"UNREASONABLENESS" AND THE RULES OF VOLUNTARY ASSOCIATIONS.

TUCKER v. AUCKLAND RACING CLUB, [1956] N.Z.L.R. 1.

The problem whether the Courts can upset rules of voluntary associations because of "unreasonableness" was raised before the Supreme Court last year.

In Tucker v. Auckland Racing Club, [1956] N.Z.L.R. 1 Shorland J. held that the Supreme Court has jurisdiction to examine decisions of domestic tribunals (here the Auckland District Committee constituted pursuant to the New Zealand Rules of Racing, or the Appeal Judges appointed by the President of the New Zealand Racing Conference pursuant to those rules) which involves a question of law - that of the proper construction of rules forming part of a contract between the litigants - and further, that the Court can and should interfere and give relief if it is established that a domestic tribunal arrived at its decision only by misconstruing such rules.

Counsel for Tucker had raised (inter alia) the point that the rules under which Tucker (a horse trainer) had been suspended were unreasonable and therefore void. Shorland J. held that in fact the rules were not unreasonable; but he left undecided whether (to quote the headnote) (ibid., 2):

> . . . the principle that a rule which is unreasonable is void can have any application to the rules of a voluntary association (such as the New Zealand Racing Conference) in the same manner as it is applicable to the by-laws of local and public authorities.

In arriving at his decision on the question of jurisdiction, Shorland J. said (at 7):

> The question whether or not the Court will examine decisions of domestic tribunals, such as were the second and third defendants, thus narrows itself to the question whether or not, upon proof that such domestic tribunals have determined the particular construction of certain rules forming part of a contract between litigants, this Court will examine the construction so determined and applied for the purpose of giving relief

to a plaintiff if the construction of the rules so determined and applied is found to be erroneous in law.

In deciding that the answer to that question was affirmative, the learned Judge followed Lee v. Showmen's Guild of Great Britain, [1952] 2 Q.B. 329. In that case Somervell L.J. had said (at 340) that the cases considered showed that the Courts would interfere if there were no evidence on which the decision of the domestic tribunal could have been based. In such a case, the tribunal would have acted ultra vires. He added that he was also alive to the principle that the Court could not be made a court of appeal from decisions of such tribunals. But a power of expelling a member was a drastic power which in many cases affected the plaintiff's livelihood or reputation. There was a distinction between cases where the decision challenged was, under the rules, based on the opinion of a committee on a matter which was primarily one of opinion, and cases, such as Lee's case, where the question was or should be based primarily on the legal construction of words in a rule.

Denning L.J. said (at 341) that the jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts no set of men could sit in judgment on their fellows except so far as Parliament authorized it or the parties agreed to it. The jurisdiction of the committee of the Showmen's Guild was contained in a written set of rules to which all the members subscribed. This set of rules contained the contract between the members and was just as much subject to the jurisdiction of these Courts as any other contract.

He added that although the jurisdiction of a domestic tribunal was founded on contract, the parties were not free to make any contract they liked. There were important limitations imposed by public policy. The tribunal must observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They could not stipulate for a power to condemn a man unheard.

After making observations about the club cases, Denning I J. says (at 343):

> It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great as, if not greater than, any exercised by the Courts of Law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important than, his rights to property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.
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> But the question still remains: to what extent will the Courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal has observed the law. This includes the correct interpretation of the rules. Let me give an illustration. If a domestic tribunal is given power by the rules to expel a member for misconduct, such as here for 'unfair competition', does that mean that the tribunal is the sole judge of what constitutes unfair competition? Suppose it puts an entirely wrong construction on the words 'unfair competition' and finds a member guilty of it when no reasonable person could so find, has not the man a remedy? I think that he has, for the simple reason that he has only agreed to the committee exercising jurisdiction according to the true interpretation of the rules, and not according to a wrong interpretation.

The words of Denning L.J. leave little doubt as to his ideas of when the Courts should intervene; but on the

question, when can or will the Courts intervene, they really go no further than saying that the Court can be called upon for a true interpretation of the rules. There is no suggestion here that the Court can or will intervene to upset the rules of a voluntary organisation on the grounds of unreasonableness.

At the same time, Denning L.J. does stress the fact that certain domestic tribunals do wield enormous powers and should be treated differently from an ordinary social club. He also points out that the element of contract is to some extent fictitious.

In Bonsor v. Musicians' Union, [1954] 1 Ch. 479, however, Denning L.J. made observations which are even more pertinent to the present case, having regard to the fact that the plaintiff was obliged to enter into a contract with the New Zealand Racing Conference in order to earn his living. After referring to the fact that Bonsor could not earn a living unless he joined the Union, Denning L.J. said (at 485):

> When one remembers that the rules are applied to a man in that state of mind, it will be appreciated that they are not so much a contract as we used to understand a contract, but they are much more a legislative code laid down by some members of the Union, to be imposed on all members of the Union. They are more like by-laws than a contract. In these circumstances, the rules are to be construed not only against the makers of them, but, further, if it should be found that any of those rules are contrary to natural justice, or what comes to the same thing, contrary to what is fair and reasonable the Court would hold them to be invalid.

He quotes Kruse v. Johnson, [1898] 2 Q.B. 91, and Lee v. Showmen's Guild of Great Britain (supra), in support of this.

Nevertheless, after noting these words of Denning L.J., Shorland J. said in Tucker's case (supra, at 15), that he entertained grave doubts as to whether the principle (i.e., that a rule which is unreasonable is void) upon which the submission was founded could have any application to a voluntary association, such as the New Zealand Racing Conference, a body clearly distinguishable from a trade union.

The first defendant (the Auckland Racing Club) was an incorporated body under the Incorporated Societies Act 1908, and it had agreed with the New Zealand Racing Conference to be bound by the New Zealand Rules of Racing. The principle that a by-law which was unreasonable was void had been applied to the by-laws of local bodies and public authorities, and to those of railway and dock companies having dealings with the general public, said Shorland J.; but it was, he thought, applicable to by-laws only. Lord Russell of Killowen L.C.J. in Kruse v. Johnson (supra) had defined a by-law as follows (at 96):

> A by-law, of the class we are considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not to do as they pleased. Further, it involves this consequence - that, if validly made, it has the force of law within the sphere of its legitimate operation: . . . .

The duties and obligations arising from by-laws, so defined, were imposed on the persons bound thereby. But the duties and obligations arising from Rules 103 (7) and 103 (8) were binding upon the plaintiff solely by reason of certain contracts which the plaintiff had elected to enter into. It was clearly for this reason Shorland J. expressed the grave doubts referred to above. It is proposed (with respect) to examine these doubts, and the general question of reasonableness raised, though not settled, by the case, a little more closely.

As indicated above, it is clear that a by-law which is "unreasonable" can be declared void by the Court. Most of the cases have treated "unreasonableness" as an aspect of the general question of ultra vires. When a local body frames a by-law considered by the court to be unreasonable, the local body is considered in the English courts to have gone beyond the authority given it in the empowering statute

to make by-laws. There is still confusion on this point, however, in New Zealand; and some judges have seemed to treat "unreasonableness" as a distinct ground for avoiding a by-law. In Hanna v. Auckland City Council, [1945] N.Z. L.R. 622, for example, Myers C.J. said (at 628):

> It is contended (i) that the by-law is ultra vires, and (ii) that if not ultra vires it is invalid on the ground of unreasonableness. In my opinion the appellant is entitled to succeed on both grounds . . . .

and Kennedy J. says (at 633):

> I am satisfied that the by-law is not within the power of the Council and that it is ultra vires of the authority . . . .
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> But even if the by-law be assumed to be authorized by s. 364 (20), it would, in my view, be unreasonable.

On the other hand, Callan J. says (at 634):

> Upon the question of unreasonableness, considered as a separate matter from the question of ultra vires, I prefer not to express a concluded opinion.

In McCarthy v. Madden (1914), 33 N.Z.L.R. 1251, which decided that a by-law passed by the Riccarton Borough Council, which imposed onerous restrictions on the driving of stock through the borough to the saleyards, was unreasonable, the main test relied on by the Court was phrased thus (per Edwards J. at 1269):

> (d) The reasonableness or unreasonableness of a by-law can be ascertained only by relation to the surrounding facts, including the nature and conditions of the locality in which it is to take effect, the evil, danger or inconvenience which it is designed or it professes to be designed to remedy, and whether or not public or private rights are unnecessarily or unjustly invaded.

In Hanna's case (supra) the private rights invaded were the rights of individuals to earn their living. The by-law which was upset (whether on the grounds of ultra vires or unreasonableness) stipulated that plans for a new building or

for repairs to an existing building) which exceeded a certain cost must be prepared by, and the building supervised by, a registered architect or registered civil or structural engineer; and additional power was given the City Engineer to bring any building he chose under the provisions of this clause.

It was held that this by-law which excluded certain architects from the designing or supervision of such buildings, involving as it did interference in a man's livelihood, was not authorized by the statute relied on, in the absence of provisions clearly conferring power to make such a by-law.

Whether or not the characterisation as "unreasonable" is one test of ultra vires as applied to by-laws, can it be applied to the rules of a voluntary association like the Auckland Racing Club or the New Zealand Racing Conference?

We live in an age when some voluntary associations wield enormous power, affecting the livelihood of thousands of people. They, or the persons controlling them, are able to lay down rules and conditions which those entering into the association have no alternative but to accept. On the face of it, the relationship is contractual. But it is a one-sided contract. To repeat the words of Lord Justice Denning already cited ". . . they (scil. the rules) are not so much a contract as we used to understand a contract, but they are more a legislative code laid down by some members of the union, to be imposed on all members of the union . . . ."

The Racing Clubs, and the Racing Conference which is the supreme central authority of the Clubs, wield great power in New Zealand. In this country racing is really a huge industry, involving the spending of millions of pounds each year. It is an industry in which the public has a real and close interest. It is an industry in which the Government, because of the substantial revenue it derives from betting, has a close financial interest.

Racing Clubs have, in certain matters, been given wide statutory authority. For example, under s. 33 of the Gaming Act 1908, a racing club has power with the approval

of the Governor-General to make regulations controlling admission of persons in racing clubs, and excluding specified classes of persons, even if the racecourse is on or forms part of a public reserve. It is submitted that the regulations which the Racing Clubs make in pursuance to these sections are really in the same category as by-laws made by a local authority.

Other examples may be given of the statutory authority with which the legislature has clothed Racing Clubs and the Racing Conference and the Trotting Conference may be cited. For example, the Gaming Amendment Act 1910, s. 4, lays down the duty of every racing club to prevent bookmakers plying their trade; if a club is negligent in this then its licence to hold race meetings can be revoked.

The Gaming Amendment Act 1949 is one of the best illustrations of the extent to which the legislature has clothed the Racing and Trotting Conferences with special powers. They are given wide powers with regard to the setting up of the Totalizator Agency Board, including the appointment of members of the Board, the appointment of its Officers and the drawing up of a scheme, for the establishment and operation by the Board of totalizator agencies in respect of race meetings, in which would be defined the functions and powers of the Board. These are certainly far-reaching powers.

A further reason for considering racing clubs as unlike other voluntary associations is the restrictions placed by the legislature on their activities. For example, s. 6 of the Gaming Amendment Act 1924 provides that no member of any racing club, trotting or hunt club shall be deemed to have any personal pecuniary interest in the property of the club; and on the dissolution of the club the assets shall be disposed of for public or charitable purposes. Again, the extent to which the legislature has intervened is shown by the fact that directions are given as to how the moneys derived from totalizator betting are to be allocated. The Gaming Amendment Act 1953, s. 8, provides for a levy on totalizator investments to provide for public improvements and amenities on racecourses. The interest of the Government in racing is strikingly shown by the fact that the number of meetings

in New Zealand where a totalizator is allowed to be operated is stringently limited. All totalizator meetings have to be licensed by the Minister of Internal Affairs: (The Gaming Act 1908, s. 50).

It is submitted that these examples are sufficient to show that the two Racing Conferences, and the Racing and Trotting Clubs of New Zealand, are in a far different position from those bodies usually included under the name "voluntary associations".

It is appropriate, therefore, to raise the question as to whether the rules promulgated by the Governing Bodies of the Racing and Trotting Clubs and their central organisations should be made subject to Court scrutiny on the grounds of "reasonableness".

By granting licences, the Government would seem to be saying by implication that proper rules for the conduct of race meetings must be drawn up. In some instances, such as the conferment of the power to refuse admittance to certain persons, the legislature has stated the type of rules which should be framed. The legislature and the public have a direct interest in the rules drawn up for the actual conduct of race meetings and the conduct of the persons, whether trainers, jockeys or owners, who take part in them. Moreover, these rules clearly affect the financial position and property rights and in some cases the livelihood of such persons.

It is submitted, therefore, that, both by reason of their affinity to by-laws and of their direct effect on the livelihood of the persons whose conduct they govern, such rules as those whose validity was in issue in the present case ought to be subject to some greater measure of scrutiny or control by the Courts than are the rules of a trade association or even a trade union. It would admittedly not be easy to describe a rule of a voluntary association as "ultra vires". But should a similar question to that which was raised in Tucker's case fall to be decided in the future it is to be hoped that the Courts in New Zealand will not hesitate to declare such rules invalid should it be possible to find them "unreasonable".
