COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

LOWER HUTT CITY COUNCIL v. BANK: THE PRINCIPLES OF "FAIRNESS"

It would appear from the decision of the New Zealand Court of Appeal in *Lower Hutt City Council* v. *Bank*[1] disallowing an appeal against the issue of a writ of prohibition on the grounds of bias, that all judical and administrative decision-making must satisfy the requirements of procedural "fairness". Since the requirements of "fairness" vary depending upon the forum and context, how is a tribunal to know what procedure the abstract concept of "fairness" will require in any particular set of circumstances?

The Facts

The Lower Hutt City Council agreed to lease an area of land in the city to a developer. Included in this area were parts of two streets which the Council agreed to close. The relevant provision of the contract between the Council and the developer read:

> The corporation shall forthwith take all steps necessary to stop those parts of Queens Road and Bloomfield Terrace shown on the said plan under the procedures laid down in the sixth schedule to the Municipal Corporations Act 1954. If the corporation is unable to stop the said portions of the said streets or either of them by notice of a contrary decision of the Magistrate's Court this agreement shall be null and void and of no effect.

The procedure laid down in the Municipal Corporations Act for closing the streets required the Council to invite and hear objections to the proposed action.[2] Should the Council, after hearing the objections, reaffirm its decision to stop the street, it must put the matter before the Magistrate's Court for confirmation.

A number of objections were filed by residents of both streets, but before a hearing was held one of the objectors applied to the Supreme Court[3] for the issue of a writ of prohibition to prevent the hearing taking place on the ground that there was a real likelihood that the Council would feel constrained to disallow the objections. The applicant maintained that the Council's contractual obligation would prevent it from exercising its statutory duty to "inquire into and dispose of the objections"[4] with the required impartiality.

In the Supreme Court Wild C. J. found that the only event the Council anticipated stopping fulfilment of the contract was a decision of the Magistrate's Court refusing to confirm the Council's resolution

1 [1974] 1 N.Z.L.R. 545.
2 Municipal Corporations Act 1954, s. 170 (4). See also the Sixth Schedule to the Act.
3 [1974] 1 N.Z.L.R. 385.
4 Municipal Corporations Act 1954, Sixth Schedule, cl. 5.

to close the street. His Honour concluded that "fair-minded and responsible persons", seeing that the Council had bound itself in this way, would conclude that there was "a real likelihood of bias". Since there was English authority[5] for prohibition issuing even in respect of an administrative function, the learned Chief Justice did not hesitate to grant the writ preventing the Council from proceeding to inquire into and dispose of the objections.

The Principles of Fairness

The City Council appealed. With little discussion the Court of Appeal held the function of the Council to be at least quasi-judicial and not merely that of "an assembler and passer-on of facts and considerations".[6] The Court could have then directly considered whether there had been a breach of the *nemo judex* principle of natural justice, since traditionally[7] any judicial decision-making function must be performed in accordance with the principles of natural justice.

However, the Court chose to use this occasion to discuss the principles of fairness.[8] McCarthy P. delivering the judgment of the Court of Appeal began by asserting that it is no longer necessary to distinguish between judicial and administrative functions for the purpose of determining whether procedural requirements should be implied into the exercise of statutory powers. Traditionally, judicial or quasi-judicial decision-making has had to comply with the principles of natural justice.[9] Should a function be classified as administrative in character the Courts have, in recent years, imposed a duty to comply with what have been called the principles of "fairness".[10] The requirements of the principles of fairness have always been uncertain, the general opinion being that they consist of some of the requirements of natural justice, but not all.[11] In *Bank's* case the Court held that there is, with respect to both judicial and administrative decision-making, a duty to comply with the requirements of fairness "if the interests of justice make it apparent that the quality of fairness is required". Several well known authorities were cited to support this proposition.[12] Thus there was held to be an overriding principle of

5 Wild C. J. referred to *R.* v. *Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.

6 [1974] 1 N.Z.L.R. 545, 548. Compare *Furnell* v. *Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705; [1973] A.C. 660 where preliminary action was held by the Privy Council to be merely administrative.

7 See for example *Buller Hospital Board* v. *Attorney-General* [1959] N.Z.L.R. 1259, 1305 per Cleary J.

8 In the light of the Court's finding that the function involved was judicial, it could be argued that the Court's comments in respect of the doctrine of fairness are merely obiter dicta.

9 See *Low* v. *Earthquake and War Damage Commission* [1959] N.Z.L.R. 1198.

10 See e g. *In re H.K. (an infant)* [1967] 2 Q.B. 617; *Wiseman* v. *Borneman* [1971] A.C. 297.

11 For a detailed survey of the cases prior to the decision in *Bank's* case see D. L. Mathieson, "Executive Decisions and Audi Alteram Partem" [1974] N.Z.L.J. 277, and J. F. Northey, "The Aftermath of the Furnell Decision" (1974) 6 N.Z.U.L.R. 59.

12 *Ridge* v. *Baldwin* [1964] A.C. 40; *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534; *Furnell* v. *Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705, 718; [1973] A.C. 660, 679; *R.* v. *Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 310. See also *Wiseman* v. *Borneman* [1971] A.C. 297 and S. A. de Smith *Judicial Review of Administrative Action* (3rd ed.) pp 66-67, 208-9.

fairness, it being suggested that any distinction between the principles of natural justice and fairness was unnecessary.

This suggestion has a sound foundation in logic because the principles of natural justice and fairness have not been regarded by the courts as rigid sets of rules which apply in toto to all judicial and administrative functions respectively, but as flexible collections of rules which vary as to the principles to be applied and the degree of compliance required in different circumstances. In the words of the Court of Appeal, ". . . what is required may vary with the circumstances and the function to be discharged". Obviously the courts will not wish the more informal tribunals to be hampered in the exercise of their discretion by the same procedural requirements as are observed by the more formal and strongly "judicial" tribunals.[13] The two principles are collections of the same notions or requirements of justice, different combinations and permutations of which are used in different situations. Thus the difference between the principles of natural justice and fairness has in recent years been one of name rather than substance. As stated in *Bank's* case the position now is that with respect to both judicial and administrative functions, if the "interests of justice" require, the principles of fairness must be satisfied.

The problem is obvious. The principles of fairness, as stated above, have a flexible content depending upon the function of the tribunal and the circumstances of the particular case. How will a tribunal know what "fairness" requires in any individual circumstance? "Fairness" is a very general abstract term which needs to be given content. It is not adequate advice to inform the chairman of a tribunal that he must act "fairly". He is concerned to ascertain exactly what procedures he should adopt to satisfy the requirements of "fairness" in a particular situation.[14] A tribunal needs to have a procedure which it knows will not result in its decisions later being set aside for want of fairness.

The Court in *Bank's* case looked to ". . . the legislation, the circumstances of the case and the subject matter under consideration"[15] to determine what was fair in the circumstances. Although these are factors which will help determine the appropriate procedure, the final decision must inevitably, because of the very nature of "fairness", be left to the intuition of the court. In the recent case of *Gregory* v. *Bishop of Waiapu*[16] Beattie J. tried to avoid this inevitable resort to intuition. The learned Judge found " 'fairness' a difficult concept to define"[17] and held that the court should look to traditional considerations in deciding whether or not to imply procedural requirements into the exercise of a power. The Court reverted to the traditional judicial/administrative distinction in order to determine what fairness required in the circumstances. Beattie J. looked to ". . . the legislation, the circumstances of the case and the subject matter under considera-

13 See *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86.

14 See D. L. Mathieson, "Executive Decisions and Audi Alteram Partem" [1974] N.Z.L.J. 277, 278, 282.

15 [1974] 1 N.Z.L.R. 545, 549.

16 [1975] 1 N.Z.L.R. 705.

17 Ibid., 712.

tion"[18] in search of ". . . some judicial foundation and not some general concept of fairness isolated from it".[19]

The only real guide the judicial or administrative officer has is precedent. Otherwise he is left to rely on his own intuition to determine what fairness requires in the circumstances. The Court seems to believe that everyone will give the same content to this abstract notion of fairness. It is respectfully submitted that what is fair to one person may not be fair to another. One tribunal may think cross-examination necessary to ensure fairness whereas another tribunal may not think it necessary even in respect of the same circumstances.

It will take time for precedents with respect to each different type of tribunal to develop. Some tribunals will tend to be over cautious, making available more procedural safeguards than necessary to those who come before them.[20] This is not in the interests of efficiency and in some cases would nullify the advantage of informality. Informal and expeditious decision-making is often the main reason for creating a special administrative tribunal to determine a particular issue rather than leaving it to the ordinary courts. Alternatively, the tribunal's assessment of what fairness requires may be insufficient and this may lead to inaccurate decision-making and unnecessary infringement of individual rights.

The Fourteenth Amendment to the Constitution of the United States prevents the taking of life, liberty or property without due process of law, but in New Zealand the guarantee of fairness in judicial and administrative action has traditionally been provided, and conscientiously preserved, by our courts. It would be unfortunate if the courts were denied their role of ensuring procedural fairness. But if the content of the rules is to vary according to the nature of the tribunal and circumstances of the individual case, the only solution is for the Legislature to make specific provision for the procedure to be followed by a tribunal in the statute under which the tribunal is established. The codes so enacted would exclude the common law principles of fairness.[21]

The Rule Against Bias

The Court of Appeal considered that fairness required a degree of impartiality on the part of the Lower Hutt City Council in hearing the objections. This is significant because although the *nemo judex* principles have always been an important part of the principles of natural justice there has been some uncertainty as to whether the rules against bias are to be regarded as coming within the ambit of the principles of fairness.

Although purporting to use an objective test[22]—i.e., whether a "fair minded and responsible person" might well think there is a real likelihood of bias being present—the Court in fact adopted a test based upon subjective evaluation of the circumstances from its own point of view. McCarthy P. said:[23]

18 From *Lower Hutt City Council* v. *Bank* [1974] 1 N.Z.L.R. 545, 549.
19 [1975] 1 N.Z.L.R. 705, 713.
20 Supra n. 14, page 282, 283.
21 See *Furnell* v. *Whangarei High Schools Board* [1973] 2 N.Z.L.R. 705.
22 [1974] 1 N.Z.L.R. 545, 549, 54.
23 Ibid., 550 (emphasis added).

> In entering into this contract, *in our view*, the council placed themselves in a situation where there are valid grounds for believing that they are unable to discharge fairly the duty which the statute has placed upon them.

The Court then considered whether, in its opinion, the Council would be willing to go back on its proposal after hearing the objections:[24]

> We think that the state of impartiality which is required is the capacity in a council to preserve a freedom, notwithstanding earlier investigations and decisions, to approach their duty of inquiring into and disposing of the objections without a closed mind, so that if considerations advanced by objectors bring them to a different frame of mind they can and will go back on their proposals.

Since the Court was of the opinion that the Council would not be willing to change its mind, even if considerations brought to its attention warranted it, it was held that the Council was not approaching the exercise of its powers under the Sixth Schedule to the Municipal Corporations Act in the manner required in the circumstances by the principles of fairness.

The test for bias adopted in this case is appropriate in view of the fact that the statutory duty "to inquire into and dispose of objections" is placed upon the body responsible for proposing the action to which objection is taken. A degree of partiality must understandably be allowed in view of the position in which the Legislature has placed the Council. As the Court of Appeal said, ". . . the extent to which this fundamental principle [that no man can be a judge in his own cause] applies must be governed by the relevant circumstances, including, especially, the statutory provisions relating to the function."[25]

The objective test based on the reasonable suspicions of a reasonable observer is the test most often used by the courts today.[26] It is therefore surprising to see the Court revert to the less favoured idea of evaluating impartiality from the Court's own subjective point of view. However the decision as to which test should be applied will seldom be of practical importance. The only major difference is that the objective test of reasonable suspicion focuses on the outward appearance of justice.

Conclusion

The contribution this case makes to the developing law of bias and fairness is that it formulates a test for bias appropriate to the nature and circumstances of the particular decision-making function in question. However, since the Court equates the principles of natural justice and fairness, and then adds that, "In each case, what is required may vary with the circumstances and the function to be discharged",[27] the precedential value of this test is limited to this one tribunal and circumstance.

24 Ibid.

25 Ibid., 549.

26 See *Turner* v. *Allison* [1971] N.Z.L.R. 833; *Whitford Residents and Ratepayers Association (Inc.)* v. *Manukau City Corporation* [1974] 2 N.Z.L.R. 340.

27 [1974] 1 N.Z.L.R. 545, 549.

Before there will be any real certainty as to the requirements of "fairness" in judicial and administrative decision-making many similar precedents will have to be established. Since this will take a considerable period of time, it is submitted that future uncertainty should be avoided by appropriate legislation in respect of those tribunals for which codes of procedure do not already exist. In establishing specific rules of procedure, or guide lines upon which a tribunal may institute its own procedure, Parliament would have to balance the individual's interest in the protection of his rights against the public interest in administrative efficiency and preserving informality (as far as possible) with respect to each tribunal.[28]

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HORROCKS v. LOWE: SCOPE OF QUALIFIED PRIVILEGE REDEFINED

1. *The Decision*

It has long been assumed that two situations in which a defamatory allegation made on an occasion of qualified privilege will not be protected by the privilege are: (1) where the allegation is found not to be sufficiently relevant to the interest or duty which gives rise to the privileged occasion; and (2) when the publisher of the allegation is found to have been actuated by malice. In *Horrocks* v. *Lowe*[1] the House of Lords has denied the existence of the first of these situations as an independent ground for loss of qualified privilege, and has also suggested significant changes to the circumstances which justify a finding of malice.

In *Horrocks* v. *Lowe,* a town councillor brought a defamation action against a fellow councillor on the basis of a defamatory speech delivered at a Council meeting. The Town Council was divided into two political parties, the plaintiff being a member of the Conservative Party majority while the defendant was a Labour Party member. The Council had agreed to grant a ninety-nine year lease of Council land to the local conservative club which intended to build clubrooms on the site. Unfortunately the land could not be used for this purpose as it was subject to restrictive covenant, but this fact was not discovered until the clubrooms were half completed. The result was that work on the clubrooms had to be abandoned and compensation paid to the conservative club by the Council. The plaintiff was the Chairman of the Management and Finance Committee which was the committee handling this matter. He was also the Chairman and majority shareholder in a company which owned land benefiting from the restrictive covenants. The company had refused to release the

28 See K. C. Davis, *Discretionary Justice* (Louisiana State University Press, 1969) with respect to legislatures restricting the procedural discretion of administrative tribunals.

1 [1975] A.C. 135.