RECENT DEVELOPMENTS IN THE LAW

A review of significant judicial decisions and legislation contributed by students of the Faculty of Law, University of Otago.

ADMINISTRATIVE LAW

Appeal—exercise of discretion

New Zealand Broadcasting Corporation v. *Stewart* [1972] N.Z.L.R. 556 was an appeal to the Supreme Court by the N.Z.B.C. against the Broadcasting Authority's decision to exercise its discretion to grant a sound radio warrant for a private commercial broadcasting station.

In determining whether the Authority's decision could be upheld having regard to the fact that the Authority was authorised to exercise its discretion to grant such a warrant, the Court found it necessary to consider the scope of the Authority's function. In delivering the decision of the Court, Wild C. J. quoted, 558, the following passage from an earlier Court of Appeal decision in *Sulco Ltd.* v. *Talboys* [1958] N.Z.L.R. 817 at 825:

> The discretion which is required to be exercised is not to be regarded as an absolute or uncontrolled discretion, but one which may be reviewed by a Court of Appeal, but nevertheless not to be reversed merely because its members would themselves have exercised the discretion in a different way. Only if there has been a wrongful exercise of its discretion in that the Judge did not apply the right principles or gave no weight or no sufficient weight to relevant considerations should this Court reverse the order of the Supreme Court.

The Chief Justice continued: "In a case such as the present this Court stands in the place of the Court of Appeal and the Authority in the place of the Judge as mentioned in that passage."

Wild C. J. found that the Authority had given consideration to all the matters stipulated in s. 21 Broadcasting Authority Act 1968. The Authority thought that 'some desire had been expressed' and 'some need' indicated for a service operated by a private enterprise and was of the opinion that while there was sufficient advertising revenue to support two commercial stations in Christchurch, there would not be sufficient to support one more. The Court stated that while the functions and powers of the Authority under its Act are extensive they are not unlimited and it held that the Authority has no general statutory authority to supervise and control stations and the holders of warrants and that in seeking to grant a warrant to Avon by taking a warrant from N.Z.B.C. the Authority had misconceived its true powers and functions and accordingly went wrong in principle.

Judicial review—natural justice—right to a hearing

The House of Lords in *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534, in dismissing an appeal by a taxpayer that a back assessment by the revenue authorities was ultra vires and void on the ground that he had been given no notice of the hearing nor any opportunity to be heard, held unanimously that the audi alteram partem rule did not apply to

give a taxpayer a right to be heard before a preliminary decision by a tax commissioner. Under the governing legislation the revenue authorities were empowered to make a back assessment against an individual provided that leave was obtained from a commissioner. The taxpayer was never informed of the date that application was to be made to a commissioner for permission and the general commissioner granted the leave prayed without hearing the taxpayer. It was argued by the applicant that before such leave was given he should be given an opportunity to state his case either orally or in writing.

By treating the case as one where positive factors must be found in favour of the right to be heard, their lordships appear to have adopted an approach in contradistinction to that adopted in *Wiseman* v. *Borneman* [1971] A.C. 297 where the House of Lords held that there can be no difference in principle between a preliminary decision on one hand and a final decision on the other when considering rules of natural justice.

In *Pearlberg's* case their lordships held that on the construction of s. 6 Income Tax Management Act 1964, application for leave was intended to be ex parte; that the function of the commissioner in deciding whether or not to grant leave was neither judicial, nor quasi judicial, but merely administrative; and that natural justice does not require that a taxpayer should have a right to be heard.

It would seem, therefore, that before the Court will interfere in a case involving 'non-judicial' activities the onus is on the applicant to show that his position is prejudiced by the existing procedural requirements.

Judicial review—natural justice—fairness—locus standi

Three of the basic problems of judicial review came before the Court of Appeal in *R.* v. *Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association* [1972] 2 W.L.R. 1262. Here the local cab owners' association sought orders of certiorari, prohibition and mandamus against Liverpool Corporation which was empowered by statute to license taxi cabs within the city. The Corporation had given a written undertaking to the association that it would not increase the number of licences in the city until proposed legislation to control private hire cars had come into force. The Corporation subsequently changed its mind and, without first informing the association or giving its members an effective opportunity to object, increased the number of licences granted.

It was argued on behalf of the Corporation that the undertaking was void as constituting an unlawful fetter on its powers, but the Court made it clear that the giving of an undertaking concerning the manner in which a power is to be exercised is not per se unlawful if the undertaking is compatible with the statutory function in the sense that only proper considerations are taken into account in connection with the statutory discretion in question and that the authority does not rely on the prior undertaking to the exclusion of all other relevant factors.

The Court also held that although the function of granting licences was not a 'judicial' one, there was nonetheless a duty to act fairly and to give persons whose interests may be affected an opportunity to be heard.

As regards locus standi for the writs of prohibition and certiorari Lord Denning said that they lie, 1267, "on behalf of any person who

is a 'person aggrieved' and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody but includes any person who has a genuine grievance because something has been done or may be done which affects him."

Judicial review—exercise of discretion

In *R.* v. *Barnet and Camden Rent Tribunal, Ex Parte Frey Investments Ltd* [1972] 2 W.L.R. 619, a local authority resolved to refer tenancy agreements relating to twenty-two furnished rooms in houses belonging to the landlords to the rent tribunal pursuant to its powers under s. 72 Rent Act 1968. The valuation officers employed by the local authority interviewed the twenty-two tenants and reported, inter alia, that they felt that the rents were a little too high but that most of the tenants did not wish the agreements to be referred to the tribunal. The landlords sought prohibition to prevent the tribunal from determining the matter, upon the ground that the reference was ultra vires because it amounted to a 'block reference' made without taking the circumstances of individual tenancies into account and because irrelevant factors had been taken into account including the previous refusal of the landlords to permit the officers of the authority to enter and inspect certain of the premises concerned.

Prohibition was refused by the High Court and the Court of Appeal, that latter Court holding that unless the landlords could show either that the local authority had made a decision which was mala fide or frivolous or vexatious, it was impossible to say that the reference was ultra vires. The Court was prepared to base its decision on the ground that even if irrelevant considerations had been taken into account the reference would still have been valid because this kind of decision was purely 'administrative' in that it did not, in itself, affect the 'basic rights' of any individual. The local authority's powers could not be inhibited by the fact that the tenants did not want the reference to be made and in this case the local authority, having considered each tenancy agreement separately and with meticulous care, had concluded that would be right to make the reference and accordingly there was n evidence to show that it had acted other than properly.

Crown privilege—discovery of documents

In *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)* [1972] 2 W.L.R. 835 the English Court of Appeal held that trading documents received by the Excise Commissioners from third parties in connection with an investigation into the applicant's liability for purchase tax were not protected by Crown privilege. This claim for Crown privilege was made by the Commissioners on the basis that the documents contained confidential information and that disclosure would hamper them in the performance of their functions by revealing their methods of working.

Lord Denning M. R. (858) thought that the exemption claimed, covering as it would ordinary trading invoices which are relevant to many kinds of litigation, was too wide, particularly as there was no public interest in the confidentiality of such documents. In revenue matters of this kind there is a public interest in disclosure of the basis upon which liability is assessed since this militates against suspicions

that "revenue departments base their valuations . . . upon the tittle tattle of the market place" (per Orr L. J., 864).

The Court held that the claim for Crown privilege for documents of a routine kind which would and should be disclosed in ordinary litigation should not be sustained for there was no public interest which required them to be withheld from production but the commissioners were entitled to the privilege attaching to all litigants to withhold from production information freely entrusted by third parties in confidence for a restricted purpose. On that ground alone those documents were privileged from production.

Leave to appeal to the House of Lords has now been granted: [1972] 1 W.L.R. 833.

R. Ah Keni

COMMERCIAL LAW

Moneylenders

The importance of the Moneylenders Act 1908, and the complications which may arise in its interpretation have been emphasised in three recent New Zealand cases. In *Re A. R. Mackay Limited (In Liquidation), Farmers Finance Limited* v. *Craig and Another* [1971] N.Z.L.R. 289 proceedings were instituted to determine the validity of a second debenture executed in favour of the appellant by A. R. Mackay Ltd to secure the sum of $2000 plus further advances. Two forms of financing were used, the first involved discounting hire purchase agreements wherein the advances were secured by assigning to the appellant by mortgage hire purchase agreements. The other form was called 'D plan financing'. Originally the appellant advanced the purchase price of each vehicle, the advance was repayable after 30 days and was secured by a conditional hire purchase agreement showing the appellant as owner and Mackay Ltd as the purchaser. Later Mackay Ltd was not required to repay the loan until the vehicle was sold and to secure the advance Mackay Ltd sold the vehicle to the appellant who resold it to them. The appellant was not a registered moneylender.

The Court of Appeal refused to accept either system of 'D plan financing' as a series of sales and repurchases, but affirmed the judgment of Macarthur J. in the lower court that the system resulted in a series of loans. Detailed consideration was given to what constitutes moneylending for the purposes of the Moneylenders Act and the court quoted with approval Macarthur J.'s judgment in *Best* v. *Sutcliffe* [1965] N.Z.L.R. 750, 758 that "it is always a question of fact in each case whether a person is carrying on business of moneylending". The appellant claimed that the financing system was a recognised mercantile service and they were therefore not moneylenders. The court held the appellant had not confined their lending to providing a recognised mercantile service to Mackay Ltd as they had loaned money for the latter's general purposes and they had also loaned money to other companies. This being so, as the appellant was not registered as a moneylender the debenture was void and unrecoverable as an unsecured debt.