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IN THE HIGH COURT OF NEW ZEALAND
(ADMINISTRATIVE DIVISION)
WELLINGTON REGISTRY

A.338/82

1630

No Special Consideration

BETWEEN	NELSON COLLIE of Isla Bank, Farmer First Applicant
AND	ALISDAIR ROSS LINDSAY of Isla Bank, Farmer Second Applicant
AND	ERLE ROBERT ALEXANDER LINDSAY of Isla Bank, Farmer Third Applicant
AND	ALLAN JAMES TEVIOTDALE of Isla Bank, Farmer Fourth Applicant
AND	DAVID TEVIOTDALE of Isla Bank, Farmer Fifth Applicant
AND	THOMAS JOHN McNEIL of Isla Bank, Farmer Sixth Applicant
AND	ERIC BERNARD ANDERSON of Invercargill, District Court Judge First Respondent
AND	SOUTHLAND CATCHMENT BOARD a body corporate constituted under the provisions of the Soil Conservation and River Control Act 1941 Second Respondent

Hearing 27 September 1984

Counsel C J Hodson and N P Lucie-Smith for Applicants
No appearance for first Respondent
B J Slowley for second Respondent

Judgment 13 December 1984

JUDGMENT OF DAVISON C.J.

BACKGROUND

The Southland Catchment Board pursuant to a resolution dated 9 March 1979 instructed its classifier Mr David Andrew Fraser to classify the Aparima River Catchment

Scheme. The classification was to be made in order to enable the Southland Catchment Board (hereinafter called the "Board") to levy a separate rate under Section 86 of the Soil Conservation and Rivers Control Act 1941 (hereinafter called the "Act") for the purpose of financing the scheme.

The Act deals with "classification of lands for rating" in ss 101 and 102. The relevant parts of these sections are as follows:

s.101(1) "Save as provided in this section, each rate made by any Board, other than an administrative rate under section 84 hereof, shall be made and levied on a graduated scale according to a classification, made as hereinafter provided, of the rateable property upon which the rate is to be levied."

s.102(1) "Subject to the provisions of section 101 of this Act, for the purpose of financing the construction and maintenance of all works for which the Board of the district is responsible, and for the purposes of this Act other than the making of an administrative rate, all lands in the district that are liable to be rated under this Act for the purposes for which the rate is to be levied shall be so classified as to provide a basis of rating that is equitable as between ratepayers and as between groups of ratepayers. The Board may from time to time appoint one or more fit persons who shall, subject to any directions which the Board may give from time to time, so classify all such lands.

(2) Subject to the provisions of subsection (1) of this section, all such lands shall be classified according to the degree of direct and indirect benefit received or likely to be received from works carried out or to be carried out by the Board or for the maintenance of which the Board is responsible; and there shall be not less than two nor more than six classes named A,B,C,D,E, and F respectively, and where, in the opinion of the Board, any land cannot reasonably be classed as receiving or being likely to receive any benefit direct or indirect from the works, that land shall be placed in another class named Class G. "

The Board on 9 March 1979 appointed as its classifier (under s 101(1)) Mr Fraser, a Catchment Board Officer.

THE CLASSIFICATION

Mr Fraser has stated in relation to his classification:

> The Aparima catchment referred to in the Board's resolution covers an area of 1,375 square kilometres extending 85 kilometres in a north-south direction and averaging around 16 kilometres wide.
>
> The resolution of the Board permitted me to use the maximum number of classes provided for by the Soil Conservation and Rivers Control Act 1941.
>
> The system of rating selected was land value rating.
>
> The proportions between each class were established by using Class F as the base class and ranking the higher classes in relation to it. The proportions between the various classes were not established by any complicated mathematical formula but rather by means of a considered opinion after taking into account all the relevant data and my extensive local knowledge of the catchment.
>
> Because of the nature of the rate and the use to which it would be put within the catchment, I considered that there was no land which would not receive some indirect benefit and would therefore qualify for Class G. As all land within the catchment must be at least Class F, I used F Class as a base from which to establish the proportion between the various classes.
>
> I have used six classes of benefit named A,B,C, D,E, and F and assigned a proportion to each. However there is no A or B class land in the catchment district at present. In my opinion no land within

the Aparima Catchment gains sufficient benefit to warrant using Class A or B. These two classes are reserved for benefits to be gained from high value work such as stopbanking or edge protection.

The classification is intended to be long term and will be amended from time to time as works proceed and benefits accrue.

Because of the size of the classification and the limited number of classes available, it is impossible to assess the degree of benefit every individual property in the catchment receives. For that reason, with the overall consideration that I had to provide equality between ratepayers and groups of ratepayers, I had to recognise that there could be a range of benefits within each class. For that reason I used "the broad brush" approach. An example of this approach is the land belonging to the Sixth Applicant. Although part of it floods and could be said to receive a direct benefit from Board works, that part of the land is classified E, the highest of the indirect classes. Until stop banking schemes are instituted there was not enough known about the effect of willow and weed clearing on the flooding of the Sixth Applicant's land and for that reason, he and his neighbours were given the benefit of the doubt.

The classification was not simply imposed on the district. Before it was finalised the Second Respondent ensured that it received media publicity. Public meetings were held at various locations within the district so that interested parties could be told what the Second Respondent was doing. Opportunity was always given for questions or discussions. During the course of the preparation I had contact with a considerable number of ratepayers and on occasion amended the classification because of representations made.

Indirect Benefits

None of the applicants' lands have been classified for a direct benefit. However, the area of Isla Bank has to the west the Aparima River and to the east the Waimatuku River.

There were approximately 3000 ratepayers involved in the classification and of these 3000 some 103 appeals were filed and they were heard by District Court Judge Anderson appointed by the Minister of Justice.

The lands of the six applicants were classified F by the classifier. Applicants contended before Judge Anderson that they should have been classified G because in terms of s 102(2) of the Act:

> " They cannot reasonably be classed as receiving or being likely to receive any benefit direct or indirect from the works".

Judge Anderson found:

> " No evidence was given to me that persuaded me that the classifier following his responsibilities under the Act was unfair in his classification of these lands. "

He dismissed the appeals.

PRESENT PROCEEDINGS

There is no right of further appeal from the decision of the District Court Judge under the Act. The applicants have therefore sought judicial review of his decision under the provisions of the Judicature Amendment Act 1972. Four main grounds were raised in the statement of claim. They were:

1. That the District Court Judge made an error of law in accepting that "the objectors are in the nature of a plaintiff, and the Board in the nature of a defendant and the onus is on the objectors to establish the case and prove the Board is wrong".

2. That the District Court Judge in deciding that the consequential effect of a successful appeal on others who had not appealed was a relevant consideration in determining the appeals took into account an irrelevant consideration.

3. That the District Court Judge made an error of law in accepting that the proportions between each class could be established by using Class F as a base line and ranking the higher classes in relation to it.

4. That the District Court Judge made an error of law in deciding that Section 102(2A)(a) of the Act permits County operations to be taken into account in determining whether there is an indirect benefit pursuant to that Act, and he made an error of fact and of law in deciding that the applicants' lands would receive indirect benefit from the proposed scheme to justify an F classification.

I now deal with each of these.

ONUS OF PROOF

In referring to this matter the Judge said:

" The Court sits as an appeal court and its duty is not to say what it would have done if it had been the classifier but to consider the appeals upon the evidence tendered and to correct proved mistakes and proved avoidable unfairness or injustice in relation to the 'scheme' overall.
In a previous hearing concerning the Lower Clutha Catchment His Worship Mr J W Kealy, S.M. made this comment:
' The objectors (the appellants) are in the nature of a plaintiff and the Board in the nature of a defendant and the onus is on the objectors to establish

> the case and prove the Board is wrong. The primary onus is not on the Board to satisfy me (that is the Court) they are right, but on the objectors to prove the Board is wrong'. "

Before this Court, Mr Hodson submitted that that approach adopted by the Judge was wrong in law. An appeal under the Act is, he said, a review of an administrative decision made by the Board and it was wrong to put the appellants in the position of plaintiffs.

Mr Hodson submitted that the extent of the onus on appellants is not to show that the classifier has made an error in his classification, but only to raise a doubt by pointing to matters which have not been taken into account, or by casting doubt on the validity of the classification. Once the appellants have done that, the onus moves to the Board to justify its classification.

This submission raises at once the nature of the proceedings on appeal before the District Court Judge under s 103 of the Act. No procedure is provided in the Act for the hearing of appeals. They are heard by a District Court Judge appointed by the Minister (s 103(5)). The appeal is heard by the District Court (s 103(12)).

It was submitted by Mr Slowley that in such case the provisions of s 124 of the District Courts Act 1947 apply:

> " Where under any Act any power, authority, or jurisdiction is given to [Judges], the proceedings shall be had and determined in a... Court in accordance with this Act and the rules unless some other procedure is specially provided or required, and [Judges] in the exercise of that power, authority, or jurisdiction shall have all the powers given under this Act to [Judges] and to Courts, but, except as aforesaid or as expressly provided in this Act or the rules, nothing in this Act or the rules shall derogate from or affect the provisions of any other Act conferring any power, authority, or jurisdiction on [Judges] or...Courts. "

Rule 203 of the District Court Rules 1948 dealing with the conduct of hearings provides:

> " .....If defended, the plaintiff (or his counsel) shall state his case, and adduce evidence; the defendant (or his counsel) shall state his case and adduce evidence, and also sum up the evidence, and then the plaintiff may reply on the whole case. If the defendant at the close of the plaintiff's case states his intention not to adduce evidence, the plaintiff shall sum up his evidence, and the defendant shall reply generally.... "

That was the form of procedure adopted by Judge Anderson as referred to earlier in this judgment.

However, that procedure does not appear to fit comfortably into the hearing of what is referred to in s 103 of the Act as an appeal against the classification or apportionment of rateable values or fixing of proportions in which rates are to be borne upon the grounds (a) to (h) set out in that section. The appeal is against an administrative decision of the Board which has never been the subject of a hearing.

There have been a number of appeals to the High Court and the Court of Appeal under s 103 of the Act but in none has there been any discussion of the onus, if any, that rests on an appellant.

In Lancaster v Manawatu Catchment Board [1957] NZLR 368, 370 Stanton J. in a judgment concurred in by the other two Judges, said:

> " While these provisions are primarily directed to the work of the Board and its classifiers, they are obviously also for the guidance of the Magistrate on the hearing of appeals, the object of the Legislature being to ensure as far as practicable that the affected lands shall ultimately be rated on a basis which is equitable as reflecting the respective degrees of benefit (if any) that such lands may be expected to receive from the intended works. It is clearly the duty of the Board to apply the principle of classifying so as to

> provide a basis of rating that is equitable as between ratepayers and as between groups of ratepayers in making its classification.
>
> If it be demonstrated by admissions made, or by the classification list on its face or otherwise, that the Board has ignored this duty as distinct from having fallen into errors in the course of endeavouring to perform this duty, then its classification list is obviously not one made pursuant to its statutory powers. "

Later at p 372 he said:

> " It is said that these considerations will require the Magistrate to be himself a classifier; but if he is to consider any objections and proposals to amend the list, he must necessarily be a classifier, he is the supreme and final authority on whether the list is to be altered and if so, in what way. He cannot escape the duty of hearing the objectors and deciding whether there are items in the classification that are unfair and how they should be corrected. "

Although the legislation has changed since the Lancaster case was decided, the function of what is now the District Court Judge has not. He is to be the classifier. Having heard an appeal, the District Court Judge -

> " shall either confirm the classification list or amend the classification list or any detail therein in such manner as he thinks reasonable to give effect to the decisions upon all appeals... " (see s 103(12)).

But the District Court Judge proceeded on the basis that he was not the classifier as stated by Stanton J. in the Lancaster case. The District Court Judge said in his decision:

> " The Court sits as an appeal court and its duty is not to say what it would have done if it had been the classifier but to consider the appeals upon the evidence tendered and to correct proved mistakes and proved avoidable unfairness or injustice in relation to the 'scheme' overall. "

If the District Court Judge is then to be the classifier, how is he to proceed where there has been nothing in the way of a formal hearing before the Board; no published reasons for its decision; and there is no record of the proceedings for examination or appeal? Some assistance can I think be gained from consideration of cases involving appeals under other statutes.

In Hammond v Hutt Valley & Bays Milk Board [1958] NZLR 720, Cleary J. in delivering the judgment of the Court of Appeal in a case under the Milk Act 1944, after noting at p 726 that the Regulations provide that an appeal shall be by way of an originating application under the Magistrates' Courts Rules and that such do not make any provision as to the procedure to be followed on appeal, stated at p 727:

> " It was conceded by Mr Relling that on an appeal under s 71 the appellant was entitled to a hearing de novo on the merits. We think this concession was rightly made. It appears to have been common ground between the parties throughout the various stages of the dispute that the Board, in dealing with the appellant's application for a licence, acted in an administrative capacity. Where there is no right of appeal against the decision of an administrative body, the Courts are confined to certain limited supervisory powers of the nature discussed in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 1 All ER 498. But here a right of appeal has been expressly conferred, and s 71(6) provides that, on appeal, the Court may reverse or vary the decision appealed against, or may confirm it, either absolutely or subject to such conditions and modifications as the Court deems just, or may make such other order as it thinks fit. It has been held in England that, where an appeal from the decision of an administrative body has been conferred in somewhat similar language, the appellate tribunal is bound to form an opinion of its own as to the merits of the matter and is entitled to substitute its opinion for that of the administrative body. "

A similar approach was adopted by Cooke J. in Re R (deceased) [1975] 1 NZLR 545, a case involving an appeal under the War Pensions Act 1954. At p 547 he said:

> " The section gives the Court the wide powers already mentioned and contains no indication of any limitation of the Court's appellate function, except that the notice of appeal is to state the grounds of the appeal. I conclude that Parliament intended a full review of the case and that the Court is not necessarily in any way fettered by the board's decision. The weight to be accorded to a decision under appeal will vary with the circumstances. "

Cases decided under the Town and Country Planning Act are also helpful in deciding on the approach to be adopted by the District Court Judge on appeal against a classification.

In Straven Services v Waimairi County [1966] NZLR 996 Macarthur J. in relation to an appeal to the Town and Country Planning Appeal Board under that Act said at p 1005:

> " I have considered all the provisions of the statute and of the regulations governing the procedure for the determination of appeals by the Appeal Board, but I can find nothing in those provisions which, either expressly or impliedly, points to there being any kind of presumption in favour of the decision of a county council under circumstances such as those existing in the present case. Having carefully considered the whole matter, my conclusion is that there is no legal basis for the view that in the present appeal there was an onus resting upon the plaintiff to satisfy the Appeal Board that the decision of the county council was wrong. On the contrary the true situation, I think, was that on the hearing of the appeal the issue for determination by the Appeal Board was essentially an issue of fact, namely, whether the plaintiff's proposed building was a 'detrimental work' within the meaning of s.38; and that, in accordance with the

> ordinary rule, the burden of establishing the affirmative of that issue rested upon those asserting the affirmative, i.e. the county council and, it would seem, the Regional Planning Authority. "

Woodhouse J. reached a similar conclusion in Wellington Club Inc. v Carson, Wellington City and Ors [1972] NZLR 698 at p 702, where he said:

> " In Straven Services Ltd v Waimairi County [1966] NZLR 996 Macarthur J. was obliged to consider whether there was any presumption in favour of a decision of a Council refusing an application to erect a petrol service station on grounds that it was a 'detrimental work' within the meaning of s 38 of the Act. He decided that there was no such presumption. He held on the contrary that in such a case the burden lay on the Council to establish that the proposed use was a detrimental work because the Council was asserting the affirmative of the issue. In his opinion cases where an appellate Court proceeded by way of rehearing on a record of the evidence given in the lower Court were inapplicable; and he said that he was able to find nothing in 'the provisions of the statute and of the regulations governing the procedure for the determination of appeals by the Appeal Board ... which either expressly or impliedly, points to there being any kind of presumption in favour of the decision of a county council under circumstances such as those existing' in the case before him: see p 1005.
>
> That case turned, of course, upon a much more limited question than the issue now raised before me: but I entirely agree with the conclusion reached by Macarthur J. "

The procedure adopted on appeal in those cases seems to me entirely appropriate to an appeal against a classification. The hearing before the District Court Judge is a hearing de novo. It is in fact the first hearing of the matter. There is no onus on an appellant to prove

the classification wrong. The District Court Judge has the duty to satisfy himself that the classification is fair and just, and although an appellant may appeal only on one or more of the grounds set out in s 103 of the Act, his doing so raises no onus on him to satisfy the District Court Judge that the decision of the Board was wrong. The Judge must place himself in the position of classifier and decide for himself the fairness of the classification or the element of it under appeal.

Such procedure avoids the difficulty of an appellant who has no expert experience often appearing in person, having to face the problems which would arise were an onus to be placed upon him of satisfying the District Court Judge that the decision of the Board was wrong.

I do not regard s 124 of the District Courts Act 1947 or Rule 203 of the District Courts Rules 1948 as preventing the District Court Judge on appeal against a classification from following the course which I have indicated as appropriate. Those provisions are merely procedural. They do not affect the question of onus of proof at all.

In so far therefore as the District Court Judge placed an onus on appellants to satisfy him that there were "proved mistakes and proved avoidable unfairness or injustice in relation to the schemes overall" I find that he approached the appeals in the wrong manner. The object of the Act is to ensure that as far as possible the lands affected by the classification are rated on a basis which is just and equitable for all ratepayers. When matters are taken to appeal the District Court Judge is to assume the role of classifier and must look at the classification, consider the matters raised by the parties and decide whether it is unfair or inequitable, and if so how to correct it. He is given full powers by s 103(12) of the Act "to confirm the classification list or amend the classification list or any detail therein in such manner as he thinks reasonable to give effect to the decisions upon all appeals".

There will have been no hearing before the Board and no notes of evidence so the District Court Judge will have the benefit of hearing the evidence and the submissions of the parties and will be in a position equally as good as the Board to make his decision as classifier on the fairness or otherwise of the classification. The grounds of appeal which must be stated merely serve to delimit the scope of the inquiry and pinpoint the issues to be raised before the District Court Judge. They do not, however, raise any onus on an appellant to prove such matters. The District Court Judge must decide the fairness of that part of the classification challenged on the whole of the evidence before him, and whilst the classification of the Board may be taken into account by the Judge, such classification is not to be presumed to be correct until proved wrong by an appellant.

EFFECT OF APPEALS ON OTHERS

It was submitted on behalf of appellants that the District Court Judge took into account an irrelevant consideration, namely, the effect of a successful appeal on others who had not appealed. The District Court Judge said:

> " All the appeals with the exception of the 'Board's' own appeals in the event have been dismissed. None of the appellants were able to satisfy me on matters of classification that the classifier had approached his task in a manner other than required by the 'Act'. It would seem to me that in the absence of expert evidence, weighing the whole of the 'scheme', and not individual complaints that the task of the appellants was indeed difficult. It must also be remembered that the Court is not set up to amend the engineering scheme. It is a court of appeal in relation to the classification and the task of the Court is in relation to the overall classification and the effect not only to the appellants but also in relation to others who have not appealed, but may be affected by any decision of the Court. "

Mr Hodson argued that such an approach was wrong and that each appellant was entitled to individual consideration. Reference was made to Lancaster v Manawatu Catchment Board (ante). But that case does not establish that the classifier must ignore the effect of changing an appellant's classification on other ratepayers who have not appealed. As Stanton J. said at p 371:

> " Under s 109 (as enacted by s 16 of the Amendment Act 1952) a landowner may appeal on the grounds that his land, or any other land is not fairly classified, that land is improperly (i.e. unfairly) included in or excluded from the list, or that the proportions in which rates are imposed do not fairly represent the varying degrees of benefit to the land in the several classes. If any of these objections is established, and even if a large number of them are, it is the duty of the Magistrate to amend the list accordingly, not to refuse to consider it. By subs (6) of the same section (as enacted by s 3(2) of the Amendment Act 1954), the Magistrate is required to do one of two things, either confirm the list or amend it in such manner as he thinks reasonable, which must mean to make it equitable as between the various owners of land affected. "

It seems to me clear that when the District Court Judge is required to decide upon the fairness or unfairness of a classification he must have regard to that matter as it affects the various other ratepayers. It would be surprising if the District Court Judge did not take into account the effect of changing an appellant's classification upon other ratepayers. A total sum of rates must be levied on the whole of the classified area and a reduction of rates to be collected from one property must result in an increased levy on other properties in order to achieve the same total.

The District Court Judge did not in my judgment err as claimed by the appellants.

CLASS F BASELINE

It was submitted by Mr Hodson that the District Court Judge made an error of law in accepting Class F as a baseline and ranking higher classes in relation to it. Section 102(2) of the Act provides:

> " Subject to the provisions of subsection (1) of this section, all such lands shall be classified according to the degree of direct and indirect benefit received or likely to be received from works carried out or to be carried out by the Board or for the maintenance of which the Board is responsible; and there shall be not less than two nor more than six classes named A, B, C, D, E, and F respectively, and where, in the opinion of the Board, any land cannot reasonably be classed as receiving or being likely to receive any benefit direct or indirect from the works, that land shall be placed in another class named Class G. "

Mr Hodson argued that the Board appears not to have had regard to a possible G classification. That is a classification of land that cannot reasonably be likely to receive any benefit direct or indirect from the works. There should have been, he said, a resolution of the Board put before the District Court Judge that there was not any land in the G category within the classification area.

However, the issue was one which had been clearly before the Board's classifier. It was referred to in the Board's resolution of 9 March 1979 instructing the classifier to act. It was referred to by the District Court Judge in his decision and can not have been overlooked by him. In using as a baseline for classification Class F, which was the lowest of the classifications receiving direct or indirect benefit, the District Court Judge acted perfectly reasonably in relating other classes to it. That left him free to classify as G all lands which were not likely to receive any direct or indirect benefit from the works.

The District Court Judge did not err in law in the respect alleged.

INDIRECT BENEFIT

In his decision the District Court Judge said:

> " The evidence suggests that Mr McNeill does accept that there are amenities such as roads, bridge approaches, which if not protected by 'Board' works would ultimately mean a higher rate over the whole county if such were subject to flood damage. There is no doubt that the Act provides for that position to be taken into account as an indirect benefit. Whilst Mr McNeill may wish to argue that one should not mix county operations with 'Board' operations that cannot be said for the Act provides otherwise. "

Mr Hodson submitted that the District Court Judge made an error in law in deciding as he did that the Act permits County operations to be taken into account in determining whether there is an indirect benefit in accordance with the Act. Section 102(2A)(a) provides:

> " In respect of works for the protection of land from flood or erosion or for the conservation of soil or water ... indirect benefit shall be assessed by reference to the establishment or preservation of economic units of land, the protection or establishment of water, sewerage, drainage, electrical, gas, and other services, and of works, services, and amenities to which rates from the lands may be applied, and of communications, and of any other property, service, or amenity within or benefiting the lands being classified. "

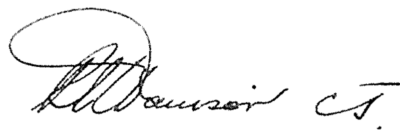
The issue was one of fact for the decision of the District Court Judge. He had before him the definition of indirect benefit and he did not wrongly interpret that expression in his decision. There is no reason to find that he erred in law.

CONCLUSION

In the result, the applicants have succeeded on the ground that the District Court Judge wrongly applied an

onus of proof upon the appellants. His decision in respect of their appeals must be quashed and the appeals referred back to him to be reconsidered on the basis that the hearing is one de novo in which he acts as classifier and where there is no onus upon the District Court Judge to prove the classification to be wrong or unfair. The approach of the District Court Judge on the rehearing should be to decide himself whether the classification is fair and equitable in accordance with the Act.

Costs reserved.



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