RECENT DEVELOPMENTS IN THE LAW

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ADMINISTRATIVE LAW

Ouster of the Jurisdiction of the Court

The anxiety of the courts to preserve their inherent powers of review of administrative action is well reflected in the strict interpretation placed by them upon statutory provisions purporting to limit these powers in some way. While such provisions may well prevail where a tribunal has acted safely within its jurisdiction, the courts have frequently held that they are not precluded by such provisions from reviewing instances of an inferior tribunal acting in excess of its jurisdiction, or without jurisdiction. Thus the concept "jurisdiction" assumes a high degree of importance in this context, a proposition which was well illustrated in the opinions of the House of Lords in the recent case of *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147. In that case the respondent Commission had, through the manner in which it interpreted its empowering Order in Council, made a determination rejecting the appellant company's claim for some £4,000,000 compensation in respect of property nationalised by the Egyptian Government during the Suez crisis of 1956. Since the appellant company had through its own efforts forced the Egyptian Government to pay it compensation totalling £500,000, the Commission interpreted the order as meaning that the company now had a "successor in title" within the meaning of the Order, and was thereby required to satisfy the Commission of certain further matters, which, in the circumstances, was not possible. The majority of the House of Lords held the Commission's interpretation to be wrong in law. Was this a "jurisdictional" error? Lord Morris of Borth-y-Gest was of the opinion that it was not, and stated:

> At no time was the commission more centrally within their jurisdiction than when they were grappling with those problems. If anyone could assert that in reaching honest conclusions in regard to the questions of construction they made any error, such error would in my view be an error while acting within their jurisdiction and while acting in the discharge of their function within it. (*ibid.*, 194).

In taking this narrow view of jurisdictional error, however, Lord Morris was in the minority. The majority of the Law Lords (Lord Reid, Lord Pearce, Lord Wilberforce and Lord Pearson) took the wider and perhaps bolder view that the misinterpretation of the Order defining the jurisdiction of the Commission meant that in rejecting the appellant's claim the commission had exceeded its jurisdiction. Once the applicant had satisfied the requirements of the Order, it was outside the jurisdiction of the Commission to consider the question of "successor in title", and the court was therefore not precluded from enquiring whether the determination rejecting the claim was a nullity. The words of Lord Wilberforce are well worth bearing in mind:

> regarding the preclusive clause. For, just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so, The courts, when they decide that a "decision" is a "nullity", are not dis-

> as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed. . . . In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive. What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could be safely passed? (*ibid.*, 208).

Judicial Review of Exercise of "Executive" Discretion

In the above quotation from *Anisminic's* case, Lord Wilberforce is anxious to deny the existence of a struggle between the courts and the executive, and it is apparent that any such struggle is always carefully avoided by the courts. On the other hand, as *Anisminic* itself demonstrates, the courts have shown themselves anxious to protect jealously any encroachment by the legislature upon their inherent powers. Questions of policy making by the Executive have traditionally been treated with judicious self-restraint by courts called upon to review them. In this atmosphere the House of Lords decision in *Padfield* v. *Minister of Africulture, Fisheries and Food* [1968] A.C. 997 has been seen by some to indicate an unusually bold approach where "policy" matters are concerned. The case centred around the Minister's exercise of a discretion conferred upon him by s. 19 (3) of Agricultural Marketing Act 1958 to refer the complaint of a group of farmers relating to milk prices to a committee of investigation. It was contended for the Minister that his only duty was to consider a complaint fairly, and that he had an unfettered discretion with regard to referral of any complaint to the committee. The House of Lords was unanimous in rejecting this submission, holding that the discretion must be exercised by the Minister according to law.

The Minister was given an executive discretion but nonetheless, his exercise of that discretion might be upset if it were shown that he (1) had failed to apply his mind to the complaint, or (2) had misinterpreted the law or proceeded on an erroneous view of the law, or (3) had based his discretion on some wholly erroneous consideration or (4) had failed to have regard to matters which he should have taken into account. The majority of the House (Lord Morris dissenting) held that the reasons given by the Minister for refusing to refer the complaint were not legally valid in that they left out altogether the merits of the complaint itself. Furthermore, their Lordships drew an inference from one reason advanced by the Minister that for him to refer the complaint and then later, as he was entitled to do, refuse to act upon a report of the committee favourable to the complainants, might well cause him embarrassment in Parliament. Notwithstanding that in looking at the question in this way the Minister was undoubtedly bearing in mind his department's overall policy in administering the Act, their Lordships found this to be an irrelevant consideration:

> . . . the Minister's decision . . . can never turn on purely political considerations; he must be prepared to face the music in Parliament if a statute has cast upon him an obligation in the proper exercise of a discretion conferred upon him . . . (*per* Lord Upjohn, *ibid.*, 1061).

Natural Justice

The importance of the recent decision of Speight J. in *Denton* v. *Auckland City* [1969] N.Z.L.R. 256 lies in the way in which that decision resolves the apparent conflict between *Connelly v. Palmerston North*

City Corporation [1953] N.Z.L.R. 115, and *Perpetual Trustees* v. *Dunedin City* [1968] N.Z.L.R. 19. The facts in both these cases were similar to those of the present case in that all were concerned with the receipt by City Councils of specialised engineers' reports upon the arguments of objectors against proposed construction work. In none of the three cases were the objectors provided with a copy of the relevant report, nor were they permitted to make representations based upon the reports. *Connelly's* case held that in these circumstances, the rules of natural justice had been violated: in the *Perpetual Trustees'* case, Henry J. was unable to arrive at a similar conclusion. The learned Judge there took the view that the matters upon which the Engineer was commenting were merely collateral to the main issue involved, and were concerned with the alternatives raised by the objectors, which the City as a matter of policy might wish to adopt:

> In dealing with this question, the learned Judge appears to be of the opinion that the City Council was then no longer discharging its quasi-judicial function, but considering a matter of policy (*per* Speight J., *ibid.*, 261).

Speight J. was able to distinguish the *Perpetual Trustees'* case with little difficulty, since in this case it was apparent that the report "covered the merits of the very matter put in issue by the objectors". (*ibid.* 262)

A further important feature of the case lies in the importance placed by Speight J. on the expertise and knowledge of the members of the committee, usually one of their qualifications for appointment. That such expertise and knowledge should be used and taken into account is highly desirable, but nevertheless, principles of natural justice must be followed:

> . . . it is proper that these matters should be taken into account, but to do so is far removed from receiving and acting on confidential information in relation to the matter in issue given by a person whose face is not seen and whose voice is not heard by the parties whose rights are affected. (*ibid.*, 263).

M. J. Grant

COMMERCIAL LAW

Arbitration

Wilson v. *Glover* [1969] N.Z.L.R. 365 was concerned with an appeal from an arbitrator's decision, that was founded upon the abitrator's own knowledge—rather than evidence adduced at the arbitration hearing. The appellant relied upon *Trevor Bros. Ltd.* v. *Westerman* [1933] G.L.R. 822, and similar decisions where an award was set aside because the arbitrator acted upon evidence not produced at the arbitration. Moller J. however preferred the approach of Lord Goddard C.J. in *Mediterranean and Eastern Export Company Ltd.* v. *Fortress Fabrics (Manchester) Ltd.* [1948] 2 All E.R. 186 (at page 188) where it was decided that if an arbitrator was appointed because of his special knowledge and experience of the trade in question, he was then entitled to fix damages without hearing expert evidence in respect of them. In the instant case the arbitrator was a building consultant. The learned judge recognised that some minor mistakes may have occurred with regard to the allowances to be made on some items but he was of the opinion