RECENT DEVELOPMENTS IN NEW ZEALAND ADMINISTRATIVE LAW

An Examination of the *Okitu*[1] and *Licensed Victuallers*[2] Decisions

A New Zealander can perhaps be excused for believing that Australians are not as familiar with the decisions of New Zealand Courts as they are with English and Australian decisions. For that reason, is was decided[3] to discuss in some detail two recent decisions of the New Zealand Court of Appeal which it is expected will influence fairly considerably the principles governing judicial control over administrative determinations.

In New Zealand, there has not been any kind of inquiry into Administrative Law akin to that undertaken by the Donoughmore Committee of 1929[4] or the more recent, but more restricted, investigation of the Franks Committee.[5] Our politicians, civil servants and university teachers have gained what enlightenment they could from the English investigations. The result leaves much to be desired. Whereas the judiciary and the legal profession have shown that they are aware of at least some of the issues involved in the creation of administrative tribunals and subordinate legislative agencies, Governments and their advisers, in the legislation for which they have been responsible, have not shown any such appreciation.

No steps have been taken to make parliamentary control over subordinate legislation more effective[6] and no coherent policy is apparent from the legislation creating administrative tribunals. In particular, no attempt has been made by the Government's legal advisers to relate the powers conferred on tribunals to their functions nor are the procedures established

1. *New Zealand Dairy Board v. Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, discussed by the author in (1954) 32 C.B.R. 87.
2. *New Zealand United Licensed Victuallers Association of Employers v. Price Tribunal* [1957] N.Z.L.R. 167, discussed by the author in (1957) 31 Aust. L.J. 2.
3. A paper on similar lines to this article was delivered to the annual conference of the Australian Universities Law Schools Association held in Melbourne in August 1958.
4. The Report appeared as Cmd. 4060, 1932.
5. The Report appeared as Cmd. 218, 1957.
6. The scrutiny of such legislation was one of the tasks assigned by the New Zealand Joint Constitutional Reform Committee (App. H.R. 1952, I-18) to the proposed Senate, but the recommendations of that Committee have not led to the creation of a Senate or to the appointment of a Parliamentary Scrutiny Committee.

always appropriate to the jurisdiction created. The absence of any clear policy results in the legislative draftsmen being given almost a free hand because they have been left to complete their work without much assistance or guidance from the Minister or officials concerned. This means that earlier, and apparently similar, legislation is accepted as the model for later legislation. Such questions as the method of appointment of members of tribunals, their tenure, the powers to be given and the procedure to be followed by a tribunal tend to be unrelated to the particular circumstances. Although uniformity of legislation has some merits, the creation of administrative tribunals and associated questions should not be resolved by rules of thumb.

Nothing is to be gained, therefore, from an examination of New Zealand legislation in relation to administrative tribunals or subordinate legislation. Attention will be concentrated on the contribution made by the judiciary in two recent and important decisions. These decisions show that the judiciary not only has mastered the issues involved, but has also made a significant contribution to the legal principles governing the relationship between tribunals and the courts.

The facts of the two cases must first be stated. In *Okitu*, the New Zealand Dairy Board, which is essentially an administrative agency, issued a zoning order, without complying with the *audi alteram partem* rule; the order, by depriving the dairy company of its source of supply of cream, put an end to its butter-making business. The Supreme Court and the Court of Appeal by a majority of three to two held that the function of the Board in the making of zoning orders was judicial. A declaration of nullity was made and certiorari quashing the zoning order was issued.

In the *Licensed Victuallers* case, the Price Tribunal issued a price order in respect of beer without according a hearing to the retailers. The Court of Appeal, by a majority of three to one, reversed the decision of the Supreme Court, and held that the function of the Price Tribunal in deciding to issue a new order was judicial. The price order was quashed.

These two decisions contain such a wealth of information that a fairly comprehensive course in Administrative Law could be built around them. Though some of the conclusions reached may not be accepted in other jurisdictions, the relevant law to be applied by New Zealand courts can now be said to have been settled.

The Availability of Certiorari

The dicta of Atkin, L.J. (as he then was), in the *Electricity Commissioners* case[7] and Lord Hewart, C.J., in the *Church Assembly* case[8] were accepted by the Court of Appeal as an exhaustive test of the circumstances when certiorari may be granted. Finlay, J., whose opinion is a representative one, stated in *Licensed Victuallers*[9] that he had been "unable to find any authority that is not subject to the principle that to be amenable to certiorari a body clothed with the right of decision must be concerned to determine questions affecting the rights of subjects and must be subject to a duty to act judicially." That statement is made immediately after a reference to the *Manchester Legal Aid* case,[10] where Parker, J. (as he then was), expressed a doubt that the *dicta* were intended to be an exhaustive test.[11] It must, therefore, he inferred that the New Zealand Court of Appeal does not share the doubts of Parker, L. J., and that any attempt to go beyond the *Electricity Commissioners* and *Church Assembly* cases as applied in *Nakkuda Ali v. Jayaratne* will not be fruitful.[12]

The Determination of a Question Affecting Rights.

Before certiorari can be issued, the tribunal must have "legal authority to determine questions affecting the rights of subjects."[13] It was not until *Nakkuda Ali's* case that the meaning of "rights" was raised for determination.[14]

It is not possible to be dogmatic that the statement in that case concerning "rights" is part of the *ratio decidendi.* Although

7. *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 K.B. 171, 205.
8. *R. v. Legislative Committee of the Church Assembly, ex parte Haynes-Smith* [1928] 1 K.B. 411, 415.
9. p. 194.
10. *R. v. Manchester Legal Aid Committee, ex parte R.A. Brand & Co. Ltd.* [1952] 2 Q.B. 413, [1952] 1 All E.R. 480.
11. p. 425, All E.R. 487, where it is stated: "Whether or not Lord Atkin was there laying down an exhaustive definition of the bodies against whom certiorari lies it is unnecessary for us to determine . . ." It had been suggested that Lord Atkin's dictum was merely a statement of *sufficient* requirements, but the New Zealand Court of Appeal has treated it as a definition of the *necessary* requirements for certiorari.
12. The Judicial Committee in *Nakkuda Ali v. Jayaratne* [1951] A.C. 66, approved the dicta of Lord Atkin and Lord Hewart, C.J., and the New Zealand courts have regarded that as settling any controversy. Earlier decisions, e.g., *Local Government Board v. Arlidge* [1915] A.C. 120, 140, per Lord Parmoor, where the test was more general, have been displaced.
13. Atkin, L.J., in the *Electricity Commissioners* case at p. 205.
14. In the meantime, certiorari had been issued in a number of cases concerning licences and other interests that were not "rights". See D.R. Benjafield (1956) 2 Syd. L.R. 1, 10-18, for some examples.

the greater part of the decision is concerned with whether the Controller of Textiles was obliged to act judicially, there is one statement which is open to the construction that the Controller was not empowered to take decisions affecting rights; rather was it his function to decide whether privileges should be withdrawn. In an enigmatic statement, the Judicial Committee declared at p. 78:

> As was said by Lord Hewart, C.J., in *Rex v. Legislative Committee of the Church Assembly* [1924] 1 K.B. 171, 205, when quoting this passage, "In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially." It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it.

The interest of the Okitu Dairy Company was described by the majority as a right, although the company was assured of its source of supply by an earlier zoning order, and might, therefore, have been said merely to be enjoying a privilege. But *Nakkuda Ali* was distinguished. The judgment of Cooke, J., is the most informative on this point. The learned judge stated:

> It is true that the rights that were there in question [in *Errington v. Minister of Health*[15]] were the rights of owners to have their buildings left intact whereas, in the present case, the right of the respondent company that is in question is its right to buy cream from whom it pleases. For present purposes, however, I do not think that there is any difference in principle between the curtailment of a person's rights of property and the curtailment of his rights to trade. It is plain that, if the zoning order in question in the present case be valid, it involves a direct interference with the trading rights of the plaintiff company. I think, therefore, that the making of that order involved the determination of a question affecting those rights. It is to be remembered, of course, that in *Nakkuda Ali's* case ([1951] A.C. 66), the Privy Council held that, when the Controller of Textiles in Ceylon cancelled a licence, he was not

15. [1935] 1 K.B. 249.

> determining a question. In my view, however, there is a cardinal distinction between the situation that existed in that case and the situation that exists here. By the law of Ceylon, dealings in textiles were restricted to such persons as held textile licences. The position thus was that there was no unrestricted right to carry on the business of dealing in textiles and that such a business could be carried on only by those who were privileged to do so by the grant of the necessary licence. The cancellation of such a licence was not the determination of a question affecting the rights of subjects; it was, as the Judicial Committee said, the taking of executive action to withdraw a privilege. In the present case, however, the respondent company had a common-law right or liberty to trade with whom it chose and the only information before the Court as to any restriction on that right or liberty until the making of Zoning Order No. 120 is that there were in existence the restriction or restrictions contained in the zoning order or orders made by the Executive Commission of Agriculture in 1937. The making of Zoning Order No. 120 was a further restriction of that right or liberty and was thus, in my opinion, the determination of a question affecting the rights of that company.[16]

The reasoning of the learned judge is not particularly satisfying as much of what he had to say about the company's interest would also describe that of the textile dealer in Ceylon. Perhaps, the most significant difference is that in *Okitu* the earlier zoning order merely defined boundaries, leaving the business of butter-making otherwise unaffected.[17]

In *Licensed Victuallers,* the majority again decided that a right was affected.[18] Cooke, J., with whom North, J., agreed and with whom Turner, J., also agreed on this point, faced the question squarely and thereby assisted in the clarification of Lord Atkin's words. The learned judge stated:

> . . . I am conscious of the fact that, although Lord Atkin's words have become almost classic, there is little direct authority as to the precise meaning and effect that should be ascribed to the expression "rights of subjects". The word "rights" itself is sometimes used to describe only

16. pp. 416-7.
17. See (1957) 31 Aust. L.J. 2, 4.
18. The complication that it was a licensed trade was adverted to only by Finlay, J., at p. 195, and he thought it irrelevant to his inquiry. But Finlay, J., dissented; he had decided against the appellant on another ground.

> a right in some person in respect of which a correlative duty rests upon someone else, and is sometimes used to describe a more general concept that is often called a liberty: see *Salmond on Jurisprudence*, 9th ed., 299-301. That Lord Atkin's words are capable of application to rights of this wider kind I do not doubt. It might of course be said that, pushed to its logical conclusion, this view would mean that the effect of his words would be more far-reaching than he ever intended. I do not think, however, that for present purposes it is necessary to attempt to define the area of their operation; because I am satisfied that upon no view of them could that area be so narrow as not to embrace the rights or liberties of vendors of a particular class of goods to sell those goods. On the other hand, each of the persons represented by the appellant is in a very different position from consumers throughout New Zealand. It is true that a consumer is an interested person; but he is interested as a member of the public, and in my opinion the interests of the public as such do not fall within Lord Atkin's words.[19]

The jurisprudential point involved in this judgment will not be pursued.[20] The Court of Appeal has indicated that "right" includes some and perhaps all liberties; this could lead to an extension of the availability of certiorari. A "right" had to be established in that case before certiorari could be issued, but there is no such impediment to the grant of a declaration.[21]

The Determination of the Function.

The *dicta* of Lord Atkin and Lord Hewart, C. J., emphasise that even if the first hurdle—establishing that the tribunal has taken a decision affecting rights—is successfully negotiated, there

19. p. 202. The significance of the reference to the 9th edition of *Salmond* and not the current edition has been pointed out: (1957) 31 Aust. L.J. 2, 5. It is possible that the most recent edition of *Salmond* was not available to the learned judge.
20. See, however, (1957) 31 Aust L.J. 2, 5-6. In a recent Canadian decision, *Re Watt & Registrar of Motor Vehicles* (1957) 13 D.L.R. (2d) 124, certiorari was granted to quash a decision to suspend a driver's licence. Cp. *R. v. Metropolitan Police Commissioner, ex parte Parker* [1953] 1 W.L.R. 1150, [1953] 2 All E.R. 717, and D. M. Gordon, *The Cab-Drivers Licence Case* (1954) 70 L.Q.R. 203.
21. A declaration that the decision is a nullity could presumably be issued where the *audi alteram partem* rule applied and had not been observed. For a discussion of the advantages of declaration over certiorari, see *Pyx Granite Co. Ltd. v. Ministry of Housing & Local Government* [1958] 1 All E.R. 625, 632, where Lord Denning stated: "It is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency . . "

is the second—the duty to act judicially—that must also be shown to exist before certiorari can be issued. It is necessary, therefore, to know how the Court determines whether the function is judicial or not.

Prior to *Okitu*, the considerations that influenced the Courts were not explicit.[22] The *Okitu* and *Licensed Victuallers* cases have decided that in New Zealand the nature of the function is determined by ascertaining the intention of the Legislature. That is, it is simply, or essentially, a question of statutory interpretation. But the Court will also look at the surrounding circumstances. Cooke, J., said in the *Okitu* case:

> It is true, I think, that in none of those five cases[23] is there to be found, in the opinion of the Judicial Committee, any statement in express terms that the question involved was largely one of construction: but I respectfully think that, in each of them, it was the language of the authorizing statute that was the main ground upon which the Privy Council reached its conclusion. I think, moreover, that at least two of the five decisions to which I have referred support the view that, in construing the statute or regulation involved, regard must be had not merely to its bare words but to anything in the conditions under which the jurisdiction is to be exercised that throws light on the question as to whether or not a quasi-judicial duty was imposed.[24]

The Court also placed considerable weight on the phrase "context or conditions of his jurisdiction" which appeared in the decision in *Nakkuda Ali's* case.[25] That phrase and the one coined by Finlay, J., "the inherent character of the jurisdiction"[26] enabled the Court to have regard not only to the legislation, but also to certain other considerations. Cooke, J., in *Okitu*, expressed it thus:

> I think that the above passage shows that the Board regarded the question as one that depended on the context and on the conditions under which or in which the jurisdiction is exercised. There can be no manner of doubt as to

22. There are, however, numerous cases where the approach of the New Zealand Court of Appeal was adopted. E.g., in *Local Government Board v. Arlidge* [1915] A.C. 120, 130, Lord Haldane said that in deciding whether the function of the Board was judicial or administrative it was necessary to refer "to the language of the Legislature".
23. The learned judge had referred at p. 417 to five decisions of the Judicial Committee.
24. pp. 417-8.
25. p. 79.
26. p. 405, in *Okitu*.

> what is meant by "the context". The phrase "conditions of his jurisdiction" refers, I think, to something other than the context and is, in my view, a reiteration of the relevance for present purposes of the conditions or circumstances under which or in which the jurisdiction falls to be exercised.[27]

Among the other circumstances that were found relevant was the existence of a *lis* in *Okitu*,[28] the fact that rights were affected,[29] the difficulty of those affected being represented[30] and the high degree of policy involved in the decisions by the Price Tribunal as to prices which it was thought indicated a legislative rather than a judicial function.[31]

As to the importance of the words used in the statute, e.g., "sittings", "tribunals", "cases", "decisions", quite different conclusions were drawn by members of the Courts in the *Licensed Victuallers* case.[32] The negative propositions of Lord Sankey in the *Shell* case[33] were referred to by Finlay, J., (who dissented)[34] but Cooke, J., pointed out that the "passage is directed, I think, to what are the attributes of a Court strictly so-called

27. p. 419. See also Finlay, J., at pp. 403-4.

28. The absence of a *lis* did not, however, prevent the Court concluding that a duty to act judicially was imposed in the *Licensed Victuallers* case. As to the significance of a *lis* in relation to the question of construction, see Finlay, J., at p. 403 and Cooke, J., at p. 422 in *Okitu* and Finlay, J., at pp. 190-1, 195-7, and Cooke, J., at pp. 203, 205 in the *Licensed Victuallers* case.

29. This of course is illogical. If both a "right" and a duty to act judicially must be shown to exist, the existence of the former should have no bearing on the latter, except perhaps in so far as it relates to the intention of the Legislature.

30. Henry, J., in the *Licensed Victuallers* case argued that the difficulty of the consumer public being represented was an indication that a duty to act judicially was not intended by the Legislature; see pp. 175-6 and the comments of Turner, J., at p. 214. With respect, it appears that Turner, J., who discussed this question in relation to the "rights" of the consumer public, did not appreciate that Henry, J., was determining the function of the Price Tribunal.

31. See Henry, J., at p. 177 and Finlay, J., at pp. 193, 197. This is in accord with the decision in *Robinson v. Minister of Town & Country Planning* [1947] K.B. 702, 713, [1947] 1 All E.R. 851, 857, where Lord Greene, M.R., stated: "The words 'requisite' and 'satisfactorily' clearly indicate that the question is one of opinion and policy, matters which are peculiarly for the Minister himself to decide. No objective test is possible." See also *R. v. Manchester Legal Aid Committee* (*supra*) at pp. 428-9 [All E.R. 489] per Parker, J., and Griffith & Street, *Principles of Administrative Law* (2nd ed.), 150-1.

32. See, e.g., Henry, J., at p. 177, Finlay, J., at p. 190, Cooke, J., at p. 204 and Turner, J., at pp. 210-11.

33. *Shell Company of Australia Ltd. v. Federal Commissioner of Taxation* [1931] A.C. 275, 296-7.

34. pp. 190, 199.

as distinct from those of an administrative tribunal possessing judicial functions".[35]

The Courts adopted the remarks of Lord Haldane in the *Arlidge* case and rejected the submission that there was any presumption that the tribunal should act judically in performing a statutory duty or exercising a statutory power, the performance or exercise of which imposes a new legal liability or interferes with existing legal rights.[36] The Court must have regard to the language of the Legislature and the other conditions in which the jurisdiction is exercised without any presumption as to the nature of the function conferred. Nevertheless, the consequences of the decision were treated as relevant to legislative intention and hence to the function to be exercised. For example, in the *Okitu* case, Finlay, J., said:

> In considering this aspect of the question [whether the function was judicial] sight must not be lost of the fact that, if the Board is under no obligation to hear any party, then it is under no obligation to notify anyone of an intention to alter any zoning position. If that were so, companies would be liable to find, at any time and without warning, that their businesses were radically affected or even partially, or wholly eliminated. Such an intention upon the part of any legislator is unthinkable.[37]

Bias.

Bias disqualifies a person from exercising a judicial function;[38] decisions made by a disqualified person will be quashed or declared to be a nullity. The fact that members of a tribunal strongly support certain views will not of necessity disqualify them from acting. Hay, J.,[39] in *Okitu* said:

35. p. 204; see also D.G. Benjafield (1956) 2 Syd. L.R. 1, 9-10, who had drawn a similar conclusion.
36. *Ex parte Wilson, Re Cuff (No. 2)* (1940) 40 N.S.W.S.R. 559 and *In re Gosling* (1943) 43 N.S.W.S.R. 312, were cited in support of that proposition. But see Finlay, J., at pp. 402-3 and Cooke, J., at p. 419 in the *Okitu* case.
37. p. 405. Though this appears slightly illogical (see n. 29, *supra*), it is a realistic approach to the question of construction.
38. But bias has no effect if the function is other than judicial; *Franklin v. Minister of Town & Country Planning* [1948] A.C. 87, [1947] 2 All E.R. 289, per Lord Thankerton, who stated at p. 103 [All E.R. 296]: "My Lords, I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator."
39. The Court of Appeal did not express a different view on this point.

> The members of the Board are all men of high standing in the dairying industry, and, even though they may have erred in adopting a wrong procedure on this particular occasion, their honesty of purpose in carrying out their important functions has not been impaired by anything that has happened in these proceedings. Touching on the further ground relied upon by the plaintiff company that the Board's decision was predetermined, it may be that the members of the Board, or some of them, had preconceived opinions on certain aspects of the industry that may have affected their attitude towards this inquiry; but that, after all, is a condition of affairs unavoidably present where a body of experts in any industry is entrusted by the Legislature with large powers affecting the industry. In my opinion, the Court should be reluctant to say in a particular case that an issue before such a body has been predetermined either on the grounds of preconceived opinions, or on the grounds that certain matters relevant to the issue have not received proper consideration, as is alleged by the plaintiff company in the present case. It is not for this Court to determine on the merits the issue with which the Board had to deal, nor to review the Board's decision in the matter, notwithstanding that the Court may have taken a different view of the facts. The Court is, however, concerned to see that the Board, in conducting its proceedings (and assuming always that it was acting in the discharge of a quasi-judicial duty) did not deny to the parties concerned the rights to which they were entitled according to the principles of natural justice.[40]

There is a suggestion of the *ex necessitate* principle here.[41] The parties must accept the tribunal as they find it and so long as it acts in good faith and otherwise complies with the principles of natural justice, they cannot object.

Disclosure of Reports.

The authorities have established that once the duty to act judicially arises, e.g., after the *lis* has been joined, the tribunal must not accept from one party evidence or submissions that are not disclosed to the other party. This is merely an application of the *audi alteram partem* rule. In the *Okitu* case, the Board

40. p. 381.

41. See *Judges v. Attorney-General of Saskatchewan* [1937] 2 D.L.R. 209 (J.C.), where that principle was invoked. See also *Muir v. Franklin Licensing Committee* [1954] N.Z.L.R. 152, where the inevitability of having well known persons in the locality acting on the Committee was discussed.

received, after the *lis* arose, a report from a Dairy Produce Grader attached to the Department of Agriculture; the report was adverse to the plaintiff, but the Board did not disclose its contents to the company. The report was treated as falling within the above rule even though it was not received from one of the parties. Hay, J.,[42] stated:

> I have had some difficulty in deciding whether the requirements of natural justice made it incumbent on the Board to disclose to the plaintiff company during the course of the inquiry the contents of the report made by the Dairy Produce Grader at Gisborne on April 5, 1950. It is clear on the authorities that, if the report had been obtained before any *lis* had arisen, there would have been no obligation to disclose it. Moreover, had the Director of the Dairy Division obtained it on his own initiative, to assist him in his advisory function under Reg. 17, it would still not be subject to disclosure. But, in the circumstances in which it was obtained, after an issue had been joined between parties, I can regard it only in the nature of evidence tendered at the request of the Board, and as such, on the principle of natural justice, available to the party adversely affected. It is important to note in that connection that, in the particular circumstances, the Grader can hardly be regarded as an officer of the Dairy Division associated with the Board in an advisory capacity under Reg. 17. The Director himself was associated with the Board in this inquiry, and the Regulation does not contemplate that more than one person shall act in that capacity at any one time. Even if I am wrong in deciding that the report should have been disclosed, it does not affect the substance of my opinion that the basic principles of natural justice were contravened by the Board in the course of its proceedings.[43]

The conclusion of the learned judge was that, the complication of Regulation 17 apart, the report should have been disclosed to the plaintiff so that the company could reply to it, if possible. This goes beyond the existing authorities because it places "departmental information" in the same category as statements from the parties.[44]

42. The Court of Appeal did not differ from Hay, J., on this point.
43. p. 385.
44. The case which goes almost as far as *Okitu* is *Douglas v. Dyer* (1908) 27 N.Z.L.R. 690, where it was held that a police report on the character of the applicant for a licence must be disclosed.

The Effect of Petitioning Parliament.

The suppliers to the Okitu Dairy Company petitioned Parliament to intervene and annul the order of the Board. When Parliament refused to grant relief, the company brought an action. It was argued that the Court, in the exercise of its discretion, should refuse the relief sought on the ground that the company had sought relief before another tribunal.

This argument was rejected, Hay, J., pointing out that the petition was not made by the company, the proceedings before Parliament were not of a judicial character, and that Parliament may have rejected the petition because the judicial remedies had not been exhausted.[45]

Delegation to a Committee.

In the *Okitu* case, two of the eight members of the Board had a meeting with the company. The remaining six had no personal knowledge of what had taken place at the meeting; they relied on a report of what had taken place. Hay, J., attached some significance to this fact as he said:

> No one can say what would have been the effect upon the views of the majority of the Board had the case for the plaintiff company been presented to the full Board by counsel on behalf of the plaintiff company. It may well be that the result would have been no different, but that is beside the question. The fact remains that the plaintiff company was denied a proper opportunity of presenting its case; and that statements relevant to the inquiry and prejudicial to the plaintiff company were made to the Board from several sources without being disclosed to the plaintiff company, which had, therefore, no opportunity of explaining, correcting, or presenting an argument upon them.[46]

The relative importance of this departure from the principles of natural justice cannot be gauged. It is akin to what occurred in the *North* case, [47] where the information complained of was communicated to the tribunal by one of its members.

On the other hand, it is clear that members of a tribunal are entitled to use their own knowledge; the possession of specialised

45. p. 386; see also Cooke, J., at p. 423, where he distinguished *Ex parte Sherlock* (1899) 16 N.S.W.W.N. 94, *R. v. Thomas* (1901) 18 T.L.R. 71, and *The Crown v. Lafter* (1924) 26 W.A.L.R. 70, on the ground that in those cases the applicant had already adopted means of obtaining from a judicial tribunal the determination of the very issue raised in the Courts.

46. p. 380.

47. *R. v. Milk Marketing Board, ex parte North* (1934) 50 T.L.R. 559.

knowledge is one of the justifications for appointing members of administrative tribunals and assigning powers of decision to them.[48]

Decisions in an Emergency.

The troublesome case of *De Verteuil v. Knaggs*[49] was cited in both decisions. In *Okitu,* it was said that the Judicial Committee had indicated that the same power may, in some circumstances, be exercisable in a judicial manner, while in others there may be no such obligation.[50] In *Licensed Victuallers,* there was disagreement as to the significance of the *dictum* in the *Knaggs* case. Henry, J., refused to accept the interpretation of Finlay and Cooke, JJ., in the earlier case. The learned judge stated:

> With the greatest respect, I am unable to accept that *De Verteuil's* case did so decide. The judgment, in my view, did no more than to construe the power as being one which, from its nature, required a construction that a hearing of the person affected by the exercise of the power was not necessary in all circumstances. Before proceeding ex parte, the person acting under the power must determine the existence of sufficient circumstances in a bona fide and judicial manner. That, in my view, would be the exercise of the power in a judicial manner, but it would be done ex parte. Such an exercise of judicial power is not unknown to our jurisprudence. The judgment says: "It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on an emergency, when promptitude is of great importance; or there might be obstructive conduct on the part of the person affected" (*ibid.,* 560-561).[51]

48. See Hutchinson, J., at p. 411, where he stated: ". . . it was pointed out that the statute was passed to meet a serious position that had shown itself in a major primary industry, and it was said that the personnel of the appellant Board, representatives of the dairy industry, indicates that it is intended that the Board shall use its own knowledge of the industry to make its decisions." See also *R. v. Brighton & Area Rent Tribunal* [1950] 2 K.B. 410, [1950] 1 All E.R. 946, where the Court conceded that one of the purposes of creating Rent Tribunals was to permit them to act on their own knowledge. There are, however, cases pointing the other way, e.g., *R. v. Paddington Rent Tribunal* [1949] 1 K.B. 666, [1949] 1 All E.R. 720.
49. [1918] A.C. 557.
50. See Finlay, J. at p. 404 and Cooke, J., at p. 418.
51. pp. 177-8. In the opinion of Henry, J., the functions of the Price Tribunal were always legislative and not judicial.

Finlay, J., appears to agree with Henry, J., while adhering to the view he expressed in *Okitu* for he said:

> That case [*De Verteuil v. Knaggs*], as I read it, means no more than this, that the power conferred was quasi-judicial in character but that, having regard to the circumstances in which it was to be exercised, the legislation must be interpreted or construed as requiring observance of the rules of natural justice when such rules could be obeyed and the results designed by the enabling legislation achieved, but that it could not be interpreted as requiring the observance of the rules of natural justice where to do so would defeat the objects of the legislation. Beyond that, *De Verteuil's* case is of interest only as illustrating a particular instance in which legislation was regarded as conferring a quasi-judicial power.[52]

Cooke, J., reconciles *De Verteuil v. Knaggs* with the need sometimes to act without according a hearing by saying that where a decision must be taken urgently, the party who has been denied a hearing could later claim the right to be heard in relation to an application to revoke or vary the decision so made. The learned judge stated:

> To the views I have expressed as to the existence of a duty on the part of the Tribunal to act judically before making a price order or giving a special approval I desire to add the qualification that it may be that in circumstances of urgency it would be proper for the Tribunal to make such an order or give such an approval without first affording a hearing to the affected parties. If this were so, there would arise the further question whether such an order or approval should not always be subject to the rights of affected parties to be heard in support of any application they might wish to make to have it revoked or varied: see *De Verteuil v. Knaggs* [1918] A.C. 557, 561-563.[53]

Cooke, J., does not, however, state what the function of the tribunal is where it acts to meet an emergency. From the point of view of the parties, the solution suggested by Cooke, J., appears to be satisfactory. The function of a judicial tribunal, when it acts without a hearing, is of no significance if the decision can be reviewed at a hearing when the parties are represented.

52. p. 192. At pp. 198-9, however, Finlay, J., says that the opinion expressed by Henry, J., is different from his own and that of Cooke, J.

53. pp. 205-6. See also Turner, J., at pp. 214-5 where he expresses approval of the views of Finlay and Cooke, JJ., in *Okitu* but says nothing of the nature of the function where urgency is claimed.

The Dispensing Power.

In the *Licensed Victuallers* case, Henry, J., characterised the function of the Price Tribunal in issuing new price orders as legislative. The learned judge stated:

> Whether or not the Tribunal should alter the price structure as fixed by the Legislature or as fixed by its own Price Orders or special approvals, appears to me to be a matter of policy or expediency for determination by the Tribunal itself. The Tribunal is a body in which the Legislature has reposed its power of revising and keeping in force its policy of controlling prices of goods and services throughout New Zealand. Obviously it is not expedient to leave prices as fixed by the Statute and wait for Parliament to sit and pass amendments. That function has been given to the Tribunal and it is, in truth, acting as a legislative body by delegation when altering or amending the application of the legislative policy of price fixation. Any person who asks for the price structure to be altered is not asking for the determination of any question affecting his rights as a citizen. He is seeking the grant of a privilege from being bound by the existing price fixation structure. To some extent every decision affects some person or his liberty to act, but the question is a much wider one than that, as so clearly appears from the decision of the Judicial Committee of the Privy Council in *Nakkuda Ali v. Jayaratne* [1951] A.C. 66. It is obviously the duty of the Tribunal to carry out its functions for the benefit of the country as a whole. It is a matter of expediency or policy whether or not it alters the prices fixed by the Legislature or previously fixed by its own decisions, and not a question of the undoubted rights of a citizen to sell at such price as he wishes. I think such a function is clearly a legislative or administrative one, and not a quasi-judicial one at any stage.[54]

In an earlier case, *F. E. Jackson & Co. Ltd. v. Price Tribunal (No. 2)*,[55] it had been decided that, though the making of the price order was legislative, it was preceded by a duty to act judicially.[56] But Henry, J., treated the dispensing power of the Price Tribunal as either legislative or administrative. Finlay, J., was of the opinion that it was legislative.[57] The majority of the

54. p. 177.
55. [1950] N.Z.L.R. 433.
56. See also *Errington v. Minister of Health* [1935] 1 K.B. 249, where a similar distinction was made.
57. p. 200.

Court of Appeal were of the opinion that the function prior to the making of the order was judicial.[58] They may have been inclined to agree with Henry and Finlay, JJ., as to the nature of the order itself. The effect of the order was to grant a dispensation or privilege to the applicants, i.e., the holders of licences to sell spirituous liquor, from the need to comply with the previous law and this appears to have the character of a legislative act. But in another case where an exemption from the general law was sought, the function was treated differently. In the *Hookings*[59] case, Turner, J., treated the dispensing power—in this case exercisable in favour of individual applicants—as administrative, while in the *Lake Alice Stores*[60] case, the granting of an exemption to an applicant was said to be a legislative function.

These decisions confirm the remarks of Hay, J., in the *Okitu* case, where he stated:

> . . . indeed the authorities are confused in the use of such terms as "administrative", "legislative", "judicial", and "quasi-judicial", making it difficult to deduce principles.[61]

As has been shown, the function of the tribunal has an important bearing on the remedy available. For example, certiorari will be granted only if the function is judicial. Declaration, however, is available whatever the function may be if it can be shown that the tribunal has acted beyond its jurisdiction or has otherwise failed to perform its functions in the manner required of it by the Court. It is extremely unlikely that any tribunal would decide not to act in terms of the declaration; if it defied the Court, mandamus or injunction would probably be issued to compel obedience. The exact limits of declaration have not yet been determined, but it has every appearance of being an extremely useful weapon in the armoury of an administrative lawyer.

The question of *locus standi* in relation to declaration does not appear to have concerned the Courts overmuch, whereas it

58. Cooke, J., at p. 206 and Turner, J., at p. 212.

59. [1957] N.Z.L.R. 929. Under regulations, attacked as *ultra vires*, the Director of Civil Aviation was authorised to issue permits for the towing of gliders. The function of the Director was treated as administrative and not legislative or judicial; see p. 938.

60. [1957] N.Z.L.R. 882. The applicant sought an exemption from the provisions of the Shops & Offices Act 1955 as to closing hours.

61. p. 383.

has frequently been raised against an applicant for certiorari.[62] It may be an over-simplification to suggest that the question of *locus standi* is associated with the question of "rights",[63] and that the applicant must in general show that his interest is different from and greater than that of the rest of the community. But in *Simpson v. Attorney-General*,[64] where the applicant asked for a declaration that the General Election of 1946 was void and consequently that legislation passed since 1946 was also void, no question of *locus standi* apparently arose and the applicant is not reported as possessing any greater interest than that of other members of the community.

Although for this and the other reasons already discussed, declaration may well prove to be a more useful remedy than certiorari as a means of making judicial review over administrative determinations more effective, it would be unwise to neglect the older weapons and to allow them to fall into disuse. In the long run, it may be found that certiorari and prohibition and the other writs are more trustworthy and effective, despite their shortcomings, than the comparatively new remedy of declaration.

J. F. NORTHEY*

62. See D.C.M. Yardley, *Certiorai and the Problem of Locus Standi* (1955) 71 L.Q.R. 388, and the notes by D.M. Gordon in (1955) 71 L.Q.R. 483 and by D.C.M. Yardley in (1956) 72 L.Q.R. 36, and the *Licensed Victuallers* case at p. 201, per Cooke, J.

63. See pp. 207-10, *supra*.

64. [1955] N.Z.L.R. 271.

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