Is the Decision in the *Smit* Case Justified?

by

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I. Introduction

The decision by White J. in *Smit* v. *Egg Marketing Authority*[1] has elevated the "duty to act fairly" to being a sufficient condition whose breach justified the award of the prerogative writ of certiorari to quash certain decisions taken by a statutory body. Hitherto, a breach of natural justice was required in similar circumstances before such a writ was issued and this was done at the court's discretion. The situation in which certiorari (or prohibition) becomes available as a remedy was clearly set out by Atkin L. J. in *R.* v. *Electricity Commissioners.*[2] He said:[3]

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

The *Smit* case decision, therefore, means either that the requirements for fairness satisfy Atkin L. J.'s dictum or that certiorari is available on different grounds from those stipulated by his Lordship.

The discussion in this article revolves around the following propositions:

(a) that everyone with a power to decide, regardless of the nature of that power, is under a duty to act fairly in exercising that power;[4]

[1] Unreported, Supreme Court, Administrative Division, 21 March 1973.
[2] [1924] 1 K.B. 171.
[3] Ibid., 205.
[4] E.g., see Lord Pearson's distinction in *Pearlberg* v. *Varty (Inspector of Taxes)* [1972] 1 W.L.R. 534 at 547.

(b) if the nature of the deciding body's power is judicial or quasi-judicial, then that body is under a duty to observe the principles of natural justice, subject to statutory limitations.[5]

These propositions may be taken as representing the traditional views on the respective roles of "fairness" and natural justice in administrative law.[6] It can be seen that these propositions, taken together with Atkin L. J.'s dictum, result in certiorari being available for a breach of natural justice but not necessarily[7] for a breach of fairness.

Where a tribunal's function is judicial, the concept of fairness applies to the extent that it requires the rules of natural justice to be observed, but only to that extent. And although failure to observe the principles of natural justice obviously means a breach of "fairness" as well, certiorari becomes available only by virtue of the breach of natural justice.

It is important to note that a breach of natural justice is generally regarded as an ultra vires act which renders the affected determination null and void.[8] Granting certiorari to remedy a breach of a duty to act fairly amounts to holding that an unfair act is an ultra vires, and therefore a void, act. In view of the first proposition forwarded above, such a result may well lead to some startling consequences.

However, one cannot conclude from all this that the *Smit* case decision was wrong in law. This is because White J. purported to base his decision on the "modern concept" of natural justice. Two judgments were cited to explain what this meant. In *Furnell* v. *Whangarei High Schools Board*[9] Lord Morris said:[10]

> It has often been pointed out that the conceptions which are indicated when natural justice is involved or referred to are not comprised within and are not to be confined within certain hard and fast rules. (See the speeches in *Wiseman* v. *Borneman*[11]). Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L. J. in *Russell* v. *Duke of Norfolk*,[12] the requirements of natural justice must depend on the circumstances of each particular case and the subject-matter under consideration.

[5] See the Privy Council's discussion in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.

[6] Professor S. A. de Smith is one prominent administrative law writer who is believed to hold this traditional view: Halsbury, *Laws of England* (4th ed. 1973—) i, paras. 64-66.

[7] Because fairness also covers those bodies with judicial functions, it may be contended that its breach here justifies the issue of certiorari.

[8] See J. F. Northey, "Contractual Misconceptions in Administrative Law" (1969) 4 Recent Law 224.

[9] [1973] 2 N.Z.L.R. 705.

[10] Ibid., 718.

[11] [1971] A.C. 297.

[12] [1949] 1 All E.R. 109 at 118.

The second judgment referred to was that of Roskill L. J. in *R.* v. *Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association.*[13] The learned judge said:[14]

> The power of the court to intervene is not limited, as once was thought, to those cases where the function in question is judicial or quasi-judicial. The modern cases show that this court will intervene more widely than in the past. Even where the function is said to be administrative, the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness.

It appears clear from his judgment that White J.[15] extracted two general conclusions from these expressions of the modern concept of natural justice. They are these:

(a) that the nature of the deciding body's function—be it administrative or judicial—does not determine the applicability of the rules of natural justice;

(b) that the rules of natural justice are the same as the requirements for fairness.

This article will examine the present state of administrative law to see if these general conclusions, and indeed if the modern concept of natural justice, can be supported.

II. The Nature of the Function and Natural Justice

1. *Judicial function*

It is settled law that the rules of natural justice apply to those tribunals whose functions are judicial or quasi-judicial. Lord Morris in *Wiseman* v. *Borneman*[16] confirms this view when he said:[17]

> My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but an essential part of the philosophy of the law.

A duty to act judicially may arise in a very wide variety of situations.[18] This was well recognised by Tucker L. J. in *Russell* v. *Duke of Norfolk.*[19] In a much quoted statement he said:[20]

> There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements for natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

[13] [1972] 2 Q.B. 299.
[14] Ibid., 310.
[15] *Smit* v. *Egg Marketing Authority,* loc. cit.
[16] [1971] A.C. 297.
[17] Ibid., 308.
[18] See Halsbury, op. cit., para. 65 for a most comprehensive reference to the different situations where a judicial function has been said to exist.
[19] [1949] 1 All E.R. 109.
[20] Ibid., 118.

This particular passage has been invoked repeatedly[21] to support the contention that the rules of natural justice are not limited in application to those tribunals whose powers are judged to be judicial or quasi-judicial. It is, however, submitted that such an interpretation does not necessarily follow from Tucker L. J.'s statement. It may well be that the general nature of the statement is intended to cover the extensive spread of tribunals which the courts have said were under a duty to act judicially, rather than encompassing all tribunals.

2. *Administrative function*

Numerous recent judgments have proclaimed that administrative decisions are subject to the principle of natural justice.[22] In *R.* v. *Gaming Board for Great Britain ex parte Benaim*[23] Lord Denning M. R. referring to the rules of natural justice said:[24]

> At one time, it was said that the principles only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge* v. *Baldwin*.[25]

Invoking the principles proposed by Lord Reid[26] in this manner, however, can be highly misleading.[27] It is, therefore, important to see just how the rules of natural justice were said to apply to administrative decisions. It seems to me that Lord Reid did not reject the basic proposition that natural justice applies to judicial functions but not to administrative ones. What he did was to expand the scope of the concept of "judicial power" to cover those administrative decisions which affect property and other rights which are of vital importance to individuals. He argued that the judicial characteristic of the power be inferred from the nature of the duty itself rather than just from the nature of the procedure involved.[28]

The learned judge concluded that if the duty of a deciding body is to determine and decide on questions affecting individuals' rights, then that body has a judicial function. Furthermore, such a function is to be presumed unless expressly excluded by statutory provisions.

The important point to note is that Lord Reid recognised the necessity of the presence of the judicial element before the rules of

[21] E.g., see *Furnell* v. *Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705 at 718 per Lord Morris; *Wiseman* v. *Borneman* [1971] A.C. 297 at 311 per Lord Guest and at 314-315 per Lord Donovan.
[22] E.g., see *In re Pergamon Press Ltd.* [1971] Ch. 388; *R.* v. *Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.
[23] [1970] 2 Q.B. 417.
[24] Ibid., 430.
[25] [1964] A.C. 40.
[26] *Ridge* v. *Baldwin*, ibid., 63-81.
[27] There is a strong implication here that in Lord Reid's view all administrative tribunals are subject to the principles of natural justice. As will be seen, this is not so.
[28] [1964] A.C. 40 at 74-78.

natural justice can be said to apply to a tribunal's determinations. It follows from this that natural justice applies only to those administrative tribunals whose powers may be seen to contain judicial elements. Such judicial elements may exist due to a variety of factors.[29] Lord Denning M. R. in *Schmidt* v. *Secretary of State for Home Affairs*[30] appeared to appreciate this distinction when he said:[31]

> Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge* v. *Baldwin*[32] show that *an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.* [Emphasis added]

The Privy Council in *Durayappah* v. *Fernando*[33] also adopted the approach of inferring the judicial characteristic of a tribunal's powers by reference to the nature of the power itself. Thus they held:[34]

> In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should apply or not. These 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 on what occasions is the person claiming to be entitled to exercise the measure or control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose on the other. It is only on a consideration of all these matters that the question of the application of the principle can properly be determined.

Though the Minister's action of dissolving the Council was clearly not a judicial act on the procedure criterion, yet the Privy Council was able to impute to it a judicial element when the above standards were applied. And having this judicial characteristic, the Minister's decision was said to be subject to the rules of natural justice.

The question is whether White J. appreciated this distinction in deciding *Smit's* case.[35] The learned judge, after concluding that the nature of the function does not determine whether natural justice applies or not, went on to say:[36]

> The doctrine may apply whatever the nature of the inquiry by a statutory body subject to any limitations and rules imposed by the statute.

Whether this means that apart from the "limitations and rules imposed by the statute", *all* administrative decisions are subject to

[29] Ante, n. 18.
[30] [1969] 2 Ch. 149.
[31] Ibid., 170.
[32] [1964] A.C. 40.
[33] [1967] 2 A.C. 337.
[34] Ibid., 349 per Lord Upjohn.
[35] Loc. cit.
[36] Ibid.

natural justice, or not, is not clear. But it is clear from our brief look at Lord Reid's judgment in *Ridge v. Baldwin*[37] and the *Durayappah* case[38] that only certain administrative tribunals are subject to the rules of natural justice.

Thus, far from being meaningless with respect to the application of natural justice, the distinction between judicial and administrative functions is still the vital factor in considering whether the rules of natural justice apply or not to any kind of tribunal.

Furthermore the recent decisions in this area do not appear to justify the popularity of the generalisation that the distinction between administrative and judicial functions is no longer of significance in the application of the rules of natural justice. The House of Lords' decision in *Pearlberg* v. *Varty (Inspector of Taxes)*[39] provides us with a useful example. In refusing a taxpayer's claim that assessments of his tax from previous years were invalid because he was not given a hearing—as natural justice requires—before the assessments were made, the court relied heavily on the fact that the tax commissioner's function was administrative and hence there was no obligation to observe the rules of natural justice. Lord Pearson said:[40]

> A tribunal to whom judicial or quasi-judicial functions are entrusted, is held to be required to apply those principles in forming those functions, unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions, there is no presumption that compliance with natural justice is required, although, as Parliament is not to be presumed to act unfairly, the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness.

In emphasising the importance of the relevant statutes, Lord Hailsham L. C. noted that[41]

> . . . decisions of the courts on particular statutes should be based in the first instance on a careful, even meticulous, construction of what that statute actually means in the context in which it was passed. It is true, of course, that the courts will lean heavily against any construction of a statute which would be manifestly unfair. But they have no power to amend or supplement the language of a statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the statute accords him. Still less is it the functioning of the courts to form first a judgment on the fairness of an Act of Parliament and then amend or supplement it with new provisions so as to make it conform to that judgment.

Viscount Dilhorne, after dismissing the appeal on the grounds that the Commissioner's powers were administrative and, therefore, not

[37] [1964] A.C. 40.
[38] [1967] 2 A.C. 337.
[39] [1972] 1 W.L.R. 534.
[40] Ibid., 547.
[41] Ibid., 540.

subject to natural justice on which the appeal was based, went on to say:[42]

> Even if I were of the opinion that it was a judicial or quasi-judicial function, I am far from satisfied that the requirements of natural justice necessitate the supplementing of the statutory provisions.

The strong emphasis placed on the importance of giving statutory provisions their proper construction, together with the "no presumption of natural justice" aspect, places the approach adopted in this case by the House of Lords very close indeed to the approach used by New Zealand courts in earlier cases.[43]

In *Wiseman* v. *Borneman*,[44] Lord Reid himself said:[45]

> For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised, it must be clear that the statutory procedure is sufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

It is arguable that his Lordship has altered his view with respect to presuming that natural justice applies unless expressly excluded by statute.[46]

In this case, the appellants contended that they were entitled to be represented and fully informed at a meeting of the tribunal which decided whether there was a prima facie case for proceeding in the matter. Natural justice was said to give them such rights as they asked for. This contention was rejected by the Court. Lord Reid continued:[47]

> It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case.

Thus, the presence of a judicial characteristic in a tribunal's powers and duties is important in deciding whether natural justice applies or not.

In *Furnell* v. *Whangarei High Schools Board*,[48] the Privy Council affirmed the decision by the New Zealand Court of Appeal in rejecting the argument on the plaintiff's behalf that he was entitled to a hearing when the sub-committee and the Board were considering his case. The majority regarded the legislation as a complete code which excluded the application of natural justice. The code itself and the actions of the sub-committee and the Board were all held to be

[42] Ibid., 545.
[43] *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co.* [1953] N.Z.L.R. 366; *Modern Theatres (Provincial) Ltd.* v. *Peryman* [1960] N.Z.L.R. 191.
[44] [1971] A.C. 297.
[45] Ibid., 308.
[46] Lord Reid's view in *Ridge* v. *Baldwin* [1964] A.C. 40 as discussed ante, pp. 64-65.
[47] [1971] A.C. 297 at 308.
[48] [1973] 2 N.Z.L.R. 705.

fair. The decision in this case could be said to constitute an extreme application of the principle that the courts must decide, above all, as the legislation directs.

There is much to be said in favour of the minority's view that the nature of the powers[49] of the sub-committee and the Board, together with the consequences[50] of their determinations, should have entitled the plaintiff to a hearing before either of these bodies. In other words, this was a case where a judicial element could have been imputed to the function of the deciding bodies concerned and where a duty to observe the rules of natural justice could have been imposed accordingly.

The foregoing discussion clearly leads to these conclusions:

(a) that the distinction between administrative and judicial functions is still a vital factor in determining the application of the rules of natural justice;

(b) that the approach adopted in *Nakkuda Ali* v. *Jayaratne*[51] and followed by the New Zealand courts[52] remains valid.

The first conclusion confirms that the apparent eroding of the distinction between judicial and administrative functions with respect to the application of natural justice is misleading. Thus the conclusion adopted in recent New Zealand cases[53] that[54]

> . . . any distinction between the judicial or quasi-judicial tribunals on the one hand and administrative functions on the other is not of itself to preclude the application of the rules of natural justice . . . .

may not be fully justified, unless of course they were referring to administrative tribunals whose powers were seen to contain judicial elements.

It is of significance that in the *Rich* case[55] and the *Pagliara* case[56] claims based on alleged breaches of natural justice were rejected by the courts on the grounds that the relevant statutes did not intend all or part of natural justice to apply and that those deciding bodies concerned carried out their duties according to the statutory provisions, i.e., they exercised their powers fairly.

[49] See Lord Reid's view in *Ridge* v. *Baldwin* [1964] A.C. 40.
[50] See Lord Denning's view in *In re Pergamon Press Ltd.* [1971] Ch. 388; McCarthy J.'s view in *Rich* v. *Christchurch Girls' High School Board of Governors (No. 1)* [1974] 1 N.Z.L.R. 1.
[51] [1951] A.C. 66.
[52] Ante, n. 43.
[53] E.g., see *Smit* v. *Egg Marketing Authority*, loc. cit.; *Rich* v. *Christchurch Girls' High School Board of Governors (No. 1)* [1974] 1 N.Z.L.R. 1; *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86.
[54] *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86 at 93-94 per Quilliam J.
[55] [1974] 1 N.Z.L.R. 1.
[56] [1974] 1 N.Z.L.R. 86.

The second conclusion is of special importance because *Nakkuda Ali* v. *Jayaratne*[57] and those cases that followed it are seen to have been decided squarely on the traditional concept of natural justice.

Thus if the modern concept of natural justice purports to exclude the judicial element as a necessary ingredient in any tribunal's powers before that tribunal is properly subject to the rules of natural justice, then the modern concept is unfounded, unsound and unjustified on the authorities examined. Moreover, it is obvious that far from being eclipsed, the traditional concept of natural justice is very much in vogue.

III. That the Rules of Natural Justice are the same as the Requirements for Fairness

In the *Smit* case,[58] White J. appears to have accepted the definition of natural justice as being "fair play in action". This description of natural justice was included in Lord Morris's statement[59] which White J. quoted to explain the "modern concept" of natural justice.[60] The learned judge used the terms "natural justice" and "fairness" interchangeably as if they referred to the same thing. But if there is uncertainty as to his use of these terms, there can be little doubt as to what he was referring to when he used them. He said:[61]

> I think the principle stated by Lord Parker C. J. in *In re H.K. (An Infant),*[62] quoted with approval in *R.* v. *Gaming Board for Great Britain ex parte Benaim,*[63] applies in the present case. The Lord Chief Justice said: ' . . . even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of being required to act judicially, but of being required to act fairly.'

It is important to remember the conclusion reached earlier that natural justice and the duty to act judicially go hand in hand. Or as Professor J. F. Northey puts it:[64]

> To state that a tribunal must comply with the principles of natural justice is synonymous with saying that it is obliged to act judicially.

The statement by Lord Parker C. J. is not seen as in conflict with the proposition that natural justice is synonymous with the duty to act judicially. It is seen rather as emphasising the proposition that

[57] [1951] A.C. 66.
[58] Loc. cit.
[59] *Furnell* v. *Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705 at 718.
[60] Loc. cit.
[61] Ibid.
[62] [1967] 2 Q.B. 617 at 630.
[63] [1970] 2 Q.B. 417 at 430.
[64] "The Exclusion of Natural Justice by a Code" [1972] N.Z.L.J. 307.

everyone with a power to decide, regardless of the nature of that power, is under a duty to act fairly in exercising that power.

It must be remembered that there is a certain amount of overlapping between the rules of natural justice and the requirements for fairness. Lord Parker C. J. went on to say:[65]

> Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly, and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, *only to that limited extent do the so called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.* [Emphasis added]

Professor de Smith[66] referred to this limited overlapping in a summary which it is submitted sets out the position fairly and correctly with respect to those deciding bodies which are under a duty to act fairly. He wrote:[67]

> The content of the rules of natural justice is not stereotyped, and a duty to act judicially does not necessarily connote an obligation to observe the procedural and evidential rules of a court of law. In some situations, where it has been said that a deciding body is under a duty to act fairly, a distinction appears to have been drawn between such a duty and a more rigorous duty to act judicially in accordance with natural justice; but given the flexibility of the rules of natural justice, the meaning of this distinction is not always clear, and a duty to act fairly can generally be interpreted as meaning a duty to observe certain aspects of the rules of natural justice, though in some situations the expression is used without reference to procedural duties.

It seems obvious though that White J.[68] regarded this limited overlapping as having been removed or even perhaps destroyed in the process leading up to the establishment of the "modern concept" of natural justice. By accepting the general proposition that the rules of natural justice apply to judicial as well as administrative tribunals,[69] the learned judge was able to treat Lord Parker C. J.'s statement[70] as amounting to establishing the principle that the rules of natural justice apply in full to these tribunals who are under a duty to act fairly. The issue of certiorari[71] on the grounds of breach of fairness surely supports this interpretation.

Actually, this practice of applying the principles of natural justice to those tribunals which merely have a duty to act fairly may be seen as most beneficial to those who see the "elevation" of fairness as being desirable. The main reason for this is that, despite the

[65] [1967] 2 Q.B. 617 at 630.
[66] Halsbury, op. cit., para. 66.
[67] Idem. See especially n. 5, where he commented that "fairness may simply denote abstention from abuse of discretion."
[68] *Smit* v. *Egg Marketing Authority*, loc. cit.
[69] Support was obtained from cases cited ante, n. 9 and 13.
[70] *In re H.K. (An Infant)* [1967] 2 Q.B. 617 at 630.
[71] This aspect was discussed ante, pp. 1 and 2.

flexibility of the rules of natural justice, there are certain established requirements which one may depend on as being certain and widely accepted. Such a situation does not exist for the requirements for fairness. Therefore, by adopting the principles of natural justice as being the requirements for fairness, a significant degree of certainty is gained by the concept of fairness and hence by the "modern concept" of natural justice.

The case of *R.* v. *Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association*[72] appears to be one which was decided on a mere breach of a duty to act fairly. The case concerned an increase in taxi licences in Liverpool which the Liverpool taxi owners' association opposed. Lord Denning M. R.[73] referred to a statement by Sankey J. in *R.* v. *Brighton Corporation, ex parte Thomas Tilling*[74] in which he said that the power to grant licences is subject to the rules of natural justice.

Thus it may be argued that there was a judicial element[75] in the nature of the duty involved here to justify the granting of prohibition. However, Lord Denning doubted this. "It is perhaps putting it a little high to say they are exercising judicial functions."[76]

At any rate, their Lordships were in agreement that, even if the function was administrative, those who exercise it must act fairly. In this case, "fairness" required that the plaintiff association be given a hearing before licences were granted and the Liverpool Corporation was bound to honour an undertaking given on their behalf by one of their members.

In the result, the Court found that the Liverpool Corporation had acted wrongly and in breach of fairness. The resulting discussion on the effects of such a breach and the appropriate remedy available is of special interest and relevance to the problem examined in this paper. Roskill L. J. said:[77]

> The applicants seek orders of prohibition, mandamus and certiorari. For my part I see no ground for allowing an order of certiorari to go. The resolution of 22nd December is not suggested to have been ultra vires. . . . Nor can I see any ground for an order of mandamus, for I see no failure by Liverpool Corporation to exercise a power which it is required by Parliament to exercise. It seems to me that if any redress can be given, it must be redress by way of an order of prohibition. The applicants have not sought relief, as perhaps they might have done, by way of injunction or declaration.

[72] [1972] 2 Q.B. 299.
[73] Ibid., 307-308.
[74] (1916) 85 L.J.K.B. 1552 at 1555.
[75] See Roskill L. J.'s view of Lord Denning M. R.'s position: [1972] 2 Q.B. 299 at 311.
[76] Ibid., 308.
[77] Ibid., 309-310.

Thus a breach of a duty to act fairly is not an ultra vires act which renders the determination concerned void. A difficulty, however, arises due to the issuing of prohibition which, as noted earlier, should issue only if the function is judicial. It may be that, in such a situation as this, mandamus is the most appropriate remedy to award. This is because mandamus is available even if the function involved is not judicial.

However, a closer look at the conditions which accompanied the issue of prohibition in this case reveals that they in fact amount to the same situation as if mandamus was granted. Lord Denning M. R. remarked, after setting the conditions:[78]

> If prohibition goes in those terms, it means that the relevant committees, sub-committee and the corporation themselves can look at the matter afresh. They will hear all those interested and come to a right conclusion as to what is to be done about the number of taxi cabs on the streets of Liverpool.

Of course, reconsideration of the affected process is not a requirement if prohibition is granted, as it is with mandamus.

A recent New Zealand decision[79] which relied on the *Liverpool Corporation* case[80] saw the award of prohibition to restrain the members of the Lower Hutt City Council from hearing objections to the stopping of a street. In this case, Wild C. J. found that there had been bias on the test proposed by Turner J. in *Turner* v. *Allison.*[81] However, instead of pronouncing that bias amounts to a breach of natural justice, i.e., a breach of the duty to act judicially and, therefore, prohibition lies, the Chief Justice appeared to regard the breach here to be that of fairness rather than of natural justice.

As pointed out earlier, the overall coverage by the requirements of fairness includes those bodies that are obliged to act judicially, but that though the non-observance of the rules of natural justice amounts also to a breach of the requirements for fairness, the determination is or will be ultra vires and attracts certiorari and prohibition by virtue only of the breach of natural justice rather than the incidental breach of fairness. Thus it is suggested that if Wild C. J. granted prohibition on the grounds that he regarded the finding of bias as a mere breach of fairness, then he based his decision on the wrong grounds.

The case of *In re Pergamon Press Ltd.*[82] is seen as helpful in the attempt to establish what the modern concept of natural justice is about. In this case the former directors of a company refused to

[78] Ibid., 309.
[79] *Bank v. Lower Hutt City Council* [1974] 1 N.Z.L.R. 385 (affirmed on appeal [1974] 1 N.Z.L.R. 545).
[80] [1972] 2 Q.B. 299.
[81] [1971] N.Z.L.R. 833 at 848.
[82] [1971] Ch. 388.

co-operate with inspectors who were investigating affairs of the company under powers granted within the Companies Act. The directors contended that they were entitled to read the transcripts of evidence adverse to them and also to cross-examine those witnesses who appeared before the inspectors. They invoked the principles of natural justice to support their claims.

The Court found that the inspectors' function was neither judicial nor quasi-judicial as they decided and determined nothing. However, Lord Denning M. R.[83] went on to list the likely consequences of the inspectors' report—it may lead to accusation, condemnation, ruination of careers, damaging judicial proceedings and so on—and said:[84]

> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see *R.* v. *Gaming Board for Great Britain ex parte Benaim.*[85]

He then continued to lay down what the duty to act judicially entails:[86]

> The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.

My summary of the situation is this: that the fairness concept used widely in many recent cases is founded on two basic views, that of Lord Reid as expressed in his decision in *Ridge* v. *Baldwin*[87] and that of Lord Parker as contained in his decision in *In re H.K. (An Infant).*[88] It is submitted that the situations envisaged in these views are different and distinct from each other.

Lord Reid's view was as established ante, i.e., that the rules of natural justice apply only to those administrative tribunals to whose powers judicial elements may be inferred by virtue of the nature of the matters—such as property and individual rights—that such tribunals decide on. Lord Denning M. R.'s decision in *In re Pergamon Press Ltd.*,[89] which invoked fairness due to the nature of the likely consequences, is suggested to come under the same classification as Lord Reid's view.

In other words, the concept of fairness in such situations as these refers in fact only to those administrative tribunals whose powers

[83] Ibid., 399.
[84] Idem.
[85] [1970] 2 Q.B. 417.
[86] [1971] Ch. 388 at 399-400.
[87] [1964] A.C. 40.
[88] [1967] 2 Q.B. 617.
[89] [1971] Ch. 388.

have judicial characteristic and are, therefore, subject to the rules of natural justice. Thus they come under the second of the propositions forwarded at the beginning of this article.

On the other hand, Lord Parker C. J.'s view is submitted to apply to all tribunals. This view is seen as supporting the first proposition, that everyone with a power to decide, regardless of the nature of that power, is under a duty to act fairly in exercising that power. A breach of the duty to act fairly in this context is seen as not being sufficient to attract certiorari and/or prohibition unless the tribunal concerned has a "judicial" function.

IV. Conclusion

The ambivalent situation that presently exists in this area of administrative law is believed to be a result of regarding the two distinct views pointed out ante as being the same. It is suggested with respect that the *Smit* case[90] decision suffered from this mistake. Indeed, I think that the whole "modern concept" of natural justice is guilty of ignoring this distinction. As a result, one can conclude that the *Smit* case as well as the "modern concept" of natural justice are not justified.

Furthermore, so long as the concept of fairness and the modern concept of natural justice refer to both of the situations envisaged by Lord Reid, Lord Denning M. R. and Lord Parker C. J., this confusion will remain. The situation as presented in the two propositions at the beginning of this article—the traditional view—is clearly the correct position with regard to the concepts of the duty to act fairly and the duty to observe the principles of natural justice, even with the recent cases which appear to indicate the contrary.

[90] Loc. cit.