DISTRICT LAND REGISTRARS' POWERS IN JOINT FAMILY HOME APPLICATIONS

FAIRMAID v. OTAGO DISTRICT LAND REGISTRAR, [1952] N.Z.L.R. 782.

The substantive issue in question in Fairmaid v. Otago District Land Registrar, [1952] N.Z.L.R. 782, was the construction of s. 3 of the Joint Family Homes Act 1950, as amended by s. 3 of the Joint Family Homes Amendment Act 1951, which in part provides:

> 3. (1) A husband and his wife or either of them may settle any land . . . as a joint family home . . . where -
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> . . .
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> (b) The dwellinghouse and land are used exclusively or principally as a home for the husband and wife and such of the members of their household (if any) as for the time being reside in the home; . . .

The plaintiff, a solicitor and partner in a firm of city solicitors, when a law clerk, had purchased his home in a suburban area. He saw some of his clients at his home on one day in the week, and occasionally saw some at other times as well. A small room at the back of the house, formerly a coal-shed, was converted into a study, and, when it was not required by the plaintiff for business purposes, it was used by his family. To encourage local clients to see him at his home, he put a notice on his front gate, giving the name of his firm and the hours on one week-day when he could be seen by clients. When the plaintiff applied for registration of the land as a joint family home the District Land Registrar considered that the dwellinghouse and land were not used exclusively or principally as a home within the meaning of the Act. North J. however, held that the essential question for decision was: Are this land and dwellinghouse by and large being used as a home, so that any reasonable person would say that that was their primary and fundamental use? In this case the answer to that question, according to His Honour, was in the affirmative.

In the report of the case there appears the following statement (at 783):

> The learned trial Judge said that it was unnecessary for him to consider whether the plaintiff had selected the appropriate remedy, because the defendant had expressly waived any objection that might otherwise have been open to him.

It may nevertheless be of interest to consider the question which His Honour found it unnecessary to consider.

The plaintiff proceeded by way of motion for a writ of mandamus to compel a District Land Registrar to register land as a joint family home, and on the substantive question in issue, His Honour took a different view of the construction of the Act from that taken by the District Land Registrar, so the plaintiff succeeded in obtaining his writ. That does not mean, however, that he would necessarily have done so if the defendant had objected to the form in which the proceedings were instituted.

As William J. pointed out in Brooks v. Jeffery (1897), 15 N.Z.L.R. 727, 733, 734, there are two kinds of mandamus known to the law of New Zealand. The mandamus which is issued under Rule 451 (now Rule 461) of the Code of Civil Procedure upon a statement of claim and motion without a writ of summons is the equivalent of the prerogative writ of mandamus at common law, formerly granted by the Court of King's Bench or Queen's Bench only, while the mandamus which is granted under Rule 463 (now Rule 473) as part of the relief in an action is the equivalent of the statutory writ of mandamus originally created by the Common Law Procedure Act, 1854 (U.K.). Apparently it was the former that was claimed in Fairmaid v. Otago District Land Registrar.

Rule 461 provides:

> Where the assistance of the Court is sought to compel any officer or person to perform any duty incumbent upon him, other than the payment of a sum of money for the non-payment of which a writ of sale may be issued, or the performance of any act for the non-performance of which he is liable to attachment, the Court may issue a writ of mandamus to such person or officer ordering him to perform such duty.

The act in question was not the payment of a sum of money, and it is clear that, until the writ of mandamus was issued, the District Land Registrar could be made liable to attachment for its non-performance. However, the word used in the Rule is "may" and not "shall". The Court is vested with a discretion, and that discretion is to be exercised in accordance with the principles which the Court of King's Bench or Queen's Bench applied in considering an application for the prerogative writ of mandamus at common law.

Section 6 (1) of the Joint Family Homes Act 1950 (as amended by s. 5 (3) of the Joint Family Homes Amendment Act 1951) provides:

> (1) Where the Registrar is satisfied that the application has been duly made under this Act, and (in the case of any application in respect of which the Registrar has given notice as aforesaid) when the time limited for lodging a caveat against any such application has expired and all caveats so lodged have been withdrawn or expired, the Registrar shall issue a Joint Family Home Certificate in the prescribed form to the effect that the land to which the application relates is entitled to be settled as a joint family home under this Act, which certificate shall specify the settlor or settlors and the husband and wife on whom the land is settled.

It will be seen that a necessary condition precedent to the issue of a certificate is that the Registrar must be satisfied that the application has been duly made under the Act. This is a totally different thing from saying, as the Legislature could have said if it had wished to do so, that the application must have been duly made under the Act. What is required is not the existence of an objective set of facts, but the existence of a certain state of mind on the part of the Registrar. It is submitted that the Registrar is vested with jurisdiction to consider the application in a judicial manner and to act on his own opinion as to whether or not it has been duly made.

It may at first sight be considered that a District Land Registrar is not a judicial or quasi-judicial officer, but a ministerial officer like the Controller of Textiles in Nakkuda Ali v. Jayaratne, [1951] A.C. 66. It is submitted that

this is not correct. In Jayaratne's case (at 78) there was quoted the following passage from R. v. Legislative Committee of the Church Assembly, [1928] 1 K.B. 411, 415:

> In order that a body may satisfy the required test [sc. for a judicial or quasi-judicial body] it is not enough that it should have legal authority to determine questions affecting the right of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.

It is submitted that the District Land Registrar has this further characteristic. He may be a mere public servant, without the security of tenure that judges have, and not required to take the judicial oath, but the law is not without instances of the conferment of judicial functions on public servants. Nobody would suggest, for instance, that a Registrar of the Supreme Court, in considering an application for probate, is acting in a merely executive or ministerial capacity. In the discharge of his ordinary functions under the Land Transfer Act 1952, the District Land Registrar is not subject to the administrative control of the Public Service Commission or the Minister of Justice, exercised by way of appeal. It is submitted that his duty is to act judicially so as to minimize the occasions on which an appeal will be necessary. This submission is strengthened by the observations of Edwards J. in In re Transfer to Palmer (1903), 23 N.Z.L.R. 1013, 1031 that :

> . . . the District Land Registrar only came to this conclusion [that there was a subdivision of certain land] because he happens to live in the vicinity, and observed what was passing upon the ground; and but for this fact the applicant's transfer would have been registered without question.

and that

> . . . nothing could be more absurd than to suppose that this question has been intentionally left by the Legislature in such a position that the right of landholders may depend upon what the District Land Registrar may or may not happen to observe in the streets as he passes from his house to his office.

Even in 1952, before the right of appeal was extended, the District Land Registrar's functions under the Joint Family Homes Act 1950 were, it is submitted, just as much judicial as his other functions. The Controller of Textiles in Ceylon would no doubt follow any instructions he might receive from the Executive Government in cancelling a textile licence, but the duty of the District Land Registrar was simply to decide whether, on the evidence before him, any particular land and dwellinghouse came within the requirements of the Act as to joint family homes.

Where application is made for a mandamus to issue to a person acting judicially, and not merely ministerially, the rule seems clear that although he may be compelled to make a decision if he erroneously declines jurisdiction, he cannot be compelled to make it in any particular way, however wrong his decision may seem to the Court. An illustration of this is to be found in the case of R. v. Archbishop of Canterbury (1812), 15 East 117; 104 E.R. 789, where a mandamus was sought, apparently with a view to compel a bishop to approve and license a lecturer under an Act (the Act of Uniformity, 1662 (Eng.), s. 15) which provided that no person should be received as a lecturer

> . . . unless he be first approved and thereunto licensed by the archbishop . . . or bishop . . . .

Lord Ellenborough C.J. said (at 138) that the answer of the bishop that he had decided that he could not approve or license the lecturer

> upon a free and deliberate consideration of all the circumstances

and

> according to the best of his judgment, and from a conviction that the duty imposed upon him by his office requires that he shall not approve of or license anyone to a lectureship whom he does not in his conscience believe to be a fit person to fill the office

must be conclusive

> unless the Court were prepared to decide that the function of approbation is vested in them, and not in the bishop; and that

> notwithstanding the conscientious judgment which upon a full and deliberate consideration of the subject he has come to, and his declared conviction that he would be acting in a manner wholly inconsistent with the duties of his episcopal function, and the trust reposed in him by the Legislature, if he did license him, we should nevertheless grant a mandamus to the bishop to say - approve, though you do not approve; take our conscience to guide you, and not your own. There is no instance of such an application for a mandamus to compel a bishop to approve: we can only compel him to inquire: we cannot divest him of that function which the Legislature has for wise purposes vested in him, and transfer it to ourselves: all that the Court can ever do is to see that that function is well exercised by him in whom it is so vested; and there never yet has been an instance of a mandamus to compel a bishop to approve and license a lecturer, where the question turned on the approbation or disapprobation of the bishop as to the fitness of the applicant.

In Fairmaid's case, His Honour, with the consent of the District Land Registrar, divested him of the function which the Legislature had vested in him, and transferred it to himself, but in view of what has been said it would appear that if the District Land Registrar had objected, His Honour would have been without jurisdiction, on an application for mandamus, to make any decision on the substantial merits of the case. An application for certiorari might possibly have fared better, but it is now unnecessary to discuss that question, as the Legislature has itself provided a more certain remedy, probably with Fairmaid's case in mind. Section 216 of the Land Transfer Act 1952 substantially re-enacts the repealed s. 199 of the Land Transfer Act 1915, but there is one important difference. Section 216 provides:

> If the Registrar refuses to perform any act or duty which he is hereby required or empowered to perform under this Act or any other Act, or if the proprietor of or other claimant to any land, estate, or interest is dissatisfied with the direction or decision of the Registrar and Examiner of Titles or of the Registrar acting alone, in respect of any application, claim, matter, or thing under this Act or any other Act, the person deeming himself aggrieved may require the Registrar to set forth in writing the grounds of his refusal, direction, or decision.

The words underlined are new. If any person is now dissatisfied with the refusal of a District Land Registrar to register land as a joint family home he may have the decision reviewed by the cheap and expeditious process provided by ss. 217, 218 of the Land Transfer Act 1952 without the need for recourse to prerogative writs of any kind. (Under s. 217 the person aggrieved may call upon the Registrar to appear before the Supreme Court to uphold the grounds of his decision.)

The history of the case and the subsequent legislation provide an example of the way in which the contingencies of litigation may draw attention to defects in the law and lead to its amendment. In this case, the Legislature has acted with a promptitude which is unfortunately so rare as to be worthy of comment. It is regrettable, however, that the Legislature has dealt with the matter only where a District Land Registrar is involved. The definition of "Registrar" in s. 2 of the Joint Family Homes Act 1950 (as amended) includes, in appropriate circumstances, a Mining Registrar or a Registrar of Deeds, and if it is ever necessary to challenge a refusal by either of these officers to register land as a joint family home it may be found that the point discussed in this note is not of merely historical interest.
