4/9 NZLR X

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.370/83

1026

BETWEEN PATRICIA MARTIN & OTHERS

Plaintiffs

A N D HER MAJESTY'S ATTORNEY GENERAL FOR THE DOMINION OF NEW ZEALAND

Defendant

Hearing: 11, 12 & 13 April 1984

Counsel: C.B. Atkinson Q.C. & I.D. Scott for Plaintiffs
G.K. Panckhurst & Miss K. McDonald for Defendant

Ruling: 6 Aug 1984

RULING ON APPLICATION FOR DISCOVERY Cook J

By agreement there has been discovery between the parties and production of documents, but this has stopped short of the production of the minutes of the meeting of the committee of the Land Settlement Board when it reached its decision following the meeting on 25th August 1983, the meeting at which the Rolleston Crown tenants made submissions in support of a request that the Board reconsider its decision to sell the land at Rolleston by auction. Minutes of the meeting, up to the point when the tenants and members of the public and press left the meeting, are available, but the defendant has objected to production of minutes from that point on: the record of what may be regarded as the private deliberations of the Committee.

Discovery is sought by the plaintiffs so that the

minutes may be available for that portion of the proceedings which constitutes the application for a review of the decision taken on the 25th August. In the amended statement of claim, which separates from the causes of action based on contract and tort the allegations in support of the review, it is alleged in paragraph 18:-

> "In the circumstances the Defendant in breach of natural justice or in excess of its jurisdiction by taking into account matters which it ought not to have taken into account or by failing to take into account matters which it ought to have taken into account has reached an invalid or voidable decision as to the disposal of the said land ...."

Then follow particulars which need not be quoted now.

For the defendant, Mr Panckhurst made it clear that the demand for production of the minutes was not resisted on the grounds of Crown privilege but rather as a question of public policy, the principle being that persons or committees in the position of judges or arbitrators may not be required to give evidence concerning the deliberative process which they have employed and that, by the same token, minutes recording what was said and decided in the course of such deliberations should not be capable of being put in evidence either.

It is necessary to be clear as to the functions of the Board and, consequently, of any committee to which it delegates its powers. By virtue of Section 13 of the Land Act it is the duty of the Board to carry out the provisions of the Act for the administration, management, development, alienation, settlement, protection and care of Crown land; there are also powers in relation to the purchase of land by the Crown. By Section 15 the Board may, from time to time, delegate any of its powers to any committee of the Board or any Land Settlement Committee appointed under Section 14, either as to matters within its jurisdiction generally or in any particular case or matter. Section 16 grants special powers to conduct enquiries and commences as follows:-

> "For the purpose of hearing and determining any matter, question, doubt, or difference in relation to any matters within the Board's jurisdiction, or for the purpose of arriving at a decision upon any application submitted to it, or of making any inquiry into breaches of this Act or of any former Land Act, the following provisions shall apply:"

Then follow powers to subpoena witnesses, to examine persons on oath for which purpose all the proceedings with the Board are deemed to be judicial proceedings within the meaning of Section 108 of the Crimes Act (relating to perjury). There is also power for a rehearing. Section 17 provides that any person aggrieved by any decision of the Board, or any determination of an administrative nature by the Board, may apply for a rehearing and it is to be noted that, by virtue of Section 18, where any lessee or licensee considers himself aggrieved by any decision of the Board affecting his lease or licence, he may appeal to the High Court subject to notice being given as specified. It is made clear, however, that in this case a decision of the Board does not include a determination of an administrative nature.

The Act recognises that at times the Board will make decisions and at other times determinations of an administrative nature. While the duties would appear basically to be administrative, there must be many occasions, especially, one would imagine, in relation to the alienation of land, involving a consideration of competing interests, when a judicial element enters into the work of the Board and the decisions which it makes; in determining the present question, importance must attach to the particular function being undertaken at the meeting to which the minutes in question relate.

When, by reason of the resolution of the zoning difficulties it became feasible to dispose of the land, the Board met on 28th February 1983 and decided to confirm an earlier decision in 1979 that no preference would apply in the disposal of land at Rolleston and, at the same time, decided

that disposal should be by way of auction. The plaintiffs claim that that was an enquiry under Section 16, but the defendant says that it was a meeting. While I doubt if anything turns on the point, as it is the subsequent meeting in August with which we are concerned, from other papers it appears that it was a meeting rather than a formal enquiry; without deciding the point lest it should assume importance for other reasons, I accept, for present purposes, that it was a meeting only.

At the insistence of the Rolleston tenants, a rehearing under Section 17 was granted and the Board appointed a committee of its members to carry out that task. According to the decision ultimately delivered, the Board delegated to that committee power "to reverse, alter, modify or confirm the previous decision or determination". This rehearing took place on 25th August 1983 and, as mentioned, minutes of the meeting, up to the point when all members of the public, the press and departmental officers left the meeting, were kept and made available. Following the committee's deliberations, a written decision was issued. This is some six pages in length and sets out the background facts, the issues in question, the reasons for the Board's decision in February, the general tenor of the submissions made at the rehearing, primarily on behalf of the tenants but also by others. Reference is made to information obtained from the Department, including information as to the manner in which the licensees had performed as tenants; also other matters taken into consideration.

It is recorded that the basic issue was whether or not the licensees as a group were to be granted preferential allotment of the properties and that the committee had unanimously come to the conclusion that they should not and decided accordingly. The written decision then goes on to mention the matters which led to this decision and made some general observations, concluding with the statement that the Board itself had fully considered the pros and cons of each method of disposal and the Committee saw no reason to do this

again. It is the minutes of the meeting of the committee while it was deliberating and coming to these decisions which the plaintiffs seek to have produced.

I accept that in the present instance the committee of the Board was doing more than carrying out a purely administrative function; it was weighing in the balance the claims of the tenants against other considerations which had a bearing on the question how the land should be disposed of. It seems to have been exercising a quasi judicial function and, it is in that light, that the question should be approached.

There appear to be no decisions of direct assistance and it is necessary to see if an analogy may be drawn from other comparable situations. In relation to arbitration, the compentency of an umpire to give evidence was considered by the House of Lords in Duke of Buccleuch v. Metropolitan Board of Works [1872] L.R. 5 H.L. 418 where, according to the headnote:-

> " An arbitrator may be called as a witness in a legal proceeding to enforce his award.
>
> He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration.
>
> But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him."

The following appears in the speech of Cleasby B. at 433:-

> " First: With regard to the competency of the umpire as a witness, I am not aware of any real objection to it.
> .....
> But those objections do not apply at all to a person selected as arbitrator for the particular occasion by the parties, and he comes within the general obligation of being bound to give evidence. The practice entirely agrees with this; for it is every day's practice for the arbitrator to make an affidavit where a question arises as to what took place before him, and I have known him to be examined as a witness without objection.

> Secondly: Being competent generally, it follows that he may be questioned as to what took place before him, so as to shew over what subject-matter he was exercising jurisdiction.
> .....
>
> Thirdly: As soon as the award is made it must speak for itself. It must be applied, as in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award."

This was followed in Ward v. Shell-Mex and B.P. Ltd [1951] 2 All ER 904 which, in some ways, may be closer to the present situation in that the witness, whose competence was in question, was a member of a medical board. There it was said by Streatfeild J. speaking of the doctor member of the tribunal, at 907:-

> "There is, of course, the well-known exception of the opinion of experts, but, as I have pointed out, in my view, although this doctor whose evidence is in issue here is an expert and was appointed to this tribunal because he was an expert, the opinion which he there expresses is not so much the opinion of an expert as the opinion of a member of a statutory judicial body. Therefore, in my view, his evidence falls under quite a different principle. He would be an admissible and competent witness to give evidence, as Cleasby, B., says, only on the facts and matters which were presented before him, but he would not, in my opinion, and I so rule, be enabled to give any evidence as to the reasons which prompted him in coming to the conclusion which resulted in the certificate granted by the medical board under the Act. That certificate - I do not know what it was - stands on its own footing and it cannot be contradicted or explained or varied by a member of that tribunal."

In that case the evidence was required not to challenge in any sense the decision of the medical board, but to support the case of the person in respect of whom the certificate had been given in an action for damages against his employers.

The question in a different form came for consideration in Zanatta v. McCleary [1976] 1 N.S.W.L.R. 230, where an attempt was made, in support of a new trial application, to rely upon an affidavit purporting to recount a conversation which was said to have taken place between the deponents and the trial Judge at a time after the hearing. In his judgment Street C.J. had this to say, at 234:-

> "But drawing upon such guidance as is to be derived from the authorities, I am of opinion that evidence cannot be adduced from a judge seeking to establish how his decision was reached, whether the line of inquiry be directed to the admissibility of the material before him, to the process of reasoning which he adopted, to the weighing by him of extraneous irrelevancies or otherwise to matters underlying his adjudicative process. The correctness or regularity of proceedings before him is not examinable in the light of subjective evidence from the judge who heard the case. There are in my view strong considerations of public policy in denying to any party the freedom to elicit from a judge evidence of this character. Nor is it without significance that no such case can be found where such evidence has been tendered and admitted."

He had made reference to Hennessy v. Broken Hill Pty Co. Ltd [1926] 38 C.L.R. 342 where the following appears in the joint judgment of three members of the High Court of Australia, Knox C.J., Gavan Duffy J., Starke J. at p. 349:-

> "Even Judges are competent witnesses, though they may not be compellable to testify as to matters in which they have been judicially engaged; but their evidence has been received upon matters which did not involve the exercise of their judicial discretions and powers (R. v. Earl of Thanet [1799] 27 How. St. Tr. 821; Taylor on Evidence, 10th ed., sec. 938; Best on Evidence, 12th ed., p. 179). Arbitrators, too, are equally competent as witnesses, though they cannot be compelled to testify as to the reasons which influenced them in the exercise of their discretionary powers or to explain, vary, contradict or extend their awards (Duke of Buccleuch v. Metropolitan Board of Works [1872] L.R. 5 H.L. 418).
>
> Now, the members of the Medical Board are neither Judges nor arbitrators: their functions are

> administrative and supervisory. To them is confided the duty of ascertaining and certifying whether a workman is or is not suffering from lead poisoning, and whether he should be removed from future exposure to its risks. It is impossible in these circumstances, in our opinion, to deny their competency as witnesses; but the extent to which they can give evidence of matters coming before them officially is another matter.
>
> In our opinion the evidence tendered is admissible because it is not prohibited or privileged, because it does not seek to invalidate any act of the Board or to explain, contradict or vary any of its certificates or acts or to disclose the manner in which the Board exercised any of its functions, and because it merely seeks the disclosure of existing facts and symptoms and the opinion of expert witnesses who also happened to be members of the Board upon those facts and symptoms."

From these authorities I would say, in relation to the minutes of the committee, that, so far as they may record the deliberations of the members, the views expressed as they worked towards a concensus, the weight attached to one particular factor as against another, evidence as to such matters would not be admissible and, by the same token, the minutes should be privileged and thereby protected from production. If I knew that the minutes contained no more than that, then I would rule that the defendant, the Attorney General, was justified in refusing their production. On the other hand, if the minutes should include reference to information put before the committee after the public portion of the hearing had concluded, information which formed part of the general body of information which was before the committee when it commenced to deliberate upon the question to be decided, then to that extent I consider the minutes are not subject to protection.

It may be that what was said by Mr Panckhurst, counsel for the defendant, was intended to convey to me that the minutes contained nothing of that nature. If he can give confirmation of that, then I would regard the matter as at an end and rule that the minutes are protected from production.

If he feels he cannot give such an assurance, however, then in order to remove any doubt it would be best if the minutes were placed before me so that I could decide whether they should be produced, in whole or in part.

Solicitors:
Bates, Edgar, Polson & Co., Christchurch, for Plaintiffs
Crown Solicitors Office, Chrristchurch, for Defendant.