A Note on JEFFS v. NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD [1965] N.Z.L.R. 522; [1966] N.Z.L.R. 73

The Dairy Production and Marketing Board, in controlling the dairy industry, has the power to zone dairy farmers into districts and to prohibit their supplying any dairy factory other than that in their district. In this case the plaintiff farmers attacked such a zoning order. They advanced four grounds but two are concerned only with the specific legislation, and are of limited general interest. It is to the other two grounds that attention will be devoted in this note.

The first was that as the Board had a financial interest in the subject-matter of the zoning application, the Board had been a judge in its own cause and had thus failed to comply with one of the dictates of natural justice: the parties accepted that the Board was obliged to comply with the rules of natural justice; *New Zealand Dairy Board v. Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, C.A.

The Board had made loans amounting to £122,152 to the Ruawai Co-operative Dairy Company, the Company which benefited from the zoning order. These loans had first to be approved by the Dairy Industry Loans Council which consisted largely of members of the Board, which in turn consisted almost wholly of persons elected by wards from the dairy factories, or appointed by the New Zealand Co-operative Dairy Company Ltd. In actual fact the advances were made by the Reserve Bank in the name of the Board, but, although the Board was merely acting as a channel through which the loan was made from the Reserve Bank to the Company, the Board was able to borrow the moneys from the Reserve Bank at an interest rate of 3% p.a. and then charge a rate of 3½% to the borrowing dairy factory.

The Courts rejected the defendants' contention that there was no financial interest on the part of the Board, which, it had been contended, was clothed with something in the nature of an implied trust to utilize the moneys it received by way of repayment in reduction of the overdraft, and to apply any surplus to the dairy industry generally. It was however made quite clear by the Court that loans and security therefor are held by the Board in its corporate capacity, and it was held that

there was such a direct financial interest in any factory to which money had been lent, and therefore such a direct pecuniary interest in zoning proposals, as would *prima facie* at common law disqualify the Board's being a judge in the matter, as expressed in the maxim *nemo debet esse judex in propria causa.*

Matters which the Court considered as being relevant in reaching this conclusion were the control of the Loans Council enjoyed by the Board by virtue of its composition, the margin of interest which the Board received, and the fact that as between the Board and the borrowing Company it was the Board which was the lender and mortgagee or debenture-holder.

In this case then there was no personal interest, but the Board in its corporate capacity did have an interest more than that of a bare trustee who would in no way be benefited by the extra security provided by the zoning order. It was certainly in its interests that the Ruawai Company to which it had advanced money, should continue profitably.

It was contended by the plaintiffs that before an Act of Parliament can make a person or a body a judge in his or its own cause, there must be very plain language showing that this was indeed the intention of Parliament; see e.g. Bennet J. in *Wingrove v. Morgan* [1934] 1 Ch.423, 430. Thus, de Smith in his *Judicial Review of Administrative Action* (1959) 140 says:

> That Parliament is competent to make a man a judge in his own cause has long been indisputable; but the Courts continue to uphold the common law tradition by declining to adopt such a construction of a statute if its wording is open to another construction.

On this question, however, McCarthy J. made the point that the money involved was not the personal money of Board members. Accordingly he said at p.95:

> . . . we should avoid approaching legislation of this character in a spirit of over-readiness to conclude that the Legislature always intends to keep administrative and quasi-judicial functions separate from one another. It is better if we have no leaning one way or the other.

Both Hardie Boys J. in the Supreme Court, and all judges in the Court of Appeal recognized that in this case, the Dairy Production and Marketing Board Act 1961 reposed in a body with a financial interest, the duty to act as a judge in a matter which would in some way affect this pecuniary interest.

There were a number of factors that the Court considered as showing that

Parliament, in the 1961 Act which amalgamated the New Zealand Dairy Board and the Dairy Products Marketing Commission into the new Dairy Production and Marketing Board, quite clearly intended that this new Board should have the power to zone in spite of its financial interest.

Section 40 (1) (c) of the 1961 Act gives the power to zone, while s.30 of the same Act gives to the Board the power to acquire shares in certain companies, and ss. 63 and 64 enable it to approve loans to companies.

Another factor that influenced the Court was the composition of the Board. Eleven of the thirteen Board members were appointed from the dairy factories and would be conversant with all problems relating to the dairy industry, including zoning. The purpose of the Act was thus seen to be to give jurisdiction to the Board generally in matters affecting the dairy industry, and that in consonance with this, the Board consisted of persons who were knowledgeable in this particular field and who were of high integrity. As McCarthy J. points out at p.95, the Board was given these powers as complementary to one another to avoid the chaos that was rampant in the dairy industry in the 1930's before there was any zoning, and when the "law of the jungle" prevailed.

Another factor was that mentioned by the learned Judge at the same page where he says:

> The money which the board advances is not the personal money of the members. Nor is it, in reality, the board's money, though the law says it is. The advances are, in fact, made on behalf of the industry, and the industry must repay the Reserve Bank if an advance is lost.

Further, it is desirable to ensure that when money is advanced to a dairy company, the Board should have the power to protect that company by appropriate zoning orders. Finally, if the plaintiffs were right in saying that the Board did not have the power to zone, it would follow that there was no existing statutory authority which could exercise this power of zoning.

Taking into account all these factors, the Courts concluded that this was the type of case referred to by de Smith *op. cit.* 155-156 where it is said that:

> A procedure that has been sanctioned by Parliament cannot be impugned on the ground that it runs contrary to the common-law principles of disqualification for interest or likelihood of bias.

The points discussed so far relate to automatic disqualification by reason

merely of a direct pecuniary interest, according to the principle in *R. v. Rand* (1866) L.R. 1 Q.B. 230, but the point was raised that there was still likelihood of actual bias by reason of the Board's composition, and that this would disqualify the Board from acting as judge even though it was not disqualified by its financial interest. This too was rejected, and the case of *R. v. Ashby* [1934] O.R. 421 was cited in support of the rule that it is not objectionable that the members of the Board were all of a group which was closely connected with the subject-matter of the dispute. On the contrary, a Board of this composition (men of the dairy industry) was best equipped to deal with these matters, and was the most suitable to be entrusted to act judicially when any matters arising within the scope of the Board's activity so required. The Legislature assumed that members would be fair in the exercise of their several functions, and if the Board failed to act judicially, it would be brought to account.

The law in this field is fairly straightforward, and it seems quite clear that a satisfactory decision was reached on the particular facts of the case. The well-reasoned judgments bear witness to this.

The other ground on which the plaintiffs sought to impugn the zoning order was that the Board was not empowered to delegate (i) the duty of hearing the applications in relation to the zoning order, and (ii) the power to consider these applications and make an order having regard to them, and that the Board had so delegated.

The relevant facts were that on an application by the Ruawai Co-operative Dairy Co. Ltd. to amend the existing zoning orders defining its area, the Board proceeded to hold a full public inquiry giving all interested parties an opportunity to tender submissions. The Board itself did not however hear the full evidence tendered or read the submissions, but created a committee of three of its members which heard the evidence and in a short report made recommendations to the Board. The parties agreed that the committee itself had complied with natural justice.

It does not appear what authority the Board relied on in creating such a committee. The Court did not hold that it could rely on s.13 of the Act which authorizes the appointment of committees for certain purposes to appoint a committee which could both hear and consider the evidence and make a decision on it (this provision is further considered below). Rather, the Court held that the Board could, as a matter of procedure, appoint a committee to hear the evidence. Neither this Act nor the *Okitu* case laid down any procedure and the Court was able to refer to *Osgood v. Nelson* (1872) L.R. 5 H.L. 636 and *Local Government Board v. Arlidge*

[1915] A.C. 120; see e.g. McGregor J. at 107. It could, subject to the requirements of natural justice, obtain its information in the way that it thought best. In order to comply with the dictates of natural justice it was necessary for the committee to report fairly and adequately to the Board, so as to enable the Board, in the words of Lord Moulton in *Arlidge's* case *supra* at 151 to "be fully seised of the facts of the case" and to enable it to come to a considered decision of its own, even though it did not hear every piece of evidence.

The plaintiffs contended that the Board, in giving to the committee the power to hear the evidence, had in the process delegated the decision-making power as well, and that it was not the Board which made the decision as to zoning (as the Act clearly intended) but the committee, and that the Board merely gave its approval to the decision or "rubber-stamped" it.

The Court accordingly set out to discover whether in this case there was sufficient material or information before the *Board* to enable *it* to decide the question.

The issue that had to be decided was whether the committee was little more than a recording machine which disgorged its evidence, while the *Board* made the decision, or, whether it was really the committee which was making the final decision because the Board had insufficient material to enable it to decide. If the latter was the case, the Board was in breach of the requirements of natural justice and of the Act. (The question can be asked whether the references to "natural justice" and, as a consequence, "judicial" functions are helpful in this case. Perhaps it is enough to note that in the result the Courts held that the duty to hear the parties, the *judicial* function, *could* be delegated, while the duty to decide, the *administrative* function, could *not* be delegated – a neat reversal of the usual rule.)

The hearing before the committee lasted two days, and all the interested parties had an opportunity to present their respective cases. After the hearing, the committee made a report which continued the parties' submissions and recommendations as to zoning, but which did not include even a summary of the evidence and this was submitted to the full Board without the longhand notes of evidence heard. The Board members read the report (but not the transcript of the evidence taken) and almost immediately adopted the recommendations, which were then put into force by the making of the zoning order.

The learned Judges argued that the change of the language in s.13 of the of the 1961 Act compared with that in s.11 of the Dairy Board Act 1953, the corresponding provision – which had allowed a wide power of delegation to a committee of *any* power of the Board – indicated that the Legislature's intention

was that the Board should not be able to delegate the power to make a decision on an application for a zoning amendment. The new section authorised the Board to appoint a committee:

> . . . to advise the Board on such matters concerning the dairy industry or the production or marketing of any dairy produce as are referred to them by the Board.

and to

> . . . furnish to the Board reports on any matter concerning the dairy industry or the production or marketing of any dairy produce in respect of which the members of the committee have special knowledge or experience.

It is submitted that it is strange that s.48 of the Dairy Production and Marketing Board Act 1961 was not mentioned in this context (see also s.55). Section 48 provides that:

> The Board may from time to time, with the consent of the Minister, arrange that *any of its duties or functions under this Act may be performed on its behalf* . . . by the Department of Agriculture *or by some other agent appointed for the purpose* . . . . (emphasis added)

This section gives a wide power of delegation similar to that given in s.11 of the Dairy Board Act 1953. Though the power in this section could not have been used by the Board, the Minister's consent not having been obtained, the existence of the power was nevertheless relevant to the alleged change of language in s.13 of the 1961 Act as compared with that in s.11 of the 1953 Act. Contrary to the suggestions of the Judges, Parliament does not appear to have shown an intent to limit powers of delegation.

North P. said that in the circumstances of this case, it could not possibly be said that the Board had complied with its duties to hear the parties unless there was at least a limited power to delegate what he called the "judicial function". He went on to refer to *Vine v. National Dock Labour Board* [1957] A.C. 488 and *Local Government Board v. Arlidge* [1915] A.C. 120 as showing that there was some encouragement for this view, but he was not prepared to hold that this Board had any implied authority to delegate any part of this important function (which he again characterized as "judicial"), particularly seeing that the Legislature in enacting the 1961 Act, had seen fit to limit the wide power of delegation which had existed in respect of the predecessor of this Board.

It is submitted that there is some inconsistency in the learned Judge's treatment of the delegation issue. Having regard to the general tenor of his judgment, it seems that North P. agreed that the Board could as a matter of procedure appoint a committee to hear the evidence, as long as the final decision was left to the Board. This would, as has already been mentioned, involve a delegation of the "judicial" function while reserving the non-delegable "administrative" function to the Board. On p.88 however the learned Judge objects to the delegation of what he characterizes as the "judicial" function.

This it is submitted, is an inconsistency brought about by the unfortunate use of the terms "judicial" and "administrative", for, having regard to the general tenor of his judgment, it is apparent that what the learned Judge really objects to is the delegation to the committee of the decision-making power, which in his adoption of the *Okitu* case at p.86 he characterized as an "administrative" power.

McCarthy J. took a functional rather than conceptual approach to the problem of delegation. He said that it was recognized by the cases that when a body was predominantly one possessing wide and nationally important administrative duties, and when the decision must to some degree be affected by considerations of policy, the tribunal may delegate some step in the exercise of what he too calls the "judicial" function.

It appears that McCarthy J. too when referring to the "judicial" function is referring to the decision-making power, for he held that there was no delegation of the judicial function, a holding which would otherwise be absurd if applied to the function of hearing, for the hearing function was, obviously and, it was held, justifiably delegated.

The limit of permissible delegation he said was that there could be no delegation to an extent which prevented the Board acting fairly between the parties, and which removed the final decision from itself. The tribunal had still to give a hearing which the Courts would consider fair and adequate having regard to the *character of the tribunal,* and the *issues to be decided.* It was this approach which led the learned Judge to hold that as the Board was one which was "primarily administrative and burdened with extensive obligations and pressures", it was possible for the Board to delegate to a committee some steps in the exercise of the "judicial process", by which presumably he means the decision-making process. McCarthy J. however doubted that there was such a delegation in this case, but held that if the committee in summarizing did take some step in the exercise of this power, then on the facts of the case it was a justifiable delegation.

The difference between these two lines of thought is that North P. says unconditionally that there could be no delegation of the decision-making function, while McCarthy J. says that having regard to the nature of the tribunal and other circumstances, a small part of the function may be delegable. It is not however this difference which gives rise to the different conclusions of the learned Judges in this particular case, for McCarthy J. found that there was no such delegation in this case anyway. Rather they differed on the question whether there was sufficient material before the Board to enable it to decide. North P. considered that in this case, unless the longhand notes of the evidence taken by the committee were attached to the report, there could not be sufficient material before the Board to enable it to come to a just decision of its own.

It was common ground that the parties had ample opportunity to present their respective cases to the committee, but North P. adhered to the view that there had not been compliance with the principles of natural justice unless the full Board was able to inspect the actual record of the evidence. At p.88 he said that a deciding body cannot be said to have heard the evidence and representations of persons interested if all that happened was that a committee of the Board heard them and the deciding body did not itself examine the record. This view seems to indicate that a report standing alone can never be sufficient, no matter how comprehensive it is. This it is submitted seems unduly rigid and may have little relation in many instances to the realities of the case. However, it is not exactly clear whether the learned Judge subscribed to a view as unbending as this, for, in reply to the Board's submission that the committee's report standing alone was sufficient compliance with natural justice, he said at p.87:

> . . . in order to substantiate this submission, the responsibility lay with the board to satisfy the Court that the report was adequate, and I am not so satisfied . . . *In these circumstances*, I do not consider that it can possibly be said that the board complied with its duty to hear the interested parties . . . . (emphasis added)

It is submitted that there does not seem to be a great deal of justification for a rigid rule that the Board must always examine the record, for even under McCarthy J's formulation, if there was so little material before the Board as to involve a too great delegation to the committee, then this would not be a compliance with natural justice. He drew the line beyond which delegation was impermissible, at the point where the *Board* was prevented from acting fairly between the parties.

Was the report in this case adequate? The report, though concise and succinct, and, it could almost be said abbreviated, did contain for the most part

the attitudes of the respective parties and their reasons (see [1965] N.Z.L.R. at 539 and [1966] N.Z.L.R. at 109). That part of the report dealing with the question whether there should be a milk zone as well as a cream zone does not outline the arguments of the parties, but merely states the opinion of the committee. The recommendations of the committee appear on p.109 of the Court of Appeal judgment of McGregor J. The only reason given there for the recommendations is that in the opinion of the committee, the decision was in the interests of the dairy farmers in the Ruawai district. The report was very short and was given to the members of the full Board only just before the meeting, and it appears that there was not a great deal of discussion on it.

It is submitted that though *prima facie* this certainly smacks of a decision by the committee with a mere stamp of approval of the Board, there are ameliorating factors. It must be remembered that the members of the Board were persons experienced in this particular field of activity, and that their summary dismissal of the application for the total abolition of zoning stemmed from their knowledge of the "law of the jungle" which prevailed before there was zoning. This was a policy decision which they had doubtless made time and time before.

Another factor which was stressed by the Court as being favourable to the Board was the knowledge of the members of the full Board. It is submitted that a distinction should be drawn between two types of knowledge of the members, a distinction which was tacitly acknowledged by the Court, but, it is submitted, not sufficiently emphasized by the learned Judges.

On the one hand there is the knowledge of the Board of the dairy industry in general; knowledge of policy and knowledge of zoning; a technical working knowledge which the Board would have acquired through long experience in its association with the dairy industry. On the other hand there is that knowledge of local affairs and the local situation in this particular part of the country; a knowledge which had come into the possession of the individual members of the Board in its dealings with this particular area.

The former type of knowledge is clearly able to be used by the Board for it is for this very reason that a specialist body such as this had been created; to apply its technical knowledge and form a policy to be applied in specific cases. This is recognized by the Court.

The use of the latter type of knowledge it is submitted, is more questionable. It was pointed out by the Court, as supporting the Board's cause, that the Board was already well aware of the difficulties and discussions in the Ruawai and Poutu

areas, and that this assisted them in reaching their decision, and, was one of the reasons for not requiring a full transcript of the evidence taken.

It is clear that such knowledge would not be allowed to be used by the deciding body in the "Supreme Court type" of hearing (apart from judicial notice). It is thus plain that the majority of the Court has allowed the use of such knowledge having regard to the type of tribunal, and the type of questions which it must decide. It is thus implicitly held that the use of this type of knowledge does not constitute a non-compliance with the principles of natural justice, having regard to all the circumstances attendant upon the jurisdiction of the Board.

It is submitted that the use of such knowledge could either help the Board in coming to a just decision or it could hinder this, by colouring their minds with facts which might have changed with the course of time, and which would be incapable of rebuttal by the parties. There is no reason to suppose however that this did happen, this being a fact difficult to ascertain, but the possibility must be stated.

Having thus decided that the Board could use this knowledge, the fact that three of the Board members were on the committee can only go to further improve the situation and make it less likely that the members came to a decision under a mis-apprehension of the facts.

Another reason for allowing the Board to come to a decision without reading a full transcript of the evidence was the busy nature of this administrative tribunal. It having been decided that the Board could for this reason appoint a committee to gather the evidence, to make the Board read all the evidence, much of which would be repetitive, would be almost tantamount to making it hear all the evidence itself. In the absence of evidence relating to the pressure of the Board's work, it may well be argued that one of the reasons for the establishment of the Board was to deal with all such questions of zoning and the associated matters, and that it should therefore not cast its duties from itself on to another body. This argument however can be countered by the fact that ss.13 and 48 of the Act clearly show that the Legislature contemplated that the Board might sometimes wish to delegate some of its duties or functions to another person or body, and that this should be a permissible practice.

It is submitted that the whole question to be decided was whether the Board was able to come to a decision of its own in accordance with the *audi alteram partem* rule and that the question whether the Board did so decide was a question depending on the particular facts of the case, having regard to all the circumstances, and that no absolute rule can be laid down that for there to be compliance with natural justice,

the deciding tribunal must hear or read all the evidence itself.

All the learned Judges except North P. were satisfied that the Board, taking into account its composition and knowledge, was sufficiently seised of the facts to enable it to come to a decision of its own, and that it did do so. As this was so, there was no abdication by the Board of its decision-making functions.

Support for the proposition that this is a question of fact in each case is drawn from McGregor J's judgment at p.110 where he said:

> " It seems to me that the final determination of this dispute was that of the Board after due consideration. I do not think it is advisable or competent for a Court to establish detailed rules of procedure of domestic tribunals. I consider that each decision should be reviewed only to consider whether it accords with the general principles enunciated by the Courts for the attainment of justice."

The learned Judge then continued to discuss the circumstances of the present case and concluded that on the facts, the representations of the parties were sufficiently reported to the Board, that there was an adequate hearing, and that the requirements of natural justice had been recognized and applied throughout.

As the majority and minority judgments show, the case is delicately balanced, depending, in the end, on this assessment of the facts; did the Board really consider the parties' cases and make the zoning order itself, or did it allow the committee to usurp its power? Clearly judges can, as they have, come down on either side of the line, and the case is more evidence, if more evidence is needed, for the proposition that the rules of natural justice can never be stated with precision and only take definite shape in the context of a particular case.

Note: The decision of the Court of Appeal was reversed by the Privy Council in a judgment delivered by Lord Dilhorne on 13 October 1966. The reason for the decision appears to be that "the report did not state what the evidence was and the Board reached its decision without consideration of and in ignorance of the evidence".