without disclosing the report of the committee, such a decision to be valid however, must be more than the mere automatic confirmation of the committee's report but it is not necessary that members of the Board should read or hear all the evidence and submissions placed before the committee. The Court of Appeal, therefore, reaffirmed the decision of Hardie Boys J. at first instance.

On appeal to the Privy Council ([1966] 3 All E.R.863) the Judicial Committee held, first, that the decision of the Court of Appeal as regards the effect of the respondents' pecuniary interest was correct. Secondly, they decided that the respondent Board did not allow improper delegation of its judicial function in allowing the appointed committee to hear evidence and submissions, but it was the duty of the Board in acting judicially to "hear" interested parties. Whether this is done by hearing the parties orally or by receiving written statements or by appointing a committee to record all the evidence is merely a matter of procedure. (see *Ex Parte Arlidge* [1914] 1 K.B.191; *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636.) However, this was not the situation in the present case as the report of the committee appointed by the respondent did not state what the evidence was. The respondent Board, therefore, reached its decision in ignorance of the evidence. The Judicial Committee stated (at p.870),

> The Board thus failed to hear the interested parties as it was under an obligation to do in order to discharge its duty to act judicially in the determination of zoning applications.

A writ of certiorari was ordered to be issued.

It is clear from the decision of the Privy Council and from the dissenting judgment of North P. in the Court of Appeal (approved by the Privy Council) that delegation to a person or committee of the task of "sifting" the evidence and submissions of interested parties is a breach of the *audi alterem partem* principle.

J. W. Hansen.

COMPANY LAW

I. *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 Q.B. 656. The plaintiff company (appellant in the Court of Appeal) had, as its principal business, the development of housing estates. It entered into a contract to introduce the defendants to a financier who would provide £1 million short term credit. The plaintiff company claimed £20,000 as commission for this service but the defendant company refused to pay, claiming that the alleged contract was void as *ultra vires* the plaintiff company. The relevant provision of the objects clause in the plaintiff company's Memorandum of Association were as follows:

(a) To carry on the trade or business of general, civil and engineering contractors and in particular . . . to construct . . . either by the company or other parties . . . houses;
(b) To acquire by purchase . . . any lands.
(c) To carry on any other trade or business whatever which can, in the opinion of the board of directors be advantageously carried on by the company in connection with or as ancilliary to any of the above business or the general business of the company. . .
(q) To . . . turn to account . . . and in any other manner deal with or dispose of . . . any of the property or assets for the time being of the company for such consideration as the company may think fit. . .
(u) To do all such other things as are incidental or conducive to the above objects or any of them.

The Court of Appeal (Sellers, Danckwerts and Salmon L.J.J.) decided that the contract was *intra vires* the appellants under clause (c) and clause (q). Salmon L.J. was also of the opinion that the contract was *intra vires* the company under clause (u).

This decision evokes discussion under two heads:

(i) It illustrates the practice of including in the objects clause of a company's Memorandum of Association a wide range of activities in order to minimise the hardships entailed in the *ultra vires* doctrine. In *Re Crown Bank* (1890) 44 Ch.D. 634, 641, referring to the objects clause of a company expressed in very wide terms, North J. said that they were,

> so wide that it might be said to warrant the company in giving up banking business and embarking in a business with the object of establishing a line of balloons between the earth and the moon.

A study of the registered documents of many New Zealand companies shows that this practice has been widely adopted, together with the practice of providing that any sub-clause in the objects clause should not be limited or restricted by a reference to or an inference from the terms of any other sub-clause. Many company lawyers defend this practice on the ground that it satisfies nervous company directors that they have the ordinary powers which management of a company requires. However, it is submitted that the ultimate effect is to make it less hazardous for third parties to enter into transactions with a company, for the likelihood of their activities being *ultra vires* is remote. In the light of this development in business practice it is now unlikely that any company will find its transactions set aside under the *ultra vires* doctrine.

(ii) Salmon L.J. refers to the "interesting, important and difficult question" which would arise were the contract in question *ultra vires*, namely, whether the defendant company, having obtained all the benefit under the contract, could successfully take the point that the contract was *ultra vires* and so avoid payment. Unfortunately the Court of Appeal refrained from answering this question, although Salmon L.J. did state:

> It seems strange that third parties could take advantage of a doctrine, manifestly for the protection of shareholders, in order to deprive the company of money which in justice should be paid to it by third parties.

Nevertheless, it is submitted that in the light of the development in business practice already mentioned it is most unlikely that the courts in New Zealand will ever be called upon to answer such a question.

II. *Jenkins* v. *Harbour View Courts Ltd.* [1966] N.Z.L.R.1. The decision of the Court of Appeal in *Jenkins'* case indicates that the doctrine of *ultra vires* is not entirely obsolete. For it was held that where a company, which has erected a building of flats, contracts to grant to each shareholder of a certain number of its shares a lease for ninety-nine years of one of such flats at a rental to be fixed each year by the directors of the company at an amount sufficient only to meet the outgoings, the grant of such lease amounts to a return of capital to shareholders and is *ultra vires* the company even though such an arrangement may be expressly authorised by the company's Memorandum of Association.

III. *Multiplex Industries Ltd.* v. *Speer* [1966] N.Z.L.R.122. This case concerned the interpretation of s.4 of the Companies Amendment Act 1963. As a result of the decision it is now quite clear that the prohibition against making a take-over offer for shares in a company contained in s.4 except on the conditions contained in that section, applies only if the take-over offer is made in writing. Consequently if a take-over scheme is carried into effect by making an oral offer there is nothing in the statute to render the actions of the offeror illegal.
IV. *Richard Bevan Ltd.* v. *Beecher* [1966] N.Z.L.R.740. Following *Brown* v. *Associated British Motors Ltd.* [1932] N.Z.L.R.655, Richmond J. held that s.99 of the Bankruptcy Act 1908 is not one of the provisions applied by s.307 of the Companies Act 1955 to the winding up of an insolvent company. Section 307 provides *inter alia,*

> In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

V. *Re Best, Ex Parte Cascade Publishing Co. Ltd. (in Liquidation)* [1966] N.Z.L.R.761. In this case Perry J. held that an order made by the Court under s.254 of the Companies Act 1955 for the payment of a call by a contributory in the winding up of a company is a final order which will support the issue of a bankruptcy notice under s.26(f) of the Bankruptcy Act 1908 which relates to the commission of acts of bankruptcy.

J. C. Turnbull.

CONTRACT

Before the decision of the House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1966] 2 W.L.R. 944, it was a widely held belief that a contracting party could not rely on an exclusion clause limiting or exempting his liability from a breach of contract where that breach could be classed as fundamental. This doctrine, arising in its modern form in *Smeaton Hanscomb* v. *Sassoon I. Setty* [1953] 1 W.L.R. 1468, had already been dealt a heavy blow by the decision of the High Court of Australia in *Council of Sydney City* v. *West* (1965) 39 A.L.J.R. 323, and was almost totally rejected by the House of Lords in the *Suisse Atlantique* case. All their Lordships in this case gave a different definition of fundamental breach but perhaps Lord Upjohn's statement that a fundamental breach is "such as to go to the root of the contract which entitles the other party to treat such breach . . . as a repudiation of the whole contract" (p.978) is most satisfactory. The House held that there was such a thing as a fundamental breach but the courts were no longer to assume that such a breach automatically overcame an exclusion clause but were to consider the exclusion clause in relation to all the circumstances of the case. In fact, in most situations a breach which could be classed as fundamental would override an exclusion clause but the breach by itself, however fundamental, does not bring the contract to an end. Thus the question of whether or not a fundamental breach of contract overrides an exclusion clause is a matter of construction. How-