

CASE NOTES

Application of Audi Alteram Partem Rule

The decision of the Privy Council in *Durayappah v. Fernando* [1967] 3 W.L.R. 289; [1967] 2 All E.R. 152 has raised once again the issue of the effect of a breach of the principles of natural justice; does it render the decision void or merely voidable? It was held in this case that a breach of the *audi alteram partem* rule results in a decision being voidable at the instance of the party aggrieved. Although this part of the decision is causing considerable interest in England, while the ultimate answer to the issue is of relevance in New Zealand, it is not the most important part of the decision from this country's viewpoint.

The first part of the decision discusses whether this is a case to which the principles of natural justice apply at all and it is on this point that New Zealand law has tended to diverge from the main thread of English authority. Since an obligation to comply with the principles of natural justice is inherent in a finding that there is a duty to act judicially, the difference lies in decisions regarding the circumstances which give rise to a judicial function. English authority on the point has tended to develop along general lines from early authorities such as *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180 in which Byles, J., made his often quoted statement that "although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." The cases adopting this dictum are outlined by Lord Reid in *Ridge v. Baldwin* [1964] A.C. 40 at pages 68 to 71, showing that a judicial function had been found in a very wide variety of circumstances. His Lordship noted, however, that the scope of application of the principles of natural justice has in recent years been eroded and that, in his opinion, one of the causes was that there have "been many cases where it has been sought to apply the principles of natural justice to the wider duties imposed on Ministers and other organs of government by modern legislation." This limited application of the principles has been used as a criterion in cases to which it does not apply. However, for present purposes, it is to the class of cases involving Ministerial decisions that we must turn.

Lord Reid recognised that, in many decisions, a Minister is guided by such considerations as public interest and government policy, and that in such cases it would be wrong for the courts to interfere. Such decisions are therefore classified as administrative and any hearing or provision for objections prior to the making of the decision are said to be for the further information of the Minister. Such a case was *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87 concerning the new town of Stevenage. In *Errington v. Minister of*

Health [1935] 1 K.B. 249 it was held that while the Minister's decision was an administrative act involving considerations of policy, yet, at the stage immediately preceding, during which he had to consider both objections and the views of the local authority so that there was something in the nature of a *lis* before him, the Minister was under a duty to act judicially. However, Lord Reid also recognises that decisions involving policy are in a special class, so that if a case does not come within that class, merely because it is a decision by a Minister it does not necessarily follow that the decision and preceding hearing, if any, should be classified as administrative. The principles of natural justice should still be applied in suitable cases and this class should not be unnecessarily whittled away.

The New Zealand divergence stems from *Nakkuda Ali v. Jayaratne* [1951] A.C. 66 which placed great emphasis on the dictum of Atkin, L.J. (as he then was), in *R. v. Electricity Commissioners* [1924] 1 K.B. 171, 205, to the effect that in order to obtain certiorari it was necessary to prove that the defendant had both legal authority to determine questions affecting the rights of subjects and a duty to act judicially. In concluding that the last requirement was not present the Privy Council stated that "the power conferred on the Controller by reg. 62 stands by itself on the bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules." The emphasis on the wording of the provision conferring the power and the reference to the context or conditions of the jurisdiction have been seized by the New Zealand courts and given a far greater importance than is accorded to them in England. The judgments in cases such as *N.Z. Dairy Board v. Okitu Co-op. Dairy Co.* [1953] N.Z.L.R. 366, *N.Z. United Licensed Victuallers v. Price Tribunal* [1957] N.Z.L.R. 167, and *Modern Theatres Ltd. v. Peryman* [1960] N.Z.L.R. 197 show this very clearly. However, in at least two instances a duty to act judicially has been found where there was nothing in the legislation to suggest it. The first is the *Okitu* case itself, particularly the judgment of Cooke, J. (p. 421), and the second is *Low v. Earthquake and War Damage Commission* [1959] N.Z.L.R. 1200, 1209. In the former case the judicial function was inferred from the cumulative effect of the conditions of the jurisdiction and the context of the legislation, and in the latter from the nature of the power. Even so, the examination to which the legislation and all the surrounding circumstances is subjected, is considerably more detailed than in English decision and, as the following comparison shows, may well result in injustice.

An example of this can be seen when the facts and decision in *Durayappah v. Fernando* are compared with those in *Buller Hospital Board v. Attorney-General* [1959] N.Z.L.R. 1259. In the *Buller Hospital Board* case the Minister of Health had power under s. 84 of the Hospital Act 1957 "if at any time it appears to" him that the Board has or has not done certain things, on the recommendation of the Hospitals Advisory Council, to appoint a Commission with power to act in place of the Board. The proviso to the section gives the Board a right to written notice and at least one month in which to remedy the defaults

referred to in the notice unless the Minister is satisfied that the Board has been guilty of a grave dereliction of duty. In the particular case notice was not given. A committee appointed by the Minister prior to appointing the Commission did conduct a hearing but not one which complied with the *audi alteram partem* rule. In determining whether the Minister's power had to be exercised judicially the New Zealand approach was followed and it was held that neither in the section, nor in the context, conditions or circumstances was there any implication of a duty to act judicially so that the *audi alteram partem* rule had no application.

In *Durayappah v. Fernando* a similar statutory provision stated that: "If at any time it appears to the Minister that a municipal council is not competent, . . . the Minister may . . . direct that the council shall be dissolved and superseded. . . ." The Jaffna Municipal Council had had a very troubled time so that the Minister sent a commissioner to prepare a report on the basis of which he dissolved the council. There was no attempt by the Minister to claim that the *audi alteram partem* rule had been complied with; merely that he was not under a duty to act judicially at any stage. The Privy Council examined an earlier Ceylonese decision on the same section which had laid down as a general rule that words such as "where it appears to . . ." or "if the . . . is satisfied that . . ." standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially. Their Lordships specifically disagreed with this approach stating that: "These various formulae are introductory of the matter to be considered and give little guidance upon the question of *audi alteram partem*. The statute can make itself clear upon this point and if it does *cadit quaestio*. If it does not then the principle stated by Byles, J., in *Cooper v. Eandsworth Board of Works* (quoted above) must be applied." This may be too general an approach, failing as it does to take account of such cases as *Franklin v. Minister of Town and Country Planning*; but nevertheless it is quite applicable to the residual class of cases, which may include certain Ministerial powers, as recognised by Lord Reid in *Ridge v. Baldwin*.

Their Lordships went on to state that: "In their . . . opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined." Their Lordships then examined all three matters in relation to the facts of the case before them and determined that upon each one individually the *audi alteram partem* rule should apply.

The different approaches therefore resulted in a different decision in each case, though the statutory provision and the circumstances were almost identical. The only possible ground for distinction would be the proviso to the section in the *Buller Hospital Board* case; but this did

not allow for a hearing, merely that notice of the default had to be given and at least a month to rectify it. If the Minister was satisfied that there had been a grave dereliction of duty then he could act more quickly in that he did not have to give the notice. This is an entirely different question, however, from the Board's right to a hearing in either event.

Although emphasis has been placed on the approach actually used by the Privy Council and the decision reached as a result of it, it must be admitted that their Lordships warned against assuming that they necessarily agree with Lord Reid's analysis of *R. v. Electricity Commissioners* or with his criticism of *Nakkuda Ali v. Jayaratne*. Their Lordships go no further in stating specifically what their reservations are, and the warning may be due simply to the composite nature of the judgment. It is nevertheless submitted that the New Zealand courts now have available to them a much more satisfactory approach to the issue of when the *audi alteram partem* rule should apply.

D.W.McM.

The Barrister, the Client, and the Court

A case which will be of considerable interest and practical importance to practising barristers and solicitors in New Zealand, is *Rondel v. Worsley* [1967] 3 W.L.R. 1666, in which the House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a case in court and the preliminary work connected therewith such as the drawing of pleadings.

A most unusual feature of the case was that the appellant (the plaintiff in the case), personally drafted his own statement of claim, and until the hearing in the Court of Appeal, was not represented by counsel. The facts of the case were, briefly, that the appellant was tried in 1959 on charges of causing bodily harm to one M. with intent to do so; his defence was that the acts, which he did not deny, were justified. The respondent, a barrister-at-law, undertook the appellant's defence on a dock-brief, but the appellant was nonetheless convicted and sentenced to imprisonment. His application for leave to appeal, which included complaints against his counsel, was refused.

In 1965, the appellant issued a writ against the respondent, claiming "damages for professional negligence", the statement of claim having been drawn by himself. The statement of claim was ordered to be struck out, the appellant appealed to the Queen's Bench Division of the High Court against this order and his appeal was dismissed following full argument. The matter then went to the Court of Appeal, where once again, the appeal was dismissed. Finally, the appellant was given leave to appeal to the House of Lords, in view of the important issues of public policy involved in the action.

In the House of Lords, the appeal was unanimously dismissed, that Court holding that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a case in Court and the preliminary work involved such as the drawing of pleadings. The immunity sprang not from the absence of a

contract between the barrister and his client, but from long usage and public policy. It was so held for the reasons first that a barrister must be able to carry out his duties to the Court without fear and free of the risk of actions against him by his client, if the administration of justice is properly to be carried out; secondly that actions against a barrister for negligence would inevitably involve retrial of the original actions, and would thus prolong litigation, a factor greatly against the public interest; and thirdly, that a barrister was under a duty to accept any client, however objectionable, who sought his services.

It is notable that the basic premise of this decision is the question of public policy. It is submitted that in the same way as the barrister receives absolute privilege for all that he says in court, so too, public policy requires that for the proper administration of justice, the barrister must receive immunity for what he does in Court.

A further prominent feature of this case is that all their Lordships were in agreement that the immunity of a barrister did not spring from the absence of contract between barrister and client. An argument that the immunity did arise from the absence of such contractual relationship could possibly be met with the proposition that the barrister was liable in tort for his negligence regardless of the absence of contractual relationship. When the recent developments in the law of negligence are considered, such a proposition is far from untenable.

The remarks of Lord Pearson (at pp. 1730 and 1731) are highly relevant to the case of the practising barrister and solicitor in New Zealand, in so far as his Lordship's remarks pertain to the position of the solicitor advocate. The precise extent of the immunity may well be a matter for debate in New Zealand, where in the majority of cases, the practising solicitor frequently appears in court as a barrister. How much of the preliminary preparation for the hearing is covered by the immunity, and how much is not? In this respect, the remarks of Lord Pearson seem, with respect, somewhat illogical, for his Lordship "draws the line" at the point where contractual relationship ceases. Yet the basis of the decision in this case is that absence of contractual relationship does not constitute the source of the immunity, but rather that the needs of public policy dictate the terms of this immunity. Thus *Rondel v. Worsley* does not provide a precise definition of the extent of the immunity in its application to the New Zealand situation but creates a degree of uncertainty upon this question. How far can the protective mantle of public policy be drawn over the professional work of the practising barrister and solicitor in this country? This question may well remain unanswered for some considerable time, for the decision in *Rondel v. Worsley* will surely discourage similar actions in the future.

It can be said, however, that the decision in *Rondel v. Worsley* has at least settled a matter which was extremely uncertain, as evidenced by the number of authorities cited by counsel and discussed at length in the judgments. The decision makes it abundantly clear that no action will lie against a barrister for negligence in respect of his conduct of a case in court. The decision, it is submitted, was a correct answer to this question, for it must always be borne in mind that a barrister is an officer of the court, and therefore owes a duty not only to his client,

but also to the court. Of necessity, if the barrister is to discharge this duty to the court, he must be free to conduct a case free of the risk of an action against him by the client. The undue prolonging of litigation which would inevitably result from the lack of such immunity would prevent the proper administration of justice, a consequence which should be avoided if at all possible.

R.A.