Environmental...

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 59/81

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Applicant 1

AND ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED

Applicant 2

AND SOUTH PACIFIC ALUMINIUM LIMITED and OTAGO HARBOUR BOARD

Respondents 1

AND MINISTER OF NATIONAL DEVELOPMENT

Respondent 2

AND GOVERNOR-GENERAL

Respondent 3

AND PLANNING TRIBUNAL

Respondent 4

AND COMMISSIONER FOR THE ENVIRONMENT

Respondent 5

Coram: Cooke J. (presiding)
Richardson J.
McMullin J.

Hearing as to discovery and interrogatories: 12 June 1981

Counsel: R.A. McGechan and Marion Frater for Applicants
E.W. Thomas Q.C. and R.H. Hansen for First Respondents
Solicitor-General (D.P. Neazor Q.C.) and R.P.G. Haines for Second and Third Respondents

Judgment: 15 June 1981

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

In these proceedings the applicants challenge the validity of the Order in Council entitled the National Development Order (No.2) 1981, 1981/107, applying the National Development Act 1979 to an aluminium smelter and associated works proposed to be carried out by the first respondents at Aramoana. The applicants have asked that the first, second and third respondents be required to make discovery of all documents relating to any matter in question in the proceedings, and that leave be granted to the applicants to administer certain interrogatories to those respondents. The present judgment deals with those requests.

Jurisdiction

As to the second and third respondents, His Excellency the Governor-General and the Minister of National Development, a preliminary point of jurisdiction has to be decided. The National Development Act, s.17(6), applies to such proceedings as these s.10 of the Judicature Amendment Act 1972, as substituted in 1977. By s.10(2)(i) there is power to require any party to make discovery of documents or to permit any party to administer interrogatories. Moreover by s.17(7) of the National Development Act itself wide powers of procedural direction are given. It is contended by the Solicitor-General, however, that as against the Governor-General and the Minister these are proceedings against the Crown; and that, while s.27 of the Crown

Proceedings Act 1950 permits interrogatories and discovery against the Crown in any civil proceedings, the present proceedings are taken out of that category by the last limb of the definition of 'Civil proceedings' in s.2(1) of that Act, as amended in 1972. That limb excludes 'proceedings by way of an application for review under Part I of the Judicature Amendment Act 1972 to the extent that any relief sought in the application is in the nature of mandamus, prohibition or certiorari'.

In dealing with this contention we begin by rejecting the contrary submission for the applicants to the effect that by making the Judicature Act 1908, including the Code of Civil Procedure in the second schedule, binding on the Crown, s.5(2) of the Crown Proceedings Act made discovery and interrogatories available against the Crown in all civil proceedings, irrespective of whether or not they were excluded from the definition in s.2(1) of the Crown Proceedings Act. It is a submission that needs only to be stated to bring out that it would undermine the plain purpose of the special definition in s.2(1).

Accordingly we accept that, to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari, discovery and interrogatories should not be ordered.

The statement of claim includes a prayer for an order in the nature of prohibition against the Planning Tribunal, but it is common ground that this is irrelevant for present purposes, neither discovery nor interrogatories being sought against the Tribunal. There is no reference to any order in the nature of mandamus. The relief claimed is first by way of declaration of invalidity - as to the Order in Council, the consequential reference by the Minister to the Tribunal under s.4(1) of the National Development Act, and the public notice by the Minister published in the Gazette of 30 April 1981. Secondly, an order setting aside what is described as 'the purported decision of the Governor-General in Council dated 27 April 1981 to apply the provisions of the Act to the Aramoana Smelter'. We understand this as an application for the exercise of the Court's power under s.4(2) of the Judicature Amendment Act 1972 to set aside a decision instead of declaring it invalid. On that footing it does not affect the present point. But thirdly the applicants seek 'an order for the issue of a writ or order in the nature of certiorari to bring up and quash ... the purported decision of the Governor-General in Council dated 27 April 1981 ...'

If they are rightly to be regarded as dependent on that prayer, discovery and interrogatories should be ruled out. But we do not see the application in that way. It is doubtful whether certiorari lies to bring up and quash an

Order in Council. There were obiter dicta that it did not in the judgment of this Court in Reynolds v. Attorney-General (1909) 29 N.Z.L.R. 24, 38. So too in Australia: see Australian Communist Party v. The Commonwealth (1951) 83 C.L.R. 2, 179 per Dixon J. Compare Ex parte The Queen; Re Barnett (1967) 70 S.R. (N.S.W.) 69, 75; Treasury Gate Pty Ltd v. Rice 1972 V.R. 148, 162. Although the range of certiorari has been extended in modern times well beyond inferior courts, and although it can undoubtedly extend to an individual Minister exercising a statutory power, we would not be prepared to affirm without hearing argument on the matter that a prerogative remedy of this kind could issue against the Governor-General, who stands in place of the sovereign.

The Declaratory Judgments Act 1908 was made binding on the Crown by the Crown Proceedings Act 1950, s.5(2). Where it is claimed that an Order in Council is invalid a correct remedy is declaration. In De Verteuil v. Knaggs 1918 A.C. 557 the Privy Council recognised that an action for a declaration was an appropriate method of invoking the jurisdiction of the Courts to determine whether a Governor had acted within his statutory powers. Declarations are the primary relief sought in the present case. Discovery is established as a valuable adjunct to proceedings for a declaration: Barnard v. National Dock Labour Board 1953 2 Q.B. 18, 43 per Denning L.J. In New Zealand this is

reinforced by the power expressly conferred by the Judicature Amendment Act 1972, s.10(2)(i). We consider therefore that the Court has jurisdiction to order discovery and interrogatories against the Crown.

But it must be stressed that the jurisdiction is discretionary. That is always so under s.10 of the Judicature Amendment Act 1972, but the point is especially important in cases under the National Development Act. The Act is concerned with cases, likely to be few in number, which fall or are claimed to fall in a distinctive category. The Long Title summarises its scope:

> An Act to provide for the prompt consideration of proposed works of national importance by the direct referral of the proposals to the Planning Tribunal for an inquiry and report and by providing for such works to receive the necessary consents

The criteria for the application of the Act to works, specified in s.3(3), include references to 'a major work that is likely to be in the public interest' and 'essential' for various purposes. Section 17, while recognising that Orders in Council under the Act may be reviewed under the Judicature Amendment Act 1972, lays down unusual time limits, provides that the application is to be brought in this Court, and (subject to those limits) authorises this Court to give such directions prescribing the procedure to be followed in any particular case under the section as it

deems expedient having regard to the exigencies of the case and the interests of justice. The special nature of this jurisdiction has to be kept prominently in mind when any procedural question arises under it.

Interrogatories

With that approach we consider first the interrogatories sought to be administered. They are so extensive that it is not convenient to reproduce them here. Broadly speaking they seek many details of what occurred at and in connection with the meeting of the Executive Council on 27 April 1981; details of consultations by the Minister with various local bodies; and details of agreements entered into by the company and the Harbour Board and of internal procedures of the company and the Board. Before coming to a decision about them it is necessary to have regard to the statement of claim and the present state of the evidence.

The statement of claim alleges, in short, no valid application under the Act; breach of natural justice in that the Governor-General in Council declined to give the Environmental Defence Society an opportunity to be heard; denial in effect of the right of the Society to petition the Crown; invalidity of the meeting of the Executive Council on 27 April 1981 because the Governor-General was not present (but see s.23(4) of the Acts Interpretation Act 1924) and because that meeting was allegedly not duly convened, nor

held in accordance with the Royal Instructions, nor preceded by consultations allegedly required by the National Development Act; failure at the meeting of the Executive Council to consider the criteria laid down in the Act; wrong interpretation at the meeting of one criterion; taking into account at the meeting irrelevant considerations and failing to take into account relevant ones.

Following the preliminary conference held in Chambers on 4 June 1981 pursuant to s.17(6) of the National Development Act, one of the directions given was that affidavits for the applicants in support of the application were to be filed not later than 11 June 1981. This was in accordance with s.10(2)(f) of the Judicature Amendment Act. On behalf of both applicants affidavits as to standing were filed. On behalf of the Environmental Defence Society there are two further affidavits. One deals with the time that would be required to obtain all the consents sought by the company and the Board by following normal procedures instead of the 'fast track' under the National Development Act.

The other affidavit is concerned with the question of natural justice and submissions that the Society wished to make to the effect that the Act could not be applied to the smelter project because it did not meet the criterion in s.3(3)(b) 'That it is essential a decision be made promptly as to whether or not the consents sought should be granted'. The affidavit annexes a copy of a letter dated 15 April 1981

from the Society's solicitors to the Clerk of the Executive Council requesting an opportunity for the Society to make submissions to the Governor-General in Council on that point. The letter also said that it was essential for the Society to have full access to all the information before the Governor-General in Council with respect to the application.

According to the statement of claim the Clerk of the Council replied by letter dated 23 April 1981, saying inter alia that in matters such as this the Governor-General acts only on the advice of his Ministers. And that it is not the practice of the Governor-General in Council to receive and consider private submissions other than the normal right of every person to petition Her Majesty's representative at any time. The statement of claim then pleads a further letter from the Society, dated 24 April 1981, requesting that the letter of 15 April 1981 be treated as the first step in a formal petition and also requesting an opportunity to make submissions to the Governor-General. As has already been mentioned, the Order now attacked was made on 27 April 1981.

The affidavits in support of the statement of claim thus provide evidence of the standing of the two societies and of facts on which the Environmental Defence Society relies for its contentions regarding natural justice. But it is apparent that as to many of the allegations in the statement of claim, including all those relating to the meeting of the

Executive Council, consultations and the affairs of the company and the Board, the applicants in these proceedings have put forward no supporting evidence at all. Some of the individual interrogatories appear to be irrelevant in any event, but we need not go into that aspect.

Against that background we accept the submissions for the respondents that the interrogatories are fishing interrogatories sought to be administered with the intention of ascertaining by minute examination whether the applicants can find out some ground of invalidity other than the specific one (alleged breach of natural justice) on which the applicants have evidence. What has just been said is an adaptation to the circumstances of this case of the observations of Kennedy L.J. in Barham v. Lord Huntingfield 1913 2 K.B. 193, 197, which are in point in principle. Accordingly we disallow the interrogatories in toto as fishing and oppressive.

Discovery

Discovery of documents is a different matter. Normally this is readily obtainable in litigation and often it is essential to enable justice to be done. If parties such as the present applicants were denied all access to the respondents' documents it could in practice be virtually impossible to challenge an Order in Council under the National Development Act on any grounds going to the reasons

for the Order. The Act itself recognises, however, that such Orders in Council should be subject to judicial review. There are limits to the scope of judicial review. In general terms they are well known and they do not call for discussion now; but we do not think that it would accord with the intention of Parliament, embodied in the Act, if the Court were to shackle itself by denying access to highly relevant evidence. These cases are of major public importance. Public confidence in the administration of the Act and in judicial safeguards would be shaken if the Court were to confine the scope of review so narrowly as to invite suggestions of rubber-stamping.

At the same time it has to be remembered that a project of this kind, necessarily discussed and planned over many months, will generate very many documents. It would be oppressive and probably unhelpful to require the respondents to make discovery of them all. Moreover we have in mind a procedure for the hearing of this case, to be mentioned shortly, which may itself significantly reduce the need for prolonged examination of documents. To enable the matter to be dealt with effectively it will be necessary and sufficient to have discovery of the documents of cardinal importance. It is impossible for the Court at this stage to define these exhaustively, but we can only infer that the Executive Council meeting of 27 April 1981 and the Cabinet meeting that would have preceded it were the crucial stage

at which the Governor-General's constitutional advisers decided to advise His Excellency to apply the provisions of the National Development Act to the smelter project.

Accordingly we order as to the Crown that discovery be made on oath of all documents relating to the Aramoana Smelter project that (a) were considered by the Executive Council or Cabinet on or about 27 April 1981, including any documents incorporated by reference in the foregoing or (b) record or transmit any decision or advice then determined on by the Executive Council or Cabinet.

Leave will be reserved to all parties to apply for any modification of the terms of this order or for further and better discovery or for leave to administer interrogatories.

As the list of documents to be discovered may not be long, and as the Act requires a compressed timetable, the affidavit of documents is to be filed not later than noon on 19 June 1981. The affidavit may be made by the Clerk of the Executive Council and Secretary of Cabinet.

In view of what was said by the Solicitor-General during the hearing on 12 June, it should be added that the order is without prejudice to the right to object to the production of documents on the ground of public interest immunity. We of course express no opinion on the form or the outcome of any such objection.

The Solicitor-General offered discovery of documents listed by him as follows and the order will also include these:

(a) Correspondence between the EDS and the Clerk of the Executive Council;
(b) the Notice summonsing the Council Meeting;
(c) Correspondence between the Minister and local authorities pursuant to s.3(4) of the National Development Act (including replies);
(d) Any notification under s.3(2) of the Act and the response to it.

As to the first respondents, Mr Thomas acknowledged that orders for discovery of documents should be made but submitted that the scope of discovery should not extend to the matters in paragraphs B.1(a)(i) and (ii) and B.8(a) and (c) of the statement of claim. We accept these submissions and there will be orders accordingly, the affidavits likewise to be filed not later than 19 June 1981. Leave to apply is again reserved as mentioned above.

Evidence at Hearing

In accordance with the time provisions in s.17(6) of the National Development Act the hearing of these review proceedings is to commence on 30 June 1981. We have given some preliminary consideration to the procedure at the hearing, as to which the Court has a wide discretion.

Apart from any question of natural justice, it appears that the crucial issue at the hearing will be, putting it broadly, whether the decision of the Governor-General in Council to apply the Act to the work was validly arrived at in accordance with the tests specified in s.3(3) and (4). We are disposed to think that in a case of this nature and importance the most satisfactory and just procedure would be for the Minister of National Development to give oral evidence and be available for relevant cross-examination. The advantages of this course from a number of points of view are so obvious that we need not underline them. We were informed from the Bar that the Minister is returning to New Zealand about a week before the hearing.

On the other hand, as the case relates essentially to the decision of the Governor-General in Council, we doubt whether any advantage would be gained by hearing oral evidence from other persons, except possibly other Ministers if the Crown wished to call the latter.

These suggestions are not intended to derogate from the previous directions that any affidavit evidence for the respondents be filed not later than 18 June 1981 and any affidavits by the applicants in reply not later than 25 June 1981.

The first respondents wish to proceed with their motion to strike out this application for review on the ground that it was not served on those respondents not later than 21 days after the date on which the Order in Council came into force. This motion will be heard at 2 p.m. on Friday 19 June. Following that hearing there will be a conference at which any party may raise any outstanding question of procedure and indicate its attitude to the suggestion that we have made regarding evidence at the main hearing.

Solicitors:

Sheffield, Young & Ellis, Auckland, for Environmental Defence Society

Brandons, Wellington, for Royal Forest and Bird Protection Society

Simpson, Coates & Clapshaw, Auckland, for South Pacific Aluminium Limited

Lemon, Duff & Caudwell, Dunedin, for Otago Harbour Board

Crown Law Office, Wellington, for Crown

S.E. Kenderdine, Wellington, for Commissioner for the Environment