Privy Council Appeal No. 8 of 1966

James Edward Jeffs and others – – – – – *Appellants*

v.

The New Zealand Dairy Production and Marketing Board and others – – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER 1966.

Present at the Hearing:

VISCOUNT DILHORNE
LORD DENNING
LORD HODSON
LORD WILBERFORCE
SIR GARFIELD BARWICK

[*Delivered by* VISCOUNT DILHORNE]

The respondent Board was established by the Dairy Production and Marketing Board Act, 1961. It is, as its name implies, concerned both with the production and with the marketing of dairy products. Before its creation, the New Zealand Dairy Board dealt with production and the Dairy Products Marketing Commission with marketing. The 1961 Act merged these two bodies and the respondent Board inherited their rights, liabilities and obligations (s. 71 (1)). Since the passage of this Act, all references to the Dairy Board and to the Commission in any Act, regulation, order or other enactment were, unless the context otherwise required, to be read as references to the respondent Board (s. 71 (2)).

Of the thirteen members of the Board, two are appointed by the Governor-General; three by the New Zealand Co-Operative Dairy Co; and the remaining eight are elected by the companies, other than the New Zealand Co-Operative Dairy Co, who own or occupy dairy factories.

Farmers are thus not directly represented on the Board. They are shareholders in the Co-operative Dairy companies which they supply.

The Dairy Factory Supply Regulations 1936 made under the Agriculture (Emergency Powers) Act 1934 "generally for the purpose of securing the effective conduct of the dairy industry" gave the Executive Commission of Agriculture power to define areas from which particular factories could get cream and milk.

In 1937 the northern part of the area on both sides of the Northern Wairoa river was "zoned" to the third respondent, the Northern Wairoa Co-Operative Dairy Co which had a factory at Dargaville and the southern part of that area was zoned to the second respondent, the Ruawai Co-Operative Dairy Co which had a factory at Ruawai.

These zonings were in relation to the supply of cream. Their effect was to secure that cream supplies from that area only went to the factory named for that area. At that time it was not the practice for farmers to supply whole milk. At the commencement of the dairy season a

farmer could change from supplying cream to supplying whole milk. If he did so, unless a zoning order for milk applied to him, he could supply anyone he chose with the result that the factory to which he had supplied cream might no longer receive a supply from him.

Since 1937 the practice has changed. For some years whole milk has been collected in tankers from the farms. In 1953 seven dairy factories including those of the second and third respondents, agreed that for the next ten years they would treat the zoning orders in respect of the supply of cream as applicable to whole milk. This made it unnecessary to make zoning orders in relation to the supply of milk.

This agreement was due to expire on the 31st May 1963 and it was realised that some arrangement for the future would have to be made before the commencement of the new dairy season on the 1st June 1963. It was proposed that the Ruawai and Northern Wairoa companies should amalgamate and, as a step to that end, that the Ruawai company should be put into liquidation. This was not done as although there was a majority of Ruawai shareholders in favour of liquidation, the majority was not sufficient to bring it about.

The minutes of the respondent Board's meeting on the 30th and 31st January 1963 record that it was resolved that a zoning committee consisting of three members of the Board should be set up " to investigate the question of supply between the two companies and to report back to the Board ".

A meeting of the shareholders in the Ruawai company was held on the 21st March for the purpose of meeting the committee. As there was insufficient support for the reopening of negotiations for amalgamation, the committee " decided to proceed with a public hearing of the zoning applications which had previously been made to the Board ".

The shareholders of the Ruawai company were told by letter dated the 28th March 1963 signed by Mr. Green the Secretary of the Board, that the Board had received an application from the Ruawai company for the extension of the existing zoning orders for the supply of cream to milk; that a committee of the Board would hold a public hearing on the 29th April 1963; and that the committee would " after considering all submissions, make a recommendation " to the Board " which will make a decision on the application ".

At the hearing the appellant Jeffs, who claimed to represent 138 shareholders in the Ruawai company, was represented by Mr. Dyson who also appeared for other suppliers including a Mr. Houghton. Mr. Sinclair appeared for the third respondent. They submitted that the Board should not make a decision on the zoning applications as it had a financial interest in the proceedings. They also doubted whether the Board was acting correctly in appointing a committee to conduct the public hearing.

A number of witnesses were called at the hearing which lasted two days. Some supplied written statements on which they were cross-examined; others gave all their evidence orally. Submissions were made by Mr. Dyson and others who appeared for interested parties. The only record of what took place at the hearing was made by the Secretary of the Board, Mr. Green, who took notes in longhand.

The committee made a written report to the Board. It was dated the 30th May 1963. They recommended that suppliers in the Poutu Peninsula should be zoned in respect of milk and cream to the third respondent, the Northern Wairoa company, and that, subject to this, the existing cream zone of the Ruawai company should be extended to apply to milk. They said that their recommendations were conditional upon compensation being paid to the Ruawai company for the loss of supply it would suffer.

Mr. Jeffs and those he represented had wanted there to be no zoning of cream and milk. The committee thus rejected their contentions.

A meeting of the Board was held on the 29th and 30th May 1963. The minutes of this meeting record that the Board accepted the committee's recommendations without alteration and passed resolutions to give effect to them and to secure that compensation should be given to the Ruawai company.

The documents in the record before their Lordships include draft minutes of that meeting as well as a copy of the minutes. The draft minutes were sent to Mr. Green on the 5th June with a covering note saying "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."

The draft minutes record the effect of what was said in the course of consideration of the committee's report by various members of the Board. The minutes, apart from recording that a Mr. Onion asked a question, do not though they state that there was "considerable discussion".

Both the draft minutes and the minutes show that the members of the Board were concerned about two matters, the legal rights of the Ruawai company if the committee's recommendations were accepted and the payment of compensation to the Ruawai company.

Mr. Green, the Secretary of the Board, in the course of his evidence at the trial of this case stated that the members of the Board who were not on the committee received the report of the committee when they received the agenda for the meeting on the 30th or sat down for that meeting. As the report is dated the 30th May it is unlikely that any members of the Board who were not on the committee saw it before the morning of the day on which the Board decided to give effect to the committee's recommendations. The minutes and draft minutes record that Mr. Green read the report to the Board.

That report does not record, even in summary form, the evidence given at the public hearing. It does contain a statement of the submissions made by those who represented interested parties at the hearing. Mr. Green testified that at the public hearing the chairman had said that the committee were prepared to receive written submissions after the conclusion of the hearing. Mr. Dyson who appeared on behalf of the appellant Mr. Jeffs and Mr. Spring who appeared for the Ruawai company sent in written submissions. Mr. Green also testified that he had drafted the committee's report according to discussions that had taken place in the car as the members of the committee were returning from the public hearing to Auckland. Although the members of the committee saw after the 17th May the written submissions that were sent in, they were not seen by the other members of the Board.

The appellants, all farmers in the Ruawai district, instituted proceedings in the Supreme Court of New Zealand praying that a writ of certiorari should be issued to the respondent Board to quash the zoning orders made on the 30th May 1963 defining a milk zone for the Ruawai company and to quash all proceedings of and incidental to and consequent upon the hearing of the committee and praying for an injunction to restrain the Board from taking steps to assess compensation to be paid to the Ruawai company.

The matter came before Hardie Boys J., who gave judgment for the Board. The appellants appealed to the Court of Appeal (North P., McCarthy J. and McGregor J.) who by a majority, North P. dissenting, dismissed the appeal but gave leave to appeal to Her Majesty in Council.

In 1960 the Ruawai company gave the Commission a debenture in return for a loan of £87,152. In 1961 the Ruawai company secured a loan from the Board of £35,000 in return for a debenture. These loans were outstanding if not entirely at least to a substantial extent in 1963.

By virtue of s. 71 (1) of the 1961 Act the Board inherited the right to repayment of the loan of £87,152. The only loans that the Board can make are those approved by the Dairy Marketing Loans Council constituted by the 1961 Act. The Board are responsible for the administration of such loans (s. 64 (3)).

The Board had thus a direct pecuniary interest in the Ruawai company and an interest in securing that that company should not lose areas of supply through zoning without compensation.

The members of the Court of Appeal agreed that the Board had a pecuniary interest in the zoning applications. Hardie Boys J. was of the same opinion.

In *New Zealand Dairy Board v. Okitu* [1953] N.Z.L.R.366 it was held that that Board in determining zoning questions affecting the rights of individuals was under a duty to act judicially. The respondent Board did not dispute that that was its duty in the present case. The appellants contended that in view of the Board's pecuniary interest, it should not have adjudicated on the zoning applications and that it had acted as judge in its own cause contrary to the principles of natural justice.

The respondent Board contended that the provisions of the 1961 Act required the Board to decide on zoning applications even though it might have a pecuniary interest.

This view was accepted by all the members of the Court of Appeal and by Hardie Boys J.

In the *Mersey Docks Trustees v. Gibbs* [1866] 1 L.R.H.L.93, Blackburn J., said at p. 110:

> " It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause, and though the Legislature can, and, no doubt, in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes."

Is it clear from the provisions of the 1961 Act that it was the intention of the New Zealand Legislature to make an exception from the general rule? In their Lordships opinion the conclusion is inescapable that it was intended that the Board should decide zoning questions even though its pecuniary interests might be affected. Decisions on zoning are of great importance both to farmers supplying dairy products and to the dairy companies dependent on the areas of supply allotted to them.

The 1961 Act did not provide for the determination of such questions by any body other than the Board. They were to be decided by the Board. By the same Act Parliament authorised the making of loans by the Board to dairy companies (ss. 63 & 64), and had transferred to the Board the right to repayment of loans made by the Commission (s. 71 (1)). It had also empowered the Board to purchase with the consent of the Minister shares in the Dairy companies (s. 30).

Acceptance of the argument advanced on behalf of the appellants necessarily leads to the result that the area of the Board's jurisdiction over zoning matters will diminish as the Board exercises its power to make loans and to purchase shares. If the Board made loans to all the dairy companies, then, if the appellants' contention was accepted, it would mean that the Board would not be able to exercise the functions entrusted to it by Parliament in relation to zoning at all.

When there is a conflict between the farmers and the factories, the Board may find itself placed in an unenviable position, having as the Board accepts, the duty to act judicially and yet having a financial interest in maintaining and advancing the viability of the company to which it has advanced money. Yet in their Lordships' view the conclusion is inescapable that Parliament intended in this instance to make an exception to the general rule.

In their Lordships' opinion this contention of the appellants must be rejected.

The appellants further contended that the Board had improperly delegated its judicial task of hearing evidence and submissions to the committee; that its duty was to consider all the evidence, notes and submissions relative to the zoning applications and it should not have relied on the report of the committee: and so it had failed to comply with the requirements of natural justice.

It is clear from the Board's resolutions appointing the committee, from the letter sent to the shareholders in the Ruawai company on the 28th March 1963 by Mr. Green and from the minutes of the meeting of the 30th May that the Board did not delegate to the committee the duty of deciding on zoning applications. The committee was appointed by the Board to " investigate the question of supply between the two companies and to report back to the Board ". It was not expressly authorised to hold a public hearing. It appears to have done so on its own initiative when there was lack of sufficient support for amalgamation. The committee was appointed to investigate and report and was not charged with the duty of collecting evidence for consideration by the Board.

The only material the Board had before it when reaching its decision was the report of the committee. In the discharge of its duty to act judicially, it was the Board's duty to " hear " interested parties. In *R. v. Local Government Board ex parte Arlidge* [1914] 1 K.B. 160 Hamilton L. J. said at p. 191 :

> " In my opinion, the question whether the deciding officer ' hears ' the appellant audibly addressing him or ' hears ' him only through the medium of his written statement is, in a matter of this kind, one of pure procedure."

In this case the Board did not hear the persons interested orally nor did it see their written statements. It did not see the written statements produced by witnesses at the hearing. Its members, other than the members of the committee, were not informed of the evidence given. The report stated what submissions were made at the hearing but did not state what evidence was given nor did it contain a summary of the evidence. The members of the Board other than the members of the committee did not see the written submissions sent in in response to the chairman of the committee's statement at the hearing.

It was argued for the respondents that the evidence given at the hearing was sufficiently summarised in the submissions recorded in the report made by those appearing for certain parties. Without knowledge of what evidence was in fact given, their Lordships cannot conclude that this is the case.

The report of the committee states that the committee was firmly of opinion that Mr. Houghton's application to be rezoned should be granted. In the course of his evidence Mr. Green said " on the evidence to the committee at the hearing they were satisfied Mr. Houghton's decision " [*sic*] " ought to be recommended ". The Board decided to grant Mr. Houghton's application without knowledge of the evidence that had led the committee to make this recommendation. There is no statement in the report of what this evidence was.

The report of the committee also contained the following statement under the heading " Milk Zone ": " In considering the evidence before the committee, we are of the 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." The Board decided to grant this application, which involved the rejection of the appellants' claims, without themselves considering any evidence and without considering the written submissions sent in on their behalf by Mr. Dyson.

The draft minutes which contain a fuller account of what occurred at the meeting of the Board on the 30th May do not reveal that any discussion took place at the meeting on the merits of the various proposals advanced at the public hearing. Both the minutes and the draft minutes only show that the members of the Board were concerned about the possibility of legal action by the Ruawai company and compensation to that company.

In these circumstances their Lordships agree with the conclusions of North P. on this issue and are of the opinion that the Board failed to discharge its duty to hear the interested parties before deciding on the zoning applications.

Considerable argument was directed to the question whether the Board had power to delegate to a committee the task of hearing evidence and submissions at a public hearing. S. 11 of the Dairy Board Act 1953 gave that Board power to appoint committees of two or more persons and with the consent of the Minister to delegate to a committee any of the powers or functions of the Board other than the fixing of a levy. This section was repealed by the 1961 Act and replaced by s. 13 of that Act which gave the Board power to appoint committees to advise it but no power to delegate. This change cannot have been made accidentally and it is to be inferred that Parliament deliberately refrained from giving the Board power with the consent of the Minister to delegate any of the powers or functions entrusted to it by Parliament.

On the facts of this case it does not appear that the Board asked the committee to hold the public hearing or delegated to the committee any part of its duties. Subject to the provisions of the Act and of any regulations thereunder, the Board can regulate its procedure in such manner as it thinks fit (1961 Act s. 12 (10)). Whether the Board heard the interested parties orally or by receiving written statements from them is, as Hamilton L. J. said in *R. v. Local Government Board ex parte Arlidge* (supra) a matter of procedure. Equally it would have been a matter of procedure if the Board had appointed a person or persons to hear and receive evidence and submissions from interested parties for the purpose of informing the Board of the evidence and submissions (see *Osgood v. Nelson* [1872] 5 L.R.H.L. and *R. v. Local Government Board ex parte Arlidge* (supra)). This procedure may be convenient when the credibility of witnesses is not involved and if it had been followed in this case and as a result the Board, before it reached a decision, was fully informed of the evidence given and the submissions made and had considered them, then it could not have been said that the Board had not heard the interested parties and had acted contrary to the principles of natural justice. In some circumstances it may suffice for the Board to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the Board.

Unfortunately no such procedure was followed in this case. The committee was not appointed by the Board, nor was it asked by the Board, to receive evidence for transmission to it. The committee's report did not state what the evidence was and the Board reached its decision without consideration of and in ignorance of the evidence.

The Board thus failed to hear the interested parties as it was under an obligation to do in order to discharge its duty to act judicially in the determination of zoning applications.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgments of the Court of Appeal and the Supreme Court set aside and the case remitted to the Supreme Court for it to issue the writs claimed by the appellants. The respondent Board must pay the appellants' costs in the Courts below and of this appeal.

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In the Privy Council

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THE NEW ZEALAND DAIRY PRODUCTION AND MARKETING BOARD AND OTHERS

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