P.C.
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June 22, 1966

In the Privy Council.

No. 8 of 1966

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

JAMES EDWARD JEFFS, and others — Appellants

AND

THE NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD, and others — Respondents

RECORD OF PROCEEDINGS

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In the Priny Council. 8 OF 1966

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

JAMES EDWARD JEFFS, AND OTHERS — Appellants

AND

THE NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD, AND OTHERS — Respondents

RECORD OF PROCEEDINGS

No. 1

STATEMENT OF CLAIM IN SUPREME COURT

In the Supreme Court of New Zealand
No. 1
Statement of Claim, 20th August, 1963

A No.27/63

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
WHANGAREI REGISTRY

BETWEEN JAMES EDWARD JEFFS, JOHN GORDON ROBINSON, COLIN EDWARD PEARCE all of Ruawai and BERTRAM ERLE DREADON of Tokatoka all of them Farmers suing on behalf of themselves and 88 Dairy Farmers in the Ruawai District.

Plaintiffs.

AND THE NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD a body corporate established under the Dairy Production and Marketing Board Act 1961, having its office in Wellington.

First Defendant.

AND THE RUAWAI CO-OPERATIVE DAIRY COMPANY LIMITED a duly incorporated company having its registered office at Ruawai.

Second Defendant.

In the Supreme Court of New Zealand

No. 1 Statement of Claim, 20th August, 1963 *continued*

AND THE NORTHERN WAIROA CO-OPERATIVE DAIRY COMPANY LIMITED, a duly incorporated company having its registered office at Dargaville.
Third Defendant.

AND THE MAUNGATUROTO CO-OPERATIVE DAIRY COMPANY LIMITED a duly incorporated company having its registered office at Maungaturoto.
Fourth Defendant.

AND ERIC BAKER, of Ruawai, Farmer, sued on behalf of himself and 125 dairy farmers in the Ruawai District.
Fifth Defendant.

STATEMENT OF CLAIM

THE PLAINTIFFS by their Solicitor EDWARD JOSEPH VERNON DYSON say as follows—

1. THAT the First Defendant is a body corporate established under the New Zealand Dairy Production and Marketing Board Act, 1961 and having its office at Wellington.

2. THAT the Second Defendant is a duly incorporated Company having its registered office at Ruawai, and there operates a factory for the manufacture of butter, butter-milk-powder and casein from cream and whole-milk supplied by its shareholders.

3. THAT the Third Defendant is a duly incorporated Company having its registered office at Mangawhare, Dargaville and there operates a factory for the manufacture of butter, butter-milk-powder and casein from whole-milk and cream supplied by its shareholders.

4. THAT the Fourth Defendant is a duly incorporated Company having its registered office at Maungaturoto and there operates a factory for the manufacture of butter, butter-milk-powder and casein from cream and whole-milk supplied by its shareholders.

5. THAT at all material times prior to the 31st day of May 1963 and expiring on that date, there was in existence between the Second Defendant and the Third Defendant an agreement in writing defining the areas from which either Defendant would accept whole-milk from supplying dairies.

6. THAT in or about the month of February, 1963 the Second Defendant requested the First Defendant to define a milk zone for the Ruawai District and to thereby determine which proprietors of supplying dairies should supply the Second Defendant's factory with whole-milk.

7. THAT on or about the 28th day of March, 1963 the First Defendant gave notice to all supplying shareholders of the Second Defendant that a committee of the First Defendant would hold a public meeting in the Ruawai-Tokatoka Memorial Hall, Ruawai, commencing at 9.30 a.m. on Monday 29th April 1963; the First Defendant advised that opportunity would be given at such hearing to all interested persons to tender submissions to the Committee of the First Defendant which

Committee would after considering all submissions make a recommendation to the First Defendant which would make a decision on the application.

8. THAT a Committee of the First Defendant duly held the said hearing referred to in Paragraph 7 hereof. At the hearing 138 suppliers, including the Plaintiffs, appeared by one Counsel to oppose the application. The Second Defendant and 126 suppliers, including the Fifth Defendant, supported the application. The Third and Fourth Defendants also appeared by Counsel.

9. THAT the hearing referred to in Paragraph 8 was conducted in the manner of a judicial proceeding: all parties were given the opportunity to tender evidence, witnesses were cross-examined by Counsel, who made submissions in writing. Immediately prior to the commencement of the hearing Counsel for the Plaintiffs and those whom they represented, and other Counsel, objected to the First Defendant's proceeding to deal with the matter on the grounds that it had a financial interest therein and the proceedings were entered upon subject to the said objection being noted and not waived.

10. THAT on or about the 30th day of May, 1963 the First Defendant issued a purported zoning order number 11B which read in the following terms:

"Board today decided that all Ruawai supply on Pouto Peninsula be zoned to the Northern Wairoa Dairy Company with effect from June 1 1963. Board further decided that existing zoning boundaries on eastern side of Northern Wairoa River should be maintained for cream supply and also be extended to apply to whole-milk supply with effect from June 1. Zoning Orders 11 and 11A will be amended accordingly. Board also decided that compensation will be awarded and directed zoning committee to investigate and report."

11. THAT the Plaintiffs bring this action as a representative action on behalf of themselves and the following other proprietors of supplying dairies who are affected by the said purported zoning order number 11B and who oppose the definition of a milk zone for the Second Defendant (names omitted).

12. THAT the Plaintiffs sue the Fifth Defendant in these proceedings on his own behalf and also as the representative of 125 other suppliers of the Second Defendant who supported the Second Defendant at the said hearing but who were represented by separate Counsel.

13. THAT at all material times the First Defendant was the holder of debentures given by the Second Defendant over the whole of its assets. Particulars thereof are —

(a) A debenture given on the 29th day of January 1960 for £87,152 to the New Zealand Dairy Products Marketing Commission a body whose assets are now vested in the First Defendant.

(b) A debenture given on the 6th day of November 1961 for £35,000 to the First Defendant.

14. THAT at all material times the First Defendant has a financial interest in the subject matter of the zoning application before it.

15. THAT the First Defendant has a financial interest in any compensation that is to be paid by the Third Defendant to the Second Defendant as a result of the said zoning order.

16. THAT the First Defendant in hearing the said application for a zoning order and in assessing compensation to be paid by the Third Defendant to the Second Defendant is a judge in its own cause contrary to the principles of natural justice applicable.

17. THAT the First Defendant will proceed to assess such compensation unless restrained by this Honourable Court. AND AS A FURTHER CAUSE OF ACTION the Plaintiffs repeat Paragraphs 1 to 17 hereof and say —

18. THAT at all material times the First Defendant purported to act pursuant to powers conferred on the New Zealand Dairy Board by the Dairy Factory Supply Regulations, 1936 and their amendments which regulations conferred powers to make zoning orders and to assess compensation on a body corporate known as The New Zealand Dairy Board.

19. THAT the said powers conferred on the New Zealand Dairy Board by the said Dairy Factory Supply Regulations 1936 and amendments did not vest in the First Defendant. The said powers were not "rights, obligations and liabilities" of the said New Zealand Dairy Board within the meaning to be ascribed to those words in Section 71 (1) of the Dairy Production and Marketing Board Act 1961.

20. THAT the actions of the First Defendant in purporting to make the said zoning order 11B and to assess compensation payable by the Third Defendant to the Second Defendant are ultra vires the First Defendant. AND AS A FURTHER CAUSE OF ACTION the Plaintiffs repeat Paragraphs 1 to 20 hereof and say —

21. THAT, if the powers vested in the New Zealand Dairy Board under the Dairy Factory Supply Regulations 1936 and its amendments are "rights, obligations or liabilities" within the meaning to be ascribed to those words in Section 71 (1) of the Dairy Production and Marketing Board Act 1961 (which is denied), then nevertheless the said powers are by virtue of the said Section 71 (1) of the said Act subject to the provisions of the said Act.

22. THAT Section 40 (1) (c) of the said Act specifically gives the First Defendant authority, in accordance with regulations under the Act, to "promote and administer schemes providing for a system of zoning in respect of the supply of milk or cream to dairy factories or other establishments used for the receipt or storage of milk or cream."

23. THAT Section 40 (2) of the said Act declares that without limiting the general powers conferred by Subsection 1 of the Section, regulations may be made under the said Act, providing for, inter alia,

(a) The definition and assignment of areas from which milk or cream may be delivered to or collected by owners or occupiers of specified dairy factories or other establishments and of routes along which any such delivery or collection shall take place.

(b) The assessment and payment of compensation for loss incurred to the owner of a dairy factory or other establishment prejudicially

affected by the operation of regulations under this Act providing for a system of zoning in respect of the supply of milk or cream to that factory or establishment.

24. THAT the First Defendant can only exercise its power to make zoning orders and assess compensation in accordance with and by means of regulations under Section 40 of the Dairy Production and Marketing Board Act 1961.

25. THAT no regulations concerning zoning orders or compensation have ever been made under the said Act.

26. THAT the actions of the First Defendant in purporting to make the said zoning order 11B and to assess compensation payable by the Third Defendant are ultra vires the First Defendant.

AND AS A FURTHER CAUSE OF ACTION the Plaintiffs say —

27. THAT if the First Defendant has power to make zoning orders and to assess compensation under the Dairy Factory Supply Regulations 1936 (which is denied) then the First Defendant was not empowered to delegate its powers under the said Regulations to a Committee.

28. THAT the hearing by a Committee of the said Board of the Second Defendant's zoning application referred to in Paragraph 11 hereof was ultra vires the First Defendant.

WHEREFORE THE PLAINTIFFS PRAY —

(a) THAT a Writ of Certiorari directed to the above-named First Defendant do issue to remove into this Honourable Court and to quash zoning order No. 11B purported to be made by the First Defendant on the 30th day of May 1963 in a purported exercise of power under the Dairy Factory Supply Regulations 1936 defining a milk zone for the Second Defendant and to quash all proceedings of and incidental to and consequent upon the hearing by a Committee of the First Defendant on the 29th and 30th days of April 1963 in the Ruawai-Tokatoka War Memorial Hall, Ruawai consequent upon an application of the Second Defendant to the First Defendant for the definition of a milk zone.

(b) THAT a Writ of Injunction do issue against the First Defendant to restrain it, its servants or agents or any of them from taking any steps to assess compensation to be paid by the Third Defendant to the Second Defendant pursuant to the said purported zoning order 11B.

(c) Judgment against the Defendants or any of them for the costs of and incidental to these proceedings.

(d) Such further or other relief, as to this Honourable Court seems just.

This Statement of Claim is filed by EDWARD JOSEPH VERNON DYSON of Messieurs Morpeth, Gould and Co., Solicitors for the Plaintiffs, whose address for service is at the offices of Messieurs Rishworth and Harrison and Kennedy, Solicitors, Bank Street Whangarei.

In the Supreme Court of New Zealand

No. 2
Motion for issue of Prerogative Writs, 20th August, 1963

No. 2

NOTICE OF MOTION TO SUPREME COURT FOR ISSUE OF PREROGATIVE WRITS

TAKE NOTICE that on Friday the 13th day of September 1963 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard Counsel for the abovenamed Plaintiffs WILL MOVE this Honourable Court at Auckland for Orders —

(a) THAT a Writ of Certiorari directed to the abovenamed First Defendant do issue to remove into this Honourable Court and to quash zoning order No. 11B purported to be made by the First Defendant on the 30th day of May 1963 in a purported exercise of power under the Dairy Factory Supply Regulations, 1936 defining a milk zone for the Second Defendant and to quash all proceedings of and incidental to and consequent upon a hearing by a Committee of the First Defendant on the 29th and 30th days of April 1963 in the Ruawai-Tokatoka War Memorial Hall, Ruawai consequent upon an application of the Second Defendant to the First Defendant for the definition of a milk zone.

(b) THAT a Writ of Injunction do issue against the First Defendant to restrain it, its servants, or agents or any of them from taking any steps to assess compensation to be paid by the Third Defendant to the Second Defendant pursuant to the said purported Zoning Order 11B.

UPON THE GROUNDS —

(a) THAT the said proceedings, the said Zoning Order 11B and the said assessment of compensation are ultra vires the First Defendant.

(b) THAT the First Defendant has a financial interest in the Second Defendant and that the First Defendant in hearing the application of the Second Defendant for the definition of a milk zone was a judge in its own cause when it was under a duty to act judicially and in accordance with the principles of natural justice.

AND UPON THE FURTHER GROUNDS contained in the Affidavit of JAMES EDWARD JEFFS, JOHN GORDON ROBINSON, COLIN EDWARD PEARCE and BERTRAM ERLE DREADON filed herein.

"Ian Barker"
Counsel Moving

In the Supreme Court of New Zealand

No. 3
Affidavit of Plaintiffs, 20th August, 1963

No. 3

AFFIDAVIT OF PLAINTIFFS IN SUPPORT

WE, JAMES EDWARD JEFFS, JOHN GORDON ROBINSON, COLIN EDWARD PEARCE all of Ruawai and BERTRAM ERLE DREADON of Tokatoka all of us Farmers Severally make oath and say as follows—

1. THAT we are the Plaintiffs in this action and are suing on behalf of ourselves and 88 other dairy farmers in the Ruawai District. We crave leave to refer to Paragraph 11 of the Statement of Claim filed herein and state that the correct names of those whom we represent in this action are correctly set forth in that Paragraph.

2. THAT we and those represented by us are all dairy farmers in the Ruawai District and are all shareholders of the Second Defendant Company.

3. THAT up until the 31st day of May 1963 an agreement was in force between the Second Defendant and the Third Defendant defining "milk zones" for both the Second and Third Defendants. Under this agreement we, as shareholders, were bound to supply our whole-milk production to the Second Defendant: the said agreement expired on or about the 31st day of May 1963.

4. THAT annexed hereto and marked with the letter "A" is a true copy of a Notice from the First Defendant received by each of us and according to the best of our knowledge information and belief by all of those represented by us on or about the 28th day of March 1963.

5. THAT upon receipt of this Notice we and 134 shareholders of the Second Defendant Company decided to instruct Counsel to appear at the hearing referred to in the said Notice to oppose the making of a Zoning Order for the Second Defendant by the First Defendant. We did not wish to be zoned to supply whole-milk to the Second Defendant.

6. THAT at the said Hearing in Ruawai on the 29th and 30th days of April 1963 the following was the position taken by the various parties represented at this Hearing —

(a) We the Plaintiffs and 134 other shareholders of the Second Defendant Company objected to the making of the Zoning Order: our Counsel led evidence and made Submissions to the effect that a milk zone should not be created for the Second Defendant.

(b) The Second Defendant was represented by Counsel who strongly advocated the formation of a milk zone and led evidence and made submissions to this effect.

(c) The Third Defendant was represented by Counsel who made no submissions.

(d) The Fourth Defendant was represented by Counsel who made no submissions.

(e) The Fifth Defendant and 125 other suppliers were represented by Counsel who led evidence and made submissions supporting the Second Defendant. The Fifth Defendant himself gave evidence on behalf of those whom he represented.

7. THAT at the Hearing referred to in Paragraph 4 all parties were given the opportunity to tender evidence witnesses, were cross-examined by Counsel, who made oral submissions and who were given leave to make later submissions in writing.

8. THAT at the said Hearing referred to in Paragraph 4 hereof our Counsel, Mr. E. J. V. Dyson, advised the Committee of the First Defendant that he objected to the First Defendant proceeding to deal with the matter as it had financial interest therein.

9. THAT by letter dated the 30th day of May 1963 the First Defendant advised our Solicitors of a new Zoning Order No. 11B and annexed hereto and marked with the letter "B" is a true copy of the said letter.

In the Supreme Court of New Zealand

No. 3 Affidavit of Plaintiffs, 20th August, 1963 *continued*

10. THAT on or about the 5th day of July 1963 our Solicitors on our instructions wrote to the First Defendant advising it of our intention to take proceedings in this Honourable Court; annexed hereto and marked with the letter "C" is a true copy of the said letter and annexed hereto and marked with the letter "D" is a true copy of the reply to the said letter from the Solicitors for the first Defendant.

11. THAT according to the records of the Registrar of Companies at Auckland which we have caused to be searched, the Second Defendant on or about the 29th day of January 1960 gave a floating charge to the New Zealand Dairy Production and Marketing Board for £87,652 and on the 6th day of November, 1961 gave to the First Defendant a Debenture securing £35,000. Both Debentures are subject to a floating charge given by the Second Defendant in favour of the National Bank of New Zealand Limited to secure advances.

AND I, the abovenamed JAMES EDWARD JEFFS for myself make oath and say as follows —

12. THAT I was a Director of the Second Defendant Company at the time when the said advance of £35,000 from the First Defendant to the Second Defendant was negotiated. The said advance was for the purchase of milk tankers and plant for the treatment of whole-milk.

13. THAT at or about the date of the said advance of £35,000 from the First Defendant to the Second Defendant indebtedness of the Second Defendant to the National Bank of New Zealand Limited was approximately £56,000.

14. THAT the latest balance-sheet of the Second Defendant reveals that the indebtedness of the Second Defendant to the said National Bank of New Zealand Limited as at the 31st day of May 1963 is approximately £48,000.

SEVERALLY SWORN at Ruawai this 20th day of August 1963 by the said JAMES EDWARD JEFFS, JOHN GORDON ROBINSON, COLIN EDWARD PEARCE and BERTRAM ERLE DREADON there being no qualified solicitor or registrar or deputy registrar available at his office within 5 miles, before me —

J. E. Jeffs
J. G. Robinson
C. E. Pearce
B. E. Dreadon

R. J. Wallace
A Justice of the Peace in and for New Zealand.

In the Supreme Court of New Zealand

No. 4 Statement of Defence by Third Defendant (Third Respondent) 19th September, 1963

No. 4

STATEMENT OF DEFENCE BY THIRD DEFENDANT

THE THIRD DEFENDANT says:—

1. THAT it admits each and every the allegations contained in paragraph 1 of the Statement of Claim.

2. THAT it admits each and every the allegations contained in paragraph 2 of the Statement of Claim.

3. THAT it admits each and every the allegations contained in paragraph 3 of the Statement of Claim.

4. THAT it admits each and every the allegations contained in paragraph 4 of the Statement of Claim.

5. THAT it admits each and every the allegations contained in paragraph 5 of the Statement of Claim.

6. THAT it admits each and every the allegations contained in paragraph 6 of the Statement of Claim.

7. THAT it admits each and every the allegations contained in paragraph 7 of the Statement of Claim.

8. THAT it admits each and every the allegations contained in paragraph 8 of the Statement of Claim.

9. THAT it admits each and every the allegations contained in paragraph 9 of the Statement of Claim and says further that it objected to the said Committee hearing the application of the Second Defendant upon the grounds that the First Defendant had no power to delegate its duties to the Committee which had been appointed by the First Defendant to embark upon the hearing referred to in paragraph 7 of the Statement of Claim and that any decision made by the First Defendant consequent upon the hearing conducted by the said Committee would be ultra vires the First Defendant. The Third Defendant still says that the decision of the First Defendant referred to in paragraph 10 of the Statement of Claim is ultra vires the First Defendant.

10. THAT it admits each and every the allegations contained in paragraph 10 of the Statement of Claim and repeats the allegations contained in paragraph 9 hereof.

11. THAT it has no knowledge of and therefore denies each and every the allegations contained in paragraph 11 of the Statement of Claim.

12. THAT it does not plead to paragraph 12 of the Statement of Claim.

13. THAT it admits each and every the allegations contained in paragraph 13 of the Statement of Claim.

14. THAT it admits and supports each and every the allegations contained in paragraph 14 of the Statement of Claim.

15. THAT it admits and supports each and every the allegations contained in paragraph 15 of the Statement of Claim.

16. THAT it admits and supports each and every the allegations contained in paragraph 16 of the Statement of Claim.

17. THAT it admits and supports each and every the allegations contained in paragraph 17 of the Statement of Claim.

18. THAT it admits each and every the allegations contained in paragraph 18 of the Statement of Claim.

19. THAT it admits and supports each and every the allegations contained in paragraph 19 of the Statement of Claim.

20. THAT it admits and supports each and every the allegations contained in paragraph 20 of the Statement of Claim.

21. THAT it admits and supports each and every the allegations contained in paragraph 21 of the Statement of Claim.

In the Supreme Court of New Zealand

No. 4
Statement of Defence by Third Defendant (Third Respondent) 19th Sepember, 1964
continued

22. THAT it admits each and every the allegations contained in paragraph 22 of the Statement of Claim subject to the pleadings hereinbefore contained.

23. THAT it admits each and every the allegations contained in paragraph 23 of the Statement of Claim.

24. THAT it admits and supports each and every the allegations contained in paragraph 24 of the Statement of Claim.

25. THAT it admits and supports each and every the allegations contained in paragraph 25 of the Statement of Claim.

26. THAT it admits and supports each and every the allegations contained in paragraph 26 of the Statement of Claim.

27. THAT it admits and supports each and every the allegations contained in paragraph 27 of the Statement of Claim.

28. THAT it admits and supports each and every the allegations contained in paragraph 28 of the Statement of Claim.

This Statement of Defence is filed by JAMES BAYNE SINCLAIR, Solicitor for the Third Defendant, whose address for service is at the offices of Messieurs Thomson, Wilson and Fiddler, Solicitors, Whangarei.

No. 5

STATEMENT OF DEFENCE BY FIRST DEFENDANT

In the Supreme Court of New Zealand

No. 5
Statement of Defence by First Defendant (First Respondent) 4th October, 1963

The First Defendant by its solicitor says:—

1. IT admits the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the Statement of Claim.

2. IT admits the allegations contained in paragraph 6 of the Statement of Claim save and except that it says that the Second Defendant applied to the First Defendant to extend the provisions of the existing Zoning Orders to the supply of whole milk.

3. IT admits the allegations contained in paragraphs 7, 8 and 9 of the Statement of Claim.

4. IT admits that on or about the 30th day of May 1963 the First Defendant issued a notice giving the nature of its decision in the application referred to in paragraph 2 hereof and that the said notice read:

> "Board today decided that all Ruawai supply on Pouto Peninsula be zoned to the Northern Wairoa Dairy Company with effect from June 1 1963. Board further decided that existing zoning boundaries on eastern side of Northern Wairoa River should be maintained for cream supply and also be extended to apply to whole milk supply with effect from June 1. Zoning Orders 11 and 11A will be amended accordingly. Board also decided that compensation will be awarded and directed zoning committee to investigate and report."

But otherwise denies the allegations contained in paragraph 10 of the Statement of Claim.

5. IT does not know and therefore denies the allegations contained in paragraph 11 of the Statement of Claim.

6. IT admits the allegations contained in paragraph 12 of the Statement of Claim.

7. IT admits the allegations contained in paragraph 13 of the Statement of Claim.

8. IT denies each and all the allegations contained in paragraphs 14, 15 and 16 of the Statement of Claim.

9. IT admits the allegations contained in paragraph 17 of the Statement of Claim.

10. IT denies the allegations contained in paragraph 18 of the Statement of Claim save and except that it admits that the regulations referred to therein, as formerly constituted, conferred powers on a body corporate known as the New Zealand Dairy Board and says that the First Defendant acted pursuant to powers conferred on it by the said regulations as they are at present constituted.

11. IT denies the allegations contained in paragraphs 19 and 20 of the Statement of Claim.

12. IT admits the allegations contained in paragraph 21 of the Statement of Claim.

13. IT admits the allegations contained in paragraphs 22 and 23 of the Statement of Claim.

14. IT denies the allegations contained in paragraph 24 of the Statement of Claim.

15. IT admits the allegations contained in paragraph 25 of the Statement of Claim.

16. IT denies the allegations contained in paragraph 26 of the Statement of Claim.

17. IT denies the allegations contained in paragraphs 27 and 28 of the Statement of Claim.

AND AS A FURTHER DEFENCE the First Defendant by its solicitor says:

18. THAT it repeats the admissions denials and allegations contained in paragraphs 1 to 17 both inclusive hereof.

19. IF it be proved that the First Defendant has a financial interest in the subject matter of the zoning application which was before it, as is alleged in paragraph 14 of the Statement of Claim, which is denied, then the First Defendant denies that it is thereby a judge in its own cause contrary to the principles of natural justice.

AND AS A FURTHER DEFENCE the First Defendant by its solicitor says:

20. THAT it repeats the admissions denials and allegations contained in paragraphs 1 to 17 inclusive and paragraph 19 hereof.

21. IF it be proved that the First Defendant has a financial interest in the subject matter of the zoning application which was before it and in any compensation that is to be paid by the Third Defendant, as are alleged in paragraphs 14 and 15 of the Statement of Claim and if it be proved that the First Defendant is thereby a judge in its own cause, as is alleged in paragraph 16 of the Statement of Claim, both of which are denied, then the First Defendant says that it was the intention of the Legislature

In the Supreme Court of New Zealand

No. 5 Statement of Defence by First Defendant (First Respondent) 4th October, 1963 *continued*

that the First Defendant, while making zoning orders or fixing and assessing compensation should be permitted to be a judge in its own cause.

AND AS A FURTHER DEFENCE the First Defendant by its solicitor says:

22. IT repeats the admissions denials and allegations contained in paragraphs 1 to 17 inclusive and 19 and 21 hereof.

23. IF it be proved that the First Defendant has a financial interest in any compensation that is paid by the Third Defendant to the Second Defendant, as is alleged in paragraph 16 of the Statement of Claim and if it be proved that in assessing compensation the First Defendant is a judge in its own cause as is alleged in paragraph 17 of the Statement of Claim and that it was not the intention of the Legislature that the First Defendant in so assessing compensation should be permitted to be a judge in its own cause, all of which are denied, then the First Defendant says that the Plaintiffs have no sufficient interest in the question of compensation to support the present application to this Honourable Court for relief in respect thereof.

AND AS A FURTHER DEFENCE the First Defendant by its solicitor says:

24. IT repeats the admissions denials and allegations contained in paragraphs 1 to 17 inclusive and paragraphs 19, 21 and 23 hereof.

25. IF it be proved that the First Defendant was not empowered to delegate any of its powers under the Dairy Factory Supply Regulations, 1936, as is alleged in paragraph 27 of the Statement of Claim, which is denied, then the First Defendant says that it did not in fact delegate the said powers to a Committee.

This Statement of Defence is filed by LYNDSAY MASON PAPPS, Solicitor for the First Defendant, whose address for service is at the Offices of Messieurs Webb, Ross and Ross, Bank Street, Whangarei.

No. 6

In the Supreme Court of New Zealand

No. 6 Affidavit of P. S. Green for First Defendant (First Respondent) 10th February, 1964

AFFIDAVIT OF PAUL STANLEY GREEN ON BEHALF OF FIRST DEFENDANT

I, PAUL STANLEY GREEN, of Wellington, Board Secretary, make oath and say as follows:

1. I am General Secretary of the New Zealand Dairy Production and Marketing Board the First Defendant in these proceedings and have held that office since the establishment of the First Defendant on 1st September, 1961 under and by virtue of the Dairy Production and Marketing Board Act, 1961.

2. AT all material times prior to the 1st day of June, 1963 the question of supply of cream as between the Second Defendant and the Third Defendant was regulated by the provisions of Zoning Order 11 as amended by Zoning Order 11A. Annexed hereto and marked with the letter "A" is a copy of Zoning Order 11 amended as aforesaid

3. ON or about the 14th day of September, 1962 the Board received a Petition from suppliers to the Second Defendant resident on the Pouto Peninsula for rezoning to the Third Defendant.

4. ONE of the signatories to this said Petition was J. B. L. Development Limited through its agent, J. E. Jeffs, who is one of the Plaintiffs in these proceedings.

5. ON or about the 30th day of January, 1963 the First Defendant resolved to set up a Zoning Committee of three men to investigate the question of supply between the Second and Third Defendants.

6. ON the 22nd day of February, 1963 the First Defendant received a formal application from the Second Defendant to amend the said zoning orders defining its area so as to include milk.

7. ON or about the 28th day of March the First Defendant notified supplying shareholders of the Second Defendant and advertised to the public at large that its Committee would hold a public meeting in the Ruawai-Tokatoka War Memorial Hall commencing at 9.30 a.m. on Monday 29th April, 1963 and that an opportunity to tender submissions would be given to all interested persons.

8. IN or about the month of April, 1963 the First Defendant received an application by suppliers to the Second Defendant for rezoning to the Third Defendant.

9. THIS application was signed by three of the people who are represented by the Plaintiffs in these proceedings.

10. IN or about the month of April, 1963 the First Defendant received applications by suppliers to the Second Defendant for lifting of all zoning regulations throughout the area of the Second Defendant.

11. THIS application was signed by J. G. Robinson, C. E. Pearce and B. E. Dreadon, Plaintiffs, in these proceedings and also by 31 of the people who are represented by the Plaintiffs in these proceedings.

12. IN or about the month of April, 1963 the First Defendant received a Petition from suppliers to the Second Defendant resident at Tokatoka for rezoning to the Third Defendant.

13. THIS said Petition was signed by B. E. Dreadon and also by eight suppliers to the Second Defendant who are represented by the Plaintiffs in these proceedings.

14. THE First Defendant's Committee duly held the said public meeting and conducted it in the manner of a judicial proceeding. All interested persons were given an opportunity to make submissions, to tender evidence and to cross-examine witnesses, either personally, or by Counsel.

15. ON or about the 29th day of May, 1963 the First Defendant received the report of its committee on the said public meeting, considered its recommendations and resolved that Zoning Orders 11 and 11A be amended as from 1st June, 1963 to the effect that suppliers to the Second Defendant resident on the Pouto Peninsula be zoned to the Third Defendant for the supply of both milk and cream, that the existing cream zone boundaries on the eastern side of the Northern Wairoa River be maintained and extended to milk and further resolved that compensation be awarded to the Second Defendant for the loss of supply. Annexed hereto and marked with the letter "B" is a copy of the said report prepared by the First Defendant's Committee.

In the Supreme Court of New Zealand

No. 6
Affidavit of P. S. Green for First Defendant (First Respondent) 10th February, 1964
continued

16. ZONING Order 11, as amended by Zoning Order 11A, was duly amended by Zoning Order 11B, but to date no compensation has been awarded to the Second Defendant. Annexed hereto and marked with the letter "C" is a copy of Zoning Order 11B.

SWORN at Wellington this 10th day of February, 1964 before me: "P. S. Green"

"Kevin J. Bell"
A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand

No. 7
Statement of Defence by Second Defendant (Second Respondent) 18th May, 1964

No. 7
STATEMENT OF DEFENCE BY SECOND DEFENDANT

The Second Defendant by its Solicitor says:

1. IT admits the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of the Statement of Claim filed herein.

2. IT admits the allegations contained in Paragraph 6 of the Statement of Claim save and except that it says it applied to the First Defendant to extend the provisions of the then existing Zoning Orders to the supply of Whole Milk.

3. IT admits the allegations contained in Paragraph 7 of the Statement of Claim.

4. IT admits the allegations contained in Paragraph 8 of the Statement of Claim save and except that it denies that the number of suppliers who opposed the application with the Plaintiffs is as set out in the Statement of Claim and further denies that the number of suppliers who supported the application is as set out in the Statement of Claim.

5. IT admits the allegations contained in Paragraph 9 of the Statement of Claim.

6. IT admits that on or about the 30th day of May, 1963 the First Defendant issued a notice giving the nature of its decision in the application referred to in paragraph 2 hereof and that the said notice read:—

> "Board today decided that all Ruawai supply on Pouto Peninsula be zoned to the Northern Wairoa Dairy Company with effect from June 1 1963. Board further decided that existing zoning boundaries on eastern side of Northern Wairoa River should be maintained for cream supply and also be extended to apply to whole milk supply with effect from June 1. Zoning Orders 11 and 11A will be amended accordingly. Board also decided that compensation will be awarded and directed zoning committee to investigate and report."

BUT otherwise denies the allegations contained in Paragraph 10 of the Statement of Claim.

7. IT denies the allegations contained in Paragraph 11 of the Statement of Claim.

8. IT admits the allegations contained in Paragraph 12 of the Statement of Claim save and except that it denies that the number of suppliers who supported the Second Defendant is as set out in the Statement of Claim.

9. IT admits the allegations contained in Paragraph 13 of the Statement of Claim.

10. IT denies each and all the allegations contained in Paragraphs 14, 15 and 16 of the Statement of Claim.

11. IT admits the allegations contained in Paragraph 17 of the Statement of Claim.

12. IT denies the allegations contained in Paragraph 18 of the Statement of Claim save and except that it admits that the regulations referred to therein, as formerly constituted conferred powers on a body corporate known as the New Zealand Dairy Board and says that the First Defendant acted pursuant to powers conferred on it by the said regulations as they are at present constituted.

13. IT denies each and all the allegations contained in Paragraphs 19 and 20 of the Statement of Claim.

14. IT admits the allegations contained in Paragraph 21 of the Statement of Claim.

15. IT admits the allegations contained in Paragraphs 22 and 23 of the Statement of Claim.

16. IT denies the allegations contained in Paragraph 24 of the Statement of Claim.

17. IT admits the allegations contained in Paragraph 25 of the Statement of Claim save and except that the Dairy Factory Supply Regulations, 1936 conferred powers upon the First Defendant to make Zoning Orders and to assess compensation.

18. IT denies the allegations contained in Paragraph 26 of the Statement of Claim.

19. IT denies the allegations contained in Paragraph 27 of the Statement of Claim and Paragraph 28 of the Statement of Claim.

AND AS A FURTHER DEFENCE THE SECOND DEFENDANT BY ITS SOLICITOR SAYS:

20. THAT it repeats the admissions denials and allegations contained in Paragraphs 1 to 19 both inclusive hereof.

21. IF it be proved that the First Defendant has a financial interest in the subject matter of the zoning application which was before it, as it alleged in Paragraph 14 of the Statement of Claim, which is denied then the Second Defendant denies that the First Defendant is thereby a judge in its own cause contrary to the principles of natural justice.

AND AS A FURTHER DEFENCE THE SECOND DEFENDANT BY ITS SOLICITOR SAYS:

22. THAT it repeats the admissions denials and allegations contained in Paragraphs 1 to 19 inclusive and Paragraph 21 hereof.

23. IF it be proved that the First Defendant has a financial interest in the subject matter of the zoning application which was before it and in any compensation that is to be paid by the Third Defendant, as are alleged in Paragraphs 14 and 15 of the Statement of Claim and if it be proved that the First Defendant is thereby a Judge in its own cause, as is alleged in Paragraph 16 of the Statement of Claim, both of which are denied, then the Second Defendant says that it was the intention of the Legislature that the First Defendant, while making zoning Orders or fixing

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No. 7 Statement of Defence by (Second Defendant Second Respondent) 18th May, 1964 *continued*

and assessing compensation should be permitted to be a judge in its own cause and further that the First Defendant acted ex necessitate by extending the Zoning Orders and determining compensation.

AND AS A FURTHER DEFENCE THE SECOND DEFENDANT BY ITS SOLICITOR SAYS:

24. IT repeats the admissions, denials and allegations contained in Paragraph 1 to 17 inclusive and 21 and 23 hereof.

25. IF it be proved that the First Defendant has a financial interest in any compensation that is paid by the Third Defendant to the Second Defendant, as is alleged in Paragraph 16 of the Statement of Claim and if it be proved that in assessing compensation the First Defendant is a judge in its own cause as is alleged in paragraph 17 of the Statement of Claim and that it was not the intention of the Legislature that the First Defendant in so assessing compensation should be permitted to be a judge in its own cause, all of which are denied then the Second Defendant says that the Plaintiffs have no sufficient interest in the question of compensation to support the present application to this Honourable Court for relief in respect thereof.

AND AS A FURTHER DEFENCE THE SECOND DEFENDANT BY ITS SOLICITOR SAYS:

26. IT repeats the admissions, denials, and allegations contained in Paragraphs 1 to 17 inclusive and paragraphs 21, 23 and 24 hereof.

27. IF it be proved that the First Defendant was not empowered to delegate any of its powers under the Dairy Factory Supply Regulations 1936, as is alleged in Paragraph 27 of the Statement of Claim, which is denied then the Second Defendant says that it did not in fact delegate the said powers to a Committee.

This Statement of Defence is filed by BARRIE CHARLES SPRING, Solicitor for the Second Defendant, whose address for service is at the Offices of BARRIE C. SPRING, McBreen Building, Cameron Street, Whangarei.

In the Supreme Court of New Zealand

No. 8

NOTES OF EVIDENCE TAKEN BEFORE HARDIE BOYS, J.

No. 8 First Defendant's Evidence Paul Stanley Green, Cross-Examination

PAUL STANLEY GREEN (Sworn) I am Secretary, General Secretary of the 1st Defendant.

CROSS-EXAMINED BY MR. BARKER:

Q. You were Secretary of Committee of the Board who went to Ruawai in April 1963 for zoning hearing? I was. Q. You took notes in longhand of proceedings? Brief notes. Q. Was that the only record taken at the time? It was. Q. Did you have your brief longhand notes typed out at any stage? No.

Q. Did any members of the Board ask to see your brief notes? No, not that I can recall.

Q. You received fairly lengthy written submissions from Mr. Dyson and Mr. Spring about 17th May? That would be correct. Q. Did you send copies of those submissions to the 3 Committee members? I either sent them or if they were in the office they received a copy of them.

Q. One way or another they got them round about 17th May? Or shortly after.

Q. How many members on the Board? 13.

Q. Did the other 10 members receive copies of these submissions? You are referring to the later submissions after the hearing, no they did not.

Q. All the other 10 members received was Committee's report which is attached to your affidavit? And to the agenda papers which they received before the meeting of 30th and 31st May.

Q. I show you report of the Committee (Exhibit B of your affidavit) that is dated 30th May 1963? Yes, I think it is, that is morning of meeting, that report had been prepared following discussion with Committee on draft report the previous day, it is attachment No. 2 of the agenda.

Q. You say this was on agenda for 30th May? I am just a little hazy. I could be a day or two out, it is some time since I saw the papers, I would need to look it up . . . the point I am making is that members of the Board had the opportunity to read the report of the Committee before the meeting and the report.

Q. This is the Board meeting extending over 2 days? Yes. Q. When did you have discussion with the 3 Committee members before the actual report was printed? On this particular occasion we travelled from Auckland to Ruawai by car, and all members of the Committee and myself returned from Ruawai to Auckland by car after the hearing, as you naturally expect the subject of the hearing was discussed during the retun car journey, and some decisions were made, some tentative decisions were made.

HIS HONOUR:

Q. Were you meaning both? I meant both . . . perhaps I am not quite correct, I should say a decision was made and some tentative decisions were made.

COUNSEL:

Q. What was the decision? The decision was that Committee was quite definitely of mind to recommend to the Board that Mr. A. A. Houghton's application should be upheld or agreed to, whichever you prefer.

Q. Was Houghton's application opposed by Ruawai Co.? I cannot recall that, not particularly I don't think.

Q. But Houghton was a supplier on Pouto and were not the Ruawai Co. and their supporters opposing any change of Pouto? In that sense, yes . . . I bring this out, I think it important as to manner Committee approached the problem — they were satisfied that Houghton had made out a very sound case, they then addressed themselves to position of Pouto Peninsula and they agreed it could not be carved up further, dealt with as a whole, and they reached the tentative decision, and I say tentative because of other further decision to be made, the tentative decision was to recommend to Board that the whole of the peninsula be zoned to Northern Wairoa . . . this naturally meant that if the Board agreed with recommendation 2, that one would be wrapped up in it, that is Houghton.

In the Supreme Court of New Zealand

No. 8
First Defendant's Evidence
Paul Stanley Green, Cross-Examination
continued

Q. Houghton was singled out because of his persistence over the years? Not necessarily, on the evidence to the Committee at the hearing they were satisfied Mr. Houghton's decision ought to be recommended.

HIS HONOUR:

Q. Didn't those submissions go to the root of your power to decide anything, whether you were disqualified by financial considerations? These points were noted by Committee, and any decision or recommendation would be subject to what Board did acting on legal advice.

COUNSEL:

Q. Was any discussion in the car from Ruawai to Auckland about milk zoning for Ruawai? Yes, tentatively they reached the decision that is recorded in draft.

Q. In other words it was tentatively agreed that Ruawai should have its milk zoning? It was.

Q. Was it not realised by you and members of the Committee that submissions were to be filed by counsel for the objectors? Not necessarily, the Chairman at the hearing said that the Committee would be prepared to receive submissions in writing, I think within 14 days, but there was no definite indication to my memory that any submissions would in fact be made, this is standard procedure at the meetings to invite further submission but by no means are they always received.

Q. I put it to you that in the complicated set of facts that you had here, submissions were likely? Not necessarily, I think it has got to be borne in mind too that this situation of Ruawai had been going on for some considerable time, the facts, the background was known to the members of the Board as well as the Members of the Committee.

Q. You sent the submissions to the various Committee Members about 17th May, would it be correct that the next discussion with Committee Members was on 29th, the first day of main meeting? You are asking me to cast my mind back about 15 months.

HIS HONOUR:

Q. When did you next discuss the lawyers' submissions with any one of the 3 members? I couldn't say any one of the 3 . . . they might not be in town, but I can say it would be 29th before whole Committee would be together.

COUNSEL:

Q. Where do 3 members live? Hickey is at Opunake in Taranaki. Mr. Friis was at Tauranga and Mr. Greenough at Te Awamutu.

Q. Would any of these gentlemen have been in Wellington in May prior to Board meeting? Quite possibly.

Q. Can you recall discussing the legal submissions with any one of the members prior to Board meeting? Yes, Mr. Hickey wrote to me, and you referred to the letter; after I had got to a stage when the report was in rough draft I recall talking to him on the phone about it, mainly to see whether I had covered the points which he himself felt should be covered for submission to the Board.

Q. Did you discuss your report on telephone with other 2 members of the Committee? I can't remember that.

Q. So at the time of the letter from Mr. Hickey to you of 1st May, letter No. 9? That is one starting "Dear Paul."

Q. At that time you made the tentative conclusions although you might or might not have received further legal submissions? I drafted the report according to the discussions in car from Ruawai to Auckland.

Q. Did you draft the report before or after you received submissions from Mr. Dyson and Mr. Spring? I can't recall, I was very tied up at the time with the local market position, and I am unable to remember.

HIS HONOUR:

Q. In the papers you say the submissions had not been forwarded? That is not correct.

Q. On 17th May you sent these submissions of Mr. Dyson and Mr. Spring to the Committee members? Yes.

Q. According to report Exhibit B to your affidavit you refer to these submissions as having not yet been received? I refer not to those submissions, I refer if you would care to read back a little further, I refer to specific submissions on jurisdiction and points made on whole of the hearing.

COUNSEL:

Q. Well I take it from date of report of 30th May, that its final form was settled by you and Committee on 29th? By the Committee, yes.

Q. And the Board members would not receive it until they sat down at meeting table on 30th May? Either that, or as soon as they saw the agenda.

HIS HONOUR:

Q. When does agenda go out? They are not sent out, they get it as they arrive, sometimes it is earlier, the previous day, or sometimes completed morning of meeting.

COUNSEL:

Q. Your meetings last all day? Normally 9.30 to 5 on first day.

Q. And then your discussion with Committee settling the final form of report took place in evening of 29th? I cannot recall, it would depend on when the 3 members were all together, on the day before the Board meeting we hold Committee Meetings, normally commencing about 12.30 with one Committee, we have Casein Committee and Powder Committee, and the Loans Council, they all meet on the one day. The Casein Committee don't always meet every month, Powder Committee does . . . depending on time the 3 members of this zoning committee would be able to get together and discuss what was to go in final report.

Q. Would it be fair to deduce from date on report, 30th, you and Committee didn't settle the final report until the day before meeting on 30th? It could be deduced no more than it was typed on 30th, a draft was given of final report to be typed with date 30th on it.

Q. Well the other members of the Board would not have chance of seeing your report until 30th? That would be correct.

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First Defendant's Evidence
Paul Stanley Green, Cross-Examination
continued

Q. Did you hear the unofficial minutes, document No. 12, prepared by your minute secretary? I did.

Q. Would those minutes represent an accurate report of what went on at a Board meeting as regards Ruawai zoning? They wouldn't be a complete report, they would be typed notes from a shorthand report, but would by no means be complete, repetition would be omitted and they were given for the main purpose of keeping a short record of the discussion and a guide to the person compiling the official notes.

HIS HONOUR:

Q. You yourself would have been there and have your own memory to guide you too? Yes.

Q. But do you prepare the minutes or does Minute Secretary? My Assistant prepares the minutes.

Q. Do I take it there are 3, the stenographer, the Minute Secretary who gets her transcription and then you? The Minute Secretary is Mr. Burnard appointed in 1951, my assistant takes longhand notes, also a man, they would compile these minutes together, draft them, and I would have corrected the draft according to my knowledge of the discussion and they would then go forward for inclusion in official minutes.

Q. Who takes the shorthand notes? Mr. Burnard.

COUNSEL:

Q. With all these people taking a record, you would end up with fairly accurate summary of what was said? I would think so.

Q. Would you agree that in your Committee's report you didn't advance any cogent reasons why . . . any reasons why there should be a milk zone for Ruawai? No, it is not necessary, what a Committee would do, the reasons are very obvious the report referred to the best interests of the suppliers of the Ruawai Dairy Co. now in terms noted by the Board Members who are steeped in this supply problem, the best interests means an awful lot, it covers a wide field.

Q. You agree that for Pouto problem you advanced reasons why Board should zone Pouto suppliers to Northern Wairoa? Yes, for the very reason that Committee felt that it was not necessarily against the best interests of Ruawai to lose that supply provided the question of compensation was adequately dealt with.

Q. Why then did you give reasons for changing over the Pouto suppliers and gave no reasons for creating the milk zone in Ruawai? As I mentioned earlier the facts of this Ruawai case were very well known, going back over quite a long period of years, and it would be quite obvious that unless some protection was given, then if no protection was given on mainland, a piecemeal break up of the Ruawai Dairy Company would occur, this is generally referred to in the term "best interests" to grant protection in the case of milk as against cream.

Q. What you say is the Board Members because of their knowledge of this dispute would read all that into the words "best interests"? They

would, in fact the case was so well known in terms of the facts to Board Members, that I think that accounts largely for reasons why there are no questions on the subject, except on broad field, this shows a real knowledge by Board Members, this is not the first time the Committee met this problem.

Q. At this time, the present Board as at present constituted had not been in existence 2 years? That is correct, in 1961 new nominations took place, this brought together the two interests.

Q. You told us there were 13 Members of the Board? Yes.

Q. Most of them come from widely scattered parts of the country? Correct.

Q. Does the membership change from year to year? No, not to any great extent . . . it varies.

Q. At the time of this meeting in May 1963 when had there been a new Board Member? The newest would be those . . . outside of the old Marketing Commission and Dairy Board, or do you mean new members from Marketing Commission came on to Dairy Board.

HIS HONOUR:

Q. Did marketing members have knowledge of the Ruawai problem? Yes, Mr. Burn and Mr. Canning, certainly.

Q. Outside those 2 former bodies who were new members? I can't be absolutely certain, I don't think there are any.

Q. There was a purpose in the visit of the 3 members of the Committee and yourself in April to try and get them back on to negotiations for amalgamation with Northern Wairoa? This had always been at the back of the mind.

Q. If that had not to become about the official purpose of your visit was to hear all the representations people wanted to make on zoning? And to inspect the Pouto area, we went across in ferry.

Q. Were you reckoning to get something new for the Board but only what they were steeped in and knew so well? There is no doubt there was possibility of new evidence being brought forward, as is the case.

COUNSEL:

Q. The loan from the Commission to Ruawai Co. of £87,000 in 1960, can you recall why that was granted and for what purpose, 29th January, 1960? Was that for the tankers? No, that is 1961 £35,000, this is £87,000 in 1960? Is this the milk powder factory, I think this was a recapping of the original loan of 1953 . . I meant revamping.

HIS HONOUR:

Q. You mean re-issue of loan and new one granted? No, the original loan was made, No. 1 loan, in 1953, made for a term of about 9 years, speaking from memory.

Q. For how much? I can't recall, quite a considerable sum, £100,000, might be more, the company was in difficulties in meeting this commitment, it applied to Loans Council for a new loan embodying a new term.

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First Defendant's Evidence
Paul Stanley Green, Cross-Examination
continued

Q. Capitalising its commitments? No, it had managed its commitments, but was in difficulties, the Loans Committee agreed to reconsider it and a new loan was granted.

COUNSEL:

Q. The £35,000 in November 1961 that was for milk tankers? Yes.

Q. And that was a loan which the Mortgagee was the Board? It was a loan that was approved by the Loans Council and made by the Board.

HIS HONOUR:

Q. Became an asset of the Board? The Loans Council cannot make a loan, it is made by the Board, and it must make all loans approved by the Council.

COUNSEL:

Q. That was for milk tankers? Yes.

Q. Would it be correct to say that if half of the Ruawai milk suppliers went to Northern Wairoa some of those tankers might become redundant? It could well be.

Q. Was that thought present in the minds of you or the Committee at any stage of your discussions? No . . . the general indebtedness of the company was, but not that specific matter. Q. You mean the general indebtedness of company to the Board? No, the general indebtedness of the company period.

Q. Is it not correct the Board was a major debtor of the Ruawai? The Bank was in fairly deeply.

Q. Does your recollection of what happened at Board meeting concur with that of your Minute Secretary when he quoted discussion between Mr. Bird and Mr. Castelberg about assessing compensation to Ruawai by taking proportion of indebtedness of Ruawai to the Board? I think it was discussed.

Q. Your recollection accords with what is in the minutes? Yes.

Q. Does your view recall that at the Board meeting when the matter was discussed there was any specific mention of the milk zone for Ruawai? Oh, definitely.

Q. Well, apart from the general adoption of the Committee's recommendation, would you care to look at Minute Secretary's notes to see if there was any mention of milk zone? I wouldn't care, I recall there is no mention of it there, but I am quite definite that mention of milk zone was made.

Q. If it were discussed why is there no mention in the notes? As I said earlier, I do not recognise those notes as being a complete record of the discussion.

Q. You have no notes or memoranda yourself to support your view that there was discussion of milk zoning? Nothing in writing, but a very definite reason for my statement.

Q. What is it? Reason is this, any piecemeal break-up of Ruawai Co. would lead to losses through the milk side of the company's business,

because this was only way supply could be taken away from the company since cream was zoned. Therefore the question of a milk zone was of very considerable moment, knowing that the ten year agreement on milk expired at the end of the season, and no assurances had been received, and the question was asked on this at the hearing from the Northern Wairoa Company that they would be prepared to renew that agreement.

Q. Would it be fair to say a piecemeal break-up of Ruawai Company would affect the Board's security? It would have I am sure.

Q. Did you not consider the application made by certain Ruawai shareholders to abolish both zoning for milk and cream? It was considered.

Q. At what stage? It was considered in the car from Ruawai to Auckland.

Q. Was the full Board given opportunity to consider that? I could not recall that, I do not think so, it is the sort of thing you couldn't imagine, you either have zoning or you don't, the laws of the jungle departed in 1935.

Q. It was an application put forward by certain Ruawai shareholders to abolish zoning altogether? There was.

CROSS-EXAMINED SINCLAIR:

Q. After you prepared the draft report and discussed it with Committee, can you recollect if any changes were made in report or not? I cannot recollect.

Q. It may well then be the case that what subsequently appeared before full Board was your report approved by the Committee? It is possible but highly improbable.

Q. The general effect of the discussions in car coming back was to give Pouto to Northern Wairoa and make a milk zoning area to Ruawai? Firm recommendation that Houghton go to Northern Wairoa, and tentatively that Pouto be zoned for milk and cream and that Ruawai mainland be zoned for milk also, which was also new.

Q. And that is exactly the effect of the report you submitted? Yes.

Q. Now in the report the words "best interests" were used to refer to milk zone to go to Ruawai? Yes.

Q. Why weren't exactly the same words used as a reason for Pouto going to Northern Wairoa? No, no particular reason.

Q. You have stated that the full Board did discuss the creation of milk zone in and for Ruawai area? It was discussed.

Q. In view of your earlier statement that you would get a pretty good record of what took place at Board's meeting, can you explain why there is no note of any such discussion either in rough minutes? I think because it was so obvious something had to be done with regard to Ruawai's application, the question of milk zone was very definitely discussed.

Q. It was in fact a matter of vital importance to Ruawai? True.

Q. Is it not strange that a matter of such importance does not find its way into any of the minutes, particularly when you have final say

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First Defendant's Evidence
Paul Stanley Green, Cross-Examination
continued

what goes in? As I mentioned earlier, the report is by no means report, for instance Mr. Finlayson is not recorded as saying anything but he spoke at that meeting . . . I think it was there, almost certain he was at Board meeting, we could check that.

Q. Wasn't it mainly a question as to the Board giving approval without any real discussion to Committee's report and then discussing the question of legal authority to make the new zoning order and question of compensation? I don't think so.

Q. Now when the zoning order was made telegrams were sent out by you notifying the result? Yes after. (File Exhibit No. 1.)

Q. Now the first letter 1A confirmed telegram which was sent by you on 30th May advising decision of the Board? I think it was, it was immediately after decision was reached. (Read.)

Q. Then the next 1B is a letter from you setting out the position as to how compensation was going to be assessed? Yes.

Q. Then 1C is letter written by you to Northern Wairoa Company on 6th August 1963 (read)? Yes.

Q. That is followed by letter 1D, from my firm to you? Yes . . . (letter 13th August.)

Q. Now letter 20th August 1E, is copy letter written by my firm to Bell, Gully and Company who have taken over this matter on behalf of Dairy Board? That is so. (Read.)

(Note: Counsel agree no further action was taken following this letter because writ was issued.)

Q. In 1954 following the Okitu case a statement was issued by the then Chairman of Board, Mr. Hale, as to manner in which zoning thereafter would be dealt with? This is first time I have personally seen this letter, but I do know he had made a statement.

12.58 COURT ADJOURNED
2.15 COURT RESUMED

Q. Mr. Green, looking at 1F which is circular of 11th October 1954, was Mr. Hale at that time Chairman of Dairy Board? He was.

Q. You will notice that in it, the opening paragraph he refers to statements made by him as to zoning explained at Dominion Conference in September of that year? Yes.

Q. Have you during adjournment been able to locate any copy of that on your files? No, in fact I can say I have not seen this before.

Q. You have been through it in luncheon adjournment? I have.

Q. Does it purport to lay down code for dealing with zoning cases? It does.

Q. Would you accept that such a circular would emanate from the Board and be signed by Mr. Hale? Probably, there was opinion in January 1953, the question of zoning was very much before industry at that time, I would say just because I have not seen this letter it does not mean it is not in existence.

Q. Now I wish to direct your attention to paragraph 3, no, paragraphs 2 and 3, you see it is suggested that an interim notice of intention of the Board as to zoning would be given, so then could be considered question of compensation? It appears to state that.

Q. And that final zoning order would not be made until question of compensation has been considered and decided? It appears to say that, I am at a loss to know why.

Q. In the present case, the zoning order was made as final order and question of compensation was left to be fixed at some later date? Not the question, the order was made subject to compensation being awarded but quantum was to be determined later.

Q. Could you point out document in which that is contained? It is contained in no document, other than Committee's report and recommendation, and telegram sent to the company.

Q. Annexed to affidavit of yours Exhibit B, paragraph 7 (iii) the Committee's recommendations are conditional on compensation being awarded? Yes.

Q. And then the actual order was made Exhibit C and signed by Mr. Candy, there was no mention in actual order of compensation? Correct.

Q. When you said this morning that the rough minutes did not include any reference to Mr. Finlayson, have you checked to see if he was at that meeting? I have and find he was overseas.

Q. And when you stated this morning that the Committee considered it was in best interests of everyone that the milk zoning order should be made for the mainland, precisely whose best interests? Of the suppliers of Ruawai Dairy Company who were remaining with the dairy company as cream suppliers, because I attempted to bring out this morning what would have happened had not the cream zoning on mainland been converted to milk zone.

HIS HONOUR:

Q. What do you mean best interests of cream suppliers? Ruawai company is both milk and cream receiving company, we are dealing now with mainland only, divorce peninsula, there are no natural boundaries as between Northern Wairoa and Ruawai, there is good main road from Dargaville to Ruawai, cream suppliers of Ruawai Dairy Company could have defeated the cream zoning order by changing over to milk supply and could then have been accepted by the Northern Wairoa Dairy Company this would have been an effective way of further supplying being lost to Ruawai Dairy Co. In effect this would have meant that zoning in the area would have meant very little.

Q. That must always be the case when you only have milk zoning and only have cream zoning? There is inherent right to supply milk or cream, the change must be made in months of June or July.

COUNSEL:

Q. It would have been competent if no milk order had been made for everyone in Ruawai on the 1st June to have changed to milk supply? It would have been provided Northern Wairoa were prepared to accept it.

Q. Or Maungaturoto? Yes.

Q. That being the case, wasn't the best interests of the company being considered ahead of that of suppliers? No, there was a substantial body of suppliers to Ruawai that were loyal to the company and wished that company to continue in existence.

Q. But could not the Dairy Board see the danger of many of the suppliers going to either Maungaturoto or Northern Wairoa if no milking zoning was made? They could.

Q. And in that event the Board's investment at Ruawai would have been very seriously affected? And so would the Bank's.

CROSS-EXAMINED SPRING:

Q. Mr. Green, I think in 1960 a Committee of the Dairy Board came to Ruawai to consider matter of amalgamation between Ruawai and Northern Wairoa? Correct.

Q. And there was a full hearing similar to what took place in April 1963? Correct.

Q. And result of that decision in 1960 was that Ruawai was economically capable of carrying on as separate dairy factory? That is correct.

Q. The members of that Committee in 1960 were Mr. Linton, Mr. Onion, and Mr. Friis? Yes.

Q. And that committee reported to the Board and the decision I referred to promulgated by the Board? Yes.

Q. And that was on 5th April 1960? Yes.

HIS HONOUR:

Q. What decision was promulgated, that they were economically self sufficient? As I remember it, that the zoning should remain the same for cream.

COUNSEL:

Q. Now in 1963 at the sitting at Ruawai, you mentioned that you took notes in longhand of some evidence given? Very brief notes.

Q. Is it not a fact that most of evidence given was given in form of prepared statements by witnesses? It was.

Q. And the Committee had copies of those prepared statements? Yes, and they were very helpful too.

Q. Now you have given in evidence that you were present at Board's meeting on 29th and 30th May, 1963 when the Committee's report was considered? Yes.

Q. And turning now to Exhibit No. 12, this statement "Mr. Castelberg . . . put into force"? I remember that.

Q. Do I take it from that that there was a discussion by the Board Members that the loss of Pouto peninsula could in opinion of Castelberg at any rate have seriously affected Ruawai? Undoubtedly, this was very much in minds of Members of Committee and I feel sure the Members of the Board . . . if you will permit me, the reason being mainly this,

that in reaching a decision as recommended by the Committee to zone the Pouto Peninsula to Northern Wairoa Dairy Company the Board was zoning away 18%, let us call it 1/5th of the butterfat intake of Ruawai Dairy Company. This is a very, very serious thing for any company and it was very much in their minds as to what this would do; by adding 450 tons of butter to the intake of the neighbouring factory at the expense of Ruawai could have a very serious effect on pay-out. The vats of the milk suppliers on Pouto Peninsula were owned by Ruawai Dairy Company notwithstanding that they are installed in individual suppliers' sheds. Also the ferry service was backed by Ruawai Dairy Company. Now the decision to zone such a high proportion of supply away raised all these issues and compensation for that was very much in minds of Committee and of the Board.

Q. In fact the Ruawai Company own the ferry? I think they do.

Q. At this meeting in May 1963 the detrimental effect of zoning order on Ruawai was fully canvassed? Very fully.

Q. Associated with that discussion was there the discussion of Ruawai obtaining a milk zone? The milk zone was discussed but it had no reference to question of compensation, it was discussed with the background that if there were no milk zoning, not only would the Board be zoning 450 tons of butter away on Pouto Peninsula, but it would be turning a blind eye to mainland in respect to further erosion of supply by way of milk to Northern Wairoa.

HIS HONOUR:

Q. That last observation? What I mean is cream suppliers would change to milk, go to Northern Wairoa, and defeat the cream zoning order.

RE-EXAMINED BLUNDELL:

Q. You have only been secretary since 1961 when the new Board came into force? Yes.

Q. Prior to that for several years you were assistant general manager of former N.Z. Dairy Board? True.

Q. So that it follows you were not on the Marketing Commission side? Correct.

Q. But in an endeavour to clarify the point that arose this morning on the first of the two loans referred to in paragraph 13 of statement of claim, you have dug out of files a letter addressed to Secretary of Ruawai from Mr. Lingard, secretary of Marketing Commission? Yes. (Read.)

HIS HONOUR:

Q. The new debenture of £87,152 was in replacement of 2 earlier debentures £120,000 in 1953 and £25,000 in December 1954? Yes.

COUNSEL:

Q. Again as there was some query about purpose of those loans, you refer on your file to memo from Capital Issues Committee of 29th August, 1952 addressed to Secretary, Dairy Applications Loans Committee, and there is application loan for Ruawai of £132,600 for erection of spray, dried

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No. 8
First Defendant's Evidence
Paul Stanley Green,
Re-Examination
continued

skim and milk powder factory? Yes, and difference there was at the time ¾d. non-interest bearing loans were being made from Dairy Industry account under agreement made to Government in 1952, known as the 1952 Agreement. In this particular case £12,600 of that loan was to be applied to the erection of this spray powder factory.

Q. Now as has been mentioned this morning, there was a loan at least in name of Board to Ruawai a month or so after Board was established? For tankers.

Q. Would you just explain what goes on in practice in the way in which a loan is made to any Dairy Company in N.Z. pursuant to what you said was direction of Dairy Company's Loan Council? Now or in 1953.

Q. The present position? An application is received by Dairy Board in most cases, in some cases by Council itself. This application is examined, I happen to be Secretary of Loans Council, it is examined by Loans Council, there is standard form to follow in making application not a form filled in but giving details that is to be covered, it is then referred to a meeting of the Council for approval or otherwise.

HIS HONOUR:

Q. How is Council constituted? (Counsel stated under s.63 and 64 of 1961 Act.)

TO COURT:

The Council has no funds of its own, it can either approve or decline a loan; if the loan is approved it must be made by the Dairy Board. The Board has no say in the making of loans other than in determining with Government what purposes the Council may make a loan for. The loan is made by the Board on the terms and conditions approved by the Council and accepted by the Dairy Company.

Q. What is source of that money for the Loan? The Dairy Industry Capital Account.

Q. Tell us what that account is please? It is an account at Reserve Bank; if it is in overdraft, as it is and has been ever since its inception, it is guaranteed by the Government. All receipts for loans are paid into that account, just as payments made are debited to it. The Board pays a higher rate interest on capital account than it does on Dairy Industry Account under the Dairy Industry Reserve account.

Q. Is this the position, in effect the moneys such as went to Ruawai in this second loan, are borrowed from the Government? Yes.

Q. Through the Reserve Bank where this Dairy Industry Capital Account? Yes, in effect from the Reserve Bank, guaranteed by the Government.

Q. What I wish to provide from you, does the Dairy Board, as a Board, incur any loss or make any gain out of these loans? The Board itself no, the Dairy Industry does though, not the Board. The loans are made at 3½% rate of interest and 3% is paid for that money, ½% with perhaps little more would cover administration costs.

Q. Individual members of Board do they get anything other than prescribed remuneration plus expenses? As Board Members, no.

Q. Now let us come to first of two loans, that is the one which the present Board has acquired as result of legislation, the one that came through Marketing Commission? Yes.

Q. In respect of payments of capital and interest on that loan, where does the money go to? The Capital Account.

Q. The same Dairy Industry Capital Account? Yes.

Q. And is it same position that Dairy Board is administrative means by which this occurs? It is just as simple as this, the capital account can only be operated on by the Board, therefore, unless the Board held the security, it couldn't make any payment.

Q. There was as we know a charge of bank of some £46,000 to £50,000. Yes, the National Bank.

Q. What sort of charge was that over assets of Ruawai? A floating charge, but there is an agreement which was negotiated right at the inception of the Loans procedure dating back to 1953, that any floating charges held by the Bank, would rate ahead of any charges at that time held by Marketing Commission, and this now applies.

HIS HONOUR:

Q. You hold second and third charges? We might be well down the list than that.

COUNSEL:

Q. But with Ruawai that is position? Yes.

Q. You were asked how many persons on your present Board are new in sense that they were not either on Dairy Board or Marketing Commission? I have checked that at lunch-time; 2 entirely new members came on in 1961, Mr. Leeson of Morrinsville and Mr. Hickford of Okato in Taranaki.

Q. Both elected members? Yes.

Q. Early in cross-examination this morning you were taken . . . occurred when you and Members of Committee were returning to Ruawai? Yes.

Q. One thing was to do something about Houghton, other idea . . . said were tentative? Yes.

Q. So far as you can say from being one present, what was, or the reason why, these proposals were tentative only? I think there would be 2, no, 3 reasons; first of all they were aware of the procedure and that they had given opportunity for further submissions in writing; secondly, there were the 2 points that were raised right at start of hearing as to whether Board had jurisdiction to examine this through a committee, and secondly whether Board had a pecuniary interest — those were points I was asked as Secretary of Committee to take up with our solicitors immediately upon our return, they are noted in report I think; and thirdly, I don't think they had fully made up their minds, as individuals, I think they wanted to give it a bit of further thought.

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No. 8
Defendant's Evidence
Paul Stanley Green, Re-Examination
continued

Q. I have taken you now to meeting on 29th May when the Committee's report was brought before and adopted by the Board? Yes.

Q. We have had a look at the minutes, it looks as if it was discussed on 29th? It looks like it, I can't follow why it is a day out in this, it was shown on agenda as attachment No. 2.

Q. And as the minute record shows, there was of course discussion on the matter of compensation? Oh yes.

Q. What I am asking you now, although you can't put yourself in minds of Members of Board, as one present there, did you see any indication whether whatever was to be decision on matter of zoning was influenced by preservation of Board's security? That was never mentioned, but general indebtedness of company was, and putting it in way you ask, there was quite, I think, concern in the minds of the Board, that adoption of the Committee's recommendation would mean that the indebtedness at Ruawai would be carried by 4/5ths of the butterfat supply instead of the whole.

Q. And one last matter of a general nature . . . 2 matters . . . as at May 1963, can you give us indication of approximately only how much was owed by Dairy Companies to advances which had been made before or after 1961 Act? Taking into account loans that had been approved but might not have advances on them, it takes some little time sometimes, it would be about a million and a half.

Q. Would that cover a large or small number of total dairy companies operating throughout country? It is very well spread throughout country with one notable exception, that there is nothing outstanding to largest company, which has about 1/3rd butterfat, that is N.Z. Dairy Company, there is less in South Island.

Q. It seems that the Board functions not just in zoning, but in its other activities, by obtaining reports from Committees? Yes . . . it has a number of Committees, it would be quite impossible for 13 men, with large responsibilities they have, to sit on all these Committees or even to deal with the matter as a Board, normal procedure is if it requires examination of facts, it goes through a Committee, but the Board is fairly jealous and makes important policy decisions themselves.

Q. Would there have been any other investigation and decision, other than Ruawai, of zoning of an area? Yes, they crop up from time to time, not as many in recent years as there were in Sir Francis Fracer's day, when whole country had to be zoned. In my personal knowledge, we have one hearing coming up in South Island next month, one between Rata and Rangitikei, one in Hawera, one in Wairarapa, all in recent times.

Q. Was there a somewhat similar procedure done in those cases as here? Yes.

Q. In other cases has it been the practice as apparently applied in instant case that you, or someone else on staff of Dairy Board, assist in preparation of Committee's report? Yes.

HIS HONOUR:

Q. Just tell me this, Mr. Green, you referred just now to million and a half advances to Dairy Companies? Yes.

Q. Those will be advances made out of Dairy Industry Capital Account? Yes, just for one purpose though.

Q. What moneys go into that account? The account is basically composed of the capital items that were taken over in amalgamation which then belong to the Marketing Commission, motor vehicles, office furniture, loans, loans staff, building in Auckland in Dominion Road used for packing butter etc., all that type.

Q. I was thinking of bank account with Reserve Bank, what moneys go into it? Any receipts associated with those particular items, the repayments of principal and interest after payment of expenses of loan.

Q. The amalgamation took place in 1961 was account in debit or credit? It was established in 1961 and went straight into debit.

Q. If through one cause or another you incurred losses, supposing for instance you lost £100,000 on Ruawai through people changing over and so on, you say the Board doesn't lose it, it is Government because Government has guaranteed overdraft? It would not affect Board one iota.

Q. The Government would have to stand by its guarantee? Yes.

Q. You expect Government to see Industry put money back again? It would. Q. Then Ruawai would be loss over whole industry? Yes.

Q. One of things might be, that Board Members might get voted out if they incurred losses among industry? There are 8 elected by Dairy Company, 2 by the Dairy Industry and other from Government.

Q. I can see from road map where Tinopai is, Hukatere, where is that? Almost to Maungaturoto area.

Q. Going inland? Yes, not a large area, and I think mainly cream.

Q. The only other place is Okahu, where is that, north of Te Kopuru? No, I think that is north.

Q. Where does ferry cross river? Not far up the river from Ruawai factory, which is in Ruawai, about 2 miles up river.

Q. There seems on map no township? There is not, only thing there is factory for toheroas.

No. 9

REASONS FOR JUDGMENT OF HARDIE BOYS, J.

Where the Northern Wairoa river flows southward from Dargaville towards its confluence with the sea there is left upon its right or western bank a long tongue of land known as the Pouto Peninsula. The many dairy farms situated in that Peninsula in early days had an outlet for their cream by road only to the Northern Wairoa Dairy factory at Dargaville (owned by the third defendant, which I shall hereafter call the "Northern Wairoa Company"); but for those situated in the southern part of the

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No. 9
Reasons for Judgment of Hardie Boys, J. 21st December, 1964
continued

Peninsula it was a long and difficult journey. I was informed at the Bar that prior to the year 1937 the Ruawai Co-operative Dairy Factory Limited, the second defendant (which I shall hereafter call the "Ruawai Company") instituted a ferry service whereby the cream from the central and southern parts of Pouto Peninsula was ferried across to its factory on the eastern side of the river.

In 1937, pursuant to the powers vested in the Executive Commission of Agriculture by the Dairy Factory Supply Regulations 1936 (which in turn derived authority from the Agriculture (Emergency Powers) Act 1934 and which I shall hereafter call "the 1936 regulations" and "the 1934 Act" respectively), Sir Francis Frazer, as the deputy chairman of the Commission, zoned the northern part of the area on both sides of the river to the Northern Wairoa Company at Dargaville and the southern area to the Ruawai Company. This zoning, which was still in force in May 1963, affected only the supply of cream, for in those days the modern method of sending out tankers from the factories to pick whole milk at the farmers' sheds had not become the commonplace method of collection.

In evidence before me the Secretary of the First Defendant, the New Zealand Dairy Production and Marketing Board (which I shall hereafter call "the new Board" or "the Board"), referred to the conditions pertaining generally before zoning was introduced as "the law of the jungle"; and I accept it that the power to zone supplies of milk and cream in a particular area to a particular dairy factory was conferred in order to eliminate uneconomic competition and the duplication of transport costs which had characterised operations prior to 1935.

As I understand it, however, it is still competent for a dairy farmer, in an area zoned only for cream, at the commencement of a dairy season to change from a cream to a whole milk supply so that he can become a supplier of milk to any factory (not itself zoned for milk) which chooses to send its tanker to his farm. It can be seen that such a course could seriously interfere with the objects of zoning and with the economic running of any factory which lost suppliers in the process. If the pay-out for butterfat was higher at the factory receiving milk than at the factory receiving cream, the inducement to change would be very real; and it seems to be accepted as the case here that the pay-out of the Northern Wairoa Company was in fact higher than that of the Ruawai Company.

In the year 1953 seven dairy factories in the North Auckland area, including both the Northern Wairoa and Ruawai Companies (no doubt realising that, unless they did something themselves, a zoning order for milk as well as for cream would come into existence), by mutual consent entered into an agreement whereby for 10 years thereafter they would treat the zoning order for cream as applicable equally to milk.

This agreement was due to expire on 31st May 1963 and accordingly it was widely recognised that some new or renewed arrangement would require to be effected before the 1963 season began on 1st June. One of the proposed solutions was to put the Ruawai Company into liquidation and have its whole supply diverted to the Northern Wairoa Company by

a process of amalgamation, with a possible saving clause for suppliers in the south-eastern area, which would enable them to supply Maungaturoto. A majority of Ruawai shareholders and suppliers was in favour of the amalgamation but they did not constitute a sufficient majority to enable a resolution to be passed putting the company into voluntary liquidation.

Negotiations for amalgamation having fallen through, various sections of the farming community, including the directors of the Ruawai Company itself, began to put pressure upon the Board to hold an enquiry into the whole needs of their district and, if necessary, to make a further zoning order or, as some sought, to do away with zoning altogether. As is usual in such a situation, there were many different groups with differing views and many of them not unnaturally were moved by self-interest as the predominant factor.

The majority of the suppliers of the Pouto Peninsula desired to change over from Ruawai to Northern Wairoa, not a little because under conditions of modern transport they had tended to become more identified with Dargaville than with Ruawai. The evidence before the Board's Committee and before this Court, which has not been challenged in any way, indicates that that part of the Pouto Peninsula's production which, prior to 1st June 1963, had gone to the Ruawai factory, represented 450 tons of butter annually and some 18% of the total through-put of the Ruawai Company.

It is necessary to understand that, under the 1936 regulations and under both the Acts of 1953 and 1961, to be referred to later, if a zoning order is made, the factory gaining supply as a result can be required, as a condition of the zoning order, to pay compensation to the factory losing supply; that compensation may include the assuming or paying off of part of the liabilities of the latter and the cost of resuming shares held in the latter company by former shareholder-suppliers now no longer supplying it. That is an important consideration for the company which, at first sight, might seem to gain by a zoning order. It could be reckoned that the Northern Wairoa Company, for instance, was by no means averse to the diversion to its turnover of 450 tons of butter annually; if this could be achieved without the southern Pouto Peninsula suppliers being zoned to either factory, so that they were left free in their choice between Ruawai and Northern Wairoa, no compensation would be involved. But if (as in fact occurred) it was achieved by means of a zoning order, compensation as a condition of zoning could confidently be expected to be ordered. Similarly, if, following the expiration of the ten year agreement, no zoning order for milk were made, suppliers could, at the commencement of the season, change from a cream supply to a milk supply and, with Northern Wairoa having a better pay-out for butter-fat, supply that company without its having to pay compensation to the factory formerly supplied.

The Ruawai Company, as a company, opposed any variation of the existing zoning order for the cream supply in the Pouto Peninsula and desired a zoning order for milk to apply to the same area as previously had been covered by the agreement; but this was by no means the view of many of its shareholders amongst whom the present plaintiffs are numbered.

In this state of affairs the Board proceeded to hold a full public enquiry into the various applications it had received. Following the decision of the Court of Appeal in **New Zealand Dairy Board v. Okitu Co-operative Dairy Company Limited** 1953 N.Z.L.R. 366 (the binding effect of which the Board acknowledges for the purposes of this action in this Court, although reserving leave, if the case goes further, to argue that it was wrongly decided), the procedure followed by the Board recognised that it had a judicial function to perform when considering applications for zoning; in order, therefore, to act judicially, it set about giving every opportunity for the varying interests to be heard by and to make submissions to a Committee of the Board which would in due course report to the Board and make recommendations, the final decision being reserved to the Board itself. According to the affidavit of Mr. Green, the Board's secretary, the Board had had a number of applications from various suppliers in which different variations of the existing zoning order were sought. Although no question of waiver or estoppel can arise, it is interesting to note that all the Plaintiffs and at least 34, if not 42, of the 88 other suppliers whom the Plaintiffs represent joined in such applications for amending or cancelling the zoning order, although part of their approach to the Court, now, is to urge that the Board has no power of zoning or of varying a zoning order. It is proper to add, however, that when they and the Northern Wairoa Company appeared before the Committee they challenged there, as they have challenged here, the Board's competence to make any sort of zoning order.

On 28th March 1963 the Board notified supplying shareholders of the Ruawai Company and advertised to the public at large that a Committee of the Board would hold a public meeting in the Ruawai-Tokatoka Hall on Monday 29th April 1963. The Committee consisted of three members of the Board assisted by the director of the Dairy Division and the Board's secretary. (It is worthy of mention here that the Board is elected primarily by the dairy factories in wards; eight members are so elected, three members are appointed by the New Zealand Co-operative Dairy Company Limited and two members by the Governor-General on the recommendation of the Minister.)

At this public meeting, which extended over to 30th April, opportunity was given to all interested persons to tender submissions in respect of the applications received by the Board. The hearing was well attended by shareholders of the Ruawai Company and the report of the Committee shows that the following parties were represented:

> "Mr. E. J. V. Dyson appeared for (i) Mr. A. A. Houghton, a Pouto Peninsula supplier; (ii) 49 out of the 54 suppliers on the Pouto Peninsula who desired to be zoned to Northern Wairoa and who opposed a milk zone; (iii) eight suppliers in the Okahu district who petitioned to be rezoned to the Northern Wairoa Dairy Company and who also opposed the Ruawai Company's application for a milk zone; (iv) 25 suppliers in the Hukatere and Tinopai areas who opposed all types of zoning, and (v) Mr. J. E. Jeffs, who claimed to be representing

138 shareholders, including suppliers on the Pouto Peninsula supplying more than half of Ruawai's total supply, who opposed the creation of a milk zone and any zoning of cream and milk.

Mr. B. C. Spring, representing the Ruawai Dairy Company.
Mr. B. T. Sinclair, representing the Northern Wairoa Dairy Company.
Mr. J. D. Gerard, representing the Maungaturoto Dairy Company.
Mr. E. F. Packwood, representing a group of about 134 suppliers who opposed the application of the Pouto suppliers and supported the application of the Ruawai Dairy Company for a milk zone."

It is established that on its return journey from Ruawai the Committee discussed the evidence that it had heard, came to a firm conclusion that the Board should be recommended that the Mr. Houghton mentioned above (a very persistent applicant) should be zoned so that his supplies went to Northern Wairoa, and came to tentative conclusions to recommend to the Board, (a) that all the Pouto Peninsula suppliers should be zoned both in milk and cream supply to the Northern Wairoa Company and (b) that the existing cream zone, as thus amended, assigned to the Ruawai Company, be extended to the supply of whole milk. These tentative conclusions crystallised into positive recommendations which the Committee put before the Board with an added recommendation that such altered zoning should be conditional on compensation being awarded.

Plaintiffs complain (inter alia) that no consideration was given to their proposal that zoning should be done away with altogether, but this proposal would merely be the converse of most of those put forward and would be regarded by many — probably by most — as the rankest heresy.

The Board at its meeting on May 29th and 30th adopted the recommendations of its Committee and issued zoning order No. 11B on May 31st 1963 to give effect to the same, although the zoning order itself does not, in the nature of things, mention the condition as to compensation, for the order is essentially one defining the zoned areas.

It is this determination that is now challenged by Plaintiffs who are supported by the Northern Wairoa Company. The Ruawai Company and Fifth Defendant support the Board, whilst the Fourth Defendant abides the order of the Court. So far as concerns the Ruawai Company, the order that was made is very different from that which it sought. For my purposes I assume that, whilst the new order represented a loss to the Ruawai Company of the 450 tons of butter annually that has already been mentioned, and although it might mean that the ferry that had primarily been established for the conveyance of cream across the river might fall into disuse or become an uneconomical proposition, the compensation which would be paid to it by the Northern Wairoa Company was regarded as adequate to compensate it for its losses. On the other hand, the Northern Wairoa Company, which would now be getting, on a basis requiring payment of compensation, that which it had hoped might be obtained for nothing, in these proceedings aligns itself with the Plaintiffs.

That is a rather imperfect account of the background of the dispute that now falls for decision; the legal questions involve a narration of the

change of authority in dealing with dairy factory supply between 1936 and the present time. Under the 1934 Act and the 1936 regulations the power to zone was vested in a body called the Executive Commission of Agriculture, which in 1948 became the New Zealand Dairy Board. The Dairy Board Act 1953 "continued" the New Zealand Dairy Board on a new footing: I shall hereafter call it the "old Board". In 1947 a separate corporate entity known as the Dairy Products Marketing Commission had been established by an Act of that name. Finally, in 1961, the old Board and Commission were replaced by the First Defendant (the New Zealand Dairy Production and Marketing Board) by virtue of the Dairy Production and Marketing Board Act 1961; the 1957 and 1953 Acts setting up the Commission and continuing the old Board respectively were repealed and part of the contest now to be resolved centres around whether all or only some of the powers of those former bodies have passed to the First Defendant, the new Board, by virtue of the 1961 Act.

The present proceedings seek (a) to have the whole of the zoning order of 31st May 1963 quashed and (b) to have a writ of injunction issue restraining the Board from taking any steps to assess the compensation to be paid by the Northern Wairoa Company to the Ruawai Company consequent upon the zoning order. (Prayer (b) of the Plaintiffs' statement of claim refers to the compensation being payable pursuant to the zoning order 11B; compensation is not referred to in the zoning order but only in the Board's resolution which imposed the condition. It has not yet been assessed, the Board having acceded to a request that it await the outcome of the present proceedings.)

Plaintiffs advance four grounds. First, that the Board has a financial interest in the subject-matter of the zoning application and in any compensation payable; accordingly, that the Board has been judge in its own cause, contrary to the principles of natural justice. Secondly, that the powers of zoning conferred on the old Board by the 1936 regulations did not vest in the new Board so that, in purporting to make the zoning order and to assess compensation, the Board acted ultra vires. Thirdly, that if the power to zone was in fact vested in the new Board, that power was subject to certain provisions in the 1961 Act and in particular subject to the making of new regulations which have never been made; so that again the actions of the Board are ultra vires. As a fourth cause of action, it is alleged that "the hearing . . . of the . . . zoning application was ultra vires" by reason of the Board having delegated to a Committee its powers to zone and to assess compensation, and likewise having delegated to this Committee the duty of hearing the applications in relation thereto.

The proper sequence in which to deal with these contentions is first to take causes of action 2 and 3; for if the Board had no power to zone, questions of being judge in its own cause and of delegating its powers do not arise. I propose to deal with them in that order.

The Dairy Production and Marketing Board Act 1961 came into force on 1st September 1961 and one result was to put an end to the existence and operation of the old Board (the New Zealand Dairy Board) and

the Commission (The Dairy Products Marketing Commission established in 1947). By s.70 of the 1961 Act all real and personal property of the old Board or the Commission became vested in the new Board without conveyance, transfer or assignment. Section 71 then enacted as follows:

> "71. Board to assume all rights, obligations and liabilities of Dairy Board and Commission — (1) Subject to the provisions of this Act, all rights, obligations, and liabilities which immediately before the commencement of this Act were vested in or imposed on the Dairy Board or the Commission shall be deemed to be the rights, obligations, and liabilities of the Board. (2) All references to the Dairy Board or the Commission in any Act, regulation, order, or other enactment or in any agreement, deed, instrument, application, notice, or other document whatsoever shall, unless the context otherwise requires, be read as references to the Board."

Plaintiffs' contention is that the phrase "rights, obligations and liabilities" contained in subs. (1) does not include "powers" and that (although it was formally conceded that the 1936 regulations are still in force and are intra vires their enabling statute and conferred on the old Board the power to make and vary zoning orders) such power did not pass to the new Board. Mr. Barker referred the Court to passages in Salmond on Jurisprudence 11th edn., p.270 and Dias and Hughes on Jurisprudence p.257, and urged the Court to adopt the thinking of the American writer Hohfeld whose view was that "right" should strictly be regarded in relation to its co-relative and opposite, i.e. duty. Likewise, power has an opposite and co-relative, i.e., liability. Based upon this conception he urged that, though there has been a transfer of rights, powers have not been transferred from the old Board to the new; that, insofar as a power to zone dairy factories and their suppliers takes away the common law right of a farmer to trade with whichever factory he chooses, a strict interpretation of s.71 is called for; and that there can be no presumption that common law rights are taken away, express words being required for that purpose, c.f., the position of a servant who has a common law right to work for whom he pleases: **Nokes v. Doncaster Amalgamated Collieries Limited** 1940 A.C.1014 and in particular per Lord Atkin at p.1031 et seq.

For the Board Mr. Blundell contends that the combined effect of subss. (1) and (2) of s.71 clearly confers the power of zoning on the Board. I have said that it is conceded that the 1936 regulations were intra vires the old Board and that they still exist; under s.71 (2) all references to the old Board or the Commission "in any Act, regulation, etc. . . . shall, unless the context otherwise requires, be read as references to the Board." Laying aside for a moment the arguments raised under the third cause of action, one starts with the indisputable fact that in the existing 1936 regulations, which confer the power of zoning, the name of the new Board is substituted for that of the old. The Board specifically inherits the obligations of the old Board under s.71 (1). Those obligations included the discharge of the functions set out in s.12 of the Dairy Board Act 1953 under which the old Board operated until its repeal in 1961. What s.12 ordained (inter alia) was this:

"(1) The principal functions of the Board shall be to promote and organise the orderly development of the dairy . . . (industry) in New Zealand . . . and generally for ensuring (sic), as far as may be practicable, the adoption of measures and practices designed to promote greater efficiency in those industries in furtherance of the interests and welfare of persons engaged therein.

(2) The Board shall have all such powers, rights, and privileges as may reasonably be necessary or expedient to enable it to carry out its functions";

and there are enumerated a number of particular ways in which the Board may act.

"(3) The Board shall have such other functions, powers, and duties as are conferred on it by this Act and by any Act other than this Act or any regulations made under any such Act."

The 1934 Act and the 1936 regulations were just such other Acts and regulations conferring on the Board other "functions, powers and duties", namely, to carry into effect zoning schemes where such were deemed necessary. They are obligations inherited by the new Board under s.71 (1). I reject the argument that the phrase, "other than this Act or any regulations made under any such Act", refers only to future and not to past Acts and regulations.

Section 39 of the 1961 Act gives to the Board wide powers to exercise its functions for the development of the dairy industry and subs. (2) provides that the Board shall have "all such other powers and authorities as are necessary, conducive or incidental to the performance of its functions and powers under Part III of this Act". It is true that s.40 goes on to give authority "in accordance with regulations under this Act" inter alia "to promote and administer schemes for zoning the supply of milk and cream" but the limitations said to arise from this provision are better dealt with in discussing the third cause of action.

Section 14 (3) reads:

"The Board shall have all such further functions as are by this Act or otherwise conferred upon it."

The words "or otherwise" preserve the notion that there are functions of the Board other than those found in the statute that set it up.

The plain intention of the Legislature expressed in these provisions is that the new Board shall be enabled to carry on all the functions of the old Board and the Commission which existed at the coming into force of the 1961 Act. To hold otherwise would mean that, although the Board would require to carry out all the functions of its predecessors, had become vested of all the property of those bodies, and had succeeded to their rights, obligations and liabilities, none the less there remained reposing in an extinct body, and reposing in it alone, the power to make or vary zoning orders. Apart altogether from s.5 (j) of the Acts Interpretation Act 1924, it is a well recognised canon of construction of statutes that a construction which leads to absurdity is to be avoided: Maxwell on Interpretation of Statutes 11th edn., p.6. Plaintiffs' counsel insists that

this absurdity is removed by giving effect to his submission that the Legislature did not intend the Board to exercise the powers of its predecessor except by making new regulations. I shall deal with that under the third cause of action.

For the reasons discussed, I find against the Plaintiffs on the second cause of action and hold that the power to zone and to vary zoning orders (vested in the old Board by virtue of the 1936 regulations) passed to the Board on the coming into operation of the 1961 Act.

But as its third cause of action Plaintiffs say that, if the power did thus pass to the new Board, it was ultra vires the Board to seek to carry out these functions without new regulations. A twofold attack is made on the Board's position under this heading. The 1936 regulations were made under the authority of the 1934 Act, ss.27 (5) and (6) of which provide that all such regulations (and therefore any regulation amending the principal one) shall be laid before Parliament within 28 days of the making thereof or of the commencement of the next Parliamentary Session and shall expire on the close of the last day of that Session except so far as they are expressly validated or confirmed by an Act of Parliament passed during that Session. The 1936 regulations were so presented and validated. (Mr. Barker offered the view that it must have been thought that there was something irregular in earlier validations for in 1957 there was passed the Agriculture (Emergency Regulations Confirmation) Act 1957 which validated all over again these and many other regulations made under the 1934 Act; I prefer the view expressed on behalf of the Board that, apart from validating three regulations laid before Parliament that year which therefore require validation, the object of the 1957 Act was to have all the regulations that had been earlier validated gathered together in one Act for the purposes of the reprint of statutes then being undertaken.)

In accordance with this requirement of statutory validation, whenever the 1936 regulations were amended a validating Act was passed and, for instance, when in 1948 by an amending regulation the definition of "Board" in the 1936 regulations was amended so as to read, " 'Board' means the New Zealand Dairy Board", that amending regulation was validated by the Agricultural Emergency Regulations Confirmation Act 1948. Accordingly, Plaintiffs, and Mr. Sinclair for the Third Defendant, argue that the effect of s.71 (2) is again to amend the definition of "Board" contained in reg. 1 of the 1936 regulations so that "Board" no longer means the New Zealand Dairy Board but means the New Zealand Dairy Production and Marketing Board established under the 1961 Act: that such amendment was never validated as required by s.27 of the 1934 Act and accordingly that no valid substitution of the old Board by the new Board has taken place in the 1936 regulations.

In my view no amendment, as such, of the 1936 regulations is involved, and no statutory validation of what s.71 (2) achieved is required. No amending regulation was promulgated as had been done in 1948. The regulation stands as printed: " 'Board' means the New Zealand Dairy Board". In the 1961 definition section, s.2 "Dairy Board" means the

New Zealand Dairy Board established under the Dairy Board Act 1953 (that is, the body mentioned by definition in the 1936 regulations). The Dairy Board Act 1953, s.3 (1) in its turn declared

> "There shall continue to be a Board to be known as the New Zealand Dairy Board, which shall be the same Board as that established by the Dairy Produce Act 1923"

(which was in force when the 1936 regulations were passed). Applying s.71 (2) to this situation, one has it that all references to the Dairy Board (which by definition is the New Zealand Dairy Board) in the 1936 regulations are references to the New Zealand Dairy Production and Marketing Board. Accordingly, I hold that there has been no amendment of the regulations but a change of meaning and reference therein achieved by the 1961 statute and one statute requires no validation by another to give it effect.

The more serious attack that is brought under the third cause of action involves a consideration of ss.40 and 69 of the 1961 Act. Section 40 (1) (c) gives to the Board "in accordance with regulations under this Act" authority to "promote and administer schemes providing for a system of zoning in respect of the supply of milk or cream etc." and subs. 2 (g), (h) and (j) include specific power to zone areas, to resume ownership of shares in co-operative factories and assess and pay compensation for the loss occasioned to the factory by a zoning order. Section 69 provides that the Governor-General in Council may from time to time by Order in Council, in accordance with recommendations made by the Board to the Minister, make regulations in regard to any matter for which regulations are prescribed or contemplated under the Act. It is common ground that no such regulations have ever been made; it is contended, therefore, that, when s.71 is invoked as transferring to the new Board the powers of the old, that transfer is "subject to the provisions of this Act", and notably to the provisions of s.40, so that the Board can exercise the old powers of its predecessor (as contained in the 1936 regulations) only by the making of new regulations; further that, insofar as this interpretation of s.40 admittedly stultifies the operative effect of the 1936 regulations, there is an implied repeal thereof. Plaintiffs are, of course, committed to this result of their argument for, not only do the 1936 regulations have the force of statute by reason of the definition of "Act" in s.4 of the Acts Interpretation Act 1924, but also, for good measure, s.27 (7) of the 1934 Act under which they were made provides:

> "(7) All regulations made under the authority of this section shall, while they continue in force, have the force of law as if they were enacted by this Act."

I entirely accept Mr. Greig's argument that repeal by implication is not favoured by the Courts and that where there is an affirmative enactment it is the more difficult to imply: 3 Halsb. Vol. 36, pp. 465, 466, paras. 709, 710. There is a sense also in which the 1934 Act and the 1936 regulations constitute a special statute dealing with zoning where the 1961 Act is a general statute, so that the principle of **generalia specialibus non derogant** applies (ibid. p. 467, para 711).

"Repeal by implication is only effected when the provisions of a later Act are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together:"

Weston v. Fraser 1917 N.Z.L.R. 549, 551; but I see nothing involving a repugnancy between the various sections and regulations referred to. On the day it came into existence the Board would have no regulations of its own until it took the steps contemplated by ss.69 and 40. Until then it was entitled to act under the 1936 regulations and any other regulations in like standing. If, as seems to have occurred, the Board has found it unnecessary to date to promulgate new regulations and has relied instead on those it took over under s.71 (2), that involves no repugnancy with s.40 for that section is available to the Board in the future if it chooses to act thereunder.

The Act of 1961 involved the repeal of a number of earlier statutes, particularly those which had set up the old Board and the Commission, but it is to be noted that there was no repeal of that part of the 1934 Act which refers to this particular Board and under which the 1936 regulations were made. In my view there is no need to invoke s.27 (3) of the 1934 Act which provides that no regulation made under the authority of the section shall be invalid because it deals with any matter provided by any Act in that behalf or cause a repugnancy to any such Act. In the view I hold there is no repugnancy and therefore it is intra vires the Board to act under the 1936 regulations.

Mr. Barker claims that, if effect is given to his submissions under both the second and third causes of action, the Board would be enabled to cure the defects under which he says it labours, when in zoning matters it finds itself acting as judge on its own cause. He suggests that by regulations made under s.40 the Board could delegate to an independent person or body the responsibility of adjudication upon zoning disputes wherever the Board was disqualified on account of having a financial interest. He invokes the phrase from s.71 (2) "unless the context otherwise requires" as indicating an awareness of the Legislature that in matters of zoning the Board might have a disqualifying financial interest and claims that this fortifies his contention that, at least so far as this present zoning dispute goes, the Board cannot act under the regulations of 1936 but can act only under new regulations — for the context so requires.

I impute no such awkward intention to the Legislature: it would mean that the 1936 regulations were deemed good for some purposes and invalid for others. The notion that new regulations could delegate the Board's judicial functions when financially interested in a zoning dispute runs counter to Plaintiffs' own submissions under the fourth cause of action. The maxim **delegatus non potest delegare** must clearly apply. Indeed, as part of his submission under that cause of action, Mr. Barker quoted from Cleary, J., giving the judgment of the Court of Appeal in **Hawke's Bay Raw Milk Producers Co-operative Company Limited v. New Zealand Milk Board** 1961 N.Z.L.R. 218, where at p. 226 line 17 he said:

"Government today is so complex, and so many statutes confer such wide powers upon such a variety of bodies and persons that it is essential that those to whom the Legislature delegates the duty of deciding any particular matter should make the decision; if there is to be power for that person or body to whom the Legislature has entrusted its legislative power to be free himself or itself to subdelegate, it should be made clear beyond any doubt that such power of subdelegation is given, and to whom, and if it is only a limited power of subdelegating, that the limits should be plainly defined."

Plaintiffs cannot have it both ways: they insist, and the Board admits for present purposes, that the Board is a quasi-judicial body which in matters of zoning must act judicially: s.40 gives it authority "to promote and administer schemes providing for a system of zoning". Its obligations to act judicially therein cannot be delegated and I read nothing from the **Okitu case** (supra) which supports the notion that, when financial interests are involved, the Board's judicial function must be exercised by an independent authority. **Low v. Earthquake and War Damage Commission** 1960 N.Z.L.R. 189 does not assist Plaintiffs, although cited in support of this submission. Parliament had made the Commission judge in its own cause but, in the course of fulfilling what should have been a judicial function, the Commission was in breach of the **aude alteram partem** rule of natural justice: its determination against the plaintiff having for that reason been quashed, but the Court granting the writ of certiorari not being entitled to usurp the exclusive jurisdiction of the Commission by itself trying the issue at stake, the problem arose as to how that issue could now be fairly tried. T. A. Gresson, J., at p.190, line 41, said:

"This is an exacting responsibility at any time, and there can be little doubt that the litigation which has now taken place in this matter has greatly accentuated the difficulty of the Commission's position. Indeed, in the unusual circumstances which now obtain, any quasi-judicial tribunal might well have serious misgivings as to its ability to conduct a rehearing with the necessary degree of impartiality and detachment.

It would, however, be premature for me to express any opinion whether or not prohibition may lie to preclude the Commission from rehearing the case . . . but if the Court were to grant such writ, it would then become necessary to constitute another tribunal to rehear the claims: see **Griffin and Sons Limited v. Judge Archer and The General Manager of Railways** 1957 N.Z.L.R. 502, 503."

In the result, by mutual consent, the issue was submitted to the arbitration of a retired Judge of the Supreme Court; but it was not the Commission's lack of independence that was challenged in the action brought against it; it was its failure to act judicially; the need for another tribunal then came to be considered only because the Commission had in the earlier proceedings pre-determined the issue at stake.

The third cause of action therefore fails.

I pass then to the first cause of action which seeks to set aside the zoning order on the ground that, by reason of financial interest, the Board was "judge in its own cause contrary to the principles of natural justice applicable". The admitted or proved facts show that in 1960 the Ruawai Company gave to the old Commission a debenture for some £87,152, an asset which vested in the Board on the coming into operation of the 1961 Act, and that the Board itself advanced £35,000 to the Ruawai Company in 1961. The evidence of Mr. Green, the secretary to the Board, deposed to the fact that these loans, which are still substantially owing are deemed (now at all events) to have been made out of the Dairy Industry Capital Account established by s.35 of the 1961 Act. Such loans must first be approved by the Dairy Industry Loans Council pursuant to ss.63 and 64 of the Act. The Council consists of five members of the Board appointed by the Minister on the nomination of the Board, the Secretary to the Treasury and the Director-General of Agriculture. I have already drawn attention to the fact that eleven out of the thirteen Board Members are elected by wards from the dairy factories or appointed by the New Zealand Co-operative Dairy Company Limited. Section 64 provides:

> "There shall be paid by the Board out of the Dairy Industry Capital Account all sums required for loans approved by the Council pursuant to s.63 of this Act."

It is said that the Board has no function except to carry out what the Loans Council decides and that in fact what occurs is that the advance is made by the Reserve Bank and guaranteed by the Government but in the name of the Board. It is none the less the fact that the Board, however nominal its position may be as a mere vehicle through which such loans are arranged, is able to borrow the moneys involved, from the Reserve Bank, at an interest rate of $\frac{1}{2}\%$ per annum lower than the interest rate charged to the dairy factory which is the borrower. Having regard to the control of the Loans Council enjoyed by the Board by virtue of its composition and to the $\frac{1}{2}\%$ margin of interest which the Board receives and the fact that, as between the Board and the borrowing company, it is the Board who is the lender and the mortgagee or debenture holder, I do not think it can be gainsaid that the Board has a direct pecuniary interest in any factory to which money has been lent and therefore a direct pecuniary interest in zoning proposals which may either (subject to payment of compensation) add to the supply of such a factory or, as has occurred here, detract from the supply of such a factory subject to the receipt of compensation. It was urged upon me by Mr. Blundell that the Board was in the nature of a trustee (to whom the principle **nemo judex in causa sua** does not apply — see 3 Halsb. 11, p. 68, **R. v. Rand** 1866 L.R. Vol. 1 Q.B. 230, 232, and the dissenting judgment of Atkin, L. J. in **R. v. Bath Compensation Authority** 1925 1 K.B. 685, 711, approved on appeal sub nom **Frome United Breweries Company Limited v. Bath Justices** 1926 A.C. 586, 609). I myself suggested phrases such as "clearing house" or a "stake holder"; but I do not think that the term "trustee" nor any of these expressions properly define the relationship of the Board and the Dairy Company which borrows from the Dairy Industry Capital

Account. The relationship is that of creditor and debtor and the consequences of that relationship must be boldly faced as one comes to consider whether on this account the Board was disqualified both from carrying out a power that reposed in it and from discharging one of the functions for which it came into being.

I cannot assent to the notion that the Board, as a Board — that is, distinct from its individual members — has only an interest of the flimsy nature referred to by Slade, J., in **R. v. Camborne Justices** 1955 1 Q.B. 41, 51.

I proceed upon the footing that the Board had a direct pecuniary interest in the outcome of the dispute it resolved finally by its zoning order of 30th May 1963, such as to bring it, prima facie, within the well-known principle of the common law that disqualifies such a body from being judge in the matter. I prefer not to use the expression "judge in its own cause", because there was no "cause" or "lis" between the Board and any of the dairy factories concerned in this dispute in which it was called upon to be judge. None the less, it had a financial interest which its solicitors and secretary candidly admit required protecting and I am satisfied that a single person, standing in the same relationship to the Ruawai Company as did the Board, would, in the absence of statutory sanction, clearly be disqualified from being judge in a matter affecting that financial interest. In **R. v. Rand** (supra) (although a case of bias rather than of financial interest) Blackburn, J., said at p. 232:

> "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter . . . "

In **Leeson v. General Council of Medical Education and Registration** 1890 43 Ch.D. 366 (where the question was rather whether certain members were prosecutors) Bowen, L. J. at p. 384 said:

> " . . . nothing can be clearer than the principle of law that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give . . . Where such a pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest."

In **R. v. Camborne Justices** (supra) (though the matter was again one of bias and not of financial interest) Slade, J., delivering the judgment of the Divisional Court, said at p. 47:

> "It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice?"

And at p. 51 (referring to **R. v. Rand,** supra):

> " . . . the right test is that prescribed by Blackburn, J., namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown."

It appears clear, therefore, that once the pecuniary interest is established, the question of whether there was in fact bias or a likelihood of bias, or whether a reasonable man would reckon bias to exist, does not require consideration. Accordingly, I deliberately refrain from discussing that topic, for there is here no allegation against the Board of actual bias. Were actual bias raised or pleaded, certainly none was established by the evidence. What is claimed is an automatic disqualification from acting in a zoning dispute when the Board has a pecuniary interest in one of the factories concerned.

de Smith in his Judicial Review of Administrative Action says at p. 144:

> "The rule applies no matter how exalted the tribunal — a decree made by a Lord Chancellor with respect to a company in which he was a shareholder was held to be voidable — or how trivial the interest."

This is a reference to **Dimes v. The Proprietors of the Grand Junction Canal** III H.L.C. 759 decided in 1852 where Cottenham, L.C., who had confirmed an earlier order of the Vice-Chancellor, was held to be disqualified from having so acted by virtue of his financial interest in the respondent company.

It appears to me, however, that there are important exceptions to the common law notion of automatic disqualification: three instances at least emerge from the cases. One exception can arise **ex necessitate,** and it is this which is pleaded by the Ruawai Company and invoked in argument by the Board although its actual pleading raises the defence only in a more general way by asserting that the intention of the Legislature was to permit the Board to act as it did. In **Dimes' case** (supra), although the Lord Chancellor was disqualified from acting in the litigation itself, his signature was a necessary pre-requisite of enrolment of the order for the purposes of appeal to the House of Lords. That, he was held qualified to give. Baron Parke, advising their Lordships of the unanimous opinion of the Judges, said (p. 787):

> "For this is a case of necessity and where that occurs the objection of interest cannot prevail. Of this the case in the Year Book (Year Book 8 Hen. 6, 19; 2 Roll.Abr.93) is an instance, where it was held that it was no objection to the jurisdiction of the Common Pleas that an action was brought against all the Judges of the Common Pleas, in a case in doubt which could only be brought in that Court."

The Lord Chancellor (Lord St. Leonards who had succeeded Lord Cottenham in office) said (p. 789):

> "I understand the opinion of the Judges to be that the interest of the Lord Chancellor was such as disqualified him from judging in the cause; and I must therefore infer that, in their opinion, there was **no such absolute necessity for his adjudication as,** upon the ground set forth in some of the cases, **might be deemed to render his decision effectual."**

It is of this state of affairs that Martin, J. A., spoke when giving the judgment of the Saskatchewan Court of Appeal in **Re The Constitutional**

Questions Act 1936 4 D.L.R. 134, 135. The Court was called upon to consider whether Judges' salaries were taxable and thus each Judge had a direct financial interest. He said:

> "It is a fundamental rule in the administration of justice that where a Judge is interested in the result of litigation he cannot sit in judgment upon it. **Nemo debet esse judex in propria causa.** Proceedings have been frequently set aside because a Judge who had an interest in the cause took part in the decision. According to the rule, therefore, the members of the Court should not participate in the reference, because each of us has a pecuniary interest in the result. The rule, however, does not apply where the Court acts **ex necessitate,** e.g., where an action is brought against all the Judges of the Court in a matter over which the Court has exclusive jurisdiction . . . The Court, therefore, acts **ex necessitate.**"

On appeal to the Privy Council (1937 2 D.L.R. 209, 210), Sir Sidney Rowlatt said the Judges

> "took the view (quite rightly in their Lordships' opinion) that they were bound to act **ex necessitate."**

In the view I take, however, the Board cannot bring itself within the very narrow compass of this sort of plea which seems confined to the kind of situation discussed in the cases just mentioned.

Another exception exists where by consent, inter partes, or by binding agreement (as for example appointing an arbitrator in a building contract or by voluntarily joining a society with rules setting up a domestic tribunal) a person has assented to his rights being entrusted to someone who may have a financial or other interest in the result, or a bias. In such a case there can be no complaint as to the Judge acting in his own cause, but only of his failure to act judicially and impartially when he actually comes to perform his judicial functions.

So the arbitrator, who is the employers' engineer, is not disqualified (see **Ranger v. Great Western Railway Company** V H.L.C. 72, 88, distinguishing **Dimes v. Grand Junction Canal Company,** supra). As to domestic tribunals see Smith (supra) at pp. 149, 151, 156-7. There is a sense in which the Board is a domestic tribunal set up by the industry so that, if its duties require it to be judge in its own cause, individuals within the industry must be deemed to have assented to its performing such functions.

I prefer, however, not to found my judgment on the domestic tribunal notion or the **ex necessitate** plea, for in between these instances there is a third exception when Parliament has deliberately reposed in a body having a financial interest the responsibility of being judge in matters that would affect that financial interest, relying upon it to act judicially none the less. I regard the Act of 1961 as being one of an "increasing number of Acts in which an interested party . . . is made judge in his own cause" (**Wilkinson v. Barking Corporation** 1948 1 K.B. 721, 727, per Asquith, L.J); de Smith cites this case (pp. 155/6) as authority for the proposition that

"a procedure that has been sanctioned by Parliament cannot be impugned on the ground that it runs contrary to the common law principles of disqualification for interest or likelihood of bias."

Again at p. 163 commencing a paragraph headed "Exemption from Disqualification" he says:

"Parliament may provide by express words or necessary implication, or the parties to a contract or the members of an organisation may agree, that power to decide disputes shall be committed to a person or an authority interested in the result. In such cases . . . the disqualifying effect of the particular forms of interest covered by the statute or agreement must be treated as having been wholly or substantially removed."

At p. 140 the learned author says:

"That Parliament is competent to make a man judge in his own cause has long been indisputable, but the Courts continue to uphold the common-law tradition by declining to adopt such a construction of a statute if its wording is open to another construction."

He cites as authority (inter alia) **Great Charte v. Kennington** 1742 2 Str. 1173, **Lee v. Bude and Torrington Junction Railway** 1871 L.R. 6 C.P. 576, 582, **Mersey Docks and Harbour Board Trustees v. Gibbs** 1866 L.R. 1 H.L. 93, 110, **Wingrove v. Martin** 1934 Ch. 423, 430. I do not think that anything in the judgment of the Judicial Committee of the Privy Council in **Murugiah v. Jairudeen** 1955 A.C. 145 affects these propositions though Mr. Barker relied on the citation from Maxwell approved by Lord Morton of Henryton at pp. 152 and 153.

In **Re Ashby** 1934 O.R. 421, Masten, J. A., delivering the judgment of the Ontario Court of Appeal, said (p. 431):

"The third ground of appeal claims the right to prohibition on the ground that the members of the respondent Board have in similar cases plainly shown their bias and unfitness to act in a judicial capacity; also because the members of the Board are interested parties being rivals in business" (therefore I take it having a pecuniary interest) . . . "I find myself unable to give effect to any branch of this argument.

The fact that all the members of the Board are optometrists engaged in the same profession as the appellants is fully answered by the fact that these men were appointed by Order in Council passed in pursuance of the Statute. If I were of opinion that such appointment was objectionable, I would still have no jurisdiction to question the appointment. But so far from considering the personnel of the Board to be objectionable, I am of opinion that no other kind of Board could effectively perform the functions and duties which the Statute authorises and creates."

So here do I believe the personnel of the Board to be the very kind of informed and interested — on some topics biased — farmers and dairy factory members, entrusted to act judicially when the occasion demands it, best suited to perform effectively the functions and duties which the statute authorises and creates.

In **Low v. Earthquake and War Damage Commission** (supra) what brought down the defendant was not the fact (acknowledged by T. A. Gresson, J.) that it was judge in its own cause in which the funds it controlled were involved but its breach of natural justice in failing when required to act judicially to give effect to the **audi alteram partem** rule.

I repeat that there is here a sense in which the Board is a domestic tribunal, chosen by the dairy industry in which all parties to this action are engaged, to carry out the functions enumerated in the Act and by the procedures contained in the Act and regulations; but the Board is more than a domestic tribunal, for it is the creature of a statute and the same Act which gave it power to zone gave it also the right to have a financial interest in the companies concerned both by making loans and holding shares therein (s.30).

I do not think the 1961 Act permits any other construction; as has already been noted, eleven of the thirteen members of the Board are elected or appointed from the companies carrying on the dairy factory industry; it could be expected that the persons so elected or appointed would be men fully conversant with the problems of the industry and in particular with the problems that arise when zoning is imposed in any area. Parliament has thought fit, notwithstanding the possibility that in given cases the Board will have a financial interest in factories involved in a zoning dispute, to entrust that dispute to the Board, even though by so doing it could be said that it was making the Board judge of its own cause. It must still act judicially and can be brought to account if it fails so to do, but otherwise it is not disqualified merely by the financial interest.

Accordingly, I hold against Plaintiffs on the first cause of action.

The fourth cause of action is one which troubled me more than any of the others once I had come to the conclusion, just expressed above, that financial interest did not automatically disqualify the Board. As pleaded the cause of action is set out thus:

> 27. That if the First Defendant has power to make zoning orders and to assess compensation under the Dairy Factory Supply Regulations 1936 (which is denied) then the First Defendant was not empowered to delegate its powers under the said Regulations to a Committee.
> 28. That the hearing by a Committee of the said Board of the Second Defendant's zoning application referred to in paragraph 11 hereof was ultra vires the First Defendant.

The literal interpretation of paragraph 27 is that the Board delegated to its Committee its power to make zoning orders, but Plaintiffs do not now suggest that that took place. The zoning order was made by the Board at a full meeting of the Board and published in the name of the Board. True, that order was based on a consideration by the Board of a report by its Committee on what (in the report itself) the Committee calls "a public **hearing** of the zoning applications which had previously been made to the Board". But in the notice calling the meeting, and in the correspondence at the time, it is made clear that the function of the Committee was only

to make recommendations to the Board after hearing all evidence and submissions and that the Board itself would "make a decision on the application".

The way in which the case was put under this cause of action was that the Board had in effect surrendered its judicial office to its Committee and that, although in form it had made the zoning order itself, in truth the Board did nothing but "rubber stamp" the recommendations of a Committee which had "heard" the zoning applications; that the Board was never in a position to consider all the evidence upon which the Committee's report was based nor in a position to give proper consideration to the report of the Committee upon that evidence.

The questions that really are raised are whether it was competent for the Board to deelgate to a Committee, as an administrative function, the task of hearing the evidence and submissions and reporting to the Board thereon and, if so, whether the Board had before it in this instance material enough to enable it and each member of its body to act judicially in making a final determination.

The two dock labour cases **Barnard v. National Dock Labour Board** 1953 2 Q.B. 18 and **Vine v. National Dock Labour Board** 1957 A.C. 488 cited by Mr. Barker do not assist the present case other than to state a principle which the Board does not dispute, namely, that, whilst an administrative function can often be delegated, a judicial function rarely can be and then only "if the tribunal is enabled to do so expressly or by necessary implication": per Denning, L.J., in the first case at p. 40. Viscount Kilmuir, L.C., in the second case at p. 499 was

> "not prepared to lay down that no quasi-judicial function can be delegated, because the presence of the qualifying word 'quasi' means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed."

For the purpose of this action, however, the function of the Board in making the zoning order is accepted as requiring to be a judicial one and therefore cannot be delegated.

Mr. Barker points out that, although the Committee's report deals fully with the cream zone application to the extent of nearly a page of close typing, the milk zone application is disposed of in four lines in the words:

> "In considering the evidence before the Committee, we are of opinion that in the interests of the dairy farmers in the Ruawai district the Ruawai Company's application for a milk zone should be granted."

He also properly points out that both in the draft minutes and the minutes finally adopted there is no mention of any discussion as to the desirability of a milk zone. I have, however, already said that "no milk zone" is not only merely the converse of an application for a milk zone, but also in many minds a rank heresy.

Mr. Barker goes so far as to suggest that the Committee's report was the product of the secretary alone, acting on the Committee Chairman's

written invitation to him to "draft a specimen report". This is not established and I accept it from Mr. Green that, although in the nature of things he would be responsible for the form and for many of the words of the report, its findings and recommendations were those of the Committee itself, meeting prior to the Board meeting of May 29th and 30th.

It is right that I should state expressly that I do not read into the Committee Chairman's letter to the Board secretary of 1st May (immediately after the public hearing) the sinister notion that the secretary was left the task of making up the Committee's mind as he wrote their report for them. I am satisfied that the Committee had a mind of its own and that its mind is expressed in its report, even although as dairy farmers they may wisely have left the framing of the report, and the clothing of it with words, to a man better trained for that kind of task, the secretary of the Board.

I would have been happier had it been the practice of the Board to have the full agenda, and any reports being submitted to a meeting, circulated in good time beforehand to enable members to be seized of the contents thereof before the meeting commenced. That is not the Board's procedure, however, and members read the material only when they arrive at the meeting or shortly prior to its commencement.

It is acknowledged that the written submissions made by Mr. Dyson and by Mr. Spring went into the hands only of the Committee so that (it is said) Board members had before them only as much information as the three members of the Committee chose to put forward in support of their recommendations and were given that information only at the commencement of the meeting. It is urged that the Board cannot fulfil a judicial function in that way, particularly when it has not read, still less heard the evidence, and has not read the submissions put forward by the contestants, and that therefore it has either delegated its responsibility or acted ultra vires — or both.

If a quasi-judicial body, at the point of time when it is required to act judicially, were bound by the rules of procedure of a Court of Justice, what has happened here could not be supported as a fulfilment of the required judicial role. It has, however, long been held that such a body is entitled to order its own procedure provided full opportunity is given to all parties to be heard; further, that it is not necessary for every member of the tribunal which makes the adjudication to hear the whole of the evidence so long as what is put finally before the adjudicating tribunal is sufficient to enable it to come to a just decision by just means.

I respectfully adopt and apply what was said by Swift, J., in **Denby (William) and Sons Limited v. Minister of Health** 1936 1 K.B. 337, at pp. 342-3, as being the duty of the person or body who or which reports to the tribunal which finally makes the decision:

> "His inquiry must be an inquiry which is fair to all parties interested. He must hear everything which any of them desire to say and should not hear anything without giving an opportunity to the other parties

interested to answer that which is said; he should not receive anything from one behind the back of the other, and although he is not bound in any sense by the rules of evidence or procedure which apply to an ordinary court of law, he must, before making his report, comply with the ordinary dictates of natural justice as to the obtaining and consideration of the matters which go to form the opinions or conclusions which he expresses in his report."

That done, the Board can proceed to its final conclusion and need not even disclose the report: that is not a delegating of its authority, it is an exercise of its right to get its information through a Committee.

This accords with what was laid down in **Board of Education v. Rice** 1911 A.C. 179 and **Local Government Board v. Arlidge** 1915 A.C. 120, namely, that, even in a matter where a judicial decision must be made by an administrative body, the materials upon which the decision is founded may be obtained vicariously. Whilst one does not elevate the Dairy Production and Marketing Board to a position of importance comparable with that of the Local Government Board or the Board of Education in England, the principles underlying these cases are in my view entirely applicable to the present one. The speech of Viscount Haldane, L.C., in **Arlidge's case,** particularly at pp. 132 and 133 where he adopts the wisdom of Lord Loreburn, L.C. in **Rice's case,** sets out the position of an administrative body to which the decision of a question in dispute has been entrusted. It is from Lord Haldane that de Smith is quoting at p. 108 in the passage which reads:

> "The best-known statement of the **audi alteram partem** rule in English administrative law was formulated by the House of Lords in relation to the apellate functions of a government department; **but it is of general application.**
>
> 'Comparatively recent statutes have extended, if they have not originated, the practice of imposing on departments or officers of State the duty of deciding or determining questions of various kinds . . . In such cases . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.' "

At p. 133 the Lord Chancellor referred also to the impairment of efficiency which would result from the attempt of the Minister and members of the Local Government Board to do everything personally: I regard the defendant Board here as in like case. It is not required that the whole Board hear every piece of evidence and every submission. On the contrary, it is enough, as Lord Moulton put it in **Arlidge's** case at p. 151, that the Board "shall be fully seized of the facts of the case".

The task of the Committee, under s.13 of the 1961 Act under which it was set up, is to advise the Board and, if thought fit, to furnish reports to it. In comparison, under s.11 of the 1953 Act, the old Board could, with the consent of the Minister "delegate to any such Committee any of the powers or functions of the Board". I do not regard the change in language as signifying any more than a recognition by the Legislature of the fact that the Courts had laid down in the **Okitu** and **Hawke's Bay** cases (supra) that certain of the Board's functions are judicial and as such are not capable of delegation. Certainly there is here no evidence that either the Board or the Committee believed that the power to hear the application was being delegated by the Board to the Committee.

The evidence of Mr. Green, the Board's secretary, satisfies me that the situation in the Ruawai district was well known to the members of the Board and would have been well known over a period of many years prior to 1963. The Northern ward is entitled to elect two members to the Board and through them alone the Board would from time to time be fully apprised of the local situation. I believe that that is why the Board is largely elected from wards in order that from members so elected the whole Board derives local knowledge. What I have quoted (supra) from Masten, J. A., in **Re Ashby** is as pertinent to this cause of action as it was to the first cause of action.

The minutes and draft minutes show that one of these two ward members, a Mr. Bird, who comes from Kaitaia, took quite a part in the discussion, although he was not present at the meeting when the vote was taken, possibly on account of the fact (disclosed in the draft minutes) that he had had overtures from the Chairmen of both the Northern Wairoa and Ruawai Companies. For what it is worth he reports that neither of them had any questions regarding the manner in which the Board conducted the case (through the Committee).

I do not find any evidence that the Board surrendered its judicial function or abdicated in favour of the Committee and merely adopted the Committee's recommendations as its own without giving it that judicial consideration which it warranted.

The failure of the report to discuss all the pros and cons of milk zoning and the failure of the minutes to record any discussion thereon is in no sense evidence of a delegation of responsibility and decision and in no wise detracts from the judicial nature of the Board's final decision. Indeed, there is good authority for the withholding of such a report and of any statement of reasons (see, for instance, Lord Haldane in **Arlidge's** case (supra) at p. 134 and de Smith at p. 109). Necessarily both the report and the minutes are a condensation of what was discussed — in the case of the report, a condensation of a hearing that went into a second day. This judgment of mine — overlong by any standards — entirely omits any reference to many submissions and to cases cited and the like — not because they have not been considered, but because in my view they add nothing to the final result. So with the proceedings of the Board: the

omission to give reasons and to show patently that this consideration or that was taken into account is in itself no evidence of delegation or of failure to act judicially.

I am satisfied that the report of the Committee, when added to the knowledge of the local situation already properly possessed by Board members from long official acquaintance with the problem that existed there, enabled it as a Board and each member of the Board to act judicially and it and they did so act in determining that the zoning order should issue and that compensation should be assessed and paid.

The fourth cause of action therefore fails. Accordingly, it is unnecessary for me to deal with questions of discretion or the contention that the Plaintiffs were not seized of such an interest as entitled them to bring the proceeedings (nor to seek a writ of prohibition if that were regarded as the proper remedy for that which they sought by way of injunction).

There will be judgment in favour of the First Defendant against the Plaintiffs who must pay costs to scale as on an action for £1,000 with disbursements and witnesses' expenses to be fixed by the Registrar. I allow 2 extra days at £21, but I do not certify for second counsel unless I can be shown that the former practice, where both counsel were members of the same firm, no longer applies. The Second and Fifth Defendants represented by Mr. Spring are entitled to their costs against Plaintiffs. I fix them at 60 guineas and disbursements. Third Defendant allied itself with the Plaintiffs and must bear its own costs. Fourth Defendant is given liberty to come in and apply for costs.

No. 10

FORMAL JUDGMENT OF THE SUPREME COURT

THIS ACTION coming on for trial on the 16th, 17th and 18th days of November 1964 before the Honourable Mr. Justice Hardie Boys UPON READING the Affidavits of the Plaintiffs, and of Paul Stanley Green and UPON HEARING Mr. Barker of Counsel for the Plaintiffs, Mr. Blundell and Mr. Greig of Counsel for the First Defendant, Mr. Spring of Counsel for the Second and Fifth Defendants and Mr. Sinclair of Counsel for the Third Defendant, the Fourth Defendant agreeing to abide the decision of the Court and UPON HEARING the evidence then adduced IT IS ADJUDGED that the claim of the Plaintiffs be dismissed and IT IS FURTHER ADJUDGED that the First Defendant do recover against the Plaintiffs the sum of £144/5/0 costs, £29/9/6 disbursements and £11/7/6 witnesses' expenses making a total of £185/2/- and that the Second and Fifth Defendants jointly do recover against the Plaintiffs the sum of £63

costs and £16/10/- disbursements making a total of £79/10/- AND IT IS FURTHER ADJUDGED that leave be and is hereby given for the Fourth Defendant to come in and apply for costs.

By the Court
D. R. Brown
Registrar

L.S.

In the Court of Appeal of New Zealand

No. 11
Notice of Appeal
23rd February, 1965

No. 11

NOTICE OF APPEAL TO COURT OF APPEAL

TAKE NOTICE that this Honourable Court will be moved by Counsel for the Appellants at the first sitting of this Court to be held at Wellington after the expiration of 14 days from the date of service hereof by way of an Appeal from the whole of the Judgment of the Supreme Court of New Zealand given by the Honourable Mr. Justice Hardie Boys at Auckland on the 21st day of December 1964 wherein the Appellants were Plaintiffs and the Respondents were Defendants UPON THE GROUNDS that the said Judgment was erroneous in point of law and FURTHER TAKE NOTICE that at the same time the Appellants will move for an Order of this Honourable Court that the Respondents pay to the Appellants the costs of the action in the Court of Appeal and of this Motion.

DATED at Auckland this 23rd day of February 1965.

"Ian Barker"
Counsel for Appellants

In the Court of Appeal of New Zealand

No. 12
Reasons for Judgment of North, P.
30th July, 1965

No. 12

REASONS FOR JUDGMENT OF NORTH, P.

An appeal from the judgment of Hardie Boys, J., dismissing a motion seeking a writ of certiorari for the purpose of quashing a zoning order made by the first respondent on 31 May 1963.

The facts of this case are not in dispute and have been very fully recorded in the judgment under appeal. In the circumstances, I shall content myself by making but a brief reference to the facts, and only in so far as they are relevant to one of the questions we have been asked to consider. In doing so, it will be convenient to refer to the first respondent, the New Zealand Dairy Production and Marketing Board as "the Board", the second respondent, the Ruawai Co-operative Dairy Company Limited, as "the Ruawai Company", and the third respondent, the Northern Wairoa

Co-operative Dairy Company Limited, as "the Northern Wairoa Company". At all material times prior to June 1963 the supply of cream as between the Ruawai Company and the Northern Wairoa Company was regulated by the provisions of Zoning Order 11 as amended by Zoning Order 11A. In September 1962 the Board received a petition from suppliers to the Ruawai Company resident in the Pouto Peninsula for rezoning to the Northern Wairoa Company. On 22 February 1963 the Board received a formal application from the Ruawai Company to amend the zoning orders defining its area so as to include milk. On 28 March 1963 the Board notified supplying shareholders of the Ruawai Company and advertised to the public at large that a committee of three of its members would hold a public meeting in the Ruawai-Tokatoka War Memorial Hall on Monday 29 April 1963 and that an opportunity would then be given to all interested persons to tender submissions. The notice stated, "The Committee will, after considering all submissions, make a recommendation to the N.Z. Dairy Production and Marketing Board, which will make a decision on the application." The meeting was largely attended, and most, if not all, interested persons were represented by counsel. When the meeting opened, Mr. Dyson, representing a large group of shareholders, and Mr. Sinclair, representing the Northern Wairoa Company, challenged the jurisdiction of the Board in two respects: (1) they doubted whether the Board was acting correctly in appointing a committee to conduct a public hearing; (2) they submitted that, as the Board had a financial interest in the proceedings inasmuch as loans had been made to the Ruawai Company from the Dairy Industry Account, it was not proper that the Board should make a decision on zoning, particularly as if a change in the present zoning boundaries were made questions of compensation would be raised and the Board would be fixing compensation in a matter in which it had a financial interest. Counsel requested that these two objections should be noted, but agreed that the hearing should proceed. It very quickly became apparent that the suppliers of the Ruawai Company took divergent views on the question of zoning. Some 49 out of 54 suppliers on the Pouto Peninsula desired to be zoned to the Northern Wairoa Company and also opposed the making of a milk zone in favour of the Ruawai Company. Some eight suppliers in Okahu district desired to be re-zoned to the Northern Wairoa Company and also opposed the Ruawai Company's application for a milk zone. Some 25 suppliers in the Hukatere and Tinopai areas were opposed to all types of zoning and some 138 shareholders who claimed to be represented before the Committee through the appellant, Mr. Jeffs, including suppliers on the Pouto Peninsula, and who were supplying more than half of the Ruawai Company's total supply, were opposed to the creation of a milk zone, and indeed, to the zoning of either cream or milk. Mr. Dyson appeared as counsel for all these groups. Mr. Packwood represented a group of some 134 suppliers who were opposed to the application of the Pouto suppliers and supported the Ruawai Company's application for a milk zone. It is common ground that the hearing was conducted in the manner of judicial proceedings, all interested persons or groups being given the opportunity to tender evidence. The hearing extended over two days, and we were told that in

the main the evidence consisted of written statements of witnesses, though some oral evidence was given as well, and all witnesses were available for cross-examination by counsel. The secretary of the Board took what he described as "brief notes" in longhand of the proceedings. Counsel were also given permission to put their submissions in writing within a reasonable time after the inquiry concluded. This they did. On 30 May 1963 the committee submitted its written report to the Board. This report gave particulars of the parties represented at the hearing, mentioning in particular those who were represented by counsel. The report then gave a short summary of the submissions made by counsel for the various parties and made its recommendations. The Committee did not attach to its report the written statements of evidence tendered by witnesses, the longhand notes of the proceedings taken by the secretary, or the written submissions later received from counsel for various parties. The three members of the Committee and the secretary, however, were present when the report was under consideration by the Board, and it is clear as well that the members of the Board were well acquainted with the general situation as it existed at Ruawai and the practice of the Board in making zoning orders. But it is agreed that the Board members did not examine or consider the record of the proceedings at Ruawai, contenting themselves merely by studying the Committee's comparatively short report and recommendations. Either on the same day or on the following day the Board adopted the recommendations of the Committee and issued a zoning order which it stated was made "in pursuance and exercise of the powers and authorities vested in it by the Dairy Factory Supply Regulations 1936, the New Zealand Dairy Production and Marketing Board having made due inquiry into the matters hereinafter set forth".

The appellant then brought a representative action on behalf of himself and 88 dairy farmers in the Ruawai district who claimed to be adversely affected by the zoning order, seeking a writ of certiorari for the purpose of quashing the order. Four grounds were alleged:

(i) that the Board was the holder of debentures given by the Ruawai Company over the whole of its assets for a large sum of money and accordingly had a financial interest in the subject matter of the zoning application, and also a financial interest in any compensation which should later be ordered to be paid by the Northern Wairoa Company to the Ruawai Company by reason of a number of the suppliers of the latter company being permitted to transfer their supply to the former company, and consequently was a judge in its own cause contrary to the principles of natural justice;

(ii) that the zoning powers earlier conferred on the Board's predecessor, the New Zealand Dairy Board, by the Dairy Factory Supply Regulations 1936 did not pass to the Board upon the enactment of the Dairy Production and Marketing Board Act 1961;

(iii) that consequently the only power of the Board to make zoning orders was that given by section 40 (i) (c) of the 1961 Act, and

this provision could not be invoked as no regulations had yet been enacted;

(iv) that the Board was not empowered to delegate its powers under the regulations to a committee.

The action coming to trial in November 1964 was heard by Hardie Boys, J., who, in a lengthy and, if I may say so respectfully, a very careful judgment, examined each of these contentions in turn and rejected them all. He accordingly dismissed the proceedings. This appeal is from his judgment. Before us, Mr. Barker and Mr. Wright for the appellants were supported by Mr. Sinclair for the Northern Wairoa Company. Mr. Blundell and Mr. Greig, who appeared for the Board, also represented the Ruawai Company.

In order to appreciate the argument we heard from counsel as to the statutory position, I think it is desirable to refer shortly to the history of the legislation leading to the enactment of the present Act, the Dairy Production and Marketing Board Act 1961. Prior to 1934 the dairy industry, co-operative though it was in name, was in a state of some disorder. In particular, in some parts of New Zealand an unhealthy struggle for suppliers existed between neighbouring dairy factories. In this situation a commission was appointed by the Governor-General in Council to inquire into and report upon the conditions of the dairy industry in New Zealand. Upon this Commission making its recommendations, the Agriculture (Emergency Powers) Act 1934 was enacted. This Act established a body known as the Executive Commission of Agriculture. The Act contained provisions for the making of regulations for the purpose of securing the more effective conduct of the industry. On 23 September 1936 the Dairy Factory Supply Regulations 1936 were passed for the purpose of authorising the Executive Commission of Agriculture to make zoning orders in respect of both cream and whole milk in favour of particular dairy factories. In due course, these regulations were confirmed and validated by Parliament. On 20 October 1948 by an amending regulation the power to zone was transferred from the Executive Commission of Agriculture to the New Zealand Dairy Board, a body originally created by the Dairy-Products Export Control Act 1923. In the same year this amending regulation was likewise confirmed and validated by Parliament. (See Agricultural Emergency Regulations Confirmation Act 1948.) Then, in November 1953 the Dairy Board Act 1953 was enacted. Section 3 declared that "there shall continue to be a Board to be known as the New Zealand Dairy Board which shall be the same Board as that established by the Dairy Products Act 1923, and existing under the same name immediately prior to the commencement of this Act." Section 12 (3) provided that the New Zealand Dairy Board "shall have such other functions powers and duties as are conferred on it by this Act and by any Act other than this Act or regulations made under any such Act." Section 13 also conferred on the New Zealand Dairy Board, in accordance with regulations to be made, authority to "promote and administer schemes providing for a system of zoning in respect of the supply of milk or cream to dairy factories . . . "

No new zoning regulations however were enacted, the New Zealand Dairy Board being satisfied to continue to act under the Dairy Factory Supply Regulations 1936. Earlier the Dairy Factory Marketing Commission Act 1947 had been enacted. The Commission established by that Act was to consist of seven persons, two of whom were to be members of the New Zealand Dairy Board. By the Dairy Products Marketing Commission Amendment Act 1956 provision was made for the setting up of a Dairy Industry Loans Council. This Council was to consist of three members of the Commission, three members of the New Zealand Dairy Board, the Secretary to the Treasury, and the Director-General of Agriculture. The function of the Council was to approve loans to co-operative dairy companies from the Dairy Industry Account. All applications for loans were to be forwarded to the New Zealand Dairy Board and referred by that body to the Council. Pausing here, I hope I have made it sufficiently clear that the function of zoning which originally was entrusted to the Executive Commission passed in the course of time to the New Zealand Dairy Board whose corporate existence was continued by the Dairy Board Act 1953, and that by 1956 the New Zealand Dairy Board not only had the responsibility of making zoning orders but also had become closely associated with the granting of loans to co-operative dairy companies.

Finally we come to the Dairy Production and Marketing Board Act 1961. This Act established a new Board called the New Zealand Dairy Production and Marketing Board and consisted of 13 members, two to be appointed by the Governor-General on the recommendation of the Minister, eight to be elected from different wards in the industry, and three to be appointed by the New Zealand Co-operative Dairy Company. The primary object of this Act was to amalgamate the functions of the New Zealand Dairy Board and the New Zealand Dairy Products Marketing Commission. As I have mentioned, by 1956 there existed a close association between these two bodies, and it would appear that by 1961 the Legislature considered there was no sufficient reason for maintaining two separate boards. Henceforth the functions of both were to be entrusted to the new Board established by that Act.

The first submission by counsel for the appellants was this: The Board did not inherit from its predecessor the powers of zoning under the Dairy Factory Supply Regulations 1936. He agreed that this submission depended wholly on the meaning of section 71, which reads as follows:

> "71. (1) Subject to the provisions of this Act, all rights, obligations, and liabilities which immediately before the commencement of this Act were vested in or imposed on the Dairy Board or the Commission shall be deemed to be the rights, obligations, and liabilities of the Board.
>
> (2) All references to the Dairy Board or the Commission in any Act, regulation, order, or other enactment or in any agreement, deed, instrument, application, notice, or other document whatsoever shall,

unless the context otherwise requires, be read as references to the Board."

(Section 2 provides that the words "Dairy Board" mean the New Zealand Dairy Board established under the 1953 Act and the word "Board" means the New Zealand Dairy Production and Marketing Board established under this Act.)

If section 71 (1) be read in isolation, then I agree with counsel for the appellants that there is considerable force in their argument that the words "rights, obligations, and liabilities" are not wholly appropriate to include "powers", but in my opinion all doubts are removed when we come to consider subsection (2), which provides that all references to the New Zealand Dairy Board in any regulations are to be read as references to the Board. One of these regulations is the Dairy Factory Supply Regulations 1936, and I think it is plain that the purpose of section 71 (2) was to ensure that all the functions, duties and powers which formerly were vested in the New Zealand Dairy Board should be assumed immediately by the newly constituted Board. This is consistent with the policy of the Legislature over the years. Mr. Barker, however, invited us to hold that the words in the subsection "unless the context otherwise requires" justified a different conclusion. He drew attention to the judgment of this Court in **New Zealand Dairy Board v. Okitu Dairy Company Limited** (1953) N.Z.L.R. 366 where it was held that the New Zealand Dairy Board was exercising a quasi-judicial function when determining zoning order applications, and he submitted that the Legislature in enacting the Dairy Factory Supply Regulations 1936 must be deemed to have contemplated that those regulations would be administered by a wholly independent body, which the Board no longer was, for it had administrative functions in connection with the making of loans to dairy companies as well. I do not doubt that, generally speaking, powerful arguments may be advanced in favour of the view that it is preferable that a quasi-judicial function should be exercised by a wholly independent body. But granting all that, in my opinion that is not a matter of context at all. It is rather a matter of desirability. In my opinion, all that the words "unless the context otherwise requires" in this subsection mean, is that in the case of any regulation it is necessary for a Court of construction to examine the contents of the regulations to determine whether there is anyconsistent with the general intention of the Legislature that the Board should take the place of its predecessor, the New Zealand Dairy Board. I have examined these regulations, and in my opinion there is nothing in their contents which would justify the conclusion that they were excluded from the ambit of section 71 (2). In my opinion then the first submission fails.

The appellants' second submission was dependent on the Court being of opinion that section 71 (2) did not embrace the Dairy Factory Supply Regulations. If this was the position, counsel's contention was that the power conferred on the Board to make zoning orders under section 40 of the 1961 Act could be exercised only upon the passing of new regulations.

In view of the conclusion I have just reached, it is unnecessary for me to say any more than this — in my opinion there were good reasons why the Board should be given the power to zone in accordance with new regulations if it thought fit. Its predecessor, the New Zealand Dairy Board, was given the same power by section 13 of the Dairy Board Act 1953, in spite of the fact that without doubt that body was authorised to act under the Dairy Factory Supply Regulations 1936 for as long as it thought fit. Nevertheless, I think it was recognised that in the course of time it might be found that the Dairy Factory Supply Regulations 1936 were no longer entirely suitable and therefore it was desirable that the Board should be given authority to obtain new regulations to take their place. In the meantime the Board, as was the case wth its predecessors, was entitled to continue to exercise the zoning powers given by the Dairy Factory Supply Regulations 1936.

I pass on then to consider the appellants' third submission, which was that, even if the Board had been given the power to make zoning orders under the Dairy Factory Supply Regulations 1936, yet nevertheless it was disqualified from acting in the present case because of financial interest. As the learned Judge in the Court below has recorded, it is common ground that in 1960 the Ruawai Company gave to the New Zealand Dairy Products Marketing Commission a debenture for some £87,152, and this debenture became vested in the Board by virtue of section 70 of the 1961 Act. Then in 1961 the Board itself advanced a further £35,000 to the Ruawai Company. These advances came from the Dairy Industry Capital Account established by section 35 of the 1961 Act. While the position is an unusual one, and it is clear that none of the Board members individually had any financial interest in the Ruawai Company, yet I think it must be accepted that the Board had a direct pecuniary interest in the Ruawai Company and consequently a pecuniary interest in the zoning proposals. The principles which required to be applied in these circumstances were not in dispute. All counsel are agreed that Parliament may provide, by express words or necessary implication, that the power to decide a dispute such as existed here shall be committed to an authority which has an interest in the result. It is interesting to notice that in early days, when the Judges endeavoured unsuccessfully to assert a right to control Parliament, it was said in **Day v. Savadge** Hob. 86, 80, E.R. 235, 237, "even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself, for jura naturae sunt immutabilia, and they are leges legum". But, as Willis, J., later said in **Lee v. Bude and Torrington Junction Railway Co.** L.R. 6 C.P. 576, 582, "That dictum, however, stands as a warning rather than as an authority to be followed. We sit here as servants of the Queen and the Legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, lords and commons? I deny that any such authority exists."

In my opinion, very much for the reasons that were given by Hardie Boys, J., in the Court below, it must be accepted that in the present case Parliament has entrusted to the Board both the power to make zoning orders and the power to make advances to dairy companies, and consequently

has recognised that from time to time the Board might have a financial interest in the company applying for a zoning order. I do not question the observation of Bennett, J., in **Wingrove v. Morgan** (1934) 1 Ch. 423, 430, that in such a case as this the Courts are entitled to expect that plain language will be used to express the intention of Parliament. But what more is needed here? Surely it is plain that Parliament has determined that the one Board should exercise the functions previously exercised by two Boards. There is nothing very unusual about this, for, as Asquith, L.J., said in **Wilkinson v. Barking Corporation** (1948) 1 K.B. 721, 727, "This is one of the increasing number of Acts in which an interested party . . . is made the judge in his own case". In considering the propriety of its proposed action, in my opinion the Legislature was justified in assuming that the members of the Board could be trusted to exercise their several functions fairly and impartially. After all, the money advanced did not belong to them, but in truth belonged to the dairy industry as a whole. The Board was merely the appointed channel for advancing the interests of the industry. (See section 32 and particularly subsection (4).) I think it is also important to bear in mind that the making of zoning orders might be particularly necessary in the case of dairy companies whose financial position was insecure. Finally, if I were to accede to the appellants' argument, it would mean that there is no existing statutory authority which could take over the task of hearing particular applications for zoning orders or, as in this case, an amendment to the existing order. I think that it must be accepted that Parliament intended the Board to act as the zoning authority in all cases, whether or not it had a pecuniary interest in the result. I am accordingly of opinion that the appellants' third submission also fails.

This brings me to the appellants' fourth submission, which, expressed in general terms, was that the Board was not empowered by its statute to delegate its powers under the Dairy Factory Supply Regulations to a committee. The difficulty which confronts the Board in answering this submission stems from the fact that a striking departure was made in the Dairy Production and Marketing Board Act 1961 with regard to the authority of the Board to appoint committees to act in its behalf. Section 11 of the Dairy Board Act 1953 provided that the New Zealand Dairy Board, with the consent of the Minister, might delegate to a committee consisting of two or more persons, "any of the powers or functions of the Board other than the power to fix the amount of any levy which the Board is authorised by this Act to impose". This provision, in my opinion, conferred on the New Zealand Dairy Board authority (with Ministerial consent) to delegate to such a committee the power to make zoning orders or grant amendments to existing zoning orders. Section 13 of the present Act, on the other hand, merely authorises the Board to appoint such a committee "to advise the Board on any such matters concerning the dairy industry or the production or marketing of any dairy produce as are referred to them by the Board" and to "furnish to the Board reports of any matter concerning the dairy industry or the production or marketing of any dairy produce in respect of which the Committee have special knowledge or experience". In view of this change in the language of the

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continued

section, Mr. Blundell conceded at once that the Board did not have the power to delegate to the Committee authority to decide whether the Ruawai Company's application for an amendment of its zoning orders should be granted; but he argued that the Board had in fact reserved to itself the duty of deciding whether or not the application should be granted and on what terms. It is as well that I should record at this stage, too, that Mr. Blundell did not attempt to challenge or distinguish the judgment of this Court in **New Zealand Dairy Board v. Okitu Co-operative Dairy Co. Ltd.** (supra) although he reserved his right to do so if there should be an appeal to the Judicial Committee of the Privy Council. Accordingly, for present purposes it is common ground that, although the decision of the Board to make an amendment to this zoning order was that of a body which at least primarily was an administrative body, yet it was under a duty to act judicially in the course of arriving at its administrative decision. In short, it was agreed by all counsel that it was obliged to conform to the basic principles of natural justice.

The interesting argument we heard from counsel ranged over a wide field, but I am of opinion that at the end of the day the case for the appellants really narrowed down to one point, namely whether they were given an adequate opportunity to present their case to the deciding body, namely to the Board. There is no doubt that they were given ample opportunity to present their case to the Committee, but the contention of the appellants is that the Board had surrendered to the Committee part of its judicial function, namely the duty of sifting the evidence and determining what was relevant and what was not, for it is common ground that the Board itself made no attempt to examine the evidence and submissions which had been tendered to the Committee at the inquiry at Ruawai. I have no doubt at all that the Board was entitled to appoint the Committee to conduct an inquiry and record the evidence and submissions, nor do I think that it can now be questioned that the Board was entitled to ask the Committee to submit to it its own report. In the absence of any statutory limitation, the Board was entitled to determine its own procedure, and accordingly, as a procedural matter, could instruct a committee or, for that matter, an official to hear and record the evidence and submissions, and in due course to forward the same to the Board together with its report. There is high authority for both these propositions. The first is **Osgood v. Nelson** (1872) L.R. 5 H.L. 636 where the Corporation of the City of London referred a complaint as to the conduct of Mr. Osgood to one of its committees. This committee was directed to make an enquiry with reference to the complaint, to take evidence and to ascertain the truth thereof. It was unavailingly contended that in so directing the committee the Corporation had surrendered a judicial function. In this case the House took the opinion of the Judges, and Mr. Baron Martin, speaking in the name of the Judges, said that the reference to the committee was:

> "not for the purpose of that committee coming to any judgment or decision themselves but for the purpose of their report being submitted to the Mayor, Aldermen and Commons in order that they might come to a judgment upon it."

The second case is **Local Government Board v. Arlidge** (1915) A.C. 120. In that case the Board had instructed an inspector to hear the respondent's evidence and submissions made on his behalf by his solicitor and to furnish his report to the Board. So far as I can see, no exception was taken to this course, the principal question before the House being whether the respondent was entitled to see the report before a decision was reached by the Board.

But the important distinction between those two cases and the present one is that in the end the deciding body had before it the whole of the evidence presented, in the first case to the committee, and in the second to the inspector. That this was so is fully recorded in the judgments. Indeed, in **Osgood's** case Mr. Osgood and his advisers were given an opportunity of offering any further evidence than that which appeared in the shorthand writer's notes. In the second case, there are a number of references to the evidence and other material presented to the inspector and indeed an affidavit was filed by Sir Horace Munro, the Permanent Secretary to the Board, who stated that the decision was come to "after full and careful consideration of the reports made by the inspector, and of the evidence and documents, including the observations and objections put forward in correspondence by the respondent's solicitors". Now in the present case nothing like this occurred. All that the Board had before it was the Committee's report, which included a short summary of the submissions made by counsel in support of their clients' cases. Although the inquiry extended into a second day, this summary occupies less than two pages in the typewritten report, a considerable portion of which consists of the making of recommendations to the Board as to the course it was advised to pursue. I am not prepared to accept the submission of Mr. Blundell that the Committee's report, standing alone, was a sufficient compliance with the principles of natural justice. In my opinion, in order to substantiate this submission, the responsibility lay with the Board to satisfy the Court that the report was adequate, and I am not so satisfied. The Board, if it had chosen to do so, could have produced the material presented to the Committee. It did not take this course and, this being so, I am not prepared to speculate on the matter. In these circumstances, I do not consider that it can possibly be said that the Board complied with its duty to hear the interested parties unless I am prepared to hold that the Board had at least a limited power of delegation of its judicial function so long as it reserved to itself the responsibility of making the final decision.

It is true that there is some recent authority that gives some encouragement to this view. The first case is **Vine v. National Dock Labour Board,** 1957 A.C. 488, where Viscount Kilmuir said (499): "I am not prepared to lay down that no quasi-judicial function can be delegated, because the presence of the qualifying word 'quasi' means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed". Likewise, Lord Somervell of Harrow said (512): "In deciding whether a 'person' has power to delegate one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated,

though no one doubted in **Arlidge's** case that the Local Government Board, which consisted of the President, the Lord President of the Council, the Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer (Local Government Board Act 1871) could act by officials duly deputed for the purpose whether or not the act to be done had judicial ingredients. There are, on the other hand, many administrative duties which cannot be delegated." The second case is **Ridge v. Baldwin,** 1964 A.C. 40, where Lord Reid (page 72) again referred to **Arlidge's** case as recognising that "a Minister cannot do everything himself. His officers will have to gather and sift all the facts, including the objections by individuals, and no individual can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case." It may well be true that Ministers of the Crown stand in a class of their own, but I am not prepared to conclude that a Board such as the present one has implied authority to delegate any part of this important judicial function, particularly seeing the Legislature, in its wisdom in enacting the present Act, determined not to continue the power of delegation which had previously existed in the case of its predecessor.

I desire to make it perfectly clear, however, that in my opinion the Board was not obliged to hold a public inquiry. It could have contented itself by inviting all interested persons to make written submissions to it and it need not, I think, have given the opposing interests the opportunity of cross-examination. But, having decided on the course it would pursue, in my opinion it was obliged to consider itself the evidence and submissions which were tendered to the Committee. This is the course that was adopted both in **Osgood's** case and in **Arlidge's** case, and I see no justification for adopting a different course here. The duty to hear can take more than one form. The deciding body may hear orally the evidence of interested persons and the submissions of those that represent them. It may "hear" the interested persons by reading their written submissions, whether made to it directly or through appointed persons. All that is a matter of procedure, but I fail to see how the deciding body can be said to have heard the evidence and representations of interested persons if all that happened was that a Committee of the Board heard them and the deciding body did not itself examine the record. As Denning, L.J., pointed out in **Regina v. The Minister of Agriculture and Fisheries ex Parte Graham,** 1955 2 Q.B. 140, 162, there is far too great a risk of the intermediary missing out something in favour of the objector or giving undue emphasis to things which are against him. The Courts have gone a long way in rendering the task of quasi-judicial bodies workable. Thus, in **Arlidge's** case, their Lordships held that the report of the inspector did not need to be shown to the objector even although it was reasonable to assume that it contained his opinion on the case and his impressions of the witnesses. (See observations of Hamilton, L.J., in the Court of Appeal, 1914, 1 K.B. 160, 193.) Now we are asked to take matters a stage further, and this I am not willing to do.

In the situation in which he found himself, Mr. Blundell was obliged to argue that it was sufficient compliance with the rule **audi alteram partem** that members of the Committee were present when the Board decided the matter and were thus available to elaborate their report in any way which the other members of the Board thought necessary. In support, he drew our attention to a further reference from the judgment of Denning, L.J., in the case last cited. At page 167 he had this to say:

> "There is one point, however, which was not raised before us but which I would mention. I notice that in Graham's case it was not the husbandry sub-committee who took action. They referred it to the county committee, and it was the county committee who made the supervision order. The county committee could not fairly come to a decision against the farmer without considering all the representations that he had to make. Indeed the statute forbade it. I ask myself, therefore: Did the county committee have all his representations before them? I should have thought that their best course, when the matter was referred to them, would have been to hear the farmer afresh themselves. They could have given him notice of their meeting and invited him to make his representations direct to them. But they did not do this. They decided without hearing him or his representative. They had, however, before them a report of the husbandry sub-committee and, no doubt, at their meeting there were present members of the husbandry sub-committee who would put forward the farmer's representations. In those circumstances I think we must assume that they considered all the farmer's representations; and if so, the order cannot be impugned."

I do not, however, think that Mr. Blundell can gain much comfort from this passage. Obviously Denning, L.J., was a little troubled by the irregular course which had been followed, but as the point had not been taken by counsel he felt entitled to conclude that it was accepted that the farmer's representations had in fact been heard. That cannot be said of the present case, for it is accepted that the appellant acted solely on the short report of the Committee and the recommendations made therein.

I am sorry that I feel compelled to come to this conclusion, for I have no doubt at all that the Board acted in perfect good faith and was most anxious to comply with the duty that had been cast upon it by the judgments in the **Okitu** case, but I am firmly of the opinion that if I were to accede to Mr. Blundell's submissions I would gravely weaken the rule **audi alteram partem.** It would mean that a tribunal such as the present Board could appoint a committee, not merely to record the evidence of the interested persons and make its report for the assistance of the tribunal, but also could direct the committee to sift the evidence and determine for itself what was relevant and then make a recommendation upon which the tribunal was free to act. Once this principle is accepted, I do not know where the limit is to be drawn. For these reasons, I am of the opinion that the appellants are entitled to succeed on their last ground of appeal.

In the Court of Appeal of New Zealand

No. 12
Reasons for Judgment of North, P.
30th July, 1965
continued

But, in accordance with the views of the majority, the appeal will be dismissed. The first respondent, the Board, will have an order for costs against the appellants in the sum of £120 and all necessary disbursements. The third respondent, the Northern Wairoa Company, supported the appellants' case and, accordingly, is not entitled to an order for costs.

No. 13

REASONS FOR JUDGMENT OF McCARTHY, J.

In the Court of Appeal of New Zealand

No. 13
Reasons for Judgment of McCarthy, J.
30th July, 1965

I am indebted to Hardie Boys, J., for his careful description of the facts of the present dispute and of the history of dairy company operations in the Ruawai and Pouto areas, and for his examination, too, of the earlier and current legislation. His comprehensive statement of these matters absolves me of any necessity to restate them. But I would at this early stage like to select and underline some features, thereby clearing the way for my examination of the submissions of the appellant. They are:

1. The first respondent, the New Zealand Dairy Production and Marketing Board, which I shall hereafter refer to as "the Board" was established by the Dairy Production and Marketing Board Act 1961 to take over the functions previously discharged by two bodies, the New Zealand Dairy Board and the New Zealand Dairy Products Marketing Commission. It is one of a number of producers' boards which substantially control the primary production of this country. It consists of 13 members, two appointed by the Governor-General on the recommendation of the Minister, eight elected from the different dairy wards of the Dominion, and three appointed by the New Zealand Co-operative Dairy Company Limited which I understand to be by far the largest dairy company in the country. Its functions are considerable and of great importance in our economy. Section 14 of the 1961 Act prescribes its main functions. They are the acquisition in New Zealand and then the marketing overseas of all butter and cheese manufactured for export; the acquisition and marketing of dairy produce of other kinds which is intended for the export market and which it chooses to acquire; the control of the export of the dairy produce which it does not choose to acquire; the promotion and organisation of the orderly development of the dairy, bobby calf and pig industries; and the orderly marketing of vells, bobby calves, pigs and dairy stock. In addition, and separately, it is charged with the responsibility of reporting to the Minister of Agriculture from time to time on trends and prospects in overseas markets and in movements in costs and prices or other factors likely to prejudice the economic stability of the dairy industry. To carry out these tasks, the Board is given a wealth of different powers by the 1961 Act and other legislation. Together these powers create the machinery for acquiring, marketing and controlling the export of the dairy produce to which I have referred, fixing prices to be paid to producers, approving loans to co-operative dairy companies and others which have been recommended by the Dairy Industry's Loans Council, levying the industry for the costs of its operations, and carrying out many associated tasks. One of the important parts of this machinery is said to be the power to zone. Section 40 of the 1961 Act enables the Board, in accordance with regulations made

under that Act, to promote and administer schemes "providing for a system of zoning in respect of the supply of milk or cream to dairy factories or other establishments used for the receipt or storage of milk or cream". Similar power is claimed for it, as I shall later show, through the Dairy Factory Supply Regulations 1936. Through all this legislation of one form or another the Board is placed in de facto control of New Zealand's dairy industry, and when it is remembered that the weight of butterfat processed by dairy factories in New Zealand approximates 500 million pounds per year, one gains some impression of the magnitude and importance of the activities and responsibilities of the Board.

2. Though most of the powers of the Board are administrative or executive in character, the power to zone has been held to be quasi-judicial, a term often criticised but which has now attained respectability by acceptance in the House of Lords. In **N.Z. Dairy Board v. Okitu Co-operative Dairy Company Ltd.** (1953) N.Z.L.R. 366 this Court held that the power to make a zoning order conferred on the New Zealand Dairy Board, a predecessor of the present Board, by Reg. 16 of the Dairy Factory Supply Regulations 1936, when used to effect the rights of some company or person, involved the exercise of a quasi-judicial power, and that, as a result, the basic principles of natural justice applied to such a use and rendered it subject to control by certiorari and injunction. Now, as I have said, the Board is given power by s.40 of the 1961 Act to promote and administer zoning schemes in accordance with regulations made under the Act; but as no regulations have as yet been made, s.40 is not operative in that respect. But it is claimed for the Board, though denied by the appellants, that the Dairy Factory Supply Regulations 1936 have been made available to it by s.71 of the 1961 Act and that in making the zoning order which is under discussion in this appeal, it did so under Reg. 16, the very regulation which was considered in the **Okitu** case. Mr. Blundell, for the Board, in relying on Reg. 16, therefore, accepted that the Supreme Court was bound by and that we should follow the **Okitu** case; but he did make it clear that should this dispute eventually come before the Privy Council he might there contend that that case was wrongly decided. This present appeal, consequently, must be approached on the basis that if the Board did have power to zone, then in making the zoning order now under review it was exercising a quasi-judicial power which imported an obligation to conform to the principles of natural justice. However, nowhere in the **Okitu** case did the Court attempt to lay down a general standard of hearing which must be observed by the Board in all its zoning activities. The judgments of the majority content themselves with the finding that no sufficient ground had been shown for disturbing the findings of fact of the trial Judge or his conclusion that the enquiry held by the New Zealand Dairy Board in that particular case was conducted in such a manner as to contravene the basic principles of natural justice. The facts in the **Okitu** case are so different from those in the present, that the trial Judge's findings and conclusion there are no help to us in deciding whether what was done here was adequate or not.

3. Although Mr. Jeffs claimed before the Committee to represent, in addition to himself, 138 shareholders in the Ruawai Company, including, as I have said, some from the Pouto Peninsula, he issued the writ now before us on behalf of himself and a lesser number, 88. Their names are set out in the statement of claim. They all farm, so it appears from their addresses, in areas lying east of the Wairoa River and of the north-western arm of the Kaipara Harbour. There are none from the Pouto Peninsula. I assume the aims of all the suppliers now represented by Mr. Jeffs may be taken to be the same: they do not seek to be zoned to the Northern Wairoa Company as many of the Pouto suppliers did; they would have no zoning orders in their areas at all, and they wish to be left to dispose of their milk or cream as they think best.

4. The difficulties and divergent views amongst dairy farmers and dairy companies in the Ruawai and Pouto areas and described in the judgment of the Court below were known to and had concerned the Board for some time. The circumstances which brought the matters to a head and induced the Board to appoint the Committee to hold an enquiry at Ruawai, was the approaching expiration of the ten-year agreement between the dairy companies operating in the district and the Ruawai Company's consequent application for whole milk and cream zoning orders for the cream areas which were given it by the then current agreement. The dominant questions for the Committee were clearly the Ruawai Company's application for zoning orders, and that of the Company's suppliers farming on the Pouto Peninsula for relief from their obligation to supply the Ruawai factory. Some of these suppliers, perhaps the majority, were willing to be zoned to the Northern Wairoa Company at Dargaville; others sought to be relieved from zoning altogether. But accompanying these more important applications there were a number of other requests from groups or individuals which were to be enquired into, including that of the present appellants for freedom from zoning. These applications or requests, though made separately, cannot really be considered in isolation one from another. They were all intimately interconnected, especially with the central issues, the Ruawai Company's application for a zoning order and the Pouto suppliers' request to be relieved of Ruawai control, and with the consequent effect that the grant of those requests would have on the economic functioning of the Ruawai Company. It may be of assistance to those who are not familiar with dairy company zoning to explain what was involved in the Ruawai Company's request that their existing cream zoning order be extended to cover whole milk. Hardie Boys, J., deals with this in his judgment. He says:

> "As I understand it, however, it is still competent for a dairy farmer, in an area zoned only for cream, at the commencement of a dairy season to change from a cream to a whole milk supply so that he can become a supplier of milk to any factory (not itself zoned for milk) which chooses to send its tanker to his farm. It can be seen that such a course could seriously interfere with the objects of zoning and with the economic running of any factory which lost suppliers in the process. If the pay-out for butterfat was higher at the factory receiving

milk than at the factory receiving cream, the inducement to change would be very real; and it seems to be accepted as the case here that the payout of the Northern Wairoa Company was in fact higher than that of the Ruawai Company."

Later he turned to another matter which it may also be desirable to explain, namely some of the implications in the requests of certain of the Ruawai suppliers that there be no zoning orders at all in their area:

"It is necessary to understand that, under the 1936 regulations and under both the Acts of 1953 and 1961, to be referred to later, if a zoning order is made, the factory gaining supply as a result can be required, as a condition of the zoning order, to pay compensation to the factory losing supply; that compensation may include the assuming or paying off of part of the liabilities of the latter and the cost of resuming shares held in the latter company by former shareholder-suppliers now no longer supplying it. That is an important consideration for the company which, at first sight, might seem to gain by a zoning order. It could be reckoned that the Northern Wairoa Company, for instance, was by no means averse to the diversion of its turnover of 450 tons of butter annually; if this could be achieved without the southern Pouto Peninsula suppliers being zoned to either factory, so that they were left free in their choice between Ruawai and Northern Wairoa, no compensation would be involved. But if (as in fact occurred) it was achieved by means of a zoning order, compensation as a condition of the zoning could confidently be expected to be ordered. Similarly if, following the expiration of the ten-year agreement, no zoning order for milk were made, suppliers could, at the commencement of the season, change from a cream supply to a milk supply and, with Northern Wairoa having a better pay-out for butterfat, supply that company without its having to pay compensation to the factory formerly supplied."

These remarks were directed to the Ruawai Company suppliers living on the Pouto Peninsula; but they applied equally to suppliers, including the appellants, living elsewhere, who for their different reasons sought to be discharged from the existing cream arrangement and opposed the making of a milk order. There are, it seems, different views of the motives behind the appellants' applications, but whatever those motives were, their attitude was plain. They sought to be free to deliver to the factory of their choice. In refusing this request and in imposing, contrary to their wishes, a milk order in favour of the Ruawai Company, plainly the Board made orders which affected their property rights and brought them within the protection of the **Okitu** case.

I come now to the appellants' submissions. The first was that the Board did not, contrary to its claim, inherit the powers given the previous board by the 1936 Regulations. This submission turns wholly on the meaning of s.71 of the 1961 Act, which I set out:

"(1) Subject to the provisions of this Act, all rights, obligations, and liabilities which immediately before the commencement of this Act

were vested in or imposed on the Dairy Board or the Commission shall be deemed to be the rights, obligations, and liabilities of the Board. (2) All references to the Dairy Board or the Commission in any Act, regulation, order or other enactment or in any agreement, deed, instrument, application, notice or other document whatsoever shall, unless the context otherwise requires, be read as references to the Board."

The appellants contend, in the first place, that the power to zone is not a "right, obligation or liability" — see subs. (1). I agree. Obviously, I think, it was not an obligation or liability. But was it a right? That term is used in different senses. Sometimes it includes powers — see **Salmond on Jurisprudence** 11th Ed. 269 — but here, I think, the word is used in its strict sense, and not in the wider sense which would include a power of the character we are considering. I agree with the submissions of Mr. Barker and Mr. Wright, that the Legislature recognised in the text of this Act that the word can have different meanings, and appreciated the difference between a power, a right and an obligation. See, for example s.39 and s.40.

I pass on then to the second arm of the appellants' first submission. It is that although the 1936 Regulations with their power to zone are prima facie taken over by virtue of s.71 (2), that subsection expressly excludes from its operation any Regulations whose context requires otherwise, and the context of the 1936 Regulations does so require. The argument runs in this fashion: one result of the **Okitu** case is that we must now take it that the body envisaged by the Regulations is an impartial judicial body; the Board possesses functions of an administrative nature which on occasions conflict with its quasi-judicial powers; therefore the context of the Regulations impliedly prohibits the assumption by the Board of the powers of the Regulations. I cannot accept this argument. I agree that we must accept the **Okitu** case as establishing that the power to zone is a quasi-judicial power. But I see nothing at all in the context of the Regulations, no matter how widely the word context is construed, which justifies the assumption that the Regulations can only be administered by a body whose administrative functions can never conflict with its judicial ones. Mr. Barker's submission, when analysed, is seen not to be based on the context of the Regulations, but rather on a consequence of the powers bestowed, a consequence which, in my view, lost the weight it might otherwise have had, when the Legislature in 1961 indicated quite clearly that it intended that the power to zone and the administrative functions dealt with in the 1936 Regulations, were thereafter to be exercised by the same authority. I shall explain in some detail why I take this view of the Legislature's action when I come, at a later stage, to the appellants' fourth submission. This, then, disposes of the appellants' first submission for Mr. Barker abandoned the argument pursued before Hardie Boys, J., that statutory validation pursuant to s.27 of the Agriculture (Emergency Powers) Act 1934 was necessary for an effective transfer of powers from the old board to the new.

The appellants' second submission was advanced in case we should hold that the power to zone was a right, obligation or liability within the

meaning of s.71 (1), and was based on the words "subject to the provisions of this Act". It claimed that the provisions of the Act, and in particular ss.40 and 69, excluded a right to zone from the operation of the subsection. However, as I have already accepted that s.71 (1) does not apply, I need not consider this point.

The appellants' next submission was that the Board was disqualified from making a zoning order by reason of its loans to the Ruawai Company. Hardie Boys, J., held that the Board had a direct financial interest which would have entitled the appellant to an order quashing were it not for the fact that Parliament in passing the 1961 Act unmistakably intended that the power to zone should be exercised, notwithstanding such a financial interest. A similar view has been taken by the President in the judgment which he has just delivered, and will be taken, so I understand, by my brother McGregor. I agree that the Board had a direct financial interest, an interest which would normally disqualify. But can a distinction be drawn between the mind of the Board and the minds of the individual members who joined in making the decision of the Board and who had no financial interest at all, so that the issue is not one of automatic disqualification but whether there was a real likelihood of bias? This may be a matter open to different views but I have not seriously examined the problem, for I, too, believe not only that Parliament intended that the Board should have both powers, but also that it must have appreciated that the Board could from time to time have a financial interest in a particular area in respect of which a zoning order would be sought and could find it necessary to exercise its power notwithstanding that interest. Such an interest could arise either by way of inheritance from the former Marketing Commission or as a result of the Board's own acts. This was Mr. Blundell's submission, and I accept it. I think it worthwhile, however, to add that though the situation of a body exercising a power to zone in relation to an area in which a dairy company financed by it is situated may at first glance appear a little startling, it is not really so extraordinary that the Legislature should have authorised the Board to do that. After all, the Board is selected from men of the highest standing and integrity, the leaders of one of our most important industries, men of great knowledge and experience of the production and marketing of dairy produce. The money which the Board advances is not the personal money of the members. Nor is it, in reality, the Board's money, though the law says it is. The advances are, in fact, made on behalf of the industry, and the industry must repay the Reserve Bank if an advance is lost. If that is appreciated, and if the state of the dairy industry before the zoning effected in the 1930's by the Executive Commission of Agriculture under the deputy-chairmanship of Sir Francis Frazer is recalled, it is not difficult to see that Parliament in 1961 could well have thought it proper that the power to zone and the power to lend should go hand in hand and be complementary to one another. I can understand it thinking it necessary to ensure that when money is advanced to a dairy company, the Board should have power to protect that company by appropriate zoning orders. I believe that we should avoid approaching legislation of this character in a spirit of over-

readiness to conclude that the Legislature always intends to keep administrative and quasi-judicial functions separate from one another. It is better if we have no leaning one way or the other.

The fourth submission for the appellants was that the Board improperly delegated to the Committee its quasi-judicial function by delegating (a) the task of hearing evidence, and (b) the actual decision. This submission raises an important matter of principle, and necessitates some examination of the decisions relating to the audi alteram partem rule and then of the facts.

In my view, there is no current statutory power of delegation of the Board's judicial authority. Section 13 of the 1961 Act enables the appointment of committees to advise the Board on such matters concerning the dairy industry or the production or marketing of any dairy produce as may be referred to it by the Board. The section also says that every committee of the Board may furnish the Board reports on any matter concerning the dairy industry or the production or marketing of any dairy produce in respect of which the members of the Committee have special knowledge or experience. But it does not, in my view, authorise a delegation of zoning powers, and the appellants do not claim that it does. Mr. Blundell says merely that the section is of importance when we have to investigate the power to appoint a committee to record evidence as distinct from one to decide an issue, and I shall come to that in due course. But before I leave s.13, I should point out that under the 1953 Act the New Zealand Dairy Board, the then Board, did have express power, with the consent of the Minister, to delegate any of its functions to a committee. That enabled that Board to delegate the function of zoning in its entirety. But when the 1953 Act was repealed and replaced by the 1961 Act, the section which took the place of s.11, namely s.13, was of a different character altogether.

It is elementary but central in the British system of justice, and indeed, in some other systems too, that when a body possessing judicial powers elects to exercise those powers, it must give them whose rights may be affected a fair opportunity to be heard. The standard to be observed in the giving of that hearing is not a constant one; it can vary according to the nature of the tribunal and the nature of the enquiry. **Russell v. Duke of Norfolk** (1949) 1 All E.R. 109, 118; **General Medical Council v. Spackman** (1943) A.C. 627, 638; **University of Ceylon v. Fernando** (1960) 1 All E.R. 631; **Regina v. Deputy Industrial Injuries Commissioner ex parte Moore** (1965) 2 W.L.R. 89. The formal procedures of the Royal Courts need not be adopted: the tribunal may fix its own procedures, **Board of Education v. Rice** (1911) A.C. 179; **Local Government Board v. Arlidge** (1915) A.C. 120; but whatever be the form into which the enquiry is fitted, it must at least give all parties affected a fair opportunity to make any relevant statements which they desire to bring forward. **De Verteuil v. Knaggs** (1918) A.C. 557. I think then, that apart altogether from s.13 whose effect in this connection could be somewhat doubtful, there can be little doubt that the Board could,

as a matter of procedure, appoint a committee to act as a recording instrument to hear the various parties and to record what they had to say. That procedure was adopted in **Osgood v. Nelson** (1872) L.R. 5 H.L. 636, where the appointment of a committee to take evidence was held to be not a delegation of authority and to be permissible. It was also followed in **Local Government Board v. Arlidge** (supra). Mr. Barker, however, contended that this power to appoint a committee to record should be restricted to occasions when the power to decide descends from a Minister of the Crown; but that is not so, for **Osgood v. Nelson** was not such a case, and, moreover, the opinions expressed in **Board of Education v. Rice** and **Local Government Board v. Arlidge** to the effect that a body exercising quasi-judicial powers may fix its own procedure, were expressly approved by the Privy Council in **University of Ceylon v. Fernando** (supra), which is another case where the powers did not come from a Minister of the Crown. I am prepared to hold, therefore, that the appointment of a committee to record evidence and submissions for later consideration by a tribunal invested with the power of decision is not of itself a delegation of quasi-judicial power.

But it is said in this case that the activities of the Committee went beyond the mere recording and reporting, for after listening to the evidence and submissions and reading the submissions filed later, it proceeded to summarise for the Board the cases advanced for the various parties, and to include that summary in its report. It is claimed that the acts of summarising and making recommendations were an exercise by the Committee of some part of the judicial function vested in the Board. I think that we can accept that the mere fact that a committee accompanies its report with recommendations to a tribunal of this character does not itself amount to a delegation invalidating the actions of the tribunal. Reports embodying recommendations were supplied both in **Osgood's** case and in **Local Government Board v. Arlidge.** The more difficult question is whether the Board in relying upon the summary prepared by the Committee and contained in its report instead of reading a full transcript of what was said at Ruawai, delegated some part of its judicial authority, and, if it did, whether it was competent to do that.

I take, first, the second part of this question, the capacity to delegate. In my view, in the absence of express statutory power, a body possessing judicial authority can never delegate wholly the power of decision, and in the normal case no part of that authority may be handed over to another. But I cannot accept that one can now say that there can never be any degree of delegation, especially when the power is quasi-judicial with a substantial administrative constituent. In **Barnard v. National Dock Labour Board** (1953) 2 Q.B. 18, Denning, L.J., at p.40 recognised that the power to delegate the judicial function can be conferred by necessary implication, and he treated **Local Government Board v. Arlidge** as a case of that type. Since then various observations in the House of Lords have indicated that this may be too narrow an approach, and that the question whether there can be delegation and, if so, in what degree, depends on the character of the tribunal and the duty delegated. In

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Vine v. National Dock Labour Board (1957) A.C. 488, Viscount Kilmuir L.C. said, at p.498:

> "I now turn to the contention that the local board could delegate its functions to the disciplinary committee. I have had the advantage of seeing in print the opinion which my noble and learned friend, Lord Somervell of Harrow, is about to express and, on this part of the case, I find myself in complete agreement with it. It was urged that the very idea was negatived by the fact that this was a quasi-judicial act. *I am not prepared to lay down that no quasi-judicial function can be delegated, because the presence of the qualifying word 'quasi' means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed* (see **Cooper v. Wilson** (1937, 2 K.B. 309, 341; 53 T.L.R. 623; (1937) 2 All E.R. 726, per Scott L.J.). As so much has been said on this point I think it is right to say that there is a judicial element here in the sense discussed by Donovan, J., in **Rex v. Metropolitan Police Commissioner, Ex parte Parker** (1953) 1 W.L.R. 1150, 1157; (1953) 2 All E.R. 717.
>
> Nevertheless, that is not the end of the matter. *It is necessary to consider the importance of the duty which is delegated and the people who delegate.* In this case the duty is to consider whether a man will be outlawed from the occupation of a lifetime." (The italics in this and in later citations are, of course, mine.)

I come next to the speech of Lord Somervell of Harrow in the same case. He said first, at p.510:

> "In **Barnard's** case (1953) 2 Q.B. 18, as in the present case, the functions of a local board under these provisions have been said to be judicial or quasi-judicial and this has been regarded as conclusive on the question whether the functions could be delegated.
> I would like, in the first place, to associate myself with the critical observations made by Lord Greene M.R. on the expression 'quasi-judicial' in **B. Johnson & Co. (Builders) Ltd. v. Minister of Health** (1947) 177 L.T. 455, 458-459; (1947) 2 All E.R. 395. It is not to be found in the statements made in this House and normally cited on this topic. I will not set them out, but I have in mind the Earl of Selborne L.C's opinion in **Spackman v. Plumstead District Board of Works** (1885) 10 App. Cas. 229, 249; 1 T.L.R. 313. Lord Loreburn L.C's opinion in **Board of Education v. Rice,** and that of Viscount Haldane L.C. in **Local Government Board v. Arlidge.**
> The phrase 'quasi-judicial' suggests that there is a well-marked category of activities to which certain judicial requirements attach. An examination of the cases shows, I think, that this is not so. The court has to consider whether a Minister, tribunal or board has to act 'judicially' in some respect and has failed to do so. The respect in which he has to observe judicial procedure will depend on the statutory or other provisions under which the matter arises."

But later, p.511, he went on to say:

"The question in the present case is not whether the board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate.

In deciding whether a 'person' has power to delegate one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated, though no one doubted in Arlidge's case that the Local Government Board, which consisted of the President, the Lord President of the Council, the Secretaries of State, the Lord Privy Seal and the Chancellor of the Exchequer (Local Government Board Act, 1871), *could act by officials duly deputed for the purpose, whether or not the act to be done had judicial ingredients.* There are on the other hand, many administrative duties which cannot be delegated."

The topic received more extensive consideration by Lord Reid in **Ridge v. Baldwin** (1964) A.C. 40. That was a case concerning the dismissal of a chief constable of the Brighton Borough Police Force. It was alleged that the judicial power involved in that dismissal had been delegated. Lord Reid, in a judgment which has my respectful admiration, set out to demonstrate the reason why in determining the requirements of natural justice one must — to adopt again the words of Lord Somervell — consider the nature of the duty and the character of the person. Lord Reid said that

"One reason why the authorities on natural justice have been found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it has been sought to apply the principle."

He was there speaking of the principle that a party must be heard.

"What a minister ought to do in considering objections to a scheme may be very different from what a watch committee ought to do in considering whether to dismiss a chief constable."

He then went on to discuss the many different types of action with which the Courts have become familiar in their field. First he took the dismissal cases. Then he considered the reported decisions relating to property rights and privileges. In due course he came to the cases where, for example, the Board of Works, or the governor or the club committee was dealing with a single isolated case. There, the tribunal was not, he said, deciding like a Judge in a law suit what were the rights of the person before it, but was deciding how the party should be treated — something analagous to a Judge's duty in imposing penalty. It was easy to see that such a body was performing a quasi-judicial task in deciding such a matter and to require it to observe the essentials of all proceedings of a judicial character — the principles of natural justice. Sometimes the functions of a Minister or a Department may also be of that character and then the rules of natural justice apply in much the same way; but more often their functions are of a very different character altogether:

"If a minister is considering whether to make a scheme for, say, an important new road, his primary concern will not be with the damage which its construction will do to the rights of individual owners of land. He will have to consider all manner of questions of public interest and, it may be, a number of alternative schemes. He cannot be prevented from attaching more importance to the fulfilment of his policy than to the fate of individual objectors, and it would be quite wrong for the courts to say that the minister should or could act in the same kind of way as a board of works deciding whether a house should be pulled down. And there is another important difference. As explained in **Local Government Board v. Arlidge** a minister cannot do everything himself. *His officers will have to gather and sift all the facts, including objections by individuals, and no individual can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case."*

Now it seems to me that these observations in **Vine's** case and **Ridge v. Baldwin,** recognise that when the body is predominantly one possessing wide and nationally important administrative duties and when the decision must to some degree at least be affected by considerations of general policy, the tribunal may delegate some step in exercise of the judicial process. But, it will be asked where is the line to be drawn; how much can be delegated? A limit which will be appropriate in this present case at least is that the tribunal may not delegate to an extent which prevents it acting fairly in all the circumstances as between the parties involved and which removes the final decision from itself to another. In other words, the tribunal must itself still give a hearing, either in the form of having the parties before it, or considering some record of their cases, which the Courts will consider fair and adequate having regard to the character of the tribunal and the issues to be decided.

Was there any delegation in this case? I doubt it. But it may possibly be said that the Committee in summarising did take some step in the exercise of the judicial power under delegation from the Board. If that be the proper view, then I would hold it to be a justifiable delegation. I think it important to emphasise, however, that although the Committee was able to reduce the whole of the submissions and evidence into two foolscap pages of a report, there has been no suggestion, either in the Court below or in this Court, that any material point advanced on behalf of any of the parties before the Committee was omitted from the summary. Therefore, I believe that we should conclude that this summary, brief though it was, correctly conveyed at least the substance of what the parties had to say. I do not overlook that the hearing stretched into the second day. Some of that time, perhaps a large portion, could have been taken up by listening to submissions going to jurisdiction which the Committee rightly rejected. But I am prepared to assume that evidence and submissions relating to the merits of individual cases did occupy the greater part of the time. But, at the same time, there must have been a great deal of repetition. After all, the issues were relatively straightforward. The Northern Wairoa Company paid more for butterfat than did the Ruawai Company. The

people living on the Pouto Peninsula found, as a result of the introduction of the modern tanker system, that it was more profitable and convenient to supply the Northern Wairoa Company. The appellants sought to be relieved from zoning altogether, so that they could deal with the Northern Wairoa Company, or any other company which they saw as suitable financially. Their case was, I have no doubt and as the summary states, fundamentally that it was wrong to prop up a company such as Ruawai and to keep it in existence at the expense of its suppliers. All that is said in the summary.

In my view, then, the Board was entitled to act on the summary and was not obliged to read in full the mass of evidence and submissions, no doubt largely repetitive, which had been given before the Committee. It must be emphasised again that the Board was comprised of men of great experience and ability in matters pertaining to the industry. None knew better the importance and the implications of a zoning system, and of the financing of dairy factories. They knew the existing policy of the Board in relation to such matters, and would apply it if they could justly do so. They were already well aware of the difficulties and dissentions in the Ruawai and Pouto areas. Each member had been given a copy of the report and then the report was read over to them. I think we must conclude that having read or heard the report, and there being some discussion — not a great deal perhaps, but some — when three members of the Committee were present and available to help, the Board was in a position to evaluate and decide the various issues raised. I believe that if we were to insist that a Board such as this, primarily administrative and burdened with extensive obligations and pressures, is obliged to read every detail of evidence and submissions and cannot call for the compiling of a fair summary by a committee, we would impose an obligation which would not necessarily assist the parties but which could seriously impede the efficient working of the Board. Such a Board should, in my view, be treated in New Zealand in much the same way as the Minister or the Department discussed by Lord Reid in **Ridge v. Baldwin.**

During the argument before us, both the appellants and the Board sought to draw support from remarks of Denning L.J. in **Regina v. Minister of Agriculture and Fisheries Ex parte Graham** (1955) 2 Q.B. 140. All I want to say about that case is that in my view it is no authority against the view I have taken. In the first place, it is a case of a different character altogether, falling into a different class in the classification made by Lord Reid. It therefore called for a different standard of hearing. In the second place, even there, as appears at p.165, Lord Denning, despite what he said earlier, was prepared to pass a report which was not a verbatim record but which made the substance of the representations available to the deciding authority.

One final matter in relation to this aspect of the case. Whilst, as I have said, there was distillation of what was heard by the Committee, no attempt has been made to establish that the Committee selected by way of accepting some submissions or evidence and discarding others — to prove a sifting in the true sense of that word. Whether the Board could

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delegate the power to effect such a sifting (though Lord Reid thought it permissible at least in the case of a Minister) does not arise on the facts of this case.

For these reasons, I am of the opinion that the Board was able to give and did give the parties a sufficient hearing, and that the zoning orders cannot be impugned for want of such a hearing. It was urged that we should recoil from that view for its adoption would be a retreat from earlier attitudes adopted by this Court which some writers see as more progressive than those discernible in the Courts of Great Britain. Whilst personally I agree that in New Zealand, where the activities of the central Government and of boards possessing power over industry are most extensive, there is a special need for the Courts to be active in ensuring that parties to quasi-judicial hearings be given proper opportunities to present the cases which they wish to advance, I can see no justification here for being anxious to upset rulings of the Board when it is not claimed that the material before it did not fairly though succintly, convey the propositions which the parties wished to place before it.

I would therefore dismiss the appeal.

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REASONS FOR JUDGMENT OF McGREGOR, J.

No. 14
Reasons for Judgment of McGregor, J. 30th July, 1965

The facts and history of this matter are, with respect, so comprehensively and carefully set out in the judgment of Hardie Boys, J., from whom this appeal is brought, that I feel it would only blur the vision if I endeavoured to restate them.

The first respondent is the New Zealand Dairy Production and Marketing Board (which I will hereinafter refer to as "the new Board" or "the Board") constituted under the Dairy Production and Marketing Board Act 1961. The appellant, a supplier of the Ruawai Co-operative Dairy Company Limited (the second respondent) represents some 138 suppliers, including suppliers on the Pouto Peninsula, who oppose the creation of a milk zone and any zoning of cream and milk. The second respondent, the Ruawai company, joins with the new Board in supporting the judgment in the Court below, and the third respondent, the Northern Wairoa Company, joins with the appellant in supporting the appeal.

In essence in the Court below where the appellant was unsuccessful he sought to have the Court quash zoning orders purported to be made by the new Board under the Dairy Factory Supply Regulations 1936 (Reprinted Statutory Regulations 1963/147). The 1936 regulations were originally made under the authority of the Agriculture (Emergency Powers) Act 1934. The regulations and all amendments thereto were respectively validated by acts of Parliament in each year in which the regulations or amendments thereto were made, and to remove any doubts their validity was again recognised by the Agriculture (Emergency Regulations Confirmation) Act 1957. The validity of these regulations is therefore conceded by the appellant, subject to the later submission that the new Board is not authorised to exercise certain of the powers therein contained.

The 1936 Regulations originally conferred the powers of zoning on the Executive Commission of Agriculture, but by Regulations 1948/167 the New Zealand Dairy Board (hereinafter called "the old Board") constituted by the Dairy Produce Export Control Act 1923 and Part II of the Agriculture (Emergency Powers) Act 1934, was substituted for the Commission. The last two enactments referred to were consolidated by the Dairy Board Act 1953.

A separate corporation entitled the Dairy Products Marketing Commission (referred to herein as "the Commission") was established by the Dairy Produce Marketing Commission Act 1947, but in 1961, by the statute of that year already referred to, the old Board and the Commission were replaced by the new Board.

By virtue of s. 70 of the 1961 Act all real and personal property of the old Board and the Commission became vested in the new Board, and by s. 71 all rights, obligations and liabilities vested in or imposed on the old Board or the Commission are deemed to be the rights, obligations and liabilities of the new Board. Section 71 reads as follows:—

> "(1) Subject to the provisions of this Act, all rights, obligations, and liabilities which immediately before the commencement of this Act were vested in or imposed on the Dairy Board or the Commission shall be deemed to be the rights, obligations, and liabilities of the Board.
>
> (2) All references to the Dairy Board or the Commission in any Act, regulation, order or other enactment or in any agreement, deed, instrument, application, notice, or other document whatsoever shall, unless the context otherwise requires, be read as references to the Board."

Under the 1936 regulations originally the executive commission of Agriculture, and since 1948 the old Board, were given the power by Regulation 5:—

> "(a) To define areas from which all cream produced in supplying dairies therein may be collected and received by owners of manufacturing dairies registered as creameries for the purpose of being manufactured into creamery butter."

and by Regulation 7 a similar power was granted in regard to the supply of whole milk.

On the 9th March 1937 the Executive Commission of Agriculture in exercise of the powers vested in it by the 1936 Regulations made zoning orders (11 and 11A) in regard to the supply of cream in respect of the Northern Wairoa area as between the Northern Wairoa and Ruawai Dairy Companies. Subsequently, in 1953, an agreement was entered into by seven Northland Dairy Companies, including Northern Wairoa and Ruawai, defining zoned areas for the supply of whole milk to each of such factories, such agreement being for a term of ten years from the 1st June 1953.

In February 1963 the new Board received a request from the Ruawai company to define a milk zone for the Ruawai District. The new Board

then proceeded to determine the matter as between the various conflicting interests consisting of those dairy companies concerned, Northern Wairoa, Ruawai, and Maungaturoto, and the suppliers in the area. As a result the new Board on the 30th May 1963 purported to make a new zoning order known as 11B, or in effect an amendment to zoning order 11A, in respect of both cream supply and whole milk supply, which order reads as follows:—

> "Board today decided that all Ruawai supply on Pouto Peninsula be zoned to the Northern Wairoa Dairy Company with effect from June 1, 1963. Board further decided that existing zoning boundaries on eastern side of Northern Wairoa River should be maintained for cream supply and also be extended to apply to whole-milk supply with effect from June 1. Zoning Orders 11 and 11A will be amended accordingly. Board also decided that compensation will be awarded and directed zoning committee to investigate and report."

The present proceedings ask for a writ of certiorari to remove into the Supreme Court and quash zoning order No. 11B on the grounds that such order is ultra vires the new Board, that it did not act in accordance with the principles of natural justice, that it was debarred by its own financial interest from making such order, and that in any case the procedure adopted invalidated the purported order.

The first ground challenges the authority of the new Board to make a zoning order, and requires consideration of ss. 70 and 71 of the 1961 Act. It is argued that the powers of zoning under Regs. 5 and 7 of the 1936 Regulations have not passed to the new Board. The Board on the other hand submits that it has succeeded to the powers of the old Board by virtue of s. 71 of the 1961 Acts as rights previously vested in the old Board, or alternatively it relies on the provisions of s. 71 (2). Considerable argument was addressed to the Court on the jurisprudential meaning of "rights" in s. 71 (1), and it has been argued that "rights" should be construed stricto sensu as applicable to a legal right conferred on one person with a co-relative obligation imposed on another. Reading subs. 71 (1) in isolation and in particular having regard to the associated words "obligations" and "liabilities" and the subsequent qualification of the two latter terms by the words "imposed on the Dairy Board" I am attracted by this construction. But it seems to me that to determine whether the powers under the 1936 regulations have been inherited from the old Board by the new Board the whole Act and the purposes of the formation of the new Board must be considered in determining the intentions of the legislature.

The Act is described in its preamble as an Act to establish a New Zealand Dairy Production and Marketing Board and to define its functions and powers. The general functions of the new Board are contained in s. 14 of the Act, and by s. 39 it is given general powers of a comprehensive nature for the development of the Dairy industry. It is conceded that the 1936 regulations still exist, and have not been repealed either expressly or (in this Court) by implication. It seems to me an inescapable corollary that some authority should be empowered to exercise the specific functions thereby conferred previously on the now defunct old Board. Section 71 (2) directs that all references to the old Board in any regulation shall, unless

the context otherwise requires, be read as references to the new Board. This provision seems to me clearly to indicate the intention of the legislature that the new Board should exercise the functions of the old Board under the 1936 regulations. In fact, considering the whole Act, this intention of the legislature is reinforced. The only other reference on which reliance is placed by counsel for the appellant is s. 40, which gives the new Board authority, in accordance with regulations under the 1961 Act, to (c) promote and administer schemes providing for a system of zoning in respect of the supply of milk or cream to dairy factories. No regulations have been enacted under the 1961 Act. In my opinion, however, this does not derogate nor can it be regarded as indicating an intention on the part of the legislature to derogate from the express declaration that references in existing regulations to the old Board shall be read as references to the new Board. Consequently, and for the reasons accepted by Hardie Boys, J., in the Court below, and with which I am fully in accord, I would hold that the new Board has authority to exercise the zoning provisions of the 1936 regulations.

I next turn to the second submission of the appellant, that the new Board is in the instant matter disqualified from exercising its judicial function by virtue of the financial interest which it has in the Ruawai factory. It is admitted that in 1960 the Ruawai company gave to the Commission a debenture for £87,152, an asset which is now vested in the new Board by the 1961 Act, and that the new Board in 1961 advanced a further £35,000 to the Ruawai Company. These advances are still substantially owing, and are treated as loans by the Board from the Dairy Industry Capital Account, pursuant to its powers and functions under s. 35 of the 1961 Act. It is suggested by the Board that it has no financial interest for the reason that the moneys it advances are obtained by way of loan from the Reserve Bank on overdraft in aid of the Dairy Industry Capital Account (s. 35 (3)); that as a consequence the Board is clothed with something in the nature of an implied trust to utilise any moneys it received by way of repayment in reduction of the overdraft, and any surplus for the dairy industry generally. I do not think this is so. It seems to me the loans and the security therefor are held by the Board in its corporate capacity, and as a separate entity, but, in any event, the Board pays to the Reserve Bank interest on the latter's advances at the rate of 3%, and is entitled to receive from the Ruawai company interest at the rate of $3\frac{1}{2}\%$. This in itself gives it a financial interest to the extent of $\frac{1}{2}\%$.

The general principle that financial interest imposes a disqualification in the exercise of a judicial function is always recognised: **R. v. Rand** 1866 L.R. 1 Q.B. 230, 232, where Blackburn, J., says:—

> "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter."

The underlying reason is succinctly stated by Atkin L.J. (**Rex v. Bath Compensation Authority** (1925) 1 K.B. 685, 719):—

> "The object of the rule involved is not merely that the scales be held even; it is also that they may not appear to be inclined."

Here the interest is not a personal interest, but, in my opinion, the Board in its corporate capacity has an interest that is more than that of a bare trustee. As a substantial creditor it is in the interests of the Board that the Ruawai company should be able to continue its business profitably.

Counsel for the appellant concedes that it is competent for Parliament to make a body with a financial interest a judge in its own cause, but he emphasises, as was said in **Wingrove v. Morgan** (1934) Ch. 430 "that one would need very plain language before one could concede that."

If I am right in the construction I have given to s. 71 (2) of the Act, the legislature has clearly designated the new Board as the body responsible to deal with all matters of zoning. This is understandable, as the constitution ensures the appointment of the large majority of its members as persons having special or expert knowledge of the Dairy Industry and the problems associated therewith (s. 3). It is also clear from the Act that the legislature contemplated that the new Board would acquire either by inheritance or by its own act financial interests in dairy companies, including factories which might acquire benefits or be prejudiced by the effect of subsequent zoning orders. Under s. 69 the new Board inherits assets of the old Board and the Commission, including loans made to factories by such bodies. Under s. 30 it may, subject to the consent of the Minister of Finance, acquire shares in dairy companies. Under ss. 63 and 64 the Board is empowered to approve loans from the Dairy Industry Capital Account to co-operative dairy factories, and for other purposes necessary or desirable in the interests of any primary industry. In my view the general and predominant purpose of the Act was to give jurisdiction to the Board generally in matters affecting the dairy industry, and in certain respects in matters, financial and otherwise, pertaining to companies associated therewith, the underlying consideration being that the Board is composed of members having special qualifications in this field. The legislature having empowered this body to exercise such functions, it does not seem to me it is disqualified from such exercise (including the exercise of zoning powers) by the fact that it is administering the other financial functions also conferred on it by the legislature. For these reasons, and those adopted by Hardie Boys, J., I hold that the Board in the present case is not debarred by financial interest from exercising its powers of zoning.

The next submission of counsel for the appellant is that the Board improperly delegated to a committee its judicial function in the taking of evidence and in its actual decision.

In reference to that submission it is necessary to relate shortly the procedure adopted by the Board. After receipt of the application of the Ruawai Company to define a milk zone for the Ruawai district, the Board at a meeting held on the 30th January 1963 set up a committee comprised of three of its members to investigate the question of supply, and to report to the Board. Notice of this intention and of the date of hearing was given to all interested parties. A public hearing was held in Ruawai commencing on Monday April 29th, and extending into the following day. Opportunity

was given to all interested persons to tender submissions in respect of the applications received by the Board

(a) for a variation of zoning orders numbers 11 and 11A, which define the area from which the Ruawai Company may collect and receive cream, and

(b) for zoning orders 11 and 11A to be extended to apply to the supply of milk, this latter application having been received from the Ruawai Dairy Company.

The inquiry was well attended by shareholders of the Ruawai company, and all parties to the present proceedings, and other large groups of suppliers were represented by counsel. Two counsel, Mr. Dyson (who represented among others the present plaintiff), and Mr. Sinclair, raised two matters of objection:—

(1) whether the Board was acting correctly in appointing a committee to conduct a public hearing

(2) whether in view of the Board's financial interest it was proper that the Board should make a decision on zoning.

Counsel, however, agreed that the hearing should proceed, and that they should forward their submissions on these objections in writing. It is clear that all interested persons were given full opportunity to give evidence and make submissions, and no real objection is taken to the method of procedure adopted by the Committee at the hearing. The written submissions of Mr. Dyson and Mr. Sinclair were received by members of the Committee about the 17th May, and on the 30th May the Committee reported to the Board the result of its investigations and its recommendations. The Board at a meeting held on the same date, when all three members of the Committee were present, after discussion approved the Committee's recommendations, and as a result Zoning Order 11B was issued on the 31st May.

Apart from the objection to delegation to the Committee the main objection of the appellant to the procedure adopted, as I understand it, is that the longhand notes of the evidence taken before the Committee and the written submissions of Mr. Dyson and Mr. Sinclair, both of which were in the possession of the Secretary of the Board, were not perused or considered by the members present at the meeting, and that the Committee's report had not been made available to those interested. Apart from this, there does not seem to have been any objection raised as to the adequacy of the Commitee's report, except in some minor matters. I should add that no notice of the intended consideration by the Board or opportunity to appear, or to call further evidence, was given to the interested parties, nor did they receive, prior to the meeting of the Board, the report of the Committee.

It is agreed that no actual power of delegation of the Board's judicial or quasi-judicial function is contained in the 1961 Act. The matter must therefore be considered in the light of the accepted general principles. The classic statement of procedure is contained in the speech of Lord Loreburn L.C. in **Board of Education v. Rice** (1911) A.C. 179, 182. There His Lordship said:—

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

Local Government Board v. Arlidge (1915) A.C. 120 is of great assistance. The House of Lords was required to consider the action of the Local Government Board in dismissing an appeal against a closing order in respect of a dwelling-house. The Board directed an inquiry before a housing inspector designated for that purpose, who also made a personal inspection of the house. The respondent had furnished the Board with copies of reports of certain experts whom he had consulted to the effect that the house was perfectly habitable, and that there was no justification for a closing order. He declined to attend the inquiry, and he did not appear or tender evidence. The inspector submitted to the Board his report, and the Board, after considering this report and other documents, confirmed the closing order. A second appeal was made to the Board. The Board gave notice to the respondent of its intention to hold a second public inquiry. The respondent was present with his solicitor and witnesses, and the local bodies concerned were represented. The case was argued, and the respondent and his witnesses gave evidence. The inspector submitted to the Board his report, together with a shorthand note of the evidence and speeches. The Board intimated to the respondent that it would be willing to consider any further statement in writing which he desired to submit. The respondent did not avail himself of the invitation, but applied for a writ of certiorari to quash the order on the ground that the appeal had not been determined in manner provided by law:—

"The points taken were that the appeal had been decided neither by the Board nor by any one lawfully authorized to act for them and, that the procedure adopted by the Board was contrary to natural justice in that the respondent had not been accorded an opportunity of being heard orally before the Board" and "That the report of the inspector on the second inquiry was not disclosed to the respondent."

Viscount Haldane L.C. in a comprehensive review of the requirements of natural justice at p. 132-134 says:—

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn."

Later, after reference to the speech of Lord Loreburn in **Board of Education v. Rice** (supra) Viscount Haldane continues:—

"When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 and 34 Vict. c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible."

The speeches of their Lordships indicate as criteria of the responsibility to act judicially

(1) The giving to each of the parties the opportunity of adequately presenting their cases.

(2) What the procedure is to be in detail must depend on the nature of the tribunal.

(3) It is competent for the tribunal to appoint an Inspector (or here a subcommittee) to hold a public inquiry.

(4) The Board is not bound to disclose the report of the person deputed to hold such inquiry: (Lord Shaw of Dunfermline p. 137).

(5) Subject to recognition of the principle audi alteram partem the tribunal is not bound to treat the inquiry as in the nature of a trial: (Lord Parmoor p. 140; Lord Moulton p. 147).

The objections of the appellant to the procedure adopted by the Board are divisible into two parts, first, the Board's decision to delegate the investigation of the matter to a committee, and second its procedure at the final meeting, when it came to a decision relative to the conflicting applications.

In respect of the first step, in my opinion, the Board acted within its power in delegating the investigation to its committee comprised of three members of the Board. The Board at its meeting of the 30th January 1963 resolved that a zoning committee be set up to investigate the question of supply as between the Northern Wairoa and Ruawai Dairy Companies, and to report back to the Board, and the Director of the Dairy Division was associated with the Committee, which comprised three members of the Board.

Apart from the provisions of s. 13 of the 1961 Act, which empower the Board to appoint committees to advise the Board on matters affecting the Dairy Industry, and to furnish reports to the Board, I take the view that such power was inherent in the Board. Provided the Board acts in good faith, and in the final result fairly listens to both sides, it is entitled to regulate its own procedure, and can obtain information in the way it thinks best. It must, however, retain to itself the power to make a final decision between conflicting interests. The power to decide cannot be delegated to the Committee, which must report fairly and adequately to the Board.

As I understand the position there is, in reality, no complaint in regard to the investigations of the Committee, and the procedure at the hearing in Ruawai. By circular dated the 28th March 1963 the supplying shareholders of the Ruawai company were notified that the Board had received applications for a variation of Zoning Orders Nos. 11 and 11A defining the area from which the Ruawai company might collect and receive cream, and from the Ruawai company that the provisions of such zoning orders be extended to the supply of milk. The notice further stated that a public hearing would be held at Ruawai on the 29th April 1963, opportunity to tender submissions to the Board's committee would be given to all interested persons, and that the Committee would, after considering all submissions, make a recommendation to the Board, which would make a decision on the application.

The hearing before the Committee occupied a full day and portion of a second day. The only objection to the procedure of the Committee was the submission by Mr. Dyson and Mr. Sinclair to the procedure of the Board in appointing the Committee to conduct the public hearing. I have already referred to this objection. If I am right in holding that the Board had power to delegate the investigation there can be no substance in the first objection. The second objection, that the Board was disqualified to decide the applications by reason of its financial interest likewise seems to me to be devoid of substance. Neither objection was decided by the Committee, but with the concurrence of counsel it was agreed that counsel might later make written submissions, which course was adopted.

In regard to the objections to the procedure of the Board, the first is based on the submission that the Board did not adequately consider the objections of Mr. Dyson and Mr. Sinclair, to which I have just referred, in relation to jurisdiction and delegation of the investigation. From a perusal of the minutes of the meeting of the Board on 30th May 1963 it seems to me these objections were properly considered. The Committee's report fairly summarised the submissions. It was reported to the Board that the submissions had been referred to the Board's solicitor, who was of opinion that the correct procedure had been followed. In any event all the members of this Court are, I understand, of opinion that the objections have no substance in law. The fact that the legal submissions were not seemingly read by all members of the Board, in my view, considering the adequate summary contained in the minutes and the Board's solicitor's advice, cannot invalidate the decision of the Board.

Longhand notes of evidence submitted to the Committee at the hearing were taken by the Secretary to the Board. It is agreed that although these were in the Secretary's file (and it must be remembered the Secretary is an officer of the Board) they were not perused by the individual members of the Board before it arrived at a decision. The objection to this procedure requires careful consideration. There is no question but that the Board was the only body competent to decide the matters of zoning and that in deciding such matters it required to have full information.

It is of importance, in my opinion, to consider the basic matters of the dispute. The two main questions were the allocation of the area as between the Northern Wairoa and Ruawai factories, and the question whether the zoning order should be amended to include milk in addition to cream. In addition, a number of suppliers, including the appellant and those whom he represents, opposed zoning entirely and desired to be free to supply any factory or change their supplies from time to time. In effect, this amounted to direct opposition to the existing zoning order No. 11A, to the existing milk agreement, and to any further zoning order. From the evidence it appears that three groups desired to be re-zoned to the Northern Wairoa company, although a number of these suppliers opposed a milk zone. These three groups consisted of Mr. Houghton, a supplier on Pouto Peninsula, forty-nine other suppliers of Ruawai on the Pouto Peninsula, and eight suppliers in the Okahu District. In regard to the areas of zoning, the submissions respectively of the applicants who desired to transfer to Northern Wairoa, of the Ruawai company, and of other opposing suppliers, seem to me to be fully and adequately set out in the report of the Committee. In my opinion, this is a question of fact, and, in any case, such applications for transfer were granted, and no objection is now made as to the Board's decision in this regard. It is also of importance to remember that no submissions were made as to any features peculiar to an individual supplier, other than Mr. Houghton, and the matter was one of districts or areas, rather than of individuals.

The applications from the appellant and his confreres that there should be no zoning in regard to milk supplies, and that zoning should be abolished, are in a different category. Inherent in the decision is a matter

New Zealand In the Court of Appeal of

No. 14 Reasons for Judgment of McGregor, J. 30th July, 1965 *continued*

not of individuals but of general principles. It is true that Mr. Dyson's submissions are, in the Committee's report, somewhat compressed. They are stated as follows:—

> "**Submissions on behalf of the Applicants.** On behalf of the applicants Mr. Dyson submitted that there was ample evidence of a continuing and worthwhile payout between the Northern Wairoa and Ruawai Companies. He submitted that the contest in this case was between a company and its suppliers and not a contest between competing companies. If the interests of suppliers were to come first he considered in the circumstances of this case it would be wrong for the Board to make an order to keep the company in existence at the expense of its suppliers as there was an economic and more profitable alternative. He maintained that the company's interests, as opposed to that of its suppliers, ought not to be an overriding consideration which would justify the Board in acceding to the zoning requests of the Ruawai Company. He continued that it was the duty of the Board to zone in the best interests of the farmers in the district and he submitted that there was a continuing worthwhile difference in payout and there were no strong and overriding considerations or reasons why the Board should restrain the applicant suppliers who wished to be free to supply the Northern Wairoa Company."

Mr. Spring on behalf of the Ruawai company contented himself with submitting "that there were strong and overriding considerations which required the Board to continue the zoning orders in full, and to extend the provisions of those orders to the collection of whole milk." He then proceeded to make full submissions in regard to the areas which should be allocated to Ruawai. These submissions are adequately included in the report.

The Committee made recommendations advising the rejection of the applications of those who opposed any zoning order, as follows:—

> "**Hukatere and Tinopai.** (i) The Committee is also of opinion that the application to lift all zoning made by the 25 suppliers in the Hukatere and Tinopai areas should not be upheld. (ii) The application made through Mr. J. E. Jeffs, who opposed the creation of a milk zone and was opposed to any zoning of milk and cream should also be refused.
>
> The Committee recommends that apart from the amendment already recommended, by which the Pouto Peninsula would be zoned to the Northern Wairoa Company, zoning order number 11 should remain in force.
>
> **Milk Zone**. In considering the evidence before the Committee we are of opinion that in the interests of the dairy farmers in the Ruawai district the Ruawai Company's application for a milk zone should be granted. We therefore recommend that zoning order number 11, amended to permit the Pouto Peninsula suppliers to supply Northern Wairoa with milk or cream as previously recommended, be extended to apply to the supply of whole milk."

In considering whether the Board had before it sufficient information to reach a decision, and whether the decision was reached in accordance with the established principles, Hardie Boys, J., in the Court below says:—

> "If a quasi-judicial body, at the point of time when it is required to act judicially, were bound by the rules of procedure of a Court of Justice, what has happened here could not be supported as a fulfilment of the required judicial role. It has, however, long been held that such a body is entitled to order its own procedure provided full opportunity is given to all parties to be heard; further, that it is not necessary for every member of the tribunal which makes the adjudication to hear the whole of the evidence so long as what is put finally before the adjudicating tribunal is sufficient to enable it to come to a just decision by just means."

I respectfully agree with this paragraph. Later he summarises the matter as follows:—

> "I do not find any evidence that the Board surrendered its judicial function or abdicated in favour of the Committee and merely adopted the Committee's recommendations as its own without giving it that judicial consideration which it warranted . . . I am satisfied that the report of the Committee, when added to the knowledge of the local situation already properly possessed by Board Members from long official acquaintance with the problem that existed there, enabled it as a Board and each Member of the Board to act judicially and it and they did so act in determining that the zoning order should issue and that compensation should be assessed and paid."

The matter, in my opinion, is one of fact. These are findings of fact which I think are justified by the evidence given at the hearing, and with which I feel I must agree.

While the minutes of the meetings of the Board at which the Committee's recommendations were accepted are almost silent as to abolition of zoning in so far as the appellants were concerned, I do not think this is surprising, nor do I think it amounted to a denial of natural justice. From 1937 a zoning order in respect of cream had been in force in the whole of the district. From 1953 there had been a zoning agreement in force in respect of milk supply. The Members of the Board all had expert knowledge of the problems affecting the Dairy Industry, and most, if not all, were acquainted with the position in the Northern Wairoa-Ruawai district. The submissions of the appellants were clearly stated in the Committee's report. The matter of abolition of zoning was a broad issue, and a matter of general policy affecting the whole dairy industry in New Zealand. As was said by the Secretary in his evidence in this action "It is the sort of thing you couldn't imagine, you either have zoning or you don't, the laws of the jungle departed in 1935". He also refers to Sir Francis Frazer's day "when whole country had to be zoned". One can well understand that an application which violated the whole policy of the Board would quickly be dealt with, and that the Board's detailed attention would be given to determining the areas to be assigned to the two competing factories rather than consideration of whether suppliers should

be entitled to supply at will. The evidence taken before the Committee was in the possession of the Board by its secretary.

It seems to me that the final determination of this dispute was that of the Board after due consideration. I do not think it is advisable or competent for a court to establish detailed rules of procedure of domestic tribunals. I consider that each decision should be reviewed only to consider whether it accords with the general principles enunciated by the courts for the attainment of justice. Here it seems to me all parties had and accepted the opportunity of adequately presenting their cases. The tribunal was entitled to regulate the details of its procedure, it was competent for the Board to depute the investigation of the matter to its committee, the Committee made an adequate report to the Board, the Board was not required to treat the inquiry as a trial, it reached its own decisions on adequate information supplied to it and it did not fail to give the parties an adequate hearing. In my view it acted in good faith and fairly listened to all parties, and fully complied with the requirements of natural justice.

A decree where the tribunal may be actuated by bias is not void but voidable (**Dimes v. Grand Junction Canal** 3 H.L.C. 758, 792; 10 E.R. 301, 315). In that case financial interest was admitted, and as a result the decree was set aside. Here the argument for the appellant is that the evidence and submissions were not considered by the body exercising the judicial authority. As the order is voidable and not void it seems to me that the onus is on the appellant to satisfy the Court that there has been a failure of natural justice in the respects he alleges. In my view the onus has not been discharged. The submissions made were before the Board. It has not been shown that any evidence, or at least any detailed evidence, was given before the Committee on the question of permitting the properties of those whom the appellant represents to be outside the area of any new zoning order. These properties were already zoned. It seems to me it was incumbent on the appellant to produce evidence in support of the application. There is no evidence in the lower court that any particular evidence was given before the Committee, or was not considered by the Board. The notes of evidence were in the hands of the Board's Secretary, and three members of the Board had heard such evidence. From my reading of the case the appellant rested the case on general submissions which were considered and rejected by the Board. I therefore find myself in accord with the view of the trial judge that the Board did act judicially in determining that the zoning order should issue.

Considerable reliance has been placed by counsel for the appellant on various passages in the judgments of the members of the Court of Appeal in **R. v. Minister of Agriculture and Fisheries ex parte Graham** (1955) 2 Q.B. 140. There the matter turned on the provisions of the particular statute where the final determination was required to be that of the Minister. While, as Denning L.J. pointed out, that in the absence of power of delegation the Minister would have been bound to hear the representations himself, I do not think that necessarily applies to every quasi-judicial body. The decision must be that of the person or body

authorised by the particular statute to decide. As Upjohn, J., at p. 175 clearly states "a hearing Committee is appointed to hear and not to decide" and the Committee must report the representations fully. Here I consider on the facts as found by the judge below the representations were sufficiently reported to the Board, and the decision was that of the tribunal empowered by the Act and regulations, and the requirements of natural justice were recognised and applied throughout.

In the Court of Appeal of New Zealand

No. 14
Reasons for Judgment of McGregor, J.
30th July, 1965
continued

For the reasons I have endeavoured shortly to state which in the main, I think, are in accord with those of Hardie Boys, J., I would dismiss the appeal with the usual consequences. I am grateful to all counsel for the assistance they have given me in this difficult matter.

No. 15

FORMAL JUDGMENT OF COURT OF APPEAL

In the Court of Appeal of New Zealand

No. 15
Formal Judgment,
30th July, 1965

Friday the 30th day of July 1965.

BEFORE

The Honourable Mr. Justice North, President
The Honourable Mr. Justice McCarthy
The Honourable Mr. Justice McGregor

This appeal coming on for hearing on the 12th, 13th and 14th days of May 1965 and UPON HEARING Mr. Barker and Mr. Wright of Counsel for the Appellants, Mr. Blundell and Mr. Greig of Counsel for the First and Second Respondents and Mr. Sinclair of Counsel for the Third Respondent THIS COURT HEREBY ORDERS that the appeal brought by the Appellants against the judgment of the Honourable Mr. Justice Hardie Boys delivered in the Supreme Court of New Zealand at Whangarei on the 20th day of December 1964 be and is hereby dismissed and DOTH FURTHER ORDER that the Appellants pay to the First Respondent the sum of £120 costs and £16/5/6 disbursements.

By the Court,
M. J. Hawkins
Deputy Registrar

L.S.

No. 16

ORDER OF COURT OF APPEAL GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In the Court of Appeal of New Zealand

No. 16
Order Granting Final Leave to Appeal to Her Majesty in Council
7th February, 1966

Monday the 7th day of February 1966

BEFORE

The Honourable Mr. Justice North, President
The Honourable Mr. Justice Turner
The Honourable Mr. Justice McCarthy

UPON READING the Notice of Motion for Grant of Final Leave to Appeal to the Privy Council filed herein and the affidavit filed in support thereof AND UPON HEARING Mr. Donovan of counsel for the Apellants and Mr. Greig of counsel for the First Respondent and Mr.

Pethig of counsel for the Second Respondent and Mr. Hall of counsel for the Third Respondent THIS COURT HEREBY ORDERS that the above-named Appellants be and they are hereby granted final leave to appeal to Her Majesty in Council from the judgment of this Honourable Court pronounced herein on the 30th day of July 1965.

By the Court,
G. J. GRACE,
Registrar.

L.S.

In the Supreme Court of New Zealand

Part II

Plaintiff's Exhibit A Letter First Respondent to Suppliers of Second Respondent 28th March, 1963

EXHIBIT "A" to Affidavit of Plaintiffs

NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD

P.O. Box 866
WELLINGTON
28th March, 1963

CIRCULAR TO THE SUPPLYING SHAREHOLDERS (1962/63 SEASON) OF THE RUAWAI CO-OPERATIVE DAIRY COMPANY

Dear Sir/Madam,

The New Zealand Dairy Production and Marketing Board has received applications for a variation of Zoning Order No. 11 and 11A which defines the area from which the Ruawai Co-operative Dairy Company may collect and receive **cream** from supplying dairies in the Ruawai district. The Board has also received an application from the Ruawai Co-op. Dairy Company that the provisions of Zoning Order No. 11 and 11A be extended to apply to the supply of **milk** from supplying dairies to Ruawai affected by the said order.

Notice is hereby given that a committee of the Board will hold a public hearing in the Ruawai-Tokatoka War Memorial Hall, Ruawai, commencing at 9.30 a.m. on Monday, 29th April, 1963. Opportunity to tender submissions to the Board's Committee will be given to all interested persons. The committee will, after considering all submissions, make a recommendation to the N.Z. Dairy Production and Marketing Board, which will make a decision on the application.

Yours faithfully,
P. S. GREEN
General Secretary.

Admitted Document 9

In the Supreme Court of New Zealand

Admitted Document 9 Letter J. S. Hickey to P. S. Green, 1st May, 1963

LETTER J. S. HICKEY TO P. S. GREEN

Opunake
1st May, 1963

Dear Paul,

I am not very happy about leaving the drafting of our Ruawai report and recommendations until we meet again probably on the 29th May. I am inclined to think you could help considerably if between now and then, as you get time to do so, you could draft a specimen report, merely as a basis for our approach to the problem of reaching conclusions. In your lead in to the Ruawai question the No. 1 possibility I would think was the zoning of the Pouto supply to Northern Wairoa and your draft might well assume that to be the eventual conclusion and proceed accordingly, then examine the side effects of such a decision and provide for them, these no doubt would include protection for Ruawai on the Maungaturoto and any other fronts and also any further zoning on Northern Wairoa's boundaries. You might then list any alternatives such as no milk zone at all on Pouto. Release of Houghton etc.

We will have to depend on you for the drafting and it will be much more difficult doing it under pressure on the 29th. Ron, I understand, will be in Wellington next week (N.D.A.) and if you could get his views on this procedure it will be helpful.

Kind Regards,
J. S. Hickey.

P.S. Please ring Mr. Marshall and tell him I approve his Mauritius recommendations.—J.S.H.

Admitted Document 10

In the Supreme Court of New Zealand

Admitted Document 10 Letter P. S. Green to J. S. Hickey 3rd May, 1963

LETTER P. S. GREEN TO J. S. HICKEY

Mr. J. S. Hickey,
OPUNAKE.

3rd May, 1963

Dear Mr. Hickey,

We thank you for your letter of the 1st May re Ruawai report. I agree with your suggestion and will get down to drafting a report as soon as I can. Unfortunately this may not be very soon as we are caught up on the local market butter Commission, the first hearing commencing on Tuesday, at 10 a.m. For the next few days therefore, if not more, we will be almost full time preparing our submissions.

Yours sincerely,
"P. S. GREEN"
General Secretary.

In the Supreme Court of New Zealand

Admitted Document 11 Letter P. S. Green to Zoning Committee 1st May, 1963

Admitted Document 11

LETTER P. S. GREEN TO MESSRS. FRIIS, HICKEY & GREENOUGH

17th May, 1963

Dear

I enclose for your leisure reading copies of written submissions which have been received from E. J. V. Dyson and B. C. Spring in respect of the Ruawai zoning hearing.

Yours faithfully,
"P. S. GREEN"
General Secretary.

EXHIBIT "B" to Affidavit of P. S. Green

ZONING ORDERS NUMBER 11 AND 11A

In the Supreme Court of New Zealand Defendants' Exhibit B Report of Zoning Committee 30th May, 1963

(Northern Wairoa, Ruawai, and Maungaturoto Dairy Companies)

REPORT OF COMMITTEE — Messrs. J. S. Hickey, A. L. Friis and R. W. Greenough.

1. AT the meeting of the Board on January 30, 1963 a zoning committee, comprising Messrs. Hickey, Friis, and Greenough, was set up to investigate the question of supply as between the Northern Wairoa and Ruawai Dairy Companies, and to report back to the Board. The Director of the Dairy Division, Mr. H. A. Foy, was asked to be associated with the committee.

2. AS a first step the committee arranged for the Ruawai Company to call a meeting of shareholders and this meeting was held on March 21. We reported at the March meeting that we had placed the facts before the Ruawai shareholders to ascertain whether there was a desire to reopen amalgamation discussions with the Northern Wairoa Company. An informal vote indicated that there was not sufficient support for reopening the discussions and the committee therefore decided to proceed with a public hearing of the zoning applications which had previously been made to the Board.

3. A public hearing was held in Ruawai commencing on Monday, April 29, and extending into the following day. Opportunity was given to all interested persons to tender submissions in respect of the applications received by the Board.

(a) for a variation of zoning orders number 11 and 11A, which define the area from which the Ruawai Company may collect and receive cream, and

(b) for zoning orders 11 and 11A to be extended to apply to the supply of milk, this latter application having been received from the Ruawai Dairy Company.

The following parties were represented at the hearing, which was also well attended by shareholders of the Ruawai company —

Mr. E. J. V. Dyson appeared for (i) Mr. A. A. Houghton, a Pouto Peninsula supplier; (ii) 49 out of the 54 suppliers on the Pouto Peninsula

who desired to be zoned to Northern Wairoa and who opposed a milk zone; (iii) eight suppliers in the Okahu district who petitioned to be rezoned to the Northern Wairoa Dairy Company and who also opposed the Ruawai Company's application for a milk zone; (iv) 25 suppliers in the Hukatere and Tinopai areas who opposed all types of zoning, and (v) Mr. J. E. Jeffs, who claimed to be representing about 138 shareholders, including suppliers on the Pouto Peninsula supplying more than half of Ruawai's total supply, who opposed the creation of a milk zone and any zoning of cream and milk.

Mr. B. C. Spring, representing the Ruawai Dairy Company.

Mr. B. T. Sinclair, representing the Northern Wairoa Dairy Company.

Mr. J. D. Gerard, representing the Maungaturoto Dairy Company.

Mr. E. F. Packwood, representing a group of about 134 suppliers who opposed the application of the Pouto suppliers and supported the application of the Ruawai Dairy Company for a milk zone.

4. SUMMARY OF SUBMISSIONS

(a) **Board's Jurisdiction.** Messrs. Dyson and Sinclair asked the committee to note two matters —

(i) They doubted whether the Board was acting correctly in appointing a committee to conduct a public hearing and agreed to forward their reasons for this objection in writing, although these have not yet been received. They did not push this particular point however, and agreed that the hearing should proceed.

(ii) They submitted that, as the Board had a financial interest in the proceedings, in as much as loans had been made to the company from the Dairy Industry Account, it was not proper that the Board should make a decision on zoning, particularly as if a change in the present zoning boundaries were made, questions of compensation could be raised, and the Board would be fixing compensation in a matter in which it had a financial interest.

Both these matters have been discussed with the Board's solicitor who is of the opinion that correct procedure has been followed. In so far as compensation is concerned he considers that since the Board is the only body with authority to exercise powers of zoning, including the fixing of compensation where that is considered appropriate, it must do so.

(b) **Submissions on Behalf of the Applicants.** On behalf of the applicants Mr. Dyson submitted that there was ample evidence of a continuing and worthwhile payout between the Northern Wairoa and Ruawai Companies. He submitted that the contest in this case was between a company and its suppliers and not a contest between competing companies. If the interests of suppliers were to come first he considered in the circumstances of this case it would be wrong for the Board to make an order to keep the company in existence at the expense of its suppliers as there was an economic and more profitable alternative. He maintained that the company's interests, as opposed to that of its suppliers, ought not to be an overriding consideration which would justify the Board in acceding to the zoning

requests of the Ruawai Company. He continued that it was the duty of the Board to zone in the best interests of the farmers in the district and he submitted that there was a continuing worthwhile difference in payout and there were no strong and overriding considerations or reasons why the Board should restrain the applicant suppliers who wished to be free to supply the Northern Wairoa Company.

(c) **Submissions on Behalf of the Ruawai Company.** Mr. Spring admitted that there was a difference in payout between the Ruawai Company and the Northern Wairoa Company, but submitted that there were strong and overriding considerations which required the Board to continue the zoning orders in force and to extend the provisions of those orders to the collection of whole milk. He submitted that the strength of the Ruawai Company lay in its unity and solidarity and the only effective method of ensuring this was by implementing a milk zone and adhering to the present zoning orders for cream. He submitted that the Pouto Peninsula was necessary to the Ruawai Company. If it were zoned away the privileges and the advantages enjoyed by settlers on the peninsula as a result of the ferry service would be lost as the ferry could not carry on without the supply from the peninsula. Strong and overriding considerations which should be taken into account by the Board were — (a) that the capital expenditure of the Ruawai Company was embarked upon with the consent of its suppliers; (b) that the disparity in payout which was really only commenced to any significant degree since 1954 was due to the disastrous fall in skim milk powder prices; (c) that the financial obligations of the company to the bank and the Dairy Industry Loans Council — which are being reduced yearly — constitute strong reasons why the status quo should be observed and that there be no weakening of the company's supply position at the present time; (d) that there should not be any weakening of the company by reducing its supply area and thereby placing the company in a disadvantageous position for any future amalgamation action; (e) the town of Ruawai itself depends to a large extent on the workings of the dairy factory and its subsidiaries — the trading company, the ferry services, etc., and (f) the ferry service to Pouto Peninsula should be maintained in the interests of the settlers and the public generally and it is therefore necessary that the Pouto Peninsula should remain zoned to the company, as the loss of same to the Ruawai Company would mean that the ferry service could no longer be maintained.

(d) **Other Suppliers.** As already mentioned, Mr. Packwood supported the Ruawai Company's submissions. No submissions were made in respect of the applications by the Northern Wairoa and Maungaturoto Dairy Companies, although at the close of the hearing Mr. Gerard said that the Maungaturoto Dairy Company would do nothing to affect the continuation of the Ruawai Dairy Company, although if through any decision of the Board there should be suppliers who wanted milk or cream collected, then Maungaturoto had the plant to collect and process it although it was not in any way seeking additional supply from the Ruawai area.

5. COMMITTEE'S RECOMMENDATIONS

Cream Zone

(a) **Application of A. A. Houghton.** The committee is firmly of the opinion that Mr. A. A. Houghton's application to be rezoned to the Northern Wairoa Company should be granted.

(b) **The Pouto Peninsula.** In respect of the supply on the Pouto Peninsula a substantial majority of the suppliers on the Peninsula have been desirous for some considerable time of supplying the Northern Wairoa Company. In his submissions on behalf of the majority of the peninsula suppliers, Mr. R. A. Ferguson, who was called by Mr. Dyson, raised not only the matter of the difference in payout but said that business dealings on the peninsula were with the town of Dargaville and not Ruawai. There was only one supplier, Mr. J. E. Shields, who came forward at the hearing to indicate that his ties were with Ruawai. It was common ground that the supply on the peninsula was the equivalent of about 450 tons of butter, or some 18 per cent of the total fat received by the Ruawai Company. Notwithstanding the effect that the loss of this supply may have on the operations of the Ruawai Company, the committee is of the opinion that the Pouto Peninsula is geographically associated with the Northern Wairoa Dairy Company rather than the Ruawai Company and that there will continue to be considerable unrest on the peninsula if their request to be zoned to Northern Wairoa is not granted. In the opinion of the committee this unrest would be justified. It is therefore recommended that zoning orders number 11 and 11A be amended and that the suppliers of milk and cream on the Pouto Peninsula be zoned to Northern Wairoa.

(c) **Okahu Suppliers.** The eight Okahu suppliers who wish to be rezoned to Northern Wairoa are on the eastern bank of the Northern Wairoa River adjoining the present boundary between Northern Wairoa and Ruawai. It is the committee's opinion that the present boundary on the eastern bank of the river should not be varied. The committee therefore recommends that the application of the Okahu suppliers should not be upheld.

(d) **Hukatere and Tinopai.** (i) The committee is also of opinion that the application to lift all zoning made by the 25 suppliers in the Hukatere and Tinopai areas should not be upheld. (ii) The application made through Mr. J. E. Jeffs, who opposed the creation of a milk zone and was opposed to any zoning of milk and cream should also be refused.

The committee recommends that apart from the amendment already recommended, by which the Pouto Peninsula would be zoned to the Northern Wairoa Company, zoning order number 11 should remain in force.

Milk Zone. In considering the evidence before the committee, we are of opinion that in the interests of the dairy farmers in the Ruawai district

In the Supreme Court of New Zealand

Defendant's Exhibit B Report of Zoning Committee 30th May, 1963 *continued*

the Ruawai Company's application for a milk zone should be granted. We therefore recommend that zoning order number 11, amended to permit the Pouto Peninsula suppliers to supply Northern Wairoa with milk or cream as previously recommended, be extended to apply to the supply of whole milk.

6. COMPENSATION

The foregoing recommendations are conditional on compensation being paid to the Ruawai Dairy Company for the loss of supply involved.

7. SUMMARY OF RECOMMENDATIONS

(i) The Pouto Peninsula suppliers to be zoned both in milk and cream supply to the Northern Wairoa Dairy Company.

(ii) The existing cream zone assigned to the Ruawai Company amended as in (i) above to be extended to the supply of whole milk.

(iii) The committee's recommendations are conditional on compensation being awarded.

J. S. Hickey
A. L. Friis
R. W. Greenough

DATED at Wellington this Thirtieth day of May, Nineteen Hundred and Sixty-three.

In the Supreme Court of New Zealand

Admitted Document 12 Minutes of Meeting of First Respondent 5th June, 1963

MINUTES OF MEETING OF FIRST RESPONDENT

5/6/63

MEMO MR. GREEN

This wants very careful editing in the light of what was said at the Board Meeting. What you then decide should actually go into the minutes becomes my official minute as these can be regarded as rough notes only. In haste.

C.B.

Report on Ruawai Mr. Green read the report of the special Committee of the Board which had investigated zoning questions relating to the Ruawai and Northern Wairoa Dairy Companies as follows:

TAKE IN REPORT AND RESOLUTIONS

Mr. Hickey said that after protracted efforts the suggestion that the two companies should be amalgamated on what appeared to be very favourable terms offered by the Northern Wairoa company, was turned down. The difference in payout between the two companies was 2d per lb butterfat. Following on the rejection of the amalgamation proposals the zoning negotiations had to be re-opened and it was fair to say that in the decisions reached, because of the high cost of collection of the cream being zoned to Northern Wairoa, the Ruawai Company would not be critically affected.

Mr. Onion asked what were Ruawai's legal rights in connection with the Board's decision.

Mr. Green said that there was no appeal authority but the decision could be tested in the Supreme Court on procedural grounds.

Mr. Castelberg asked whether Ruawai could not take out an injunction to prevent the Board's order being put into force.

Mr. Green replied that the Board's solicitors were satisfied that they could not do so.

Mr. Hickey said that the Board's committee leant over backwards to see that everyone at the meeting who wanted to say anything had the opportunity of saying it.

Mr. Green said that the Committee had very carefully followed the procedure laid down by Mr. H. R. wild after the Okitu case had been decided against the Board on procedural grounds.

Mr. Bird commended the committee. He had had overtures from the chairmen of both Companies and neither had any question regarding the manner in which the Board conducted the case. So far as compensation was concerned, he had in mind that it should not be large but should have relation to the amount of the present debt. Those suppliers who would now go to Northern Wairoa would thus have costs to offset the higher payout they would receive.

Mr. Castelberg asked whether Mr. Bird's suggestion meant something along these lines. The Ruawai Company owes the Board £x. He says 'well, the Ruawai Company is losing 20% of their supply. Therefore we divide that debt by five and that is the compensation to be paid.'

Mr. Bird said that was really the story.

Mr. Hickey said that the Committee so far had discussed the question of compensation only in principle because it was only after a zoning order was made that the question of compensation arose. Both companies had suggested that the Committee should meet the two companies and it had undertaken to do this.

Mr. Friis said it seemed as if the Board could leave it to some extent to the agreement reached between the parties. He thought that the Board should approve in principle that the supply released should carry its burden of the debt provided suitable adjustments be made according to the facts. He thought the Board should (1) approve the Committee's recommendations and (2) ask the Committee to go back and discuss with the companies the question of compensation and then come back to the Board.

Mr. Green explained the legal position. Because Mr. Dyson had raised the question of the Board's jurisdiction in relation to its financial interest, he thought that Mr. Dyson would have to come into the picture as well as the two dairy companies. If agreement could be reached between those three parties the matter would be settled. If not he thought the Board's own solicitor should be in the party. His suggestion would be to invite the people concerned to Wellington to discuss it here.

Mr. Hickey: We should not put the suggested basis on the record now.

Mr. Friis said he was a little concerned about bringing in interested parties. He felt there was no real legal merit in hiding anything from them.

In the Supreme Court of New Zealand

Admitted Document 12 Minutes of Meeting of First Respondent 5th July, 1963 *continued*

Mr. Candy thought it would be quite wrong to toss the ball to the other people. The Board ought to indicate the basis of its thinking, that the people left behind with Ruawai were not left with that portion of the debt accruing on the supply that had gone to Northern Wairoa.

Mr. Green said he would not like to see the compensation fixed without the Board's solicitor being present and consulted.

Mr. Candy agreed that was right. It was the other point about recording the basis that he was raising.

RESOLVED

(1) that the Committee's recommendation be approved

(2) that the Committee, comprised of Messrs. Hickey, Greenough and Friis be asked to discuss with the companies concerned, the question of adequate compensation and that the Committee bring in the Board's solicitor as and when it thinks fit.

Mr. Bird was absent from meeting when the vote was taken.

Admitted Document 13

In the Supreme Court of New Zealand

Admitted Document 13 Extracts from Minutes of the N.Z. Dairy Production and Marketing Board, 30th and 31st January, and 29th and 30th May, 1963

EXTRACTS FROM MINUTES OF THE N.Z. DAIRY PRODUCTION AND MARKETING BOARD.

NORTHERN WAIROA/RUAWAI

Meeting January 30 and 31, 1963, page 6

"Mr. Green reported that he had visited the area and had discussed procedure with the joint amalgamation committee. A proposal to amalgamate with the Northern Wairoa Company had then been considered at an extraordinary general meeting of Ruawai shareholders on December 20 when $51\frac{1}{2}$ per cent had voted for the proposal.

Mr. Green then read a letter dated January 18 from the Ruawai Company requesting a stayput order on milk and cream pending a zoning decision, and referred to correspondence received from Ruawai suppliers since the Ruawai meeting.

Mr. Foy reported that in 1959 when applying for a casein licence the Northern Wairoa Company had undertaken not to receive supply from outside its cream zone without the approval of the board.

After discussion it was

RESOLVED that a zoning committee comprising Messrs. Hickey, Friis and Greenough, be set up to investigate the question of supply between the two companies and the correspondence received and to report back to the Board, and that the director of the Dairy Division be associated with the committee."

Meeting May 29 and 30, 1963, page 7

"Mr. Green read the report of the special Committee of the Board which had been appointed at the January Meeting, to investigate the question of supply as between the Northern Wairoa and Ruawai Companies. Mr. Hickey said that the Committee had already reported on the meeting of shareholders that had been called to ascertain whether there was a desire to

reopen amalgamation discussions with the Northern Wairoa Company. An informal vote had indicated that there was not sufficient support for amalgamation and he said the Committee therefore decided to proceed with a public hearing of the zoning applications which had previously been made to the Board. This public hearing had been held in Ruawai on Monday and Tuesday, April 29 and 30.

The committee's recommendations were as follows—

1. The Pouto Peninsula suppliers to be zoned both in milk and cream supply to the Northern Wairoa Dairy Company.
2. The existing cream zone assigned to the Ruawai Company amended as in (1) above to be extended to the supply of whole milk.
3. The Committee's recommendations are conditional on compensation being awarded.

Some considerable discussion followed and Mr. Onion asked what Ruawai's legal rights were. Mr. Green said there was no appeal authority but as with the Okitu case the decision could be tested in the Supreme Court on precedural grounds, although the Board's solicitors were satisfied the correct procedure had been followed.

The question of compensation was discussed and the general view was expressed that if supply were released to Northern Wairoa from Ruawai it should carry with it some burden of the debt incurred by the Ruawai Company. On principle it was considered that it would not be equitable to leave the remainder of the Ruawai supply to carry the full debt, part of which had undoubtedly been incurred in servicing the supply that the Committee recommended should be zoned to Northern Wairoa.

RESOLVED that zoning orders 11 and 11A be amended with effect from June 1 1963, and that (1) Ruawai suppliers of milk and cream on the Pouto Peninsula be zoned to the Northern Wairoa Co-op. Dairy Company; (2) the existing cream zone boundaries assigned to the Ruawai Company on the eastern side of the Northern Wairoa River be maintained for cream and be extended to apply to the supply of whole milk to the Ruawai Company and (3) compensation be awarded to Ruawai for the loss of supply, and a committee comprising Messrs. Hickey, Friis and Greenough be asked to investigate and report to a later meeting on the question of compensation after consulting the Board's solicitor as thought fit."

Meeting 25, 26 and 28 June, 1963 page 3

"Mr. Friis reported that the two companies had been unable to agree upon the amount of compensation.

RESOLVED that the Board's committee investigate and report to the Board on the amount of compensation to be paid by the Northern Wairoa Company."

Certified true and correct copy
29th October, 1963

"P. S. Green"
General Secretary

In the Supreme Court of New Zealand

Plaintiff's Exhibit C Letter Appellant's Solicitors to First Respondent 5th July, 1963

EXHIBIT "B" to Affidavit of Plaintiffs

NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD

P.O. Box 866
WELLINGTON.
5th June, 1963.

Mr. E. J. V. Dyson
Morpeth, Gould & Company
Barristers & Solicitors
P.O. Box 687
AUCKLAND.

ZONING ORDERS No. 11, 11A and 11B

Dear Sir:

I have to confirm the telegram we sent you on the afternoon of May 30, which reads as follows:

"Board today decided that all Ruawai supply on Pouto Peninsula be zoned to the Northern Wairoa Dairy Company with effect from June 1 1963. Board further decided that existing zoning boundaries on eastern side of Northern Wairoa River should be maintained for cream supply and also be extended to apply to whole milk supply with effect from June 1. Zoning Orders 11 and 11A will be amended accordingly. Board also decided that compensation will be awarded and directed zoning committee to investigate and report. Letter to follow."

The amending order 11B has been issued by the Board. This Order gives effect to the Board's decision to zone the Pouto Peninsula supply to the Northern Wairoa Dairy Company and to assign a milk zone to the Ruawai Company on the eastern side of the Northern Wairoa River based on existing boundaries for cream supply.

Yours faithfully,
"P. S. GREEN"
General Secretary.

In the Supreme Court of New Zealand

Plaintiff's Exhibit B Letter First Respondent to Appellant Solicitor 5th June, 1963

EXHIBIT "C" to Affidavit of Plaintiffs

MORPETH, GOULD & CO.

5th July, 1963.

The Secretary,
The New Zealand Dairy Production and Marketing Board,
WELLINGTON.

Re: Ruawai Co-operative Dairy Company Limited
Milk Zoning Order

Dear Sir:

As the writer stated when appearing on behalf of a large number of Ruawai shareholders when your Board's Committee sat at Ruawai it was considered that the Board had pecuniary interests in the Ruawai Co-

operative Dairy Company Limited and the writer expressly reserved, on behalf of the shareholders for whom he was appearing, the right to raise this issue at a later date.

In the Supreme Court of New Zealand

Plaintiff's Exhibit B Letter First Respondent to Appellant Solicitor 5th June, 1963 *continued*

We have now received instructions to take proceedings to have the position of the Board, in this matter, reviewed in the Supreme Court on the ground that the Board's pecuniary interest as a creditor of the Ruawai Co-operative Dairy Company Limited disqualifies it from acting judicially in making a zoning order affecting that company. The same issue of course concerns the question of compensation still to be fixed and the proceedings will also include an injunction to restrain the board from fixing the compensation. There are certain preliminary steps necessary in launching proceedings. Because of the very large number of shareholders involved, the proceedings will be in the nature of a representative action and it will possibly be necessary for some one to be appointed as a representative of other shareholders.

Yours faithfully,
MORPETH, GOULD & CO.
Per: E. J. V Dyson.

EXHIBIT "D" to Affidavit of Plaintiffs

In the Supreme Court of New Zealand

Plaintiffs' Exhibit D Letter First Respondent's Solicitors to Appellants' 12th July, 1963

BELL, GULLY & CO.
Barristers, Solicitors and Notaries

12th July, 1963.

Messrs. Morpeth, Gould & Co.
Solicitors
P.O. Box 687
AUCKLAND.

Re: Ruawai Co-operative Dairy Co. Ltd.
Milk Zoning Order

Dear Sirs:

We act for the New Zealand Dairy Production and Marketing Board, which has handed us your letter of the 5th inst. We do not agree with your contention that the Board because of its pecuniary interest was disqualified from making a Zoning Order and awarding compensation. The Board is specifically empowered by the Dairy Factories Supply Regulations, 1936, to make Zoning Orders and to award compensation. In a great many instances where Zoning Orders are made it has some pecuniary interest, one way or another, in one or more of the Dairy Companies concerned. If your contentions were valid the Board would nearly always be disqualified from making Zoning Orders. One would have thought that if this were to be the position the Regulations would specifically have stated so. The Board will defend any proceedings that you may care to issue and we will accept service on its behalf.

Yours faithfully,
BELL, GULLY & CO.

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD

I, GERALD JOSEPH GRACE, Registrar of the Court of Appeal of New Zealand DO HEREBY CERTIFY that the foregoing 103 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal in delivering judgment therein, such reasons having been given in writing:

10 AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this ..... th day of March 196.

G. J. GRACE
Registrar

L.S.

In the Privy Council.

No. 8 of 1966.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

JAMES EDWARD JEFFS and others ... *Appellants*

AND

THE NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD and others ... *Respondents*

RECORD OF PROCEEDINGS

BLYTH, DUTTON WRIGHT & BENNETT
Hastings House,
10 Norfolk Street,
Strand,
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As Agents For

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New Zealand.

Solicitors for the Appellants

WRAY, SMITH & CO.
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As Agents For

BELL, GULLY & CO.,
Wellington,
New Zealand.

Solicitors for the Respondents

ASCP—25474