IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP.188/87

IN THE MATTER OF *Part I of the Judicature Amendment Act 1972*

BETWEEN NORTHERN ROLLER MILLING COMPANY LIMITED
a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as a flour miller

First Applicant

AND THE MANAWATU MILLS LIMITED
a duly incorporated company having its registered office at Palmerston North and carrying on business as a flour miller

Second Applicant

A N D THE COMMERCE COMMISSION
a duly incorporated body pursuant to Section 8 of the Commerce Act 1986

First Respondent

AND THE NEW ZEALAND WHEAT BOARD
a body corporate constituted under the Wheat Board Act 1965 and having its principal office at Christchurch

Second Respondent

AND THE ATTORNEY-GENERAL

Third Respondent

Hearing: 1, 2 and 3 February 1994

Counsel: J.R.F. Fardell and G.A. Cox for Applicants
K. Smith for First Respondent
C.J. Mathieson and R.J. Sussock for Second and Third Respondents

Judgment: 24-3-94

JUDGMENT OF GALLEN J.

The applicants in these proceedings seek by way of review, orders in relation to a decision of the Commerce Commission dated 8 February 1991. By that decision the Commission fixed final authorisations at nil in respect of flour supplied by the applicants to the Wheat Board during the period 1 August 1986 to 31 January 1987.

The factual background is not in dispute. The sale of both wheat and flour had been the subject of regulatory control in New Zealand for many years. In particular the Wheat Board Act 1965 provided that the Wheat Board was the sole buyer and seller of wheat and flour in New Zealand. The price for flour had to be authorised by the Secretary of Trade and Industry and the considerations to be observed by the Secretary in fixing the prices were set out in s.98 of the Commerce Act 1975. It is accepted that the principles which were developed and applied for fixing the price involved ascertaining the net wheat costs, conversion costs of processing flour from the wheat and an element of profit. As from 1 February 1985, mills were charged for the total inter-mill charge of wheat. On the receipt of that wheat they paid 25% of the purchase price to the Wheat Board. The balance was not due until the 30th of the month following. The Wheat Board itself paid the mills for flour purchased by the Wheat Board on a fortnightly basis. The effect of this arrangement was that the mill was paid for flour up to 4 weeks before the mill had to pay for the wheat used to produce that flour and this obviously produced a significant financing advantage to the mill concerned. Subsequently an arrangement was initiated by which the Wheat Board charged interest, but this was recoverable by the mill concerned by virtue of an appropriate adjustment to the millers' prices.

As from 1 February 1986, the Wheat Board permitted mills to purchase 50% of their wheat requirements directly from growers. No doubt such an arrangement had its advantages but it also had the

obvious disadvantage that the advantageous financing arrangements ceased to be available to the mills concerned. Accordingly the Secretary to Manawatu Mills Limited on 12 November 1985, wrote to the officer at the Department of Trade and Industry dealing with the matter and the letter contained the following statement:-

> "I have a couple of points regarding Millers Prices for 1986 that I would like clarification on;
>
> (1) Will interest charges be allowable as a conversion cost in 1986? As we will be purchasing 50% of our wheat direct from growers our overdraft will be substantially higher than it has been this year.
>
> (2) Will interest charges made on loans for the purposes of capital development be recoverable in the Millers Prices in 1986?"

This letter was answered by letter dated 25 November 1985 which contained the following passages:-

> "2. Interest costs on Contract Wheat
>
> Interest cost associated directly to the cost of the wheat will be recoverable either through the monthly wheat price or alternatively as a conversion cost. The Secretary would prefer the direct allocation method although discussions with the Wheat Board are continuing on the exact method of levying interest charges for 1986 wheat.
>
> 3. General Interest Cost
>
> The longstanding policy of the department is that when interest costs are properly allocated to the goods and services under review then these costs are to be recoverable, e.g. as in 2 above. However when determining a return or profit under section 98 (1)(c) of the Commerce Act 1975 on total gross assets then general interest is not considered as it is contrary to the objects of price control."

As a result of receiving that advice, Manawatu Mills Limited determined to purchase wheat directly from farmers and entered into an agreement with Westpac Merchant Finance to provide the funds for the contract wheat purchases. By letter dated 23 January 1986, the Secretary for Manawatu Mills Limited writing to the Department of Trade and Industry, referred to this agreement in the following terms:-

> "The agreement is such that Westpac finance the purchase of all grain and we pay for the grain as it is used (very similar to the New Zealand Wheat Board system except that in this case we pay in full as used). Westpac will invoice us with a monthly stock holding charge which is in effect an interest charge.
>
> In keeping with your comments of 25 November 1985, I understand that if we forward a copy of their invoice to you, we would receive a direct allocation in conversion costs to cover the charge."

This was answered by letter dated 3 February 1986 by letter from the Department of Trade and Industry which was in the following terms:-

> "Thank you for your letter of 23 January concerning your financial arrangements for purchasing contract wheat.
>
> I can confirm that the monthly stock holding charge will be recoverable if this charge is directly attributed to the purchase of wheat. This charge can either be recovered as a conversion cost or be included with the monthly cost of wheat that will be required to be sent to this office each month.
>
> Details of your contract purchases and costs of wheat must be sent to this office at the beginning of each month covering the period of the previous calendar month. This stock handling charge could be included in this return.

> The Department envisages that this information should be sent in the form of a declaration that the costs/tonnages stated is correct and that the Department reserves the right to examine and inspect the documentation if required.
>
> Please contact me if you have any further questions regarding this matter."

Subsequently on a month by month basis, the interest charges incurred were advised to the Department of Trade and Industry and as a result, affected the wheat cost calculation for Manawatu Mills Limited for the following month in a manner which compensated for the interest.

On 1 May 1986 the Commerce Act 1986 came into force whereby the Commerce Commission replaced the Secretary of Trade and Industry as pricing authority. The criteria for determination of price also changed, these now being provided by the provisions of ss.70 and 73 of the Commerce Act 1986 which are in the following terms:-

> "70. (1) Subject to section 71 of this Act, the Commission may, on application by any person who is a supplier of controlled goods or services, authorise a maximum, actual, or minimum price, as the case may require, for those controlled goods or services by notice in writing to that person.
>
> (2) All the provisions of section 60 of this Act except subsections (2)(c) and (d), (3) and (6) of that section, shall apply to every application under subsection (1) of this section as if it were an application under section 58 of this Act.
>
> (3) The Commission may, of its own motion, from time to time by notice in the *Gazette,* authorise a maximum, actual, or minimum price, as the case may require, for any controlled goods or services.
>
> (4) The Commission shall authorise prices in such manner as it thinks fit, and may authorise different prices

for goods or services to meet different circumstances relating to the supply of those goods or services.

(5) An authorisation granted by the Commission under this section shall include such provisions, not inconsistent with this Act, as the Commission thinks necessary or desirable for the proper administration of the authorisation or to ensure compliance with its provisions.

(6) Every such authorisation shall have effect from the date specified in it.

(7) Every supplier of goods or services in respect of which the Commission proposes to authorise a price under this section, shall from time to time produce, or, as the case may be, furnish to the Commission, within such time as it may specify, such documents and information in relation to those goods or services as may be required by the Commission for the purpose of enabling it to exercise its functions under this section.

(8) The Commission may consult with any person who in the opinion of the Commission is able to assist it in making a determination under this section.

(9) The Commission shall have regard to any submissions made to it -

(a) In the case of an application under subsection (1) of this section, by the applicant; and

(b) In any case where the Commission authorises a price for controlled goods or services under subsection (3) of this section, by any supplier of those goods or services.

(10) The Commission may have regard to any advice or information obtained from any person with whom it has consulted pursuant to subsection (8) of this section.

(11) The Commission shall state in writing its reasons for any determination under this section.

(12) Any authorisation made under subsection (1) of this section may be amended or revoked at any time by the Commission by notice in writing to the supplier of the goods or services.

(13) Any authorisation made under subsection (3) of this section may be amended or revoked by the Commission by notice in the *Gazette*.

(14) For the purpose of informing purchasers and prospective purchasers of the authorised price of any controlled goods or services, the Commission shall publish, or require the supplier of those goods or services to communicate to purchasers, the authorised price for the goods or services in such manner and in such circumstances as it thinks fit.

73. In exercising its powers under section 70 and section 72 of this Act, the Commission shall have regard to -

(a) The extent to which competition is limited or is likely to be lessened in respect of the controlled goods or services:

(b) The necessity or desirability of safeguarding the interests of users, or consumers or, as the case may be, of suppliers:

(c) The promotion of efficiency in the production and supply or acquisition of the controlled goods or services."

By letters dated 19 May 1986, the Commerce Commission wrote to all mills advising them of the change in pricing authority. The letter contained the following statement:-

"Attached for your information is a copy of the latest approved flour prices for your mill(s) to take account of changes in wheat costs for April. These prices take effect from 1 May 1986.

You may not be aware that with the coming into force of the new Commerce Act 1986 on 1 May 1986 the relevant authority for items subject to price control has transferred from the Secretary of Trade and Industry to the Commerce Commission, for applications made since 1 May 1986. The effect of this transfer is largely administrative but there are some aspects of the new Act that mills should know:

(a) Any substantive application to increase prices under the Act is now subject to a fee of $300 which must be forwarded along with the application before it can be considered. (NB This does not include the current monthly adjustments based on changes of wheat prices).

(b) Approval will be given in the form of a price authorisation by the Commission rather than the traditional special approval. The effect of an authorisation will be the same as an approval.

Apart from these considerations the current pricing policies and procedures will largely remain unaltered."

The letter was signed by Mr Bruce Auld who had previously signed communications on behalf of the Secretary for Trade and Industry.

Mr Mathieson submitted that this was intended only as a transitional arrangement and referred to the affidavit of Mr Tucker which indicated this. The letter itself however does not suggest that the arrangement is transitional and states affirmatively that the effect of the transfer is largely administrative.

S.112 of the Commerce Act provided for a transitional period from 1 May 1986 to 31 July 1986. On 3 June 1986 a meeting was held between representatives of the Commerce Commission and the General Manager of the New Zealand Wheat Board. By that time all parties were aware that regulation of prices for flour was to cease from

1 February 1987. Mr Auld made a note of what was discussed at the meeting and that note included the following paragraphs:-

> "1. Mr Elliott wanted to talk to Commission on a number of matters relating to the implementation of price control on flour to take account of the deregulation of flour prices from 1 February 1987. He specifically wanted to know our policies on accounting for wheat stocks in flour prices and the possibility of retrospective adjustments in flour prices after 1 February.
>
> 2. Mr Wilkinson outlined that after 31 January 1987 the Commission will have no legal authority to authorise any prices at all. Therefore no retrospective adjustments could be made and the mills will be on there (sic) own in this regard. So any adjustments that have to be made to account for pre-Jan 1987 must be done so before 31 January. There could be no exceptions to this. Mr W could not envisage any standardisation of wheat stock values as at 31 January 1987.
>
> 3. With regards to wheat stocks and to all other costs and asset valuation the Commission does not intend to price flour any differently. Wheat stocks will continue to valued at current wheat costs with the current divisors and costs continuing till the last price approval - with effect from 1 January 1986. All adjustments needed will have to be done by that day."

On 10 June 1986 the Commerce Commission sent to all mills, a letter in the following terms:-

> "This letter is to advise your company of the Commerce Commission's approach to price control on flour up until 31 January 1987.
>
> From 1 February 1987 price control will be removed from flour and each mill or company will be free to set its own price in the light of market circumstances. From that date the Commission will have no legal powers to determine

flour prices. Retrospective adjustments after 1 February are therefore not possible.

The last price authorisation is expected to be with effect from 1 January 1987 and all under/over recoveries (where appropriate) will need to be settled at that determination. It is essential that mills maintain close links with the Wheat Board and the Commission during this transition period.

Some concern has been expressed at the $300 fee payable for every price application submitted. In my last letter of 18 May I indicated that this fee would be waived for the monthly approvals. A subsequent legal opinion received within this office is at variance with my earlier advice. The Commission considers however that the payment of $300 every month is inappropriate and from August 1986 it will be able to accept written undertakings pursuant to the Commerce Act. This essentially will enable mills to set their own flour price, subject to Commission confirmation, and therefore avoid the need for a pricing application and with it the payment of a $300 fee. Under this senario (sic) mills will not need to pay the $300 fee for monthly price alterations from 1 August 1986, although the fee will obviously be payable for substantive pricing applications such as the recovery of increased power charges, new assets employed etc.

The written undertaking that will be involved for monthly flour price movements from 1 August will involve mills establishing their own price according to the currently accepted formula pursuant to section 72 of the Commerce Act 1986. Rather than the Commission setting each mill price it will merely confirm or otherwise each mill's price which must be established on the above-mentioned basis. At the beginning of each month from 1 August each mill will be required to forward to me details of what they consider the new monthly price should be for that mill and how that price was derived. I will check the details then forward letters confirming the price, or otherwise, to the mill and to the Wheat Board. This process would need to be completed by the 17th of each month.

This leaves the month of July, during which time the Commission has no legislative basis for accepting written undertakings. Applications for monthly adjustments in

> July will therefore require the payment of a $300 fee with each pricing application. The fee is legally enforceable by the Commission, and a new price authorisation cannot be determined unless it is accompanied by the fee.
>
> If you have any enquiries in respect of the foregoing please contact me in Wellington (734-040). I shall be writing again shortly with further details of the written undertakings.
>
> Those South Island mills seeking to use Australian wheats for trial purposes before 1 February 1987 should liaise very closely with the Wheat Board. The Commission's views are that costs of such wheat may be recoverable where such imports are not a significant percentage of a mill's wheat usage. It is important therefore that mills alert the Board to their import requirements as soon as possible so that the Commission in turn can rule on whether such imports are recoverable in mill's flour prices.
>
> Between now and 31 January 1987 the current divisors and the established wheat pricing mechanism will be retained. Similarly wheat stocks will continue to be valued at the applicable current wheat costs. No artificial adjustments will be made by the Commission."

(The underlining is mine).

It is apparent that up to this time the intention of the Commerce Commission was to carry on in precisely the same way the Department of Industry and Commerce had approached the question of pricing. It is also apparent that the approaching deregulation was exercising the minds of those involved in the Commerce Commission who were aware of what they saw as the necessity to have all matters relating to price control of wheat, dealt with by the date of deregulation. Of particular significance was the fact that because of the exigencies of the pricing mechanism and the fact that not all information was known in time to make definitive arrangements on each monthly pricing occasion, the practice had developed in accordance with the Act, of provisional pricing being carried out, each provisional price being corrected in terms of exact figures when these were later known.

The Commerce Commission considered that it would have no power to make final determinations correcting provisional determinations, after the date of deregulation and was concerned to ensure that no matters of this kind remained outstanding at the time deregulation actually occurred.

The sale and purchase of flour continued on this basis. By letter dated 8 August 1986, the Commerce Commission wrote to all mills pointing out that it was required under the provisions of s.73 of the Commerce Act, to obtain information which would allow it to authorise a price pursuant to s.70. Subsequently the Commission wrote indicating that until full applications had been assessed pursuant to s.73 of the Act, all authorisations would be provisional.

Another factor which affected the price of flour was the actual quantity of flour produced by a tonne of wheat. The Commission required an extraction rate of 77.7% to be maintained. Manawatu Mills Limited had some difficulty in achieving that extraction rate in respect of its contract flour which by this time amounted to 100% of its processing material. On 4 November 1986 a meeting was held between representatives of the Commerce Commission and Manawatu Mills Limited where this question was raised. The Commerce Commission indicated that because Manawatu Mills had chosen to purchase its wheat directly, it could not be given an advantage which other mills contracting directly with the Board did not receive. The meeting was also important however because the question of financing costs was raised. This came about because an investigation of the pricing system carried out by the Commerce Commission suggested that the arrangement which had been in existence for some time, first with the Department of Industries and Commerce and subsequently with the Commerce Commission whereby interest payable by the mills was recovered by reflection in the price, in effect amounted to a double recovery and could not be justified. This was discussed and a record of the meeting suggests that there may have been some agreement that there was a discrepancy and that theoretically a double recovery might have been being made. No decision was made with regard to this and it seems that the initial approach which the

Commerce Commission considered appropriate was to correct what it saw as an anomaly by a reduction in the percentage profit figure which had been accepted at 15%.

The evidence suggests that the Commerce Commission subsequently decided to approach the problem rather by accepting the 15% profit figure but opposing the recovery of interest because the figures indicated this would result in a larger sum by way of savings.

While the applicants were looking at specific aspects of the price fixing mechanism, the Commission was also aware that the general criteria for fixing prices had changed. The provisions of the Commerce Act put an emphasis on efficiency which had not been such a significant feature of the earlier criteria. The Commission considered that the need to fix prices in such a way that they reflected in the efficiency of the industry, meant that that became a consideration in addition to the concerns which had already been the subject of discussion.

There is a certain unreality in considering the use of price fixing mechanisms to encourage efficiency in an industry which is about to be deregulated. Nevertheless the Commission not unreasonably considered that in completing the obligations imposed upon it, it was obliged to proceed on the basis of the existing statutory criteria even if price fixing itself was about to cease. The point is not unimportant however since it has a significance in terms of the material which Mr Mathieson submitted the Commission was entitled to take into account when ultimately it did make a final determination.

Consideration was also given by the Commission to the possibility of recovering sums which were seen as having been overpaid either in terms of interest or profit.

The Commerce Commission then prepared a draft determination directed towards the fixing of the final figures and issued this to the mills for their consideration. This indicated that it was the conclusion of the Commission that it was contrary to principle to enable

mills to recover interest costs on assets, as well as providing a guaranteed profit on total assets and the draft decision indicated that it was the intention of the Commission to disallow interest costs previously claimed by Manawatu Mills and Cereal Food Group Mills. There was a specific determination that these interest costs claimed were not recoverable.

On 19 December 1986, Manawatu Mills Limited wrote to the Commerce Commission in the following terms:-

> "Please find enclosed copies of invoices received from Westpac being interest on grain held for November 1986.
>
> As has been the case in previous months, I request that the interest of $43,046.65 (83% x $51863.43) be allowed in the next Millers Price.
>
> As we will probably not have the December interest charge to hand before you set the January Millers Price and we will definitely not have the January charge, may I suggest you estimate the interest for those two months and incorporate it in our January Millers Price. A minor adjustment only will then need to be made in February between ourselves and the Wheat Board. I can see that it would be rather difficult to recoup the interest once January 31 has come and gone."

The interest claimed by the mills was allowed as a pricing factor until 2 months before the deregulation of the industry. No allowance was permitted for the months of December 1986 and January 1987.

It has already been said the practice up until that point had been to make provisional orders on the basis of the information which had been available. When the final information was available, the provisional orders were converted into final determinations. It became apparent that with time running out it would not be possible to make a

final determination in respect of the provisional orders which had already been made before the deregulation of the industry took effect.

On 13 January 1987 a joint submission on behalf of the applicants was made to the Commerce Commission with regard to the matters which were by then clearly in dispute. This was a detailed document which set out the point of view of the applicants and which concentrated to a considerable extent on the interest question. The submission also raised the question of wheat recovery and drew attention to the fact that it was accepted 1.21682 tonnes of wheat were necessary to produce 1 tonne of flour but the standard allowance which had been made by the Board and the Secretary for Screenings was 2% and that in a case where the actual loss was greater where a mill could establish that fact, allowances reflecting that had been made.

On 31 January 1987 the Wheat Board ceased to trade and on 1 May 1987 it was dissolved under s.13 of the Wheat Board Amendment Act 1986. No final determination had been made at that time. Acting on advice, the Commission took the view that after deregulation and the expiration of price control, it no longer had the power to make a final determination.

The Commission's view that it did not have power to make a final determination perfecting the provisional determinations already made, was not accepted by the applicants who initiated proceedings in the High Court seeking a determination of this question as a preliminary question. This matter came before me on 1 February 1989 and on 9 February 1990 I delivered judgment, holding that the Commission did have jurisdiction to issue final determinations under the provisions of s.70.

In accordance with that decision the applicants on 11 April 1990, requested the Commission to determine the final maximum price authorisations. On 19 June 1990 the Commission wrote to the solicitors acting for the applicants, advising of the course of action which the Commission proposed to take to resolve the matter. In brief summary

the Commission indicated in that letter that there were two matters remaining unresolved. The first was the recovery of certain costs said to have been incurred by the applicants over the period 1 May 1986 to 31 January 1987 and for which it is claimed no allowance was made by the Commission and secondly, the inclusion of interest payments for the cost of production.

The Commission pointed out that s.73 of the Commerce Act required the Commission to consider the extent to which competition in the relevant market was or was likely to be lessened and it drew attention to the fact that as from 1 February 1987 the applicants were free to recover costs of production to the extent that the market would allow. The Commission suggested that there were three possibilities:-

1. That the controlled price was too low in relation to the market price.

2. That the controlled price was too high in relation to the market price.

3. That the controlled price matched the market price.

In the case of the first, the Commission took the view that the millers would have had an opportunity to recover any costs to the extent that the market would subsequently allow. In the case of the second possibility, competitive pressures would require a downwards price adjustment and as far as the third was concerned, price control would have achieved the same results as market forces.

Put in another way, the Commission expressed the view that in a deregulated market the applicants could set the price at any figure the market would bear. If the market would stand it, then the costs could be recovered in the price. If the market would not, competition requires that the price reflect the market figure.

Leaving aside however this analysis of the situation, the Commission was of the view that the recovery of costs after deregulation was inconsistent with the workings of a deregulated market and it also considered that it was difficult to justify such a recovery in the interests of users or consumers as contemplated by s.73 (b) or that it promoted efficiency in respect of s.73 (c). As far as interest payments were concerned, the double recovery argument was repeated.

Not surprisingly this approach was not acceptable to the applicants which filed detailed submissions in opposition to the approach foreshadowed by the letter. Following further negotiations between the parties, on 13 December 1990 the Commission released a draft determination. This effectively maintained the Commission's view as to both interest and recovery costs and met with the response that the applicants reserved their position.

On 8 February 1991 a final authorisation was issued for the period 1 August 1986 to 31 January 1987. It took the view that no adjustment to the provisional flour prices either for over-recovery of interest costs or possible under-recovery of other costs, was necessary. The prices authorised were those provisional prices in force at the expiry of the order.

It is the contention of the applicants that the approach adopted by the Commission in arriving at its final determination was not open to it and in particular, that the Commission failed to make a retrospective decision; that it took into account an irrelevant consideration, that is a change in market conditions following the cessation of price control and that it failed to take into account relevant considerations in failing to take into account or giving insufficient weight to the actual costs of the applicants; it failed to ensure that the relevant cost components and the costs of flour milling companies were recovered when a price authorisation was fixed for a period subsequent to the actual periods to which those costs related; and it did not assess on an individual basis the position of different milling companies and the differences in cost components.

It was the contention of the applicants that in the light of those assertions the final determination of the Commission was reviewable on grounds that it was substantively unfair and/or contrary to the legitimate expectation of the applicants that prices would be determined in accordance with established practice both because of the existence of that practice and the specific authorisation given on behalf of the Secretary of Trade and Industry and repeated on behalf of the Commission.

The respondents contended that the scope of the decision and those factors which could properly reflect in it were determined by statute and those over-rode any practice which had been established or any assurances which were given. They maintained if that were not so, both would impact on the statutory discretion of the Commission which would run counter to the scheme of the statute. They also asserted that in any event the considerations upon which the applicants rely were taken into account by the Commission but were outweighed by the consequences of de-regulation, the financial performance of the applicants and a concern that the ultimate consumer was being asked to absorb substantial costs for no benefit to the consumer.

Although there are differences between the positions of the two applicants on factual aspects, no emphasis was placed on these during the hearings and it is convenient to deal with the matter on a question of principle.

Mr Fardell made the general submission that the decision was fatally flawed as being unfair in a way sufficient to justify the intervention of the Courts by way of review. He commenced his argument by reference to the well-known comments of Cooke J. (as he then was) in *Daganayasi v. Minister of Immigration* [1980] 2 NZLR 130 and the line of cases in which those comments have been referred to, concluding with the comments of Hammond J. in *NZFP Pulp and Paper Limited and Others v. Thames Valley Electric Power Board and Others* (High Court, Hamilton, CP35/93 judgment delivered 1 November 1993).

He contended that substantive unfairness as distinct from procedural unfairness, could properly be regarded in New Zealand as a ground for impugning an administrative decision and that the decision in this case was unfair to such an extent as to justify intervention. This is an area of the law which has occasioned a very substantial amount of analysis and comment. I am prepared to accept that the concept of fairness need not be confined to merely procedural matters. At the same time I do not think that the field is so wide open that some broad concept of fairness can be used to justify interfering with a decision which merely gives rise to perhaps a general unease or distaste. Such an approach runs the risk of merely substituting one opinion for another and allowing the Court to make a decision which has been reposed in other hands.

It could perhaps be suggested that the concept of fairness is an elastic means of ensuring that standards generally held by the community are brought to bear on decisions made within the community. This is subject to the difficulty of ascertaining precisely what those standards are and fails to take into account the fact that divisions of opinion within the community itself may exist with regard to such standards. It may be helpful to consider that the law itself embodies in the end those standards which the community through its formal institutions consider properly reflect in the law.

Even in its wider concept, the term "fairness" has in the authorities been related to some generally accepted category of intervention. Perhaps it might be said that it is a notion which must have some kind of skeletal structure to support it.

Mr Fardell put an emphasis in his submissions on the concept of legitimate expectation. That too is a concept which has given rise to very considerable difficulties and to a diversity of opinion. It could perhaps be suggested that legitimate expectation itself as a concept is a shorthand term for an expectation that decisionmaking will be carried out not only according to law, but in accordance with those

principles which the law embodies unless there is something in the decisionmaking power itself which excludes such an approach. If that is so, then the two separate concepts relied on by Mr Fardell can be considered for the purposes of this enquiry, as one. I note that Dr GDS Taylor in "*Judicial Review*" in para.13.10 asserts that the two concepts of legitimate expectation and substantive fairness are mutually reinforced.

The concept of legitimate expectation has in the authorities been generally confined to an expectation that the procedures adopted by the decisionmaker will meet those expectations which those affected by the decisions are entitled to have and the first formulation of the concept by Lord Denning in *R v. Liverpool Corporation(Ex Parte) Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 was a procedural case. More recently there has been some discussion of a contention that legitimate expectation can apply not only to the procedures leading up to the making of the decision, but may extend to the decision itself.

The question is discussed in some detail by Professor Forsyth in "*The Provenance and Protection of Legitimate Expectations*" 1988 Cambridge Law Journal 238 and is also referred to by the High Court of Australia in *Attorney General for the State of New South Wales v. Quin* [1990] 3 ALR 1.

R. v. Secretary of State for the Home Department (Ex Parte) Ruddock and Others [1987] 1 WLR 1482 involved a decision to allow telephone tapping which was alleged to have been made in breach of the criteria published by the Home Office in relation to such matters. Taylor J. put an emphasis on the comments of Lord Fraser of Tulleybelton in the *Council of Civil Service Unions case* 1985 AC 374 at p.401. At p.1497 Taylor J. said:-

> "On those authorities I conclude that the doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the

doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power. I accept Mr Law's submission that the Secretary of State cannot fetter his discretion. By declaring a policy he does not preclude any possible need to change it. But then if the practice has been to publish the current policy, it would be encumbent upon him in dealing fairly to publish the new policy, unless again that would conflict with his duties. Had the criteria here needed changing for national security reasons, no doubt the Secretary of State could have changed them. Had those reasons prevented him also from publishing the new criteria, no doubt he could have refrained from doing so. Had he even decided to keep the criteria but depart from them in this single case for national security reasons, no doubt those reasons would have afford him a defence to judicial review as in the G.C.H.Q. case [1985] A.C. 374. It is no part of the Secretary of State's evidence or argument here, however, that the published criteria were inapplicable, either because they had been changed or abandoned or because for good reason (e.g. national security) it was justifiable to depart from them. Sir Brian Cubbon's evidence amounts to an acceptance that the criteria were throughout regarded as binding and an assertion that all decisions under his purview have been made in accordance with them. So Mr Law's argument that providing he acts in good faith for a proper purpose the Secretary of State could grant a warrant outside the criteria and not be subject to judicial review is irrelevant on the evidence he has adduced.

As to the strength of the legitimate expectation here, not only were the criteria repeated publicly in similar terms some six times between 1952 and 1982, the Home Secretary in office at the relevant time adopted them in the most trenchant terms which Sir Brian quotes in his affidavit as follows:

> "I would authorise interception only in those cases where the criteria set out in the white paper were clearly met."
>
> It would be hard to imagine a stronger case of an expectation arising in Lord Fraser's words "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue." Here it was both."

The Judge also relied on comments in *R. v. Secretary of State for the Home Department (Ex Parte) Asif Mahmood Khan* [1984] 1 WLR 1337. In that case a failure to follow criteria advised by the Home Secretary was equated with a misdirection and categorised as an unreasonable action. Parker LJ at p.1344 said:-

> ..... in principle, the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it."

Dunn LJ at p.1352 said:-

> "He caused the circular letter in common form to be sent to all applicants setting out the four criteria to be satisfied before leave could be given. Thereby, in my judgment, he in effect made his own rules, and stated those matters which he regarded as relevant and would consider in reaching his decision. The letter said nothing about the natural parents' inability to care for the child as being a relevant consideration, and did not even contain a general "sweeping up clause" to include all the circumstances of the case which might seem relevant to the Home Secretary.
>
> The categories of unreasonableness are not closed, and in my judgment an unfair action can seldom be a reasonable one. The cases cited by Parker L.J. show that the Home Secretary is under a duty to act fairly, and I agree that what happened in this case was not only unfair but unreasonable. Although the circular letter did not create an estoppel, the

> Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration, and then reached his decision upon a consideration which on his own showing was irrelevant. In so doing, in my judgment, he misdirected himself according to his own criteria and acted unreasonably. I would allow the appeal and quash the refusal of entry clearance."

The concept of substantive protection was discussed by Mason CJ in *Attorney-General for the State of New South Wales v. Quin* (supra) and in particular at p.22. At p.23 he points out the difficulty that the view that legitimate expectations may attract substantive as distinct from procedural protection, encounters the objection that it will entail curile interference with administrative decisions on the merits by precluding the decisionmaker from ultimately making the decision which he or she considers most appropriate in the circumstances. He goes on however to say that it is possible perhaps that there may be some cases in which substantive protection can be afforded and ordered by the Court without detriment to the public interest intended to be served by the exercise of the relevant statutory prerogative power.

In *In re Preston (R. v. Inland Revenue Commissioners (Ex Parte) Preston* 1985 AC 835 at p.865, Lord Templeman discussed with approval the earlier decision of the Court of Appeal in *H.T.V. Limited v. Price Commission* 1976 ICR 170.

> "The question of "fairness" was considered in *H.T.V. Limited v. Price Commission* [1976] I.C.R. 170.
>
> In that case the Price Commission misconstrued the counter inflation price code and changed its mind as to the treatment of exchequer levy as an item in the costs of television companies allowable for the purpose of increasing their advertising charges within the limits prescribed by the code. The effect of the change of mind of the Price Commission was to deprive the companies of an increase of advertising charges which they were plainly intended to enjoy and which they badly needed in order to remain financially viable. Lord Denning M.R. said, at pp.185-186:

> "It has been often said, I know, that a public body, which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it. So when an army officer was told that his disability was accepted as attributable to war service, and he acted on it by not getting his own medical opinion, the Minister was not allowed to go back on it: see *Robertson v. Minister of Pensions* [1949] 1 Q.B. 227. And where an owner, who was about to build on his land, was told that no planning permission was required, and he acted on it by erecting the building the Minister was not allowed to go back on it: see *Wells v. Minister of Housing and Local Government* [1967] 1 W.L.R. 1000 and *Lever Finance Ltd. v. Westminster (City) London Borough Council* [1971] 1 Q.B. 222. Very recently where a man was issued with a television licence for a year, then, although the Minister had power to revoke it, it was held that it would be a misuse of that power if he revoked it without giving reasons or for no good reason: see *Congreve v. Home Office* [1976] 2 W.L.R. 291."

In the first three cases cited by Lord Denning M.R. the authorities acted in a manner for which, if the authorities had not been emanations of the Crown, the applicants would have enjoyed a remedy by way of damages or an injunction for breach of contract or breach of representations. In the third case of *Congreve,* as I have indicated, the decision was "unfair" because the Minister was actuated by an irrelevant motive.

In the *H.T.V.* case [1976] I.C.R. 170 my noble and learned friend, then Scarman L.J., said, at p.189:

> "Agencies, such as the Price Commission, must act fairly. If they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as is sought in this case, by declaring the meaning of the

> statute and the duty of the agency.....It is a commonplace of modern law that such bodies must act fairly.....It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness."

Scarman L.J., after considering the Price Commission's change of mind, said, at p.192, that "the commission's inconsistency has already resulted in unfairness, and, unless corrected, could cause further injustice. First, it gives rise to a real possibility of an erosion of profit margin....." Next, if, as the Price Commission contended, the Exchequer levy was excluded in 1976 but included in 1973 then the television companies would be unable to obtain a fair increase in advertising charges corresponding to increases in costs between 1973 and 1976:

> "The Commission, to avoid being unfair, must either include or exclude Exchequer levy as a cost upon both sides of the comparison. Since it has made clear that, in the absence of a ruling to the contrary, it intends to exclude it when calculating current profit margins, the commission must also exclude it when calculating the profit margin at April 30, 1973. I am not completely sure that it intends so to do if it succeeds in this litigation.....The commission has acted inconsistently and unfairly; and on this ground, were it necessary, I would think H.T.V. are also entitled to declaratory relief."

In the *H.T.V.* case [1976] I.C.R. 170, the "unfairness" of the decision was due not to improper motive on the part of the Price Commission but to an error of law whereby the Price Commission misconstrued the code they were intending too enforce. If the Price Commission had not misconstrued the code, they would not have acted "inconsistently and unfairly." Of course the inconsistent and unfair results to which Scarman L.J. drew attention were themselves powerful support for the contention that the Price Commission must have misconstrued the code.

In the present case, the appellant does not allege that the commissioners invoked section 460 for improper purposes or motives or that the commissioners misconstrued their powers and duties. However, the *H.T.V.* case and the

> authorities there cited suggest that the commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation."

H.T.V. Limited v. Price Commission (supra) is not directly relevant to this case because the Commission had made a mistake in construing relevant material. The illustrations given by Lord Denning in the passage cited however, all have at least some degree of analogy with the circumstances of this present case and it is I think of particular significance that Lord Templeman considered there may be unfairness amounting to abuse of power if there has been conduct equivalent to a breach of contract or breach of representation.

There is authority then for the proposition that where a decisionmaking authority has indicated the criteria which will be taken into account in arriving at that decision, but proceeds on some other basis, the decision may be flawed for misdirection or even for irrationality. In addition, in the words of Lord Templeman, it may be unfair if it is equivalent to a breach of contract or breach of representation.

The idea behind the concept has some affinities with estoppel, but there are difficulties in applying estoppel to the making of decisions because of the extent to which this may impinge upon the necessary discretion without which a decision would be no decision at all. The difficulty may to some extent be met if indications given by the authority prior to the making of a formal decision can themselves be regarded as a preliminary decision. It is not extending the reasoning of Mason CJ in the *Quin case* very far to suggest that where the circumstances are such that in a dispute between individuals, the

behaviour of one would lead to a particular outcome, the same approach should lead to a similar result in an administrative situation unless the nature of the decision is such that its maker should not be fettered in this way. That is close to the views expressed by Lord Templeman (supra).

In this case at least as regards the recovery of interest payments, the established practice supported recovery. The Commission indicated that it intended to continue the previous practice. The applicants specifically asked the Commission before committing themselves to the financial consequences of the procedure which they proposed, for an assurance that the interest charges would be incorporated into the pricing mechanism and they received a definite and unequivocal assurance to that effect. On the basis of that the applicants proceeded to alter their position by entering into contractual arrangements which bound them to meet such payments. They were then reimbursed over a period. If this had been a dispute between private entities. It cannot be doubted that all the elements are there to establish an estoppel which would prevent the Commission from resiling from the position to which it had committed itself in writing.

Mr Mathieson submitted that the Courts will not normally interfere with a decision where the complaint relates to the weight which has been placed on a particular factor or consideration, as distinct from that situation where the factor was not taken into account at all and he referred to comments in *Minister for Aboriginal Affairs and Another v. Peko-Wallsend Limited and Others* [1986] 162 CLR 24. I accept that it is normally for the decisionmaker to decide what weight is to be placed upon particular factors but where a decisionmaker has indicated what significance will be accorded to a particular factor, it will need to have strong grounds before altering that weight after a person affected thereby acts in accordance with the conclusion so indicated.

Nevertheless the Commission argues that it was entitled to decide as it did. The first and perhaps the strongest argument on which it relies is the contention that it did in fact take into account all these factors. Having given the applicants every opportunity to make detailed

written submissions which the Commission had before it when coming to its conclusion nevertheless it considered them outweighed by other considerations. This is not an attractive argument against the background of this case. The complaint of the applicants is not that the criteria were not taken into account, but rather given the background to which reference has already been made, they were not regarded as decisive. The argument would be sufficient to dispose of legitimate expectations as a procedural ground, but cannot controvert it if it is accepted that it is a consideration which has a bearing on the substantive decision itself. The circumstances suggest that in a dispute between individuals, the behaviour of the parties would have been decisive. That indicates the considerations upon which the applicants rely cannot have been given sufficient weight in this case in the absence of a statutory scheme which would have the effect of downgrading them or permitting the Commission to arrive at a conclusion notwithstanding them. To fail to give them an appropriate weight is to proceed unreasonably or unfairly.

The second argument upon which Mr Mathieson relies for the Commission, is that even if there is scope for the argument to have substantive effect, in this case it cannot do so because the statutory criteria contained in s.73 are such that they outweigh any considerations dependent upon legitimate expectation. The answer to this is I think to note that the criteria giving rise to the argument were in existence at the time the Commission decided to continue the existing practice. They were the governing criteria when the assurances were given on the basis of which the applicants changed their position and they were in force when payment recognising the position for which the applicant contends, were made. In fact therefore the Commission made and implemented a number of decisions which were represented by the interim or progressive determinations which only remain to be finalised.

Looked at in that light, what the Commission is trying to do is to change decisions which it has already made and to do that after those affected by the decisions have ordered their affairs in accordance with them. Mr Mathieson properly submitted that the provisions of

s.71 of the Commerce Act are such that a provisional decision made under it may well differ from the final determination because of the possibility under subs.(3) that a refund may be required. This contention is not without strength, but the nature and surrounding circumstances of the first decision must I think have some impact on the second for the reasons already set out.

Mr Mathieson placed an emphasis on the contention that it was not in the public interest that there should be a double recovery. This argument contains a certain emotive quality. What the Commission and its predecessor were required to do was fix a price. That involved a calculation made up of a number of elements. Although logically part of that calculation may have been open to question, for all practical purposes the conclusions had been accepted by both parties and implemented.

In any event although the Commission is required to have regard to the criteria set out in s.73, these are not necessarily exclusive nor do I think that they empower or oblige the Commission to set aside those obligations which it incurred by its acceptance of an existing procedure and the giving of specific assurances. While the provisions of s.98 of the Commerce Act 1975 differ from those contained in s.73 of the 1986 Act, they have certain similarities and it must be of significance to parties who have ordered their affairs in accordance with the interpretations not only of the Commission but its predecessor, that the procedures adopted were not seen to be in conflict with that section.

Finally it was the contention of the Commission that in arriving at the final determination some years after the provisional determination, the Commission was entitled to take into account what had actually occurred in economic terms since de-regulation. This argument has two aspects - first, that in a de-regulated system, it is the market which determines prices and secondly, that the economic advantages which have accrued to the applicants since de-regulation, make up for any losses not recognised by the final determination.

The final decision involved the perfecting of decisions which had already been taken and implemented. Deregulation brought into play a whole new approach where market forces were intended to achieve the ultimate result, rather than the considerations which had previously held reign. I do not think the financial results occasioned by a quite different regime should affect the completion of arrangements made under a previous system. If that were not so, had the market dropped substantially, it is conceivable that the applicants would have been in a position to claim on that basis.

Some argument was addressed to me on on the effect of my previous decision on the matters under dispute. That decision did not address the matters at present under consideration and should not be taken as leading to any particular result in the present dispute. At the same time, I do not think that that conclusion is inconsistent with that at which I have now arrived.

In my view when the matter is looked at in the round, it would be unfair if the decisions already taken were not implemented in final form in accordance with the criteria on which the parties had agreed. Payment had been made in accordance with the interim decisions and they themselves reflected the advice which the Commission had given the applicant and which was in accord with the practice of the Commission's predecessor. I think that the Commission could be regarded as having misdirected itself in not adequately taking into account that situation which it had itself encouraged and confirmed and the position to which the applicants had committed themselves on the basis of those assurances. I do not think that this involves any fetter upon the decisionmaking powers of the Commission or that given the circumstances it can be regarded as contrary to the public interest or in some way as in contradiction to the criteria set out in s.73. From one point of view it is no more than the completion of a decision which had already essentially been taken, but even if this were not so, for the reasons already canvassed it is my view that the final determination arrived at by the Commission was flawed in that it did not properly take

into account the situation which existed and which had been not only accepted but at least partially implemented by the Commission itself.

Accordingly I conclude that the decision of the Commission not to meet the interest commitments of the applicants was in the circumstances of this case, sufficiently flawed to justify it being set aside.

I therefore arrive at the conclusion that the applicants have established the Commission was in error in its final determination in not in the circumstances of this case, perfecting the interim decisions made in accordance with the assurances given by the Commission itself with respect to interest and implemented in the provisional decisions.

I have not so far made more than passing reference to the other grounds upon which the applicants relied, that is that the recoveries were deficient in such a manner and to such an extent that the decision in failing to meet this aspect of the claim was also flawed. This is in a quite different category to the question of interest. On the material before me, it is the contention of the Commission that the earlier method of recognising a shortfall in recovery by way of a percentage was replaced by the index system which is referred to in the evidence. This may be a matter of dispute as between the parties, but I am in no position on the material before me to conclude that the Commission was wrong in the conclusion to which it came in respect of this. Unlike the question of interest, there is nothing to suggest that any assurances were given in respect of this, or that the applicants altered their position in reliance upon it.

As far as the under-recoveries are concerned, I do not think the applicants have made out a case for review.

Mr Mathieson properly submitted if I arrived at a conclusion that the decision ought to be the subject of review, then there were further arguments which would justify the Court declining to intervene in this case. First he submits that the granting of a remedy is always

discretionary and I accept that proposition. I also accept that the Courts will not intervene where the failure does not have sufficient substance to justify intervention. I do not think that this case falls into that category. Although the amounts claimed in respect of interest are small in comparison to the claim as a whole, they are still not without significance.

Second, Mr Mathieson submits that it is inappropriate to intervene where there is an unexercised right of appeal and draws attention to the fact that a right of appeal against the final determinations is contained in s.91 (1) of the 1986 Act, but no appeal was lodged within the time limit contemplated by the Act.

Mr Mathieson conceded that in New Zealand the situation differs from England in that the existence of an appeal is not an absolute bar to the granting of relief. I accept that the failure to appeal has a relevance to the exercise of the discretion. It is certainly not however decisive, see *Fraser v. State Services Commission* [1984] 1 NZLR 116. These proceedings were extant before the time expired for an appeal. The appeal under s.91 is to the High Court. The questions involved are difficult questions of law and it would not seem that the mode by which they came before the Court would in circumstances such as these be determinative of the outcome. In any event the scope to argue questions such as those upon which the applicants have relied, might have been more restricted had the appeal rights contemplated by the statute been relied upon.

Mr Mathieson submitted that there would be prejudice to third parties if the decision were interfered with and draws attention to the fact that any increases granted will be irrecoverable by the Board. That is true, but it is a consequence of the expiration of the original pricing system. I do not consider this is prejudice of the kind which might justify refusing to intervene.

Mr Mathieson puts an emphasis on the fact that there was a need for finality to the knowledge of all mills and of the appropriate

deadline. That is true, but it is also true that the Commission itself accepted the basis of computation for which the applicants contend until 2 months before the termination of the pricing system.

Mr Mathieson says that the end users will sustain a windfall gain because they will not be required to retrospectively pay the increased purchase price. He submits that since the applicants through the company structure of which they are a part are involved with bakeries, they would sustain an unreasonable benefit. This assertion is general rather than specific and ignores the significance of the independence of company personality. While it is conceivable that this may be a bar in appropriate cases, I do not think that Mr Mathieson has established a case here, for denying the applicants the remedy on the basis that some unspecified unrelated companies may achieve a benefit as a result.

In the event then, I am of the view to the extent that the Commission failed to take into account the interest payments incurred by the applicants in accordance with the arrangement submitted to and approved by the Commission, then the decision was in error and ought to be reviewed.

The parties were agreed that in the event of a reference back to the Commission and this must follow from my conclusion that the Commission was wrong with regard to the approach it adopted to the question of interest, each category of cost referred to in the affidavit of Mark Ivan Bennett, has to be referred back to the Commission for a decision:-

(a) As to how s.73 should be applied to that category of costs and;

(b) The extent to which any one or more of these costs should be reflected in any final adjustment paid to the milling companies.

It was further agreed that as a part of this process, the Commission would have to look at both under-recoveries and over-recoveries by the two applicants during the period 1 May 1986 to 31 January 1987.

There will therefore be an order directing the first respondent to reconsider and re-determine its maximum price authorisations under s.70 of the Act in respect of the supply of flour and related products to the second respondent during different parts of the period commencing 1 February 1986 and expiring 31 January 1987.

The applicants having succeeded are entitled to costs. Counsel may submit a memorandum in respect of this.

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