Reported Decision : 59 NSWLR 232

New South Wales Court of Appeal

CITATION :	**George v Children's Court of New South Wales & 4 Ors [2003] NSWCA 389**
HEARING DATE(S) :	28/11/03
JUDGMENT DATE :	19 December 2003
JUDGMENT OF :	Sheller JA at 1; Ipp JA at 2; McColl JA at 146
DECISION :	(1) Appeal dismissed. (2) No order as to costs is made.
CATCHWORDS :	CHILDREN'S COURT - Whether Children's Court has power to make an order providing for parents to have contact with child in foster care in form requiring DOCS to pay rail/bus fares and reasonable accommodation expenses of parents - Statutory interpretation - Possible sources of power - Children and Young Persons (Care and Protection) Act 1998 s 74 - Children's Court Act 1987, s 15 - Implied power. D
LEGISLATION CITED :	Children's Court Act 1987, s 15 Children (Care and Protection) Act 1987, s 91(1) Children and Young Persons (Care and Protection) Act 1998, ss 3, 7, 8, 9, 15, 16, 20, 21, 22, 34, 35, 38, 39, 43, 44, 45, 46, 50, 51, 61, 66, 69, 71, 72, 74, 76, 78, 79, 80, 81(1), 82, 85, 86, 90(7)(b), 91, 113, 115, 118, 134, 151, 157, 161, 164, 165 Environmental Planning and Assessment Act 1979, s 123 Federal Court of Australia Act 1976 (Cth) s 23 Land and Environment Court Act 1979, ss 20, 22, 23
CASES CITED :	Bryne v Australian Airlines Limited (1995) 185 CLR 410 Grassby v The Queen (1989) 168 CLR 1 Jackson v Sterling Industries Limited (1987) 162 CLR 612 National Parks and Wildlife Service v Stables Perisher Pty Limited (1990) 20 NSWLR 573 Patrick Stevedores Operations (No 2) Pty Limited v Maritime Union of Australia (1998) 195 CLR 1 Reid v Howard (1995) 184 CLR 1 The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404 Thomson Australian Holdings Pty Limited v Trade Practices Commission (1981) 148 CLR 150
PARTIES :	CD (Claimant) Children's Court of New South Wales (First Opponent) Minister for Community Services (Second Opponent) Director-General for Community Services (Third Opponent)

	AB (Fourth Opponent) LR (Fifth Opponent)
FILE NUMBER(S) :	**CA** 40888/03
COUNSEL :	J Basten QC/I Bourke (Claimant) Submitting Appearance (First Opponent) I Temby QC/G W Moore (Second & Third Opponents) A Kumar (Fourth Opponent) P Singleton (Fifth Opponent)
SOLICITORS :	S O'Connor, Director, Legal Aid Commission (Claimant) I V Knight, Crown Solicitor (First, Second, Third Opponents) C/- A Kumar (Fourth Opponent) Stuart & Mills (Fifth Opponent)
LOWER COURT JURISDICTION :	Supreme Court - Common Law Division
LOWER COURT FILE NUMBER(S) :	11320/03
LOWER COURT JUDICIAL OFFICER :	Grove J

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40888/03
SC 11320/03

SHELLER JA
IPP JA
McCOLL JA

Friday 19
December 2003

'GEORGE' v CHILDREN'S COURT OF NEW SOUTH WALES & 4 ORS

FACTS

Since 2001, George (now three-years of age) has been in foster care. On 28 January 2003, Mitchell CM heard an application by the Director-General (Department of Community Services ("DOCS")) seeking an order that parental responsibility for George be allocated to the Minister until George reached the age of 18 years. The magistrate was informed that the foster carers had moved to a different region of NSW to that of the parents. It was apparent that, if contact visits were to take place between George and George's parents, the parents would have to travel from their respective residences to the region of New South Wales where the foster carers and George reside. Mitchell CM found that the parents could not afford the costs of visiting George and ordered DOCS to pay the "rail/bus fares and reasonable accommodation expenses [of the] parents" which were to be incurred as a result of making periodic visits to George (the "challenged order").

On 19 September 2003, Grove J quashed, by way of certiorari, the challenged order. His Honour held that the Children's Court had no power to make the order pursuant to s 15 of the

Children's Court Act 1987 ("the CC Act"), s 74 the *Children and Young Persons (Care and Protection) Act* 1998 ("the CYP Act") or an implied power under these Acts.

CD, George's mother, sought leave to appeal and appealed against the decision of Grove J.

HELD per Ipp JA (Sheller JA and McColl JA agreeing)

i. The CYP Act provides exclusively and exhaustively for the relief the Children's Court may order arising out of obligations imposed on the Director-General (and the Minister) by that Act, and that Act imposes limitations on the power of the Children's Court to grant such relief. Accordingly, neither s 15 of the CC Act nor any power implied from any of the legislation extends the powers of the Children's Court to grant relief arising out of obligations imposed on the Director-General (and the Minister) by the CYP Act beyond the powers of the Children's Court that are contained in the CYP Act.

Jackson v Sterling Industries Limited (1987) 162 CLR 612 at 620-621, 631, 632 & 641; *Patrick Stevedores Operations (No 2) Pty Limited v Maritime Union of Australia* (1998) 195 CLR 1 at 29, 35 & 61; *National Parks and Wildlife Service v Stables Perisher Pty Limited* (1990) 20 NSWLR 573; *Grassby v The Queen* (1989) 168 CLR 1 considered and applied.

ii. The supply of services and support by the Director-General (that formed the basis of the challenged order) was a matter that fell within the discretion of the Director-General, and (in the absence of the agreement of the Director-General) the Children's Court was not empowered by s 74(3) or s 86 of the CYP Act (or any other part of that Act or the *Children (Care and Protection) Act* 1987 to order DOCS (the Director-General) to provide the services, the subject of the challenged order.

iii. While, on 28 January 2003, the Director-General sought an order that all parental responsibility for George be allocated to the Minister until George reached the age of 18 years, neither the Director-General nor the Minister agreed to an order being made in the terms of the challenged order. Thus, the Children's Court had no power under the CYP Act to make the challenged order. Section 15 of the CC Act did not provide the necessary power and no such power could be implied from any of the legislation to which we were referred.

Orders

i. Appeal dismissed.

ii. No order as to costs is made.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40888/03
SC 11320/03

SHELLER JA
IPP JA
McCOLL JA

Friday 19 December 2003

'GEORGE' v CHILDREN'S COURT OF NEW SOUTH WALES & 4 ORS

Judgment

1 **SHELLER JA**: I have had the privilege of reading in draft the judgment prepared by Ipp JA with which I entirely agree.

2 **IPP JA**:

The application for leave to appeal, the grant of leave, and the appeal

3 This is an application for leave to appeal and an appeal from a decision of Grove J quashing, by way of certiorari, an order made on 28 January 2003 by Mitchell CM sitting in the Children's Court of New South Wales.

4 By that order (the "challenged order") the Department of Community Services ("DOCS") was required to pay the "rail/bus fares and reasonable accommodation expenses [of the] parents". The "parents" in question were the parents of a child who, for the purposes of these proceedings, has been given the pseudonym of George. George was a child living "out of home" with foster carers. The "fares" and "accommodation expenses" that, by the challenged order, DOCS were required to pay, were the expenses the parents would incur in making periodic visits to George.

5 Grove J held that the Children's Court had no power to make the challenged order. CD, George's mother, now wishes to appeal against his Honour's decision and she is the claimant in these proceedings. The Children's Court is the first opponent, and the Minister for Community Services and the Director-General of Community Services are the second and third opponents respectively. George's father, AB, is the fourth opponent and the fifth opponent is a solicitor, LR, who is sued as separate representative for George.

6 Mr Basten QC appeared for the claimant mother, CD. The Children's Court was not represented and, it seems, abides the decision of the Court. Mr Temby QC and Mr G W Moore represented the Minister for Community Services and the Director-General. Mr Kumar represented AB, the fourth opponent, and Mr Singleton represented LR, the fifth opponent.

7 The fourth and fifth opponents supported the claim of the claimant. Thus, Mr Kumar and Mr Singleton supported the arguments of Mr Basten. In addition, they advanced submissions of their own.

8 It was common ground between all parties that leave to appeal should be given. The issue that is raised is an important one. I would grant leave.

Background circumstances

9 George was born on 10 February 2000.

10 CD, George's mother, has a prolonged history of binge drinking. She commenced but failed to complete various rehabilitation courses. She has been admitted on numerous occasions to

various hospitals for alcohol-induced pancreatitis. She has not completed any long-term rehabilitation. She has continued to drink despite being aware that this endangers her life and her custody of George.

11 AB, George's father, is apparently unable to abstain from alcohol and is a consumer of drugs. He has failed to complete successfully any rehabilitation programme.

12 AB and CD have a history of, together, consuming alcohol to excess. On numerous occasions the police have been called to deal with various alcohol-related incidents, including domestic violence, involving both of them. In some, George has been present. Between October 2000 and April 2002, DOCS received eight reports that George was at risk of harm whilst in the care of CD or AB due to problems associated with abuse of alcohol by both of them and domestic violence in his presence.

13 In about February 2001, George was taken into the temporary care of foster carers. Foster care continued at intermittent intervals until, on 1 May 2002 AB and CD consented to the Director-General making a "temporary care arrangement" in respect of George pursuant to s 151 of the *Children and Young Persons (Care and Protection) Act* 1998 ("the CYP Act"). George was then placed with his present foster carers. At that time, the foster carers resided in the Sydney metropolitan region where AB and CD were also resident.

14 Between May 2002 and September 2002, AB and CD renewed their consent to the temporary care arrangement and George was maintained in foster care.

15 On 24 September 2002, the Director-General applied to the Children's Court for an order pursuant to Chapter 5 of the CYP Act for an interim order allocating parental responsibility for George to the Minister for a period of 12 months.

16 On 3 October 2002, following that application (and with the consent of all parties), an interim care order was made pursuant to s 69 of the CYP Act. This order allocated to the Minister what were stated to be specific aspects of parental responsibility, including residential arrangements, day-to-day care, supervision, contact arrangements, provision of services and financial support.

17 The interim order made on 3 October 2002 was continued from time to time and George remained under the parental responsibility of the Minister and in the care of the same foster carers. CD had supervised contact with George each week or fortnightly from May 2002 until December 2003.

18 On 28 January 2003, Mitchell CM heard a new application by the Director-General seeking an order that parental responsibility for George be allocated to the Minister until George reached the age of 18 years. The magistrate was informed that the foster carers had moved from Sydney to the southern part of New South Wales. At that time, AB and CD were living apart. AB was living in the northern part of Sydney and, although CD was also apparently resident in the same general area, she had commenced a full-time residential rehabilitation programme in the Canberra district.

19 It was therefore apparent that, if contact visits were to take place between George and his parents, AB would have to travel to the southern part of New South Wales from northern Sydney and CD would have to travel there from the Canberra district.

20 Mitchell CM found that the parents could not afford the costs of visiting George. He made the following orders:

> "(1) That the interim order of 3/10/2002 continue.
> (2) That the child have contact supervised by the Department of Community Services, once per fortnight 4 hours weekly and including one such period on the day before the child is interviewed for the purposes of the assessment; the Department of Community Services to pay the rail/bus fares and reasonable accommodation expenses [of the] parents.
> (3) That there be leave to re-list on short notice in the event of default."

21 The second order, to the extent that it orders DOCS to pay "the rail/bus fares and reasonable accommodation expenses [of the] parents", is the challenged order.

22 On 28 May 2003, the Minister and the Director General filed a summons in the Supreme Court seeking an order, by way of certiorari, quashing the challenged order. On 19 September 2003, Grove J upheld their application and ordered:

> "[S]o much of the order of the Children's Court made and entered on 28 January 2003 as directed 'the Department of Community Services to pay the rail/bus fares and reasonable expenses [of the] parents' be quashed."

23 Merely to complete the picture, thereafter, on 7 November 2003, the Children's Court made the following orders:

> "(1) That the interim orders made on 3 October 2002 be discharged.
> (2) Pursuant to s 79(1)(b) of the Act that parental responsibility be allocated to the Minister until the child [George] attains the age of 18 years.
> (3) Pursuant to s 81(1)(b) of the Act, parental responsibility for residence, medical and dental needs, recreation, special education and training, official documents and financial support be allocated solely to the Minister.
> (4) Pursuant to s 81(1)(c) of the Act, parental responsibility for religion be exercised jointly between the Minister, [CD] and [AB].
> (5) …
> (6) Pursuant to s 86 of the Act,
>
> > (i) contact between the child and [AB] and [CD] is to occur for a period of four hours each month. Such contact is to be supervised by a delegated officer of the Minister or a person nominated or approved by the Minister. Such contact is to occur in the [southern] area of New South Wales or at such other place as agreed between a delegated officer of the Minister, the foster carers and [AB] and [CD].
> > (ii) continuation of supervision of contact to be at the discretion of the Minister's delegate."

The decision of Grove J

24 The issue for determination before Grove J (and before this Court) was whether the Children's Court had power to make the challenged order.

25 His Honour noted that three sources of power had been suggested. These were s 15 of the

Children's Court Act 1987 ("the CC Act"), implied power under either the CYP Act or the CC Act, and s 74 of the CYP Act.

26 Section 15 of the CC Act provides:

> "15. The Court may, in relation to all matters in respect of which it has jurisdiction, make such orders, including interlocutory orders, as it thinks appropriate."

Grove J referred to the remarks of Brennan J in ***Jackson v Sterling Industries Limited*** (1987) 162 CLR 612 at 620-621 and pointed out that in ***Reid v Howard*** (1995) 184 CLR 1 at 16 it was observed in the joint judgment that:

> "Although it has been said that the inherent power of a superior court cannot be restricted to defined and closed categories, the power is not at large."

27 The learned judge concluded that s 15 did not provide a source of power for making the challenged order.

28 Grove J then turned to implied power. His Honour said in this regard:

> "I would apply the views of Dawson J (which had general agreement of the other members of the bench) in Grassby v The Queen (1989) 168 CLR 1 where his Honour said at 16-17:
>
> > '…a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arsing by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest). Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent.'
>
> and
>
> > 'It would be unprofitable to attempt to generalize in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'."

29 His Honour concluded that it was not a necessary implication of the objects of either the CC Act or the CYP Act that there should be power to order the Director-General (or, implicitly, DOCS) to meet the travelling and accommodation expenses of the parents.

30 His Honour then turned to s 74 of the CYP Act. This section provides:

> "74(1) The Children's Court may make an order directing a person or organisation named in the order to provide support for that child or young person for such period (not exceeding 12 months) as is specified in the order.
> (2) The Children's Court must not make an order under this section unless:
> (a) it gives notice of its intention to consider making the order to the person or organisation who would be required to provide support pursuant to such an order, and
> (b) the person or organisation is given an opportunity to appear and be heard by the Children's Court before the Children's Court makes such an order, and
> (c) the person or organisation consents to the making of the order, and
> (d) the views of the child or young person in relation to the proposed order have been taken into account."
> (3) The Director-General may be required to provide support pursuant to an order made under this section."

31 Grove J dealt with s 74 by saying:

> "A critical restraint on s 74 as a source of power is s 74(2)(c) which prohibits [an] order in the absence of relevant consent. I do not construe s 74(3) as doing anything other than making explicit that the Director-General may be a person subject to direction as contemplated in s 74(1)."

His Honour noted:

> "[I]t is clear that the Director-General did not consent to any order."

Accordingly, his Honour considered s 74 was thereby rendered "sterile as a source of power".

The contentions of the claimant and the fourth and fifth opponents

32 Mr Basten, on behalf of the claimant, submitted that the primary principle underlying ss 8 and 9 of the CYP Act was that the "safety, welfare and well-being of the child" must be the paramount consideration in all actions and decisions made under the Act.

33 He drew attention to ss 8(a) and (c) which provide that the following are objects of the CYP Act:

> (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, taking into account the rights, powers and duties of their parents or other persons responsible for them, and
> …
> (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment."

34 He also drew attention to ss 9(a) and (f) which provide:

> "9(a) In all actions and decisions made under this Act (whether by legal or administrative process) concerning a particular child or young person, the safety, welfare and well-being of the child or young person must be the paramount consideration. In particular, the safety, welfare and well-being of a child or young person who has been removed from his or her parents are paramount over the rights of the parents.
>
> (f) If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure that provision of a safe, nurturing, stable and secure environment, recognising the child or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement."

35 Mr Basten referred to the observation by Grove J that "[a]ny inhibition upon the ability to undertake contact ordered by the Children's Court relates to matters subjective to the parents namely their claimed inability to afford the cost of travel and not to care of the child". Mr Basten submitted that contact between the parents and the child fell within the concept of "care of the child" and his Honour erred in his approach to this issue.

36 Mr Basten submitted that, by the CYP Act, the primary responsibility for the exercise of the care and protection jurisdiction was that of the Children's Court. He accepted that there might be orders that operated at a level of remoteness from the welfare of the child and hence beyond the proper identification of the "matter" with respect to which the Court has jurisdiction pursuant to s 15 of the CC Act. He submitted, however, that any order concerning contact between the child and its natural parents could not fail to qualify on this ground. He submitted that there was no reason to read down the plenitude of the power conferred on the Children's Court by reference to implied limitations: *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 420-421.

37 Mr Basten pointed out that, save for the challenged order, the Minister and the Director-General did not dispute that on 28 January 2003 Mitchell CM made a valid contact order pursuant to s 86 of the CYP Act. He submitted that the challenged order was no more than a mechanism designed to give effect to the valid elements of the contact order and was reasonably adapted to that end. He submitted that the challenged order did not require DOCS to act in a manner outside its statutory functions and was not subject to an express prohibition on the power of the Children's Court. Hence, he argued, the challenged order, itself, was valid.

38 Mr Basten submitted, in the alternative, that s 74(3) of the CPY Act conferred express power on the Children's Court to order the Director-General to provide support.

39 He submitted, in the further alternative, that the necessary power could be derived from s 86 on the basis that the order requiring DOCS to pay the travelling and accommodation costs of George's parents was a necessary part of facilitating contact of the kind contemplated by s 86.

40 Mr Kumar adopted the arguments of Mr Basten. In addition, he submitted that the challenged order gave effect to the other elements of the contact order made on 28 January 2003 and was therefore within the implied power of the Children's Court: *Grassby v The Queen* (1989) 168 CLR 1.

41 He drew attention to the fact that "parental responsibility", as defined by s3 of the CYP Act, means "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children." He submitted that parental responsibility included the provision of travelling and accommodation expenses for the parents; hence, the challenged order was within

power.

42 Mr Singleton adopted the submissions of Mr Basten and Mr Kumar and placed particular reliance on s 15 of the CC Act. He submitted that the Children's Court was seized of jurisdiction to consider what interim measures should be put in place for the welfare of the child and, in such circumstances, s 15 conferred power in the widest possible terms on the Children's Court. He submitted that the challenged order was in relation to a "matter" in respect of which the Children's Court had jurisdiction, and its making was "appropriate" within the meaning of s 15. Hence, he submitted, the challenged order was validly made.

The section 15 and implied power argument

43 Section 15 of the CC Act is in similar terms to s 23 of the *Federal Court of Australia Act* 1976 (Cth). Section 23 of the latter Act provides:

> "The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

44 In ***Jackson v Sterling Industries Limited***, Brennan J (at 620-621) said in regard to s 23:

> "As Toohey J points out, s 23 confers on the Federal Court such powers as are necessary or incidental to the exercise of that Court's jurisdiction. But that is not to say that the Court's discretion to mould relief is at large. The relief which the Court is authorised to give does not extend beyond the grant of remedies appropriate to the protection and enforcement of the right or subject matter in issue."

Toohey J (at 631) said:

> "Section 23 should be read according to its language and it is apparent that, where jurisdiction exists, the section confers a wide range of powers, though these powers must be read in the light of the comment by the majority in **Thomson Australian Holdings Pty Limited v Trade Practices Commission** (1981) 148 CLR 150 at 161: 'So also with s 23; it arms the Court with power to make all kinds of orders and to issue all kinds of writs as may be appropriate, but it does not provide authority for granting an injunction where there is otherwise no case for injunctive relief.'"

And at 632:

> "The effect of s 23 is to equip the Federal Court with powers arising expressly or by implication, in this case from the *Trade Practices Act*, and with powers that are incidental and necessary to the exercise of the jurisdiction conferred by that Act and the powers so conferred …".

Gaudron J (at 641) said:

> "In **Thomson Australian Holdings Pty Limited v Trade Practices Commission** it was held that s 23 does not enlarge powers circumscribed by or in connexion with the grant of jurisdiction, and in particular, does not authorise the grant of an injunction where there is otherwise no case for injunctive relief. That case was not an exhaustive exposition of the limits of the powers conferred by s 23. Section 23

> must be read in the context of any relevant conferral of jurisdiction and any legislative provision limiting the relief to which a party is entitled … ".

45 In **Patrick Stevedores Operations (No 2) Pty Limited v Maritime Union of Australia** (1998) 195 CLR 1 Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said (at 29):

> "In **Jackson v Sterling Industries Limited**, Brennan J and Toohey J at 632 expressed the point as being that s 23 confers on the Federal Court such powers as are necessary or incidental to the exercise of the jurisdiction of that Court."

Their Honours said further (at 35):

> "But the powers of the Federal Court under s 23 are limited to the making of orders that are "appropriate" and that limitation directs attention to the rights and liabilities of the parties to the proceeding under the applicable law, both Commonwealth and State or Territorial laws."

Significantly, their Honours had previously stated (at 29) that the power conferred by s 23 of the *Federal Court of Australia Act*:

> "may be exercised in any proceeding in which the Federal Court has jurisdiction unless the jurisdiction invoked is conferred in terms which expressly or impliedly deny the s 23 power to the Court in that class of proceeding. It cannot be invoked to grant an injunction where the Court acquires its jurisdiction under a statute which provides an exhaustive code of the available remedies and that code does not authorise the grant of an injunction: Byrne v Australian Airlines Limited (1995) 185 CLR 410 at 425-426, 456."

46 Gaudron J said (at 61):

> "It is correct to say, as the applicants for special leave contend, that resort cannot be had to s 23 of the *Federal Court Act* to supplement a provision of another Act which provides exclusively and exhaustively as to the relief available, which provides as to conditions which must be satisfied before relief is granted or otherwise imposes limitations on the grant of relief."

47 **National Parks and Wildlife Service v Stables Perisher Pty Limited** (1990) 20 NSWLR 573 illustrates the application of the principles expressed in **Jackson v Sterling Industries Limited** and ***Patrick* Stevedores Operations (No 2) Pty Limited v Maritime Union of Australia**. In **National Parks and Wildlife v Stables Perisher** the Court was concerned with, amongst other things, s 23 of the *Land and Environment Court Act* 1979 (which was in terms similar to s 15 of the CC Act and s 23 of the *Federal Court of Australia Act*). The issue was whether the Land and Environment Court had jurisdiction to deal with a claim in tort for general damages. Sections 22 and 23 of the *Land and Environment Court Act* conferred broad powers on the Land and Environment Court. Proceedings were commenced in that court under s 20 of the *Land and Environment Court Act* which provided that the Land and Environment Court had jurisdiction to hear and dispose of proceedings under s 123 of the *Environmental Planning and Assessment Act* 1979. Gleeson CJ (with whom Kirby P and Meagher JA agreed) explained that the jurisdiction conferred by the *Land and Environment Court Act* was limited by the statute itself (despite the broad terminology used in ss 22 and 23 of that Act) and said at 582:

> "[W]here it is s 20(2) that is the basis of the application to the court, then the available powers to grant relief are to be found in the terms of the subsection, read together with s 22."

48 The question in the present case, therefore, is whether the CYP Act provides exclusively and exhaustively for the relief the Children's Court is empowered to order arising out of the statutory duties and obligations imposed thereby, or otherwise imposes limitations on the power of the Children's Court to grant such relief. If the CYP Act so provides, or imposes such limitations, s 15 of the CC Act does not relevantly extend the powers of the Children's Court

49 This question also resolves the issue whether the Children's Court had the implied power to make the challenged order. As Dawson J pointed out in ***Grassby v The Queen*** (at 17) implied powers will be confined to "so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'." Thus, if the CYP Act provides exclusively and exhaustively as to the relief available, or imposes limitations which preclude the grant of relief in terms of the challenged order, there could be no implication of a power entitling the Children's Court to make the challenged order.

Powers, discretions and obscurities under the CYP Act

50 Section 7 of the CYP Act provides:

> "The provisions of this Chapter are intended to give guidance and direction in the administration of this Act. They do not create, or confer on any person, any right or entitlement enforceable at law."

Section 7 is part of Chapter 2 of the CYP Act, as are ss 8 and 9 (on which Mr Basten placed some reliance – see [31] to [33] above).

51 Sections 15 and 16(1) (which are also part of Chapter 2 and have to be understood in the light of s 7) set out the general roles of the Minister and the Director-General, respectively.

According to s 15, the general role of the Minister is:

> "… to promote a partnership approach between government, non-government agencies, families, corporations, business agencies and the community in taking responsibility for and dealing with children and young persons who are in need of care and protection under this Act."

According to s 16(1), the general role of the Director-General is:

> "… to provide services and promote the development, adoption and evaluation of policies and procedures that accord with the objects and principles of this Act."

It is apparent from sections 15 and 16(1) and other provisions of the CYP Act that the roles and functions of the Minister and the Director-General differ materially.

52 Part 1 of Chapter 3 concerns requests by children or young persons for assistance. Sections 20 and 21 (which fall within Part 1) provide for the making of requests by a child, a young person or a parent of a child or young person for assistance from the Director-General. Section 22 provides:

> "If a person seeks assistance from the Director-General under this Part

> (whether or not a child or young person is suspected of being in need of care and protection), the Director-General must:
> (a) provide whatever advice or material assistance, or make such referral as, the Director-General considers necessary, or
> (b) take whatever other action the Director-General considers necessary,
> to safeguard or promote the safety, welfare and well-being of the child or young person."

53 The steps the Director-General must take in accordance with s 22 include the provision of "material assistance" (see s 22(1)(a)). The obligation to take such steps, however, is conditioned on the Director-General considering them to be "necessary". The taking of such steps therefore depends on a decision being made by the Director-General.

54 Chapter 4 deals with children and young persons in need of care and protection. Sections 34, 35 and 38 are within Chapter 4.

55 Section 34(1) provides:

> "(1) If the Director-General forms the opinion, on reasonable grounds, that a child or young person is in need of care and protection, the Director-General is to take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person."

Section 35(1) provides:

> "(1) The Director-General may decide to take no action if the Director-General considers that proper arrangements exist for the care and protection of the child or young person and the circumstances that led to the report have been or are being adequately dealt with."

56 The obligation of the Director-General to take action pursuant to s 34(1) is conditioned on the Director-General forming an opinion that a child or young person is in need of care and protection. A discretionary decision is involved.

57 Section 38(1) provides for the registration of a care plan "developed by agreement in the course of alternative dispute resolution". Section 38(2) provides:

> "(2) A care plan that allocates parental responsibility, or aspects of parental responsibility, to any person other than the parents of the child or young person, takes effect only if the Children's Court makes an order by consent to give effect to the proposed changes in parental responsibility."

58 Section 38(2) must be read in the light of s 80, to which I refer below. Section 80 provides that the Children's Court must not make a final order for the allocation of parental responsibility unless it has *considered* a care plan presented to it by the Director-General. The requirement that the Children's Court consider the Director-General's care plan (and the absence of a requirement in s 80 that the Children's Court give effect to such a care plan) suggests that the Children's Court (subject to the other provisions of Chapter 5 and the CYP Act as a whole) can make a final order allocating parental responsibility, or aspects of parental responsibility, otherwise than by consent (that is, after considering – but not adopting – the Director-General's care plan). Presumably, on this basis, the Children's Court would make such an order (allocating final responsibility contrary to and without adopting the Director-General's care

plan) without the care plan taking effect – although such an approach seems contrary to the general tenor of the Act.

59 This question is relevant to the issue raised in this appeal as, by s 79(2), "contact" – meaning communication – between a child and its parents is an aspect of parental responsibility (and Mr Basten submitted that the obligation on which the challenged order was based derived primarily from the order allocating parental responsibility).

60 This question was not touched upon by counsel, however, and I think it undesirable that I express a firm opinion on it. I shall simply proceed (to the advantage of the claimant and the fourth and fifth opponents) on the assumption that the Children's Court has the power (subject to the CYP Act as a whole) to make an order allocating parental responsibility, or aspects of parental responsibility, to a person other than the parents of the child or young person, otherwise than by consent.

61 Section 39 provides that nothing in Chapter 4 prevents the Director-General from exercising any function imposed on the Director-General under the Act if, in the Director-General's opinion, it is necessary or desirable to do so having regard to the safety, welfare and well-being of the child or young person concerned. This section is an example of the broad discretionary powers afforded to the Director-General that, in many respects, are not subject to interference or control by the Children's Court.

62 Division 1 of Pt 1 of Chapter 5 deals with emergency protection and assessment of children and young persons. Section 43 empowers the Director-General to remove children and young persons without warrant from a place of risk. Section 44 empowers the Director-General to assume "care responsibility" of a child or young person in hospital or other premises. The Children's Court plays no part in decisions taken by the Director-General under these sections.

63 Subject to s 45(3), s 45(1) requires the Director-General to apply to the Children's Court after the removal or assumption of care and protection in respect of a child or young person or one or more of certain specified "care orders". Section 45(2) provides that the Director-General must explain to the Children's Court why the removal of the child or young person without a warrant was considered to be necessary. Section 45(3) provides, however:

> "Despite sub-section (1), the Director-General is not required to apply for any order of the Children's Court if the Director-General considers that no order is necessary, but the Director-General must explain to the Children's Court at the first available opportunity why no care application was made."

64 Thus, Division 1 of Pt 1 of Chapter 5 affords overriding discretionary powers to the Director-General. While Division 1 provides for the making or refusal of care orders by the Children's Court, by s 45(3) the Director-General is not required to apply for a care order if the Director-General considers that no such order is necessary. Accordingly, it is open to the Director-General to remove a child or young person from his or her family without the Children's Court being able to intervene. The Children's Court can make no order impinging on the Director-General's powers of removal and assumption of care and protection under s 45.

65 By s 46 (which falls within Division 2 of Pt 1 of Chapter 5) the Children's Court may make an order placing a child or young person in the "care responsibility" of the Director-General. "Care responsibility" is not parental responsibility even though it may involve aspects of parental responsibility (see the authority conferred by s 157 in regard to care responsibility, particularly s 157(2)). Broadly speaking, care responsibility is the daily care and control of a child or young person, supervisory responsibility is the supervision of those who have care

responsibility (see s 134(c)), and parental responsibility (as I have mentioned) is defined by s 3 as being "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children".

66 Section 50(1) (which falls within Division 4 of Pt 1 of Chapter 5) empowers the Director-General to discharge a child or young person from the Director-General's care responsibility. Section 50(4) provides:

> "If the Director-General discharges the child or young person from the Director-General's care responsibility following an order of the Children's Court, the Director-General must explain to the Children's Court at the next sitting day of the Court why the Director-General's care responsibility was no longer needed."

Section 50(4), therefore, allows the Director-General to discharge the child or young person from care responsibility despite the fact that the Children's Court may have made an order vesting the care responsibility in the Director-General.

67 Section 51 (which falls within Division 5 of Pt 1 of Chapter 5) requires the Director-General to give certain information to stipulated persons when a child or young person is placed in the care and protection of the Director-General under Pt 1 of Chapter 5. Section 51(2) empowers the Children's Court to order the Director-General to disclose the whereabouts of the child to such of the parents of the child as it may direct.

68 Part 2 of Chapter 5 deals with care applications (which are applications for care orders (see s 60)). Sections 74 and 86, being the sections principally relied on by Mr Basten, fall within this Part.

69 Section 61(1) provides that a care order may be made only on the application of the Director-General, "except as provided by this Chapter". On my reading of the Chapter, save in regard to s 90, which deals with rescission and variation of care orders, the Chapter makes no provision for any other party to make a care application (albeit that s 66(1) – which provides that a care application may be withdrawn by "the person who made the application" – appears to contemplate that persons other than the Director-General may make care applications).

70 Section 67 provides:

> "The making of a care application for a particular care order of the Children's Court does not prevent the Children's Court from making a care order different from, in addition to, or in substitution for, the order for which the application was made …".

This section says nothing about the extent to which care orders can be varied and the powers of the Children's Court in this respect must be sought elsewhere in the CYP Act.

71 Section 69 provides for the making of interim care orders by the Children's Court. Section 70 provides that the Children's Court may make interim care orders "as it considers appropriate for the safety, welfare and well-being of a child or young person in proceedings before it pending the conclusion of the proceedings." This section does not confer unlimited powers on the Children's Court. The section must be read subject to the CYP Act as a whole and, in particular, s 74. As I have attempted to demonstrate, there are very many sections of the CYP Act that impose limitations on the powers of the Children's Court. Of some significance here is s 90(7)(b), which provides that the Children's Court, if it rescinds a care order, may make an

order that it could have made had an application for a care order been made to it with respect to the child concerned. Section 90(7)(b), accordingly, presupposes the existence of limitations.

72 Sections 71 and 72 set out the grounds and basis on which the Children's Court may make care orders.

73 It is helpful to see s 74 (a section critical to the result of this appeal) in its context. Accordingly, I shall repeat its terms without, at this stage commenting upon it.

> "74(1) The Children's Court may make an order directing a person or organisation named in the order to provide support for that child or young person for such period (not exceeding 12 months) as is specified in the order.
> (2) The Children's Court must not make an order under this section unless:
> (a) it gives notice of its intention to consider making the order to the person or organisation who would be required to provide support pursuant to such an order, and
> (b) the person or organisation is given an opportunity to appear and be heard by the Children's Court before the Children's Court makes such an order, and
> (c) the person or organisation consents to the making of the order, and
> (d) the views of the child or young person in relation to the proposed order have been taken into account."
> (3) The Director-General may be required to provide support pursuant to an order made under this section."

74 Section 76 empowers the Children's Court, after inquiry, to make an order placing a child or young person in relation to whom a care application has been made under the supervision of the Director-General. As I have observed, supervisory responsibility is a concept different to "parental responsibility" and involves the supervision of those who have care responsibility.

75 Section 78 deals with care plans. Section 78(1) provides:

> "(1) If the Director-General applies to the Children's Court for an order, not being an emergency protection order, for the removal of a child or young person from the care of his or her parents, the Director-General must present a care plan to the Children's Court before final orders are made."

Section 78(2) provides:

> "The care plan must make provision for the following:
> (a) the allocation of parental responsibility between the Minister and the parents of the child or young person for the duration of any period for which the child or young person is removed from the care of his or her parents.
> (b) …
> (c) the arrangements for contact between the child or young person and his or her parents …
> (d) …
> (e) the services that need to be provided to the child or young person."

76 Sections 79(1) and (2) provide:

> "(1) If the Children's Court finds that a child or young person is in need of care and protection, it may:
> (a) make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility:
> (i) to one person to the exclusion of the other parent, or
> (ii) to one or both parents and to the Minister or another person jointly, or
> (iii) to another suitable person, or
> (b) make an order placing the child or young person under the parental responsibility of the Minister.
> (2) The specific aspects of parental responsibility that may be allocated by an order of the Children's Court include, but are not limited to, the following:
> (a) the residence of the child or young person,
> (b) contact,
> (c) the education and training of the child or young person,
> (d) the religious upbringing of the child or young person,
> (e) the medical treatment of the child or young person."

77 An important point arising out of s 79 is that it provides for the allocation of parental responsibility to the Minister and not to the Director-General. I again draw attention to the fact that the Minister and the Director-General have entirely different roles and functions under the CYP Act and due regard must be had to the distinction. I also draw attention to the fact that "contact" is treated by s 79(2)(b) as an aspect of parental responsibility, hence, under s 79, is treated as a matter involving the Minister and not the Director-General.

78 Section 80 provides:

> "The Children's Court must not make a final order:
> (a) for the removal of a child from the care and protection of his or her parents, or
> (b) for the allocation of parental responsibility in respect of the child, unless it has considered a care plan presented to it by the Director-General."

79 I have previously noted that s 80 is capable of implying that the Children's Court, after considering a care plan presented to it by the Director-General, may make a final order otherwise than in accordance with the Director-General's care plan; no indication, however, is provided by the section as to the particular respects in which the Children Court might override the Director-General's care plan. Whatever the Children's Court's powers may be in this regard, they are, as I have previously observed, limited by the CYP Act as a whole.

80 Section 81(1) provides that, if the Children's Court makes an order placing a child or young person under the parental responsibility of the Minister, the Children's Court must determine which aspects (if any) of parental responsibility are to be the sole responsibility of the Minister, or persons other than the Minister, or which aspects are to be exercised jointly by the Minister and other persons. The power, under this section, to determine the boundaries of parental responsibility, appears by its terms, to be exercisable against the opposition of the Director-General. Nevertheless, as the Children's Court has limited powers, under the CYP Act as a whole, to make orders against the Minister and the Director-General, the power under s 81(1) must be exercised subject to those limitations. The section casts no light on the nature and extent of the limitations.

81 Section 82 provides for the monitoring by the Children's Court of an order allocating parental responsibility "to a person (including the Minister) other than a parent". Section 82(2) provides that if, after consideration of a written progress report, the Children's Court is not satisfied that proper arrangements have been made for the care and protection of the child, "it may order that the case be brought before it so that the existing orders may be reviewed." This section may mean that the Children's Court may make at least some orders contrary to the wishes of the Director-General. The section, however, casts no light on the specific extent of the Children's Court's powers of review.

82 Section 85 provides:

> "A government department or agency or a funded non-government agency that is requested by the Children's Court to provide services to a child or young person or his or her family in order to facilitate restoration is to use its best endeavours to provide those services."

This section, therefore, provides only that the government department or agency concerned "use its best endeavours" to provide the services mentioned. It does not confer on the Children's Court the power to require the government agency to undertake any action.

83 Section 86 provides for the making of contact orders. It is in the following terms:

> "86. **Contact orders**
> (1) If a child or young person is the subject of proceedings before the Children's Court, the Children's Court may, on application made by any party to the proceedings, do any one or more of the following:
> (a) make an order stipulating minimum requirements concerning the frequency and duration of contact between the child or young person and his or her parents, relatives or other persons of significance to the child or young person,
> (b) make an order that contact with a specified person be supervised,
> (c) make an order denying contact with a specified person if contact with that person is not in the best interests of the child or young person.
> (2) The Children's Court may make an order that contact be supervised by the Director-General or a person employed within the Department only with the Director-General's or person's consent.
> (3) An order of the kind referred to in subsection (1)(a) does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.
> (4) An order of the kind referred to in subsection (1)(b) may be made only with the consent of the person specified in the order and the person who is required to supervise the contact."

84 It is to be noted that s 86 makes no reference to the making of contact orders against the Minister, even though "contact", by s 79(2) is part of parental responsibility. Moreover, while s 79 provides that parental responsibility may be allocated to the Minister, there is no provision under the CYP Act for parental responsibility to be allocated to the Director-General.

85 It is to be noted that, while s 86(2) provides for the making of orders that contact be

supervised by the Director-General, the section says nothing about the detail of orders that can be made against the Director-General for the purposes of giving effect to an order for supervision. In particular, the section does not provide that the Director-General may be ordered to provide support or services as part of a contact order.

86 Section 113(1) (which falls within Chapter 7) provides:

> "(1) A parent, child or young person, or any other person may ask the Director-General for assistance:
>
> (a) if there is a serious or persistent conflict between the parents and the child or young person of such a nature that the safety, welfare or well-being of the child or young person is in jeopardy, or
>
> (b) if the parents are unable to provide adequate supervision for the child or young person to such an extent that the safety, welfare or well-being of the child or young person is in jeopardy."

87 Section 113(2) provides that on receiving a request for assistance the Director-General may provide or arrange for the provision of such advice or assistance as is necessary. This is a matter within the discretion of the Director-General.

88 Section 115 deals with the preparation of an alternative parenting plan by the Director-General or another party if the Director-General is not a party to the proceedings. An alternative parenting plan is a plan "that sets out the way in which the needs of the child or young person are proposed to be met having regard to the breakdown in the relationship between the child or young person and his or her parents" (s 115(1)(a)). Section 115(1)(b) provides that an alternative parenting plan may include proposals concerning the following:

> "(i) allocation of parental responsibility …
>
> …
>
> (iv) contact arrangements,
>
> …
>
> (vii) the provision of services."

89 Section 118(1) provides that:

> "The Children's Court may make such orders as it considers appropriate to give effect to a proposed alternative parenting plan or specified parts of the plan."

90 The Children's Court is not given express power to make variations to an alternative parenting plan. Thus, in those instances where the Director-General is proposed to be a party to an alternative parenting plan, the Director-General's agreement to such a plan appears to be required before the Children's Court can make orders relating to matters that would be covered by such a plan (including contact between the parents and the child).

91 Chapter 8 deals with "out of home care". This Chapter is of particular relevance in this appeal as George is a child subject to out of home care.

92 Section 134 provides that the objects of Chapter 8 are:

> (a) to create a high standard in the provision of out-of-home care, and
>
> (b) to provide a model for the organisation of out-of-home care, and

> (c) to clarify the roles and responsibilities of those involved in the provision of out-of-home care by distinguishing between care responsibility (that is, the daily care and control of a child or young person), supervisory responsibility (that is, the supervision of those who have care responsibility) and parental responsibility."

93 Sections 164 and 165 are part of Chapter 8. Section 164 provides:

> "The Minister is responsible for the provision of accommodation for any child or young person for whom the Minister has parental responsibility."

Section 165 provides:

> "(1) The Minister is to provide or arrange such assistance for children of or above the age of 15 years and young persons who leave out-of-home care until they reach the age of 25 years as the Minister considers necessary having regard to their safety, welfare and well-being.
> (2) Appropriate assistance may include:
> (a) provision of information about available resources and services, and
> (b) assistance based on an assessment of need, including financial assistance and assistance for obtaining accommodation, setting up house, education and training, finding employment, legal advice and accessing health services, and
> (c) counselling and support.
> (3) The Minister has a discretion to continue to provide or arrange appropriate assistance to a person after he or she reaches the age of 25 years."

It is to be emphasised that while the appropriate assistance to be provided by the Minister includes, expressly, financial assistance, that assistance is only to be provided at the Minister's discretion.

94 Section 161 (which is also part of Chapter 8) confers on the Director-General a discretion to grant financial assistance "to any person having the care of the child or young person for any period during which the child or young person is in that person's care". Section 161, however, is yet to be proclaimed.

95 It is common ground, nevertheless, that s 91 of the *Children (Care and Protection) Act* 1987 (the predecessor of s 161) was at the relevant time (and still is) of application (and will continue to apply until s 161 is proclaimed). Section 91(1) of the *Children (Care and Protection) Act* provides:

> "(1) The Minister:
> (a) shall provide for the accommodation, care and maintenance of wards and protected persons.
> (b) may make payments, at such rates as may be prescribed by the regulations, to persons having the care of wards or protected persons.
> (c) to (f) …".

96 While s 91(1)(a) requires the Minister to provide for accommodation, care and maintenance, it is significant that s 91(1)(b) imposes only a discretionary obligation on the Minister to make

payments to persons having the care of "wards or protected persons".

97 Generally, there is nothing in Chapter 8 that deals expressly with the making of orders by the Children's Court against the Director-General for the provision of services.

The provision of services or support by the Director-General and the Minister

98 The challenged order was part of a series of orders made by Mitchell CM on 28 January 2003 allocating aspects of parental responsibility to the Minister. Such allocation of parental responsibility to the Minister was undoubtedly within power: see s 79.

99 The challenged order required DOCS (and not the Director-General) to "… pay the rail/bus fares and reasonable accommodation expenses [of the] parents". The appeal, however, was argued on the tacit basis that the challenged order, requiring DOCS to pay the transport and accommodation expenses, was in effect an order made against the Director-General (the Director-General's role as defined by s 16(1) being to provide services). Grove J dealt with the matter on the same basis, namely, that the order requiring DOCS to pay the transport and accommodation expenses was in effect an order made against the Director-General.

100 According to the submission of the claimant and the fourth and fifth opponents, the *power* to order the Director-General to provide the services in question was derived from s 74(3) (which is in terms that purport to empower the Children's Court to "require" the Director-General to provide "support").

101 The submission of the claimant and the fourth and fifth opponents was that the *obligation* to provide support was derived from parental responsibility. This was a necessary submission, as "contact", by s 79(2) is an "aspect" of parental responsibility. Moreover, by s 79, the specific aspects of parental responsibility that may be allocated by an order of the Children's Court include "contact".

102 But, as I have noted, s 79 provides for the allocation of parental responsibility to the Minister and not to the Director-General. Moreover, the Children's Court, correctly, ordered that parental responsibility was allocated to the Minister, not to the Director-General. It is to be emphasised that the Minister and the Director-General have entirely different roles and functions under the CYP Act. Importantly, the Minister, as I have mentioned, has no obligation under s 74 to provide support; nor is it the role of the Minister to provide support. That is the role of the Director-General.

103 Also, as part of the orders made on 28 January 2003, Mitchell CM ordered that George "have contact supervised by the Department of Community Services". The order for supervision by the Director-General was made pursuant to s 86(2).

104 While DOCS (which I take to be the Director-General – the appeal being argued on this basis) was ordered to supervise the contact, "supervisory responsibility" involves only "the supervision of those who have care responsibility" (s 134(c)). Orders as to the provision of financial assistance so as to facilitate contact are not ancillary to supervisory responsibility.

105 In summary, at this stage:

> (a) The order of the Children's Court allocating parental responsibility to the Minister was within power.
> (b) The order of the Children's Court that the Director-General supervise George was within power.

(c) The contact order Mitchell CM purported to make was an aspect of parental power, but the order to supervise was not.
(d) The submission that the obligation of the Director-General to provide (financial) support (as ordered by the challenged order) flowed from parental responsibility, must be rejected (as the Director-General was not allocated parental responsibility).
(e) No obligation to provide financial support flows from the duty of supervision.

106 It is helpful, now, to have regard to those sections of the CYP Act that deal, expressly, with actions to be taken by the Director-General in providing support and services to children in need of care.

107 The CYP Act provides that the Director-General, when requested pursuant to s 22, must provide "material assistance" when the Director-General considers that to be "necessary". The Director-General, upon forming the requisite opinion, may "take … action" under s 34(1). The Director-General (if regarded as a government department) may, pursuant to s 85, be ordered to "use … best endeavours" to provide services to a child when requested by the Children's Court to do so. The Director-General may provide assistance "as is necessary" upon request pursuant to s 113(2). The Director-General may be required to provide services pursuant to an agreed alternative parenting plan (see 115 and 118(1)); and, upon s 161 coming into force, the Director-General may grant financial assistance pursuant to that section.

108 None of the sections referred to in the preceding paragraph imposes unconditional or absolute obligations on the Director-General. Each of the obligations arising out of those sections is essentially of a discretionary nature and is conditional on and defined by an opinion or decision of the Director-General. Accordingly, it would not be open to the Children's Court to order the Director-General to take any action pursuant to those sections without the Director-General first having formed the necessary opinion or made the necessary decision. Moreover, the extent of any obligation of the Director-General that may arise after the forming of such an opinion or the making of such a decision will depend on the terms of the opinion or decision in question. Thus, in respect of these matters, the power of the Children's Court to make orders against the Director-General is limited indeed.

109 The only source of power on which the Children's Court could rely to order the Director-General to provide support or services pursuant to obligations of the Director-General under Chapter 5 of the CYP Act (which provides, generally, for care orders and contact orders) is s 74 (3). It is sufficient to note that if s 74(3) afforded the Children's Court unconditional and unlimited power to make such an order, it would be the only provision of the CYP Act, dealing expressly with the provision of support or services by the Director-General, which would confer such power. I can see no reason in policy for there to be such a material difference between the discretionary powers given to the Director-General under the sections referred to in [106] and what is submitted to be the source of power (under s 74(3)) to impose an unconditional and absolute obligation on the Director-General to provide services or support.

110 There are some sections of the relevant legislation that deal with the provision of assistance by the Minister (as opposed to the Director-General).

111 Section 164 provides that the Minister is responsible for the provision of accommodation for any child or young person for whom the Minister has parental responsibility; s 165 provides that the Minister is to provide or arrange for such assistance for certain children and young persons who leave out-of-home care until they reach the age of 25 years, as the Minister considers necessary; and while s 91(1)(a) of the *Children (Care and Protection) Act* provides that the Minister shall provide for the accommodation, care and maintenance of wards and

protected persons, s 91(1)(b) provides that the Minister *may* make payments to persons having the care of wards or protected persons (that is, a discretion is thereby conferred on the Minister).

112 The arguments advanced by the claimant and the fourth and fifth opponents were not directed to any obligation of the Minister to provide services or support. That is no doubt because the terms of the challenged order do not impose any obligation on the Minister.

113 Moreover, s 74 imposes no obligation on the Minister. In addition, no other provision of the CYP Act affords the Children's Court the power to impose an absolute and unconditional obligation on the Minister to supply services or support. For the reasons I have explained, s 91 (1) of the *Children (Care and Protection) Act* does not provide the claimant and the fourth and fifth opponents with any relevant assistance.

The construction of s 74 and the Parkinson Report

114 I have set out above the many provisions of the CYP Act that afford the Director-General and the Minister discretionary powers to provide support and services. I have attempted to demonstrate that while there are instances of the Children's Court being given power to make orders otherwise than by consent and against the opposition of the Director- General, these are comparatively few in number and do not, expressly, impose unconditional and absolute obligations to supply support and services.

115 I have also, above, referred to other factors that militate against the construction of s 74 advanced by the claimant and the fourth and fifth opponents.

116 Section 74 falls to be construed in the context of all the matters to which I have above referred. I now turn to the specific words of the section.

117 Of immediate relevance to the meaning of the words used in s 74 (without reference to the other contextual matters) is a governmental review and report entitled "The Government's Responsibility for the Care and Protection of Children and Young People: Recommendations for Law Reform", November 1997, apparently commonly known as the "Parkinson Report". The Parkinson Report preceded and influenced the CYP Act.

118 Recommendation 4.16 of the Parkinson Report provided:

> "**The Children's Court should have the power to make orders for services with the consent of the service provider**.
> *Comment*: At present the Court has no power to order that support services be provided to an individual child, young person or to a family, even though the provision of a service may be the only alternative to the removal of the child from the home.
> The Act should contain a provision along the lines of sections 91 and 93 of the New Zealand Children, Young Persons and Their Families Act 1989 which provides:
>
> > 91(1) Where the Court makes a declaration under section 67 of this Act in relation to a child or young person, it may make an order directing any person or organisation named in the order to provide support for that child or young person for such period (not exceeding 12 months) as is specified I the order.
> > 91(2) The Court shall not make an order under subsection (1) of this section unless -

> (a) It gives notice of its intention to consider making the order to any person or organisation who would be required to provide support pursuant to such an order; and
> (b) That the person or organisation is given an opportunity to appear and be heard by the Court before the Court makes such an order; and
> (c) That person or organisation consents to the making of the order.
>
> 91(3) The Director-General may be required to provide support pursuant to an order made under this section.
>
> This recommendation is resource-neutral. This provision requires the consent of the service provider, and thus does not involve the court in trying to order services which do not exist or which are not available. Although it requires consent, the order has been found to be very useful in New Zealand in formalising the roles and responsibilities of agencies in meeting the needs of the child and family, and in emphasising to all concerned the importance of this service provision."

119 The heading of recommendation 4.16 indicates the nub of the proposal. That is, the Children's Court should be given power to order the provision of services, but only with the consent of the "service provider". Section 91 of the New Zealand statute (which, by recommendation 4.16, the Parkinson Report suggested should be adopted in New South Wales legislation) is virtually identical to s 74 of the CYP Act. In other words, recommendation 4.16 was accepted and implemented in New South Wales (and s 74 is, in effect, a duplicate of s 91 of the New Zealand statute).

120 Recommendation 4.16 is a compelling indication that s 74(3) was intended to be read subject to s 74(2).

121 The first sentence of the Parkinson Report comment regarding recommendation 4.16 is: "This recommendation is resource-neutral". I understand this to mean that the proposed legislation was not intended to empower the Court to order the service provider, otherwise than by consent, to render services and, thereby, deplete its resources.

122 This inference is reinforced by the next sentence of the comment. The first part of the next sentence states in explicit terms: "This provision requires the consent of the service provider". The second part of that sentence explains that the proposal would not involve the ordering of "services which do not exist or which are not available".

123 The explanation for the proposed section is also illuminating, namely:

> "Although it requires consent, the order has been found to be very useful in New Zealand in formalising the roles and responsibilities of agencies in meeting the needs of the child and family, and in emphasising to all concerned the importance of this service provision."

124 It can be seen that recommendation 4.16 is unequivocally intended to empower the Court to make orders of the kind referred to therein only with consent. This is the paramount theme of the section and applies to sub-section (3) as well as sub-section (1).

125 Recommendation 4.16 is, accordingly, powerful support for the proposition adopted by Grove J, namely, that s 74(3) is merely explanatory of the fact that the power of the Children's Court under s 74(1) includes the power to make orders against the Director-General (albeit that such orders may, by s 74(2), only be made by consent).

126 Mr Basten emphasised the phrase "may be required to provide support" in s 76(3). He submitted that this indicated an intention to empower the Children's Court to require the Director-General to provide support even without the Director-General's consent. There is, however, no difference in substance between the phrase "may be required" in s 74(3) and the phrase "an order directing a person or organisation … to provide support" in s 74(1). Both s 74 (1) and s 74(3) are couched in terms that prima facie afford the Children's Court unconditional power to make orders of the kind referred to in the sections concerned. Nevertheless, s 74(2) is unambiguously stated to apply to s 74 as a whole.

127 In other words, s 74(2), according to its natural meaning, governs both s 74(1) and s 74(3) and conditions the power of the Children's Court to make orders under ss 74(1) and 74(3). By s 74(2), the Children's Court may only make orders in terms of ss 74(1) and 74(3) upon the consent of the "person or organisation" referred to in s 74(1) and the Director-General referred to in s 74(3).

Other factors relevant to the construction of s 74

128 There are other cogent factors that support this construction.

129 The pool of funds available to DOCS for carrying out its manifold duties is finite. The pool is derived from the Consolidated Fund in accordance with the applicable Appropriation Act that is passed each year. No doubt, as with all government departments, DOCS works out its budget each year by reference to the amount allocated to it under the governing Appropriation Act. In doing so it will allocate a particular sum for the provision of services to children and young persons in need of care and protection. If the Children's Court is empowered to order DOCS to expend money other than in accordance with the current budget applicable, the result will be that some children who otherwise would have benefited will not receive the services intended. The money available for the services to be provided to them will have to be used to accommodate the orders of the Children's Court.

130 In essence, the allocation of money and other resources for the care and protection of children and young persons is a matter of policy. It is preferable that such policy decisions be made by the body vested with the administrative responsibility for the proper use of the resources in question, and not by a court on an ad hoc basis. This approach underlies the many instances in the CYP Act where the provision of services is expressly left to the discretion of the Director-General and the Minister. In my view there is no reason why the legislature intended this approach to be different in regard to the powers of the Children's Court under s 74.

131 Next, I would point out that the overall amount likely to be involved in the provision of transport and accommodation expenses to parents of children in foster care, generally, is not necessarily trivial.

132 Once the principle is established that the Children's Court may, on an ad hoc basis, order the Director-General to pay such expenses, it is likely that very many such applications will be made. Applications may then be made, for example, for the cost of transport by taxi where public transport is not available or is inconvenient. Any change of address by foster parents may give rise to all such applications. Even where there is no change of address, illness or disability or other difficulty experienced by the parents might result in them applying for orders that the

Director-General pay their travelling expenses. To take an extreme example, foster parents may decide to live, say, in London for a year. The Children's Court may decide that it would be in the child's interests to accompany the foster parents, but it would also be in the child's interests for the parents to visit him or her in London. Once the principle is established that the Children's Court has power to order the Director-General to pay the parents' costs of travel and accommodation, so as to facilitate giving effect to a contact order, it would be open to the Children's Court to require the Director-General to pay the parents' costs of overseas travel. This would be a result of some incongruity, to say the least.

133 As Mr Temby pointed out, all parents have to make choices in regard to their children. These choices involve such matters as the place of family residence, the kind and place of education each child is to receive, and the kind and standard of medical treatment each child is to receive. The number of choices that parents are required to make through the lifetime of their children is infinite. While parents will ordinarily have the welfare of their children at heart, the choices that parents will make will be dictated, largely, by the funds that they have at their disposal. It would be unthinkable to compel parents to make choices which they could not afford simply because those choices would advance the interests of a child.

134 In my view, the same approach has to be taken when parental responsibility is allocated to the Minister pursuant to the CYP Act. What is in the best interests of the child one would readily expect to be left to the discretion of the Minister and the Director-General, having regard to the limited funds allotted to DOCS for the protection of children in need of care, generally.

Conclusion

135 I accept that contact between the parents and George falls within the concept of "care of the child" and is an "aspect" of parental responsibility.

136 I also accept that, generally, under the CYP Act, those provisions that deal with the supply of services and support by the Director-General (and the Minister) include the supply of financial assistance.

137 The CYP Act (subject to the temporary application of the *Children (Care and Protection) Act*) provides for the regulation of:

> (a) the care of children and young persons who need protection for their safety, welfare and well-being;
>
> (b) the services (including financial assistance) to be provided by institutions (including DOCS) responsible for the care and protection of children and young persons.

138 In my opinion, the CYP Act provides exclusively and exhaustively for the relief the Children's Court may order arising out of obligations imposed on the Director-General (and the Minister) by that Act, and that Act imposes limitations on the power of the Children's Court to grant such relief.

139 Accordingly, neither s 15 of the CC Act nor any power implied from any of the legislation to which we were referred extends the powers of the Children's Court to grant relief arising out of obligations imposed on the Director-General (and the Minister) by the CYP Act beyond the powers of the Children's Court that are contained in the CYP Act.

140 For the reasons I have expressed, I conclude that the supply of services and support by the Director-General (that formed the basis of the challenged order) was a matter that fell within the discretion of the Director-General, and (in the absence of the agreement of the Director-General) the Children's Court was not empowered by s 74(3) or s 86 of the CYP Act (or any other part of that Act or the *Children (Care and Protection) Act* to order DOCS or the Director-General to provide the services, the subject of the challenged order.

141 While, on 28 January 2003, the Director-General sought an order that all parental responsibility for George be allocated to the Minister until George reached the age of 18 years, neither the Director-General nor the Minister agreed to an order being made in the terms of the challenged order.

142 Thus, the Children's Court had no power under the CYP Act to make the challenged order.

143 It follows that s 15 of the CC Act did not provide the necessary power and no such power could be implied from any of the legislation to which we were referred.

144 Accordingly, I propose that the appeal be dismissed.

145 The Minister and the Director-General did not seek any order for costs and I propose that no such order be made.

146 **McCOLL JA**: I agree with Ipp JA.

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