiction was not open to review by way of the prerogative writs.

[193] See esp. s. 317 of Local Government Act (N.S.W.), 1919, e.g., s. 317U; V; Y. Also s. 341 (Town Planning Appeals).

[194] Milk Act, 1931-42 s. 11 with s. 23.

[195] *Re Gosling* (1943) 43 S.R. 312.

[196] *Ex p. McCarthy* v. *The Milk Board* (1934) 35 S.R. (N.S.W.) 47.

[197] (1963) 2 W.L.R. 935.

[198] Milk Act, 1931-42, s. 36.

[199] *Nakkuda Ali* v. *Jayaratne* (1951) A.C. 66 as against the approach in *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. 180.

[200] *Testro Bros.* v. *Tait* (1963) 37 A.L.J.R. 100.

(c) The effects of the imposition of a judicature system in New South Wales

It has been said earlier that the 1965 reforms to the Equity Act, 1901-1965 and Commercial Causes Act, 1903-1965 have introduced a unique situation in New South Wales. The legislation has the appearance of being an interim measure until the final step is taken to end the isolation of this State and impose a legal system that would abandon the duality of law and equity and streamline the procedures associated with pursuing a legal action.

It is now to be expected that this further development will occur and that accordingly the Equity Act and the Commercial Causes Act will, together with much other legislation, be repealed *in toto*. There will, no doubt, be substituted a "Supreme Court Act" in which, or under the rules of which, provision will be made to enable the making of declaratory judgments along the lines of the English Order 25 r. 5 which is now Order 15 r. 16.

This is the change that was made in England in 1883, although advantage will no doubt be taken at the present time of several refinements and improvements that have been revealed in the course of the case law development surrounding this remedy. Will this change in New South Wales be the "great innovation" it was believed to be in England in 1883?[201] It was, as a result of the Judicature Acts in England, possible "to have recourse to the old equitable practice to explain, still less to limit, a novel practice created by this legislation and a power given to the High Court under the rules".[202] As the remedy has developed since 1883 as generally available, it has increasingly diverged from the strict equitable limitations that marked its pre-1883 existence. At the present time in New South Wales declaratory relief is available in a Court of Equity that embodies the traditional limitations. The 1965 legislation has to a certain degree upset the anachronism that had been so clearly illustrated in the field of declaratory relief and the opportunity has at least been provided for use of the declaratory remedy on a more general basis. To what extent the court would still be influenced by "doctrines of equity" in applying the new legislation is difficult to assess. Any difficulty in this respect would probably be removed if a Judicature Act system were introduced in New South Wales and judges would then only be concerned to limit their application of the power according to the basic principles that have developed as restrictions on the court's discretion.

The new power given under a "Supreme Court Act" will presumably be exercised by an Equity Division of the court. There is every reason to believe that judges who will sit in equity will adopt an attitude to declaratory belief attuned to the English attitude which, of course, has been reflected in the other Australian States. On the other hand, it is conceivable that the strong equity tradition in New South Wales will preserve judicial reluctance to exercise a liberal discretion in applying the new remedy.

Before the legislature takes the vital step that would make the 1965 legislation concerning declaratory judgments a matter of historical interest only it would do well to consider whether s. 7B of the Commercial Causes Act and s. 10 of the Equity Act have any special significance that would be lost by repeal. To this end the potential of the new sections should be considered rather than actual experience to date. A valuable procedure may be lost in an endeavour to put a Judicature Act on the statute books quickly.

Section 7B, in a commercial context, provides a summary procedure to enable declaratory determinations involving interpretation of written instruments (equivalent to the old Order 54A r. 1 of the English Supreme Court Rules) and resolution of commercial disputes ancillary to commercial docu-

[201] See n. 30 *supra*.
[202] *Per* Farwell, L.J. in *Chapman* v. *Michaelson* (1909) 1 Ch. at 238.

ments. In England, at least until recently, the summary procedure was only available in situations involving interpretation of instruments (Order 54A r. 1). If declaratory relief was requested in a commercial dispute relating to some commercial document but not necessarily involving its interpretation the general provisions of Order 25 r. 5 would operate. Thus s. 7B as it stands is unique. It provides a simple, prompt procedure suited to business requirements.

If s. 7B is abolished by a Judicature Act which would provide for declaratory judgments by inclusion of a provision similar to the old Order 25 r. 5 or say the equivalent Victorian legislation, the advantages of this more extensive summary procedure in the Commercial Court would be lost.

It is therefore suggested that any Judicature Act to be introduced in New South Wales should make specific provision for declaratory judgments and for their availability in general by way of a summary procedure. The summary procedure should not be restricted to the interpretation of commercial documents but should also be available for all commercial disputes ancillary to commercial documents.

No doubt separate provision will be made in the Act or the Rules for the trial of certain actions as commercial causes in a Commercial Court. This would appear to be the appropriate place to indicate the procedural detail concerning the method of obtaining declaratory relief in a commercial dispute situation. The most effective solution may well be the inclusion in all its terms of the present s. 7B in the rules that will relate to commercial causes.

Section 10 of the Equity Act must also be considered in the light of its possible repeal. The 1965 legislation is explicit. It says what the old Order 25 r. 5 said but it explains the remedy's expected operation and in its reference to "administrative acts" it contemplates a wider availability than that which has been limited by judicial discretion in England. If the 1965 legislation is repealed the benefit of this explanation will be lost and the "conservative" attitude that has developed elsewhere as to the remedy's use in administrative law will, no doubt, be adopted in New South Wales. Of course, it may be that New South Wales judges would follow the conservative approach even if the 1965 legislation were retained. But at least, if the full text of the present s. 10(2) is included in any Judicature Act or its rules, the scope of the remedy's operation and the significance of the terminology used will be a matter for judicial decision. A full text would provide some guidance to a judge in reaching such decisions.

In any new legislation the value of summary proceedings for declaratory relief in equity or in commercial causes should receive full expression and in this regard the recent alterations to the English Supreme Court Rules should be borne in mind.[203] Order 5 r. 4 provides for commencement of proceedings either by way of writ or originating summons as the plaintiff considers appropriate (and this, of course, applies to proceedings under Order 15 r. 16). It is further provided that proceedings in which the main issue is construction of any instrument or some other question of law or in which there is unlikely to be any substantial dispute of fact, could appropriately be begun by originating summons. Such a general provision could well be suitable to any future New South Wales legislation which seeks to fuse law and equity. The onus is, of course, on the plaintiff to take advantage of a summary procedure if he so desires and on the face of it this is possible in all actions. The Order specifies a field of appropriate application but this appears to be only to assist a plaintiff and in some deference to the old Order 54A r. 1 which has now been excluded.

[203] See 1 *The Supreme Court Practice* (1967) at 29 and 191.

If such a provision were adopted in New South Wales it would, of course, as part of its general application, apply to declaratory judgments sought in the Equity Division or in the Commercial Court. Thus the inclusion of s. 7B or an equivalent to the old Order 54A r. 1 would not be necessary. However, as Order 5 r. 4 stands, there is a clear inference that disputes of fact would not be suitable to summary relief. Yet s.7B at least contemplates declaratory relief by summary procedure on questions involving the application of a commercial document to any facts.[204] Although s. 7B provides for full trial as a commercial cause if issues of fact are raised, it is difficult to see how a court, in summary proceedings, could be prevented from determining questions of fact which are extraneous to commercial documents.

Any new legislation, it is submitted, should clarify the exact area that a summary procedure for declaratory relief is to cover. If a general summary procedure is to be provided for, as in Order 5 r. 4, it seems that any reference to "questions of law" as more appropriate to these proceedings may tend to be confusing in seeking to apply an implied limitation, rather than be of practical assistance to a plaintiff.

CONCLUSION

It is probably true to say that the 1965 amendments to the Equity Act and Commercial Causes Act, which provide for declaratory relief, have been received with considerable interest by the New South Wales legal profession, but it is also true that, to date, there has been little conversion of this interest to practical application. It may be, however, that a dramatic change in the New South Wales legal system to a judicature system will stimulate an awareness among the New South Wales profession of the declaratory judgment as a valuable remedy.

A. T. SCOTFORD, B.A., Legislation Editor—Fourth Year Student.

[204] See nn. 70, 71, 72 *supra.*