IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.225/81

Set I

IN THE MATTER of the Judicature Amendment Act 1972

A N D

IN THE MATTER of an application for review

BETWEEN EDGAR JAMES SMITH and KATHLEEN FRANCES SMITH, GLENHAVEN FARM LIMITED, YERN FARMS LIMITED, CHARLES LEONARD RYDER and WINIFRED BERYL RYDER, F.W. HALE LIMITED, GORDON BERESFORD HENRY and RAYMOND NELSON HENRY

Applicants

A N D WAIKATO COUNTY COUNCIL

First Respondent

A N D KAITINGI ENTERPRISES LIMITED

Second Respondent

A N D TAHUROA FARMS LIMITED

Third Respondent

Hearing : 9th September 1983

Counsel : A.L. Hassall for Applicants
J. Milne for First Respondent
J.D. Atkinson for Second and Third Respondents

Judgment : 20 September 1983

JUDGMENT OF BARKER, J.

This is an application for review under the Judicature Amendment Act 1972. The applicants seek to have declared invalid a decision of the first respondent ("the Council") made on 15th

land at Monument Road, Maramarua. The land in question, originall owned by the second respondent, has now been transferred to the third respondent.

The facts are fairly complicated but not in dispute. The applicants in this Court are all farmers in the Maramarua district in the northern part of the Waikato County. In terms of the Council's Operative District Scheme, commercial piggeries are a conditional use in this district. The second respondent lodged an application with the Council on 6th December 1979 for planning consent to the establishment of a commercial piggery on their farm which has an area of 142.854 hectares. The Council determined that the applicants, as well as the occupiers of other nearby properties, should receive notice of the application; accordingly, on 11th December 1979, the Council sent various written material to the applicants, including a copy of the application; it invited objections to be lodged by 11th February 1980. By letter dated 24th January 1980, the Council's Planning Officer advised potential objectors that the closing date for objections was to be enlarged because a site plan had not been received. At some stage (whether then or later is immaterial) the applicants in this Court received a copy of a plan depicting the approximate location on the second respondent's property of the proposed piggery. This plan was not drawn to scale; it showed in broadest outline the proposed locations of the piggery buildings (to be built in two stages) and of three oxidation ponds. The information supplied was rudimentary in the extreme. There was a notation on the plan that "all pig housing will be greater than 100 metres from any boundary and will cover approximately 3 acres".

The applicants duly objected to the Council. Their

through many of the relevant properties; loss or diminution of water supply and fouling of the stream were thought likely to occur.

The Council conducted a hearing of the application and objections on 22nd April 1980, after giving appropriate notice to the parties. At this hearing, the applicants to this Court presented submissions and evidence in opposition to the proposal, including evidence from an engineer.

The subject land had been used as a mixed sheep and cattle farm. According to the judgment of the Planning Tribunal (to which later reference will be made) the piggery was to be established near the centre of the property; up to 4,000 animals would ultimately there be housed in closed pens with mechanical ventilation, nourished only by mixed meal.

The basis on which the present applicants presented their evidence and on which their expert presented his to the Council hearing, was that the approximate siting of the piggery and oxidation ponds was as shown on the rough sketch which accompanied the application. Mr Yern, a director of one of the present applicants, prior to the hearing of the application before the Council, had discussions with a representative of the second respondent; he confirmed to Mr Yern and to others opposed to the proposal, that the site of the treatment plant was as shown in the rough sketch. The entire hearing before the Council proceeded on that basis.

The second respondent made an application to the Waikato Valley Authority ("the Authority") for a water right under the Water and Soil Conservation Act 1967. It sought also a right to discharge effluent by an open channel into a tributary of the

At the conclusion of the planning hearing after evidence and submissions for and against the piggery proposal had been given, the Council advised the parties that its decision on the planning application would have to await the outcome of the water right application.

The present applicants and others objected to the water applications as well. There was a hearing before the Authority on 2nd December 1980; the present applicants again appeared through counsel and again led evidence from the same expert witness.

In the course of this water right hearing, the applicants learned for the first time that the first site nominated for the treatment plant was considered unsuitable; the second respondent then nominated another site for the treatment ponds some 500 metres away from the site shown on the plan.

The Authority eventually granted the discharge right application of the second respondent upon the basis of the treatment plant and oxidation ponds being as shown on the amended plan, namely, a site some 500 metres away from the site on the first plan. Lest it be thought that the oxidation pools are just triflingly small ponds on a large farm, Mr Hassall advised me from the Bar (without opposition from other counsel) that the evidence disclosed that the total surface area of the three oxidation ponds in issue was of the order of 6 acres. The Authority considered that the grant of a separate water right was unnecessary because of the general authorisation to take water for stock purposes found in Section 22 of the Water and Soil Conservation Act 1967.

the applicants were notified by the Council on 16th December 1980 that it had granted the second respondent's planning application. The letter recording the relevant resolution, referred to general expressions found in the Act and to "a conditional use to permit the establishment of a commercial piggery and buildings with provision for grain storage, mixing and milling facilities on 142.8540 ha" etc. subject to certain conditions which included:

(a) That prior to the commencement of site preparation or the erection of any buildings or the construction of any ponds, the applicant, i.e. the first respondent, should first obtain a water right;

(b) That the proposal be limited to a maximum of 350 sows and progeny and "to the area and site shown on the plan submitted with the application".

No reasons were given for the Council's decision; in particular, reasons why the contentions of the applications were rejected and the contentions of the second respondent favoured. This failure to give reasons was clearly contrary to the express provisions of Section 67(2) of the Town and Country Planning Act 1977 ("the Act"). The reference to "the plan submitted with the application" clearly tied the Council's consent to the original site for the treatment plant shown on the rudimentary sketch which had been filed at an early stage and on which the application was conducted.

The present applicants then appealed to the Planning Tribunal against both the grant of planning consent by the Council and the water right decision of the Authority. At the hearing of such appeals, counsel for the present applicants made it clear to the Tribunal that his clients reserved their right to challenge the validity of the Council's consent in this Court

A report has now been furnished by the Tribunal pursuant to a request made by the Chief Justice who had considered this present application in a preliminary way on 27th July 1983. The report of the Planning Tribunal shows that the appeals were heard before it over a period of some 5 days in December 1980. It conducted a hearing de novo both of the application for plannin consent and the water discharge right; the Tribunal required the applicant for both (namely the present second respondent) to present its case in support of both applications before calling on the present applicants to present their case. Evidence was heard from the Council's Town Planning Officer before the present applicants were called upon to present their case in opposition to both proposals.

The evidence called for the Council made it clear to the Tribunal that, despite the inept wording of the Council's resolution, the planning consent related to the amended site for the ponds; the expert witness for the applicants, Mr Kelly, gave evidence to the Tribunal that on learning of the change of the treatment site, he had had the opportunity of viewing the amended site; he gave the Tribunal his expert opinion on the suitability of that amended site.

The decision of the Planning Tribunal was delivered in a lengthy written judgment dated 6th July 1981. The Tribunal allowed the appeal against the decision of the Authority to grant the water discharge right; it dismissed the appeal against and therefore confirmed the decision of the Council granting planning consent. The bulk of the Tribunal's judgment was concerned with technical matters arising out of the water application. However, the Tribunal did canvas the merits of the planning application and came to the conclusion that the

The applicants filed their motion for review in this Court on 23rd December 1981. After various judicial conferences, an order for a priority hearing was made; the Council filed a counter-claim for an order under Section 5 of the Judicature Amendment Act 1972 validating its decision should it be held that such decision was invalid.

Three further factual matters need to be mentioned; first, Section 167 of the Act provides as follows:

> "167. Requirements as to serving notice, etc., may be waived - In any proceedings or intended proceedings before it, the Tribunal, the united or regional council or the Regional Planning Authority, the Council, or the Maritime Planning Authority, on application to it in that behalf, may, if there is any omission from, or any inaccuracy in, any information required to be supplied, or in any step required to be taken, in respect of any such proceedings -
>
> (a) Waive compliance with the requirement in respect of any such omission or inaccuracy; or
>
> (b) Direct that any such omission or inaccuracy be rectified upon such terms as to adjournment, service of documents, costs, or other thing as shall in its opinion be appropriate to the circumstances -
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> if it is satisfied that no party to the proceedings will be prejudiced by the waiver or direction."

Neither the Tribunal nor the Council has made any order under that section in respect of the inaccuracy over the plans, nor was any application made to either in that behalf.

Secondly, the third respondent has made a further application to the Council for planning consent for the piggery project; this time the application refers to the amended site. This application has been granted; it is subject to a further

Thirdly, the applicant made a further application to the Authority under the Water and Soil Conservation Act 1967; this application was granted; the present applicants again appealed to the Tribunal; on this occasion, unlike on the first, the decision of the Authority was upheld by the Tribunal; this means that the third respondent now has a water right which was required by the Council as a condition of the planning consent.

Mr Hassall submitted that the initial decision of the Council should be quashed and declared invalid because:

(a) It had failed to comply with its statutory responsibility to give reasons; and

(b) The consent was granted in respect of a proposal different to that upon which the application had been based and the objectors had conducted their case.

Mr Hassall relied on the decision of Bisson, J. in Duncan v. Thames/Coromandel District Council, 7 N.Z.T.P.A. 65 and on Routley and Others v. Bay of Islands County Council, an unreported decision of Prichard, J. (M.7/80, Whangarei Registry, 18th June 1980). In both of those cases, the Court invalidated planning consents given by local bodies where reasons had not been given for their decisions. Bisson, J., in the Duncan case, stressed that the giving of reasons was of fundamental importance; that the failure to give reasons worked injustice to those considering an appeal and that it defeated the main object of the legislation.

Prichard, J. considered that there was prejudice to the applicants in a failure to give reasons; they could only consider blindly, without knowing the Council's reasons, whether or not or on what grounds they should pursue an appeal.

no requirement at common law for a Court or Tribunal to give reasons for its decision. The view of the Court of Appeal as enunciated in R v. Awatere, (1982) 1 N.Z.L.R. 644, 649, was that a Court or Tribunal should do its "conscientious best to provide reasons for their decision which can sensibly be regarded as adequate to the occasion".

The judgment of Somers, J. in the Court of Appeal in R v. MacPherson, (1982) 1 N.Z.L.R. 650 is more consonant with Chilwell, J.'s view in Connell v. Auckland City Council, (1977) 1 N.Z.L.R. 630 and also various Australian cases; namely, that, where there is a right of appeal, the tribunal of first instance is under a duty to make such findings or express such reasons or conclusions as in the particular circumstances are necessary to render the right of appeal effective. I myself took a similar view in T. Flexman Limited v. Franklin County Council, (1979) 2 N.Z.L.R. 690 which dealt with a statutory right of appeal to a Court from a County Council sitting as an administrative tribunal. See also a scholarly article by M. Taggart in (1983) 33 University of Toronto Law Journal 1.

In my view, R v. Awatere does not apply to the present situation because of the express statutory requirement on the Council to provide reasons; the present case is analagous to Clark v. Wellington Rent Appeal Board & Another, (1975) 2 N.Z.L.R. 24 where the statute required the Rent Appeal Board to give reasons for any rental assessment.

Difficulty arises in determining the extent to which the Council's admitted failures both to give reasons or to make any amendment concerning the subject matter of the application, have been cured by a subsequent appeal wherein all relevant

to present their case; briefs of evidence-in-chief were exchanged before the hearing; full cross-examination was permitted The applicants were not required to present their case until after the evidence in support of the proposal and the evidence of the Council had been given.

Mr Milne and Mr Atkinson submitted that there could be no possible prejudice or unfairness to the applicants consequent upon the admitted inadequacies of the Council's earlier decision. Mr Hassall submitted that there could have been some 9 other appellants before the Planning Tribunal who had objected before the Council; had they appealed, their evidence might have been decisive. I was advised from the Bar that it was suggested at one judicial conference before Bisson, J. that affidavits might be filed by such persons to the effect that they might have appealed; no affidavits were filed. In any event, reading the Tribunal's decision, I doubt very much whether any point of planning merit could have been offered by such persons. One would anticipate that the planning merits of the piggery proposal would have been canvassed very fully by Mr Hassall, his clients and their expert witness before the Tribunal.

The submissions of Mr Milne and Mr Atkinson call for reference to the decisions of the Privy Council in Calvin v. Carr, (1980) A.C. 440, the House of Lords in London and Clydeside Estates Limited v. Aberdeen District Council, (1979) 3 All E.R. 876 and the Court of Appeal in Reid v. Rowley, (1977) 2 N.Z.L.R. 472. Both Calvin v. Carr and Reid v. Rowley were concerned with the decisions of domestic tribunals which had certain deficiencies. It was, however, held that the deficiencies could be cured by a complete and regular rehearing by way of appeal before a properly constituted appeal authority. It is important

was void for breach of natural justice, there was no basis on which the Appeal Board could entertain the appeal.

Without going into these decisions at length - they have been much written about by academic writers - in general terms, they lay down that the decision of administrative or domestic tribunal reached in breach of natural justice is void rather than voidable; until declared void by a competent Court, it is capable of having some effect in law and cannot be considered as being legally non-existent.

Lord Hailsham, L.C. encapsulated the principles in this passage of the London & Clydeside case at p.883:

> "When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences on himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory'

> 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

There is no absolute rule that defects in natural justice at an original hearing can or cannot be cured by appeal proceedings, correctly and fairly conducted. The Court has to look at the defects and the surrounding circumstances; whether the appeal body embarked on its task without predisposition; whether it had the means to make full enquiry; and other relevant matters relating to the quality of the appeal hearing.

In the present case, there is no doubt as to the high quality of the hearing before the Tribunal, presided over by an experienced District Court Judge with lay members with specialist experience in planning matters. In Reid v. Rowley, Richmond, P. said at p.486 that where the appellate tribunal is, as here, exercising an original jurisdiction, the applicant for review may need to show that the appellate hearing was tainted by a defect in the original proceedings. Such would be a difficult task in the present case. As against these matters, there is no doubt in my mind that the failure to give reasons was a clear breach of a mandatory statute

Mr Milne submitted that Section 166 of the Act which requires applicants to appeal to the Planning Tribunal before applying for judicial review, has, as a purpose, the ability to have defects in the original proceedings cured on appeal. I do not think it necessary to embark on a consideration of this proposition which I would find some difficulty in accepting.

The appeal before the Planning Tribunal in a practical and real way cured the admitted defects in the decision of the Council. That decision was void but should not, for that reason alone, be placed into "rigid legal categories" or stretched or cramped "on a bed of Procrustes invented by Lawyers for the purposes of convenient exposition". In other words, I must look at the whole picture to arrive at a solution just in the circumstances.

The whole proceeding was conducted on the basis of the amended site. The reasons for the Council's decision were obvious from the evidence of its Town Planner given before the applicants were required to make submissions or call evidence; it is hard to see how the addition of additional appellants of like mind with the applicants could have enhanced to any marked degree the quality of the de novo hearing before the Tribunal.

The Duncan and Routley decisions are distinguishable; no appeal had been heard before the Tribunal and they appear to have been decided without reference to any of the cases of high authority that I have mentioned.

Whilst tending to the view, on authority, that in the particular circumstances of this case, the appeal hearing cured

should be declined. The reasons for this conclusion are really the same as for saying the appeal cured all defects. The applicants have had the merits of the proposal exhaustively debated before and decided by the very body set up by Parliament to determine planning matters. The fact that their point of view did not find favour does not detract from the obvious quality of the hearing.

Another reason for exercising the discretion against the applicants is that there is pending before the Tribunal, a further appeal from the decision of the Council for permission to set up the piggery; the decision from the Council was given with reasons and in respect of the amended site. The applicants to this Court will have yet another chance to air their objections.

I turn to the counter-claim by the Council for a validating order under Section 5 of the Judicature Amendment Act 1972; the section reads as follows:

> "5. Defects in form, or technical irregularities - On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief, and where, the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit."

There have been no reported cases under this section. I am not prepared to exercise my discretion in favour of the Council in respect of the failure to give reasons. I consider that its failure to comply with its statutory obligation to give reasons was far more than "a defect in form" or a "technical irregularity". Whilst, in view of the Planning Tribunal's

statutory requirement to give reasons is extremely important for the reasons noted in both the Duncan and Routley decisions by Bisson, J. and Prichard, J. respectively. The practical situation is not beyond salvation. Calvin v. Carr shows that a decision which was void still has sufficient life to enable it to be the subject of an appellate decision which can make it effectively valid.

I consider that I can make an order under Section 5 in respect of the site of the treatment station. The Council or the Tribunal could have made an order under Section 167 (quoted earlier). In the circumstances of all parties before the Tribunal knowing the site under discussion, no substantial wrong or miscarriage of justice could occur by the making of an order under Section 5.

The application is dismissed with costs in favour of the second and third respondents of $500. The Council's counter-claim for an order under Section 5 is granted only in respect of the site of the treatment ponds covered by the consent.

I make no order for costs in favour of the first respondent. In my view, the action of the Council in disobeying the clear statutory requirement to provide reasons and its confused role over the siting of the effluent ponds, has rather provoked these proceedings.

R. D. Barker J.

SOLICITORS:

Evans, Bailey & Co., Hamilton, for Applicants

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