Turner and Others v Allison and Others

COURT OF APPEAL WELLINGTON
16, 17, 18 NOVEMBER: 2 DECEMBER 1970
WILD C J, TURNER AND RICHMOND J J

Town and Country Planning—Appeals—Nature of functions of Appeal Board—Preconceived opinions not necessarily bias disqualifying Board—Composition of Board changed during proceedings—Conditions imposed by Board intra vires and ultra vires.

Practice—Certiorari—Discretionary remedy—Disentitlement by delay—Bias—Preconceived opinions not predetermination.

Courts—Jurisdiction—Certiorari—Town and Country Planning Appeal Board—Preconceived opinions not disqualification from performing judicial function.

This was an appeal from the judgment of Wilson J directing that a writ of certiorari be issued to the second respondents being the surviving members of the Town and Country Planning Appeal Board to quash its decisions in granting a specific departure in respect of land zoned residential owned by the appellants permitting the use thereof as a site for a supermarket. On 19 August 1966 the Waimairi County Council despite opposition changed its scheme by realigning Memorial Avenue and Fendalton Road at the Clyde Road intersection and rezoning the existing shopping centre as residential. On 25 August 1966 the appellants applied for a specified departure to use their residential land for commercial purposes. Before this application could be heard an appeal was lodged against the Council's determination to change its scheme. Accordingly the application for the specified departure had to be adjourned until the appeal had been determined. The appeal was heard on 14 and 15 March 1967 and was then adjourned until 28 August 1967 to enable a report to be brought down by the Council's town planning officer. This report expressed the view that the existing shops could be re-located on the land which was the subject matter of the appellant's application for the specified departure. Objection was made at the hearing to the admission of this report but was overruled. At the end of the hearing the Chairman announced that the appeal would be dismissed. On 19 September 1967 the Council's Planning Committee proceeded with the adjourned hearing of the specified departure and reported thereon to the Appeal Board on 28 October 1967 supporting the application. The Board proposed to hear the specified departure application on 21 November 1967 but was prevented by an application to the Supreme Court for a writ of prohibition. The latter application was heard by Macarthur J on 5 February 1968 and dismissed on 5 July 1968. On 5 March 1968 the Board confirmed in a written decision its dismissal of the appeal against the change of the Council's scheme. The specified departure application came before the Board on 11 December 1968. The Board consisted of two of the three members who had heard the appeals against the change of the Council's scheme, one of whom was the Chairman, and two other members. The objectors to the application objected to the composition

of the Board but this was rejected. At the conclusion of the hearing on 13 December 1968 the Board intimated that it would grant the application subject to some conditions which should be discussed between the interested parties and for that purpose adjourned the proceedings sine die. These conclusions were expressed in a written interim decision on 11 February 1969. The Council agreed certain conditions with the appellants, which were then circulated to other interested parties. The Board met again on 14 August 1969 to finalise the matter and on 4 September 1969 the Board delivered its written decision granting the application subject to conditions. The Board at the final meeting included a new member who had not sat in December 1968. Three of the conditions were to be carried out to the satisfaction of a town planning consultant and a fourth condition conferred upon the consultant the power to make a final and binding decision should any dispute arise. On 14 October 1969 the building on the appellants' land was demolished and on 14 November 1969 an oral agreement was made by the appellants with a builder for the erection of a supermarket in accordance with the permission granted by the Board at a cost of $196,000.

The writ in the present proceedings was issued on 22 January 1970 by the first respondents for a writ of certiorari to quash the Board's decision granting the specified departure.

Wilson J heard the case on 21 to 23 September 1970 and gave judgment for the first respondents on 12 October 1970. At the time of the hearing in September the buildings on the appellants' land were almost completed. The first respondents who were the plaintiffs before Wilson J claimed (1) That the Board's final decision in respect of the specified departure was void as one of the members had not heard the original application thereof in December 1968; (2) That the Chairman had already indicated his view as to the outcome of the application before it was heard; (3) That the conditions attached to the final decision contained an unlawful delegation to the consultant which invalidated the whole decision.

Held, 1 Preconceived opinions held by a judicial officer do not of themselves disqualify him from hearing a case (see p 842 line 47; p 847 line 48.).

English v Bay of Islands Licensing Committee [1921] NZLR 127, 135; *Taylor v Salmon* [1926] NZLR 589, 594; *R v Alcock* 37 LT 829, 831; and *R v London County Council* 71 LT 638, 639: applied.

Griffin & Sons Ltd v Judge Archer and General Manager of Railways (unreported, 1956) referred to.

2 A tribunal is to be regarded as biased if—"a suspicion of bias reasonably—and not fancifully—is entertained by responsible minds" (see p 848 line 18).

Ex parte Angliss Group [1969] ALR 504, adopted.

3 A tribunal such as the Town and Country Planning Appeal Board is in a different position from a normal judicial officer since by the very nature of its work in a special field its members must inevitably acquire opinions about the type of question with which they deal (see p 843 line 19; p 849 line 10).

4 The Board by recognising facts determined in a prior decision, such facts inevitably affecting the case before it, was neither predetermining the issue nor guilty of bias (see p 849 line 32; p 854 line 37).

5 A party who has acquiesced in the hearing of a matter by a tribunal one or more of the members of which has not sat throughout the hearing is normally precluded from raising objections afterwards (see p 855 line 9).

Muir v Franklin Licensing Committee [1954] NZLR 152, followed.

6 The questions dealt with at the second hearing were all of a kind which could be dealt with sensibly and fairly by a member who was not present at the first hearing (see p 855 line 31).

7 A tribunal entrusted with judicial as opposed to administrative duties cannot delegate the performance of such judicial duties to some other person (see p 856 line 24).

Barnard v National Dock Labour Board [1953] 2 QB 18; [1952] 2 All ER 424, referred to.

8 There is a distinction between a person who is a "certifier" and one who is an "arbitrator" (see p 856 line 45).

Nelson Carlton Construction Co Ltd (In Liquidation) v A C Hatrick (NZ) Ltd [1964] NZLR 72 (SC); [1965] NZLR 144 (CA); and *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 WLR 963, 974; [1954] 3 All ER 136, 145, referred to.

9 The conditions imposed which were to be carried out to the standards set by the town planning consultant conferred upon her the status of "certifier" not of "arbitrator" (see p 857 line 1).

10 The stipulation that "any dispute be settled by the consultant whose decision should be final" conferred upon her the status of arbitrator and its validity was doubted (see p 857 line 44).

11 The severance of an ultra vires condition is permissible in proper cases if such condition is not essential or important to the structure of the permission given but trivial or unimportant (see p. 857 line 50).

Kent County Council v Kingsway Investments (Kent) Ltd [1970] 1 All ER 70, 86, applied.

12 The stipulation in question was not fundamental to the planning permission and was severable. (see p 858 line 5).

13 The remedy sought was discretionary and the conduct of the first respondents in remaining inactive for a long period disentitled them to the exercise of the Court's discretion in their favour (see p 843 line 35: p 850 line 12; p 854 line 29).

R v Stafford Justices [1940] 2 KB 33; *R v Aston University Senate* [1969] 2 QB 538; [1969] 2 All ER 964 and *R v Board of Broadcast Governors* (1962) 33 DLR (2d) 449, referred to.

The judgment of Wilson J (unreported, Christchurch, 12 October 1970) reversed.

Others cases referred to in judgment

Allison v Kealy [1968] NZLR 958.

Eckersley v Mersey Docks and Harbour Board [1894] 2 QB 667.

Metropolitan Properties Co Ltd v Lannon [1969] 1 QB 577; [1968] 3 All ER 304.

R v Barnsley Licensing Justices [1960] 2 QB 167; [1960] 2 All ER 703.

R v Cambourne Justices [1955] 1 QB 41; [1954] 2 All ER 850.

R v Sussex Justices [1924] 1 KB 256.

Note
Refer 15 Abridgement 375; 12 Abridgement 280, 289; 3 Abridgement 500.

Appeal
This was an appeal from the judgment of Wilson J (unreported, Christchurch, 12 October 1970) directing the issue of a writ of certiorari to quash decisions of the Town and Country Planning Appeal Board consenting to an application under s 35 of the Town and Country Planning Act 1953.

Somers and *Woodward* for the appellants.
Leggat and *Erber* for the first respondents.
Neazor for the second respondents.

WILD CJ. This is an appeal from a judgment of Wilson J delivered at Christchurch on 12 October 1970 directing the issue of certiorari to quash decisions of the Town and Country Planning Appeal Board consenting to an application under s 35 of the Town and Country Planning Act 1953 for a specified departure from the operative district scheme of the Waimairi County Council in respect of land at 19-23 Memorial Avenue, Christchurch. The appellants were the applicants for the specified departure. The first respondents were the applicants for certiorari. I shall call them "the respondents" because the second respondents (who were the members of the Board) submitted to the judgment of this Court and took no part in the appeal.

The case concerns the Fendalton Shopping Centre which is at the intersection of Clyde Road, Memorial Avenue and Fendalton Road in Christchurch. The appellants (who, with the company through which they traded, I shall call "the Turners") carried on a grocery business in one shop on the south side of Fendalton Road and another on the south side of Memorial Avenue, both of them being very close to the intersection. In 1965 the Council had under consideration two proposals to amend its operative district scheme. The first was a street alignment designed to produce a curving sweep from Memorial Avenue eastwards into Fendalton Road, which would have had the effect of eliminating most of the shops on the north side of the intersection. The second proposal involved rezoning the whole of the existing shopping centre as residential. Being aware of these proposals the Turners, in September 1965, purchased the properties at 19-23 Memorial Avenue on the south side of that street a little distance west of the intersection. These properties were at that time zoned residential. I shall call them "the Turner land". Despite objections from the Turners and others the Council resolved on 19 August 1966 to adopt their proposals, which became known as change No 2. Notice of change No 2 was received by the Turners on 24 August 1966. On the following day they applied to the Board under s 35 of the Act for a specified departure to enable them to establish on the Turner land a mall-type shopping centre of approximately 15,000 square feet which would include a supermarket for their own use. Their reasons, which were set out extensively in their application, stressed the need to re-locate the Fendalton Shopping Centre and to ameliorate traffic hazards. This application, as the law then stood, had to be considered by the Council before being dealt with by the Board.

In the meantime, on 14 and 15 March 1967, some ten appeals which had been lodged against the realignment and rezoning involved in change

No 2 came before the Board for hearing. As to the course of that hearing, which has special importance in this case, Wilson J accepted the evidence of Mr Mahon, counsel for one of the ten appellants. Mr Mahon said that when, because the proposed widening of the streets would eliminate the shops on the north side of the intersection, the question of re-locating these shops arose at the hearing, the Chairman of the Board suggested that some land on the southwestern corner could be zoned commercial and the shops re-located there, and he mentioned that the Turner land and perhaps some other land could be zoned commercial. There was also evidence before Wilson J that other alternative sites for the shops were suggested by various counsel, including Mr Mahon. In the result the Board adjourned the proceedings so that the Council could submit a report on the re-location of the shops then on the north side of the intersection. This report was duly prepared by the Council's town planning officer, and it was circulated to all parties early in July. It discussed the existing shopping situation and the traffic problems and ended with an expression of opinion that "the area which met most of the factors to be taken into account was" the Turner land. The report did not suggest that this site was ideal but said it was "the most practical for the re-location of the existing centre". It was suggested that it be zoned as commercial A1.

When the hearing was resumed on 28 August 1967 the Board called the town planning officer as a witness to produce his report. Mr Mahon objected to the witness being called on the ground that the re-location of the shops was irrelevant to the matter being determined. Mr Mahon's evidence was that:

> "The Chairman then said that it was relevant because the Board had the power to direct an amendment of the County scheme in those proceedings. The Chairman said the Board could on the basis of Mr Parker's report direct the zoning of the Turner land as commercial. He said that the objectors were entitled to cross-examine Mr Parker on his report and that is why he was being called by the Board."

Then followed submissions by Mr Mahon that such a direction was not authorised by s 42 of the Act, after which (to quote Mr Mahon),

> "The Chairman then made an observation to the effect that the Turner land was the obvious place to put the shops that had to be moved and that a decision under subs (3) would bring that about without any further ado. I complained that the objectors to this specified departure application had rights in the matter and were not present. The Chairman maintained that all substantial objectors were present that day. There was reference to the situation of traffic. I said that there were local residents who were objectors in this specified departure who had retained counsel and neither those people nor the counsel were present. I said that there must be the strongest objection in a specified departure application on the grounds of traffic and that that matter would be unresolved if the Board took its proposed course, and the colloquy ended with my intimating that if the Board took the course proposed by the Chairman that we would have to either ask the Board to state a case to the Supreme Court as to its jurisdiction under s 42 or alternatively we would have to take proceedings to restrain the Board from what it apparently intended to do."

The Chairman said he would proceed with the witness and would review the question of jurisdiction after lunch. On resuming he announced

that on reflection he would not pursue the course which he had proposed. According to a newspaper report which all witnesses before Wilson J accepted as accurate he also during the afternoon said this about the Turners' application for a specified departure:

> "Objections have not been heard and it would be most improper for us to pre-judge. In the event of the application being granted, the Board is likely to impose stringent conditions to ensure that other shopkeepers who are dispossessed are likely to obtain sites at reasonable rents and terms."

At the conclusion of the hearing the Chairman said that certain appeals relating to the south-western corner of the intersection would be allowed, so that that land would remain commercial, but that the other appeals would be dismissed, and a written decision would be issued in due course.

The next event was the consideration by the Council of the Turners' application for specified departure. Under the regulations then current the Council had to decide whether to support or oppose that application before it went to the Board. The Council considered it on 19 September 1967 when the Turners called evidence and made submissions. Evidence and submissions in opposition were presented by objectors, including the respondents to this appeal. They are two citizens each of whom owns a piece of residential land immediately adjacent to the Turner land, but having a frontage to Hamilton Avenue to the south. After considering the material put before it the Council, on 20 October 1967, notified the Board and all parties that it would support the Turners' application subject to certain conditions.

The next step was that the Turners sought a hearing of their specified departure application by the Board, and this was fixed for 21 November 1967. On that morning, however, the members of the Board, having assembled in Christchurch, were served with a motion for a writ to prohibit them from hearing the Turners' application. This was issued by the respondents to this appeal, and was based on three grounds. One of them concerned a change in procedure introduced by the Town and Country Planning Amendment Act 1966 and was not pursued when the motion was heard: the other two related to land ownership. Naturally enough, the filing and service of this motion halted any progress with the specified departure application. The motion came to hearing on 5 February 1968 before Macarthur J who gave judgment dismissing it on 5 July 1968. The judgment is reported as *Allison v Kealy* [1968] NZLR 958.

In the meantime, on 5 March 1968, the Board had issued its written decision on the 10 rezoning and realignment appeals against change No 2, the fate of which the Chairman had announced orally on 28 August 1967. In the course of this decision the Board said:

> "In the present instance the proposed change is prompted by what the Board is satisfied, on the evidence, is a very real need for road-widening operations, and the improvement of conditions for traffic, at the intersection of Memorial Avenue and Fendalton Road and Clyde Road.
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> "While, as already stated, the Board is fully satisfied that the proposed road widening operations (which, if carried out as planned, will 'cut into' quite a number of the existing buildings) the Board also considered that there was considerable merit in the contention of the appellants that a change so drastic should not be made unless

some other suitable provision was also made for the possible relocation of the business premises which would be affected. The Board therefore requested Mr R M Parker, the respondent Council's town planning officer, to prepare and submit a report on this aspect of the case, and adjourned the further hearing of the appeals until this had been done. The hearing was resumed on 28 August 1967, on which date Mr Parker read his report and was cross-examined on behalf of a number of the appellants.

"The Board does not wish to discuss Mr Parker's report in this present decision, as it affects (inter alia) land which is the subject of an application to the Board under section 35 of the Act and which has not yet come to a hearing.

"The Board is, however, satisfied that it seems probable that suitable sites will be available for businesses which will be in effect dispossessed when the proposed road widening operations take place."

The motion for prohibition having been dismissed on 5 July 1968, the Board fixed 4 December 1968 for the hearing of the Turners' specified departure application. An adjournment for one week was granted at the telephoned request of Mr McClelland who, at that time and in the earlier prohibition proceedings, was counsel for Mr Allison, the first-named of the present respondents. Mr McClelland's evidence was that in this telephone conversation he told the secretary of the Board that "we would not be proceeding on the date that he had fixed because we objected to the Tribunal" and "if they chose to come down that was their own affair, that I would not be appearing before them I hoped, and would make submissions along those lines". When the Board assembled on 11 December 1968 it comprised 2 of the 3 members (including the Chairman) who had sat on the rezoning and realignment appeals on 14-15 March and 28 August 1967, and two members who had not then sat. According to Mr Mahon's evidence, "Mr McClelland objected to the Board hearing the case on the ground of bias, they having expressed a view in the realignment appeals". He was supported by Mr Mahon and another counsel. The Chairman adjourned and saw counsel in Chambers where he made some reference to a recent judgment in the Supreme Court and said that nothing that had gone before precluded him in any way from hearing the case. Counsel asked for their objections to be noted and subject to that proceeded with the hearing, though Mr McClelland withdrew and left the matter to his junior. Mr Mahon said in evidence that early on the second day of the hearing he made a note of a comment made by the Chairman.

> "The whole object of the Board in the previous proceedings has been to get rid of the shops on the north side of the road and put all shops on the other side of the road."

At the end of the hearing on the third day, 13 December 1968, the Board intimated orally that the Turners' application would be granted subject to certain conditions that were indicated and to others to be discussed among the parties. For that purpose the proceedings were adjourned sine die. The Board's conclusions were embodied in an interim decision dated 11 February 1969 which included the following passages:

> "Counsel for certain of the objectors now raises the further preliminary point that the Board was now precluded from hearing the present application by reason of the fact that opinions expressed by the Board (or certain of its members) during the hearing of the

section 26 appeals indicated that the Board had already come to a conclusion as regards the merits of the present application."

After reference to the evidence the Board then made this comment in reference to submissions by junior counsel appearing for the second named respondent, and for other objectors:

"Mr Palmer, of counsel for certain of the objectors, put the matter fairly and succinctly when he said that in reaching its decision the Board must balance 3 separate interests:

"1 The local public interest in having replacement shops for a local shopping centre.

"2 The general (and wider) public interest in the preservation of Memorial Avenue as—

(a) A main thoroughfare between the City and Airport.

(b) A memorial to fallen servicemen, and

"3 The local interest of persons whose property would be adversely affected.

"Accepting the above definition, and endeavouring to strike a just balance in the public interest, the Board has reached the conclusion that the application should be granted in part."

Six conditions were then stated and the decision concluded with the following:

"Many other possible conditions will need to be considered, but in respect of these the Board considers that there should be an opportunity for discussion between the various parties affected. The present decision is therefore promulgated as an interim decision only, and the present proceedings adjourned sine die with leave to any party to have them brought on for further hearing on 21 days' notice."

In the discussions as to the further conditions the Council took the initiative. Having reached some agreement upon them with the Turners it circulated them to the objectors, inviting representations. The objectors who made representations included both the present respondents.

The Board sat again on 14 August 1969 to complete the matter, and an oral decision was given stating the conditions. At this sitting one of the new members who had sat on 11-13 December 1968 was replaced by a Mr Tutt. Counsel for both the present respondents were present. At the conclusion of the hearing the Chairman spoke to two of the counsel, and Wilson J accepted the account of this as given in evidence by the counsel then appearing for the second-named respondent:

"Immediately upon the adjournment the Chairman of the Board (the late Mr Kealy) approached myself and Mr Palmer clearly indicating that he wanted to discuss some matter with us. I remember this quite distinctly because I felt it was a trifle unusual. I can recall Mr Kealy speaking to Mr Palmer in my presence and saying that he had considerable sympathy for the position of the objectors and, in particular, our clients but that the Board had not been left with much alternative. I couldn't guarantee that those were the exact words which he used but I do recall the tenor of them and I remember it because it struck me as a very unusual thing to be said immediately upon the conclusion of a hearing of that kind."

The Board's written decision issued on 4 September 1969 contained the following passages:

"This application was again brought on for hearing before the Board on 14 August 1969, and counsel for the various parties were heard in respect of the conditions to be imposed by the Board.

"Save for a variation as to the number of off-street parking spaces to be provided, the Board confirms its interim decision dated 11 December 1968, a copy of which is hereunto attached."

Among the conditions of the consent to the specified departure were the following:

"2 That the supermarket of 8,000 square feet be sited not closer than 20 feet to the widened line of Memorial Avenue or closer than 20 feet to the south-eastern boundary of the site and that the main door entrance to the supermarket be sited as far from Memorial Avenue as practicable, and further that the external appearance (including colour) of the supermarket be to the approval of Miss Nancy Northcroft.

"5 That the site be screened by suitable planting satisfactory to the said Miss Northcroft.

"7 That landscaping and planting be carried out at the earliest possible opportunity to the satisfaction of the said Miss Northcroft.

"18 That where practicable conditions be complied with before any business is commenced—any dispute to be settled by Miss Northcroft whose decision shall be final and binding on the parties."

Having now been granted their special departure the Turners set about engaging demolition contractors, a draftsman, structural engineers and quantity surveyors. Demolition of a house and earthworks on the site were commenced on 14 October 1969. On 14 November, as Wilson J found on the evidence, an oral agreement was made by the Turners with a building contractor that he would be employed on the basis of his estimate subject to certain variations. On their side the respondents, so far as the Turners were aware, did nothing until 24 January 1970 when they served on the Turners their present proceedings for certiorari which they issued on 22 January. A week later building work on the site began though it was not until April that a formal building contract was signed.

At least partly because of delay on the part of the Crown's solicitors (for which no satisfactory explanation is apparent) in filing a defence and making discovery of documents, the respondents' action was not brought to hearing until eight months later, 21-25 September. By that time the buildings were almost completed and were expected to be open for business by the end of October. Understandably, Wilson J wasted no time in delivering his judgment which was issued in favour of the respondents on 12 October. In the circumstances this Court, too, has given urgency to the hearing of the Turners' appeal and to the preparation of its judgment.

In their statement of claim the respondents allege three grounds for their claim that the Board's decisions on the Turners' special departure application should be quashed. These were:

(1) That the final decision was void and of no legal effect in that there was a breach of natural justice by reason of Mr Tutt's being party to it though he had not been present at the first stage of the hearing on 11-12 December 1968.

(2) That the Board acted in breach of natural justice in that the Chairman had already indicated his view as to the outcome of the application;

(3) That the conditions attached to the final decision, and therefore that decision itself, were void and of no legal effect by reason of the unlawful delegation to Miss Northcroft of powers lawfully exercisable only by the Board.

These three remain as the principal issues on this appeal though there is, of course, in addition the important question as to whether, if the respondents made out their case on any one or more of them, the Court should grant the discretionary relief claimed. Wilson J decided against the respondents on the first of these issues, but in their favour on the second and third, and he held in his discretion that the respondents were not disentitled to the relief claimed.

Though curiously enough, and perhaps significantly, the respondents gave it only second place in their pleadings, the main ground of contest both at the trial and in this Court was the allegation against the Chairman of bias by reason of his having formed a view before the Board sat to hear the application. Wilson J's view that an impartial observer fully informed of the relevant circumstances would have thought there was a real likelihood that the mind of the Chairman was closed to evidence or argument on the matter was based on four factors. Of these the first was the Chairman's "vigorously-stated proposal", as Wilson J described it, to rezone the Turner land at the hearing on 28 August 1967. The second was the inclusion in the decision of 5 March 1968 of what Wilson J called "the fact that suitable sites were available for the shops dispossessed by the realignment then confirmed" (the actual words of the decision have already been quoted), when the Chairman had accepted the town planning officer's report that the only site available for this purpose was the Turner land. The third factor was the Chairman's insistence on 11 December 1968 on hearing the Turners' special departure application in the face of strong objection on the ground of bias. Fourthly, there was the Chairman's private comment to counsel after the final hearing concluded on 14 August 1969, linked with his remark at the hearing eight months earlier. The last of these factors, to which Wilson J himself attached little weight, occurred at the very end of all the proceeding, and I would regard it simply as a kindly act on the part of the Chairman. Nor would I attach much significance to the second factor which was really only a matter of record. The first factor hardly meets the test of what an impartial observer would regard as a real likelihood of bias when it is viewed in the light of what the respondents' legal advisers, who had so much more reason so to regard it, did *not* do about it when they had the opportunity. They were not present, of course, at the hearing on 28 August 1967 when the incident occurred, because their clients were not parties to the rezoning and realignment appeals. But they knew all about it within minutes because, as he said in evidence, Mr Mahon asked to be excused from the hearing and saw the counsel acting for each respondent "and conveyed to them the turn of events". Yet when, three months later, these gentlemen issued proceedings for the respondents to prohibit the members of the Board from hearing the special departure application they did not allege bias as a ground, though this item of evidence to support it was then fresher by more than two years than when it was put forward in the present action.

It was the third factor that Wilson J thought most weighty. I agree with him that any indication by a party that it is felt that a judicial officer may not have an open mind on a matter which he is about to hear is generally accepted as sufficient reason for relinquishing the business to another. Nevertheless, when the allegation of bias comes to be tried,

> "It is not the case that every Magistrate or judicial officer is disqualified by the premature expression of an opinion as to the matter

in issue or about to come in issue before him. In *R v Alcock* 37 LT 829 it is said by Mellor J (p 831): 'I know of no reason for saying that the expression of a man's opinion on any subject should render him unfit to adjudicate upon it'. Cockburn CJ in the same case says (p 831): 'There is no authority for saying that an expressed opinion is sufficient to oust a Magistrate's jurisdiction'. So in *R v London County Council* 71 LT 638 it is said (p 639): 'Preconceived opinions—though it is unfortunate that a Judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded'." (Per Salmond J in *English v Bay of Islands Licensing Committee* [1921] NZLR 127, 135).

That passage was referred to by this Court in *Griffin & Sons Ltd v Judge K G Archer* (1956, unreported), and the Court went on to say:

> "If preconceived opinions, even opinions strongly held, do not of themselves disqualify on the ground of predetermination, then it is obvious that something more than the expression of preconceived opinions is necessary to constitute bias . . . "

In my opinion the position of a tribunal such as the Town and Country Planning Appeal Board is somewhat different from that of a judicial officer acting in the normal run of his duties. By the very nature of their work in a special field the members of such a Board must acquire opinions (if they do not hold them before appointment) about the type of question they deal with. Planning problems all over New Zealand must have a certain similarity, and decisions reached in one part of a city must inevitably have an influence on the solution of contested issues in another. Moreover, because town planning can so drastically affect private property rights it is a field in which strong feelings are aroused and bitter resentments persist. For these reasons I think that the opinion of Salmond J in the *Bay of Islands* case (p 135) that the "rule of disqualification by reason of predetermination must be applied with the utmost caution" has no less importance in the case of tribunals of this kind.

Notwithstanding these reservations on the reasons that brought Wilson J to his conclusion, and putting aside consideration of what the proper test of bias is, I will assume that the evidence as a whole satisfied that test. Even so, I think this appeal should succeed for the reason that the Court's discretion should not be exercised in favour of the respondents.

The real substance of their complaint is that the Turners have been permitted to build a supermarket on what was formerly residential land next door to them. Within a day or so of 11 February 1969 the respondents knew that that permission would be granted. Though it is true that the decision was called an interim decision the fact is that the Board on that day issued under its seal and its Chairman's signature a declaration that it had "reached the conclusion that the application should be granted in part", and that it authorised a supermarket building with a floor area of up to 8,000 square feet, with up to ten shops for letting. All that remained to be done was the settling of some ancillary conditions. But it was not until almost a year later that the respondents began these proceedings. In the meantime they had taken their part in discussions on the ancillary conditions. Wilson J makes no mention of the respondents' inactivity during this period of nearly a year. I think it should have weighed heavily in the exercise of the Court's discretion and, in my respectful opinion, the omission to take it into account justifies a reversal of the decision. Even after the Board's final written decision was issued on 4 September 1969 and they knew that the Turners were

proceeding with the building, the respondents said not a word to indicate to the Turners that they intended to attack the decision. Their writ was not issued until four months later. For these reasons I think the respondents disentitled themselves to the discretionary relief claimed, and that certiorari should have been refused.

In regard to the first and third grounds for the respondents' claim that the Board's decisions should be quashed I agree with the reasoning and conclusions in the judgment about to be delivered by Richmond J, which I have read in advance.

I would allow the appeal and discharge the orders made by Wilson J.

This being the unanimous opinion of the Court, the appeal is allowed and the order made by Wilson J granting declarations and the issue of writs of certiorari is vacated. There will be judgment for the defendants in the Supreme Court.

TURNER J. I do not completely restate the facts, which have already been set out in the judgment which the Chief Justice has just delivered. The first question is whether Wilson J was right in deciding that the Town and Country Planning Appeal Board (to whom I shall refer as the "Board"), and particularly its Chairman, were biased, in the sense of having predetermined the issue on the specified departure hearing before they entered upon it: and if this question is decided in favour of the respondents, then a second, equally important, must arise—viz whether the respondents' delay in making application to the Supreme Court was such as should in the circumstances of the case have resulted in a refusal of a writ of certiorari by the learned trial Judge.

It may be of assistance, in approaching these two interwoven questions, if, although myself omitting any general narrative of the facts, I set out by way of introduction the chronological summary of events with which counsel supplied us. It is as follows:

9 65 Purchase of land by the appellants following County proposals for rezoning and realignment of road.

19 8 66 Waimairi County Council makes change No 2 to district planning scheme involving (a) rezoning of commercial properties to residential (b) realignment of Fendalton Road–Memorial Avenue intersection.

23 8 66 Application (as then proper, direct to the Town and Country Planning Appeal Board) by the appellants for specified departure filed.

4 10 66 Appeal to the Board by L M Hooper against decision of County of 19 8 66.

16 11 66 Application for specified departure adjourned by Council pending hearing of appeal from its decision on rezoning and realignment.

28 11 66 Application for specified departure received by the Board.

14–15 3 67 Hearing before the Board of appeals from County decision on rezoning and realignment—adjourned for report.

28 8 67 Further hearing of appeals on rezoning and realignment by the Board.

19 9 67 Council hears application for specified departure.

20 10 67 Council indicates it will support specified departure.

21 11 67 Date for hearing of application for specified departure.

Application for writ of prohibition served on the Board (contained no allegation of bias).

5 2 68 Hearing in Supreme Court of application for writ of prohibition.

5 3 68 Decision of the Board on appeals against rezoning and realignment given—Allowed in part in respect of land edged blue on plan at p 34.

5 7 68 Application for writ of prohibition refused by Macarthur J (*Allison v Kealy* [1968] NZLR 958.)

4–5 12 68 Date of hearing given by the Board for hearing of specified departure (Mr McClelland for the respondent Allison requests postponement and objects to the Board hearing the application)—allegation of bias made.

11–13 12 68 Hearing of application for specified departure by the Board—objections taken by Mr McClelland and Mr Mahon on ground of predetermination.

13 12 68 Oral interim decision on last day—specified departure granted but conditions to be fixed.

11 2 69 Written interim decision of the Board.

30 5 69 Representations by objectors to specified departure made to the County on conditions to be imposed—the respondents made representations at a meeting arranged by the Council.

14 8 69 Hearing by the Board as to conditions—oral statement of result.

4 9 69 Written final decision of the Board.

14 10 69 Demolition of house on site and earthworks commenced.

14 11 69 Oral agreement made by the appellant with building contractor for erection of supermarket and shopping mall for $196,000.

22 1 70 Writ issued.

24 1 70 Writ served on the appellant.

The first of the two principal questions which I must now attempt to decide, and in my opinion the more difficult of them, is whether Wilson J was right in his conclusion that the Board, or at least its Chairman, was shown to be biased, in the sense of having predetermined the matter which was to be decided, to the extent necessary to invalidate the decision to which the tribunal ultimately came. All the facts which seemed to the learned trial Judge to support his inference of predetermination are undisputed, or virtually undisputed. I have listed them in order as appears below, taking care, I hope, to omit nothing however tenuous which can be thought materially to have supported the judgment now under appeal.

1 (14–15 March 1967). In the course of the realignment appeal the Chairman discussed the possibility of including in the decision of this appeal an order rezoning as commercial the Turner land. Mr Mahon then protested against the introduction of the last-mentioned matter into the realignment hearing, pointing out that the objectors to the Turner application were not present.

2 (14–15 March 1967). In the course of the realignment appeal the question of the relocation of the Northern shopkeepers was referred to Mr Parker for a report; Mr Parker was an employee of the County Council, and it is suggested that his nomination was evidence of an acceptance, even at this early stage, of the Council's view or probable view on both applications.

3 (28 August 1967). The favourable reception of Mr Parker's report by the Board at the adjourned hearing of the realignment appeal.

4 (28 August 1967). The revival, at the resumed hearing of the realignment appeal, at which Mr Parker's report was dealt with, of the Chairman's earlier proposal to rezone the Turner land; the Chairman

showed some insistence, but after lunch indicated that he accepted Mr Mahon's objection to the Board dealing with this matter in the absence of the present respondents.

5 (5 March 1968) the realignment decision itself, and particularly the following provisions in the written decision:

> "While, as already stated, the Board is fully satisfied that the proposed road widening operations (which, if carried out as planned, will 'cut into' quite a number of the existing buildings) *the Board also considered that there was considerable merit in the contention of the appellants that a change so drastic should not be made unless some other suitable provision was also made for the possible re-location of the business premises which would be affected.* The Board therefore requested Mr R M Parker, the respondent Council's town planning officer, to prepare and submit a report on this aspect of the case, and adjourned the further hearing of the appeals until this had been done. The hearing was resumed on 28 August 1967, on which date Mr Parker read his report and was cross-examined on behalf of a number of the appellants.
>
> "The Board does not wish to discuss Mr Parker's report in this present decision, as it affects (inter alia) land which is the subject of an application to the Board under section 35 of the Act and which has not yet come to a hearing.
>
> "*The Board is, however, satisfied that it seems probable that suitable sites will be available for businesses which will be in effect dispossessed when the proposed road widening operations take place.*"

It is suggested that these three paragraphs indicate (1) that in coming to its decision the Board had done so only after being satisfied that some suitable provision could be made for the Northern shopkeepers, (2) that after having read Mr Parker's report the Board regarded it as at least probable that the shopkeepers could be re-located on the Turner land.

6 (5 March 1968). The fact that the Board, in its decision, allowed the appeals of the shopkeepers on the south-west corner. This decision preserved the commercial zoning on this corner alone of the four corners under consideration; and such a decision is at least consistent with the proposition that it would be unrealistic not to allow the appeal of these shopkeepers if the adjoining or adjacent Turner's land was going to be the subject of a specified departure order.

7 (3 December (approximately) 1968). The challenge to the impartiality of the Board, before it entered upon the specified departure hearing, which Mr McClelland made on the telephone to the secretary, applying for the alternative Board to hear the special departure application by reason of the indications of partiality or pre-determination which have been summarised above; and the fact that the Board overrode these representations and insisted itself on hearing the matter when there was no apparent necessity for this course.

8 (12 and 13 December 1968). The formal protests made by Mr Mahon and Mr McClelland before the Board at the commencement of the hearing of the specified departure application; Mr Mahon and Mr McClelland raised again the same objections which had been taken on the telephone by Mr McClelland, and asked that the other Board should deal with the matter. Notwithstanding the objections to the Board's impartiality, the Board insisted on proceeding with the hearing.

9 The observation from the Chairman early on the first day of this hearing that—

"The whole object of the Board in the previous proceedings has been to get rid of the shops on the north side of the road and put all the shops on the other side of the road".

10 (13 December 1968). The evidence of sundry people directly concerned in the matter (eg Mrs Glasgow, Mrs Crawford and Mr Allison) of their separate impressions on the subject of partiality.

11 (30 May 1969). After the written interim decision of the Board had been issued on 11 February 1969 the Board sat on 30 May 1969 to fix the conditions; the objections to its jurisdiction were again raised by counsel, and again the objections were overruled.

12 (30 May 1969). At this hearing the Chairman showed some degree of impatience that these objections were again raised, and indicated his view they were raised only for the purposes of delay.

13 (30 May 1969). The informal private conversation between the Chairman and Mr Tipping immediately after the hearing at which the Chairman is alleged to have said that "the Board had not been left with much alternative".

To the thirteen matters which I have listed Mr Leggat added a fourteenth—the actual conditions ultimately imposed by the Board; but I am for myself unable to see that this item assists him in the list of items demonstrating predetermination.

On these facts Wilson J found the tribunal disqualified for bias. He said:

> "Where it is sought to quash the decision of a tribunal such as the Town and Country Planning Appeal Board for bias it is necessary for the Court to be satisfied, not that the tribunal was in fact biased but that an impartial observer fully informed of the relevant circumstances would think that there was a real likelihood of bias on the part of one or more members of the tribunal. This, it seems to me, is the effect of what was said by Lord Denning MR in *Metropolitan Properties Ltd v Lannon* [1968] 3 All ER 304 . . . this passage was adopted by Sachs LJ in *Harman v Bradford City Council* [1970] 2 All ER 690 . . . There has been some difference of judicial opinion as to whether the correct test is that of a real likelihood of bias in the mind of right-minded persons or that of a reasonable suspicion of bias, and this matter was argued before me at some length. Like Sachs and Cross LJJ in the last-mentioned case I doubt whether there is any practical difference. If a right-minded person would *think* that there was a real likelihood of bias I think that that is the same thing as having a reasonable suspicion of bias. My preference for the former mode of expressing the test is a resistance to the thought that a Court will act on suspicion and an apprehension that the qualifying adjective "reasonable" may receive less than its due weight."

Applying to the facts before him the test of a real likelihood of bias in the mind of an informed bystander Wilson J decided that it had been met.

In examining the decision of Wilson J I find it necessary first to say something about the law. It is not of course enough that the tribunal, or some member of it, has expressed a preconceived opinion, even one strongly held, on the matter to be tried. "I know of no reason for saying that the expression of a man's opinion on any subject should render him unfit to adjudicate upon it", said Mellor J in *R v Alcock* 37 LT 829, 831; and Cockburn CJ in the same case said "there is no authority for saying that an expressed opinion is sufficient to oust a Magistrate's jurisdiction".

So, too, in *R v London County Council* 71 LT 638, 639 it was said: "Preconceived opinions—though it is unfortunate that a Judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded".

So in this country Stringer J sitting in the Supreme Court in *Taylor v Salmon* [1926] NZLR 589 said at p 594 that "it would hardly be contended that every person holding a judicial office is disqualified merely because of the previous expression by him of an opinion upon a matter that was about to come before him for decision". And in this Court in *Griffin & Sons Ltd v Judge Archer and General Manager of Railways* (unreported, 1956) Finlay J, delivering the judgment of a Court of Appeal of which I was myself a member, said that something more was necessary than the mere expression of a preconceived opinion (though in that particular case the preconceived opinion had been a fairly definite one); it must appear that the tribunal intends to adhere to the point of view which has been expressed, uninfluenced by further evidence or argument afterwards addressed to it.

Various tests have been proposed as to whether a tribunal is to be regarded as disqualified for bias. It has been said that the true test is whether "a real likelihood of bias" on the part of the tribunal has been shown. This was the view accepted by the Court of Appeal (Lord Goddard CJ, Cassels J and Slade J) in the judgment of that Court delivered by Slade J in *R v Camborne Justices* [1954] 2 All ER 850, and it has been reiterated in a number of other cases since that date. On the other hand "a reasonable suspicion of bias" has been put forward by equally eminent authority. Lord Esher accepted this test in *Eckersley v Mersey Docks and Harbour Board* [1894] 2 QB 667, 671; and it received the support of Lord Hewart CJ in *R v Sussex Justices* [1924] 1 KB 256, 259. Its most recent appearance has been in the thoughtful judgment of Edmund Davies LJ in *Metropolitan Properties Co Ltd v Lannon* [1969] 1 QB 577; [1968] 3 All ER 304. There has been some attempt, particularly of late, to synthesise the two points of view, and one might mention in this regard the judgment of Devlin LJ in *R v Barnsley Licensing Justices* [1960] 2 QB 167; [1960] 2 All ER 703 and that of Lord Denning MR in *Metropolitan Properties Ltd v Lannon* (supra). Without deciding between the rival formulae, I may say that I have found myself attracted by the statement adopted by seven Judges of the High Court of Australia in a joint judgment in the recent case of *ex parte Angliss Group* [1969] ALR 504 where at p 506 they defined the test as:

> "A suspicion of bias reasonably—and not fancifully—entertained by responsible minds".

I will accept it in this judgment, but in doing so must point out that it is immaterial for the purposes of my judgment which of the tests is used here, for the reason that whichever of them is used, I have for myself concluded that the facts proved do not amount to bias such as will disqualify the tribunal.

Wilson J, having defined the test which he proposed to apply, said that casting himself in the role of an impartial observer fully informed of all the relevant facts he would have been convinced that the mind of the Chairman was closed to evidence and argument from the respondents at the time of the hearing of the specified departure application. He held this conclusion sufficient to disqualify the tribunal for bias. For myself, having examined the undisputed facts with all the care which I can

command, I have decided, with all due deference to Wilson J's opinion, that even if the test to be applied is that adopted by the Judges of the High Court of Australia (perhaps a more rigorous test than that adopted by Wilson J) its application does not carry my mind to the same conclusion. I think that the facts indicate a degree of resignation, on the part of the Chairman, to the conclusion that accomplished facts had now made it difficult, if not impossible, for the respondents' application to succeed; but not that he had closed his mind to anything that could be said in support of the respondents' case.

It seems to me of some importance to notice the role of planning tribunals in the constitution and evolution of the town plan. Once a general policy has been laid down, either by the district scheme, or by the tribunal itself, the next step is the application of that policy in detail. This application is determined in a series of cases heard by the tribunal. These cases are disputed between different parties. At the hearing of each one many of the parties to other hearings are not even present. Not every citizen can afford to take part, or is willing to go to the trouble of taking part, in every town planning case heard as to a property in his own neighbourhood. Even if such cases are adequately advertised, and if all who come forward and ask to be heard in response to the advertisement are heard, still many persons whose interests may in some degree be affected do not bother, or cannot afford, to appear. But whatever is decided in the first case must ultimately affect in some degree the result in the next, and so on. And when, following a series of such cases, the characteristics of a neighbourhood have perhaps effectively been changed, and when (for instance) buildings of a kind different from those previously standing are first authorised, then erected and occupied, it ultimately becomes futile to contend that the decisions of the tribunal adjudicating upon later applications are not affected, and sometimes even necessarily and irrevocably determined, by what has already been done with complete propriety in earlier decisions. This inevitability which follows upon earlier decisions of an administrative tribunal, even decisions made in the absence of the parties in the instant case, is clearly to be distinguished from bias. In a sense it is predetermination, but it is a kind of predetermination peculiarly characteristic of decisions of this kind. The mention, and the recognition of it, by the tribunal itself, does not indicate that kind of predetermination that amounts to bias. It does not amount to a refusal to hear evidence or argument. It simply recognises facts; and one of these facts is that what has already happened affects what is to happen, and may necessarily and inevitably operate in some degree as a restriction on the possibilities open to the tribunal in cases still to come before it. This distinction is easily seen when one asks: would not an alternative Board, having no previous knowledge of the matter, and hence impossible to accuse of bias, have been faced in this case with exactly the same sense of inevitability as the Board whose impartiality is now in question? I think that this must undoubtedly have been so, and that all that Mr Kealy did was to notice, and to acknowledge, something that was an indisputable fact, viz that the decision to which the Board had already properly and legitimately come on the evidence before it on the realignment appeal might strongly indicate a decision in the appellant's favour on the specified departure application, when it came on for hearing, on grounds of public interest conditioned by what had gone before. I do not think

that Mr Kealy would have been taken by the intelligent bystander to say that he would not listen to the evidence, or to argument by the respondents, when the case came on before him. I think he would have been taken to say that when he had listened to their evidence and to their argument, the public interest and what had already been done might so strongly indicate a view favourable to the Turner application that he found it difficult to think that the respondents' case could succeed. This, I think, is not predetermination, or bias; it is merely a recognition of hard facts.

It follows from what I have said that for myself I would allow this appeal on the ground that on the undisputed facts the submission of bias cannot be satisfactorily sustained. But quite independently of this conclusion I would in any case, even if unsupported by the other members of the Court on the ground which I have mentioned, have favoured allowing the appeal on another ground altogether—viz in the proper exercise of the Court's discretion to refuse the writ, having regard to the delay and the other relevant conduct of the respondents.

Wilson J exercised his discretion in favour of the respondents in granting the issue of a writ of certiorari. To justify this Court in revising the trial Judge's discretion, and in exercising its own discretion in place of his, it must appear that the learned Judge exercised his own discretion on a wrong principle, or at the least was clearly wrong in its exercise. I am satisfied that he acted on wrong principles, and I will now elaborate this statement.

There are not many reported cases in which mere delay, without other complicating factors, has been enough to persuade the Court in its discretion to refuse a writ of certiorari. I think that this is because the Rules of Court in England place a limitation of six months on the issue of the proceedings, and on this account alone litigants launch their proceedings with reasonable promptitude. But Mr Somers was able to refer us to useful authorities indicating that delay may be an important, and indeed a decisive factor. Especially is this so, of course, when a plaintiff's delay is considered in conjunction with such effect as it has had upon the conduct of the other party to the proceedings. In *R v Stafford Justices* [1940] 2 KB 33 the English Court of Appeal had to consider the refusal of a Divisional Court, in the exercise of its discretion, to issue a writ of certiorari for the purpose of quashing an application to divert a public highway under the Highways Act 1835. The Justices granted a certificate on 3 January 1938, and thereafter builders proceeded with their operations in reliance on the certificate, erecting houses so as to encroach on the old footpath. The local authority became aware of the position on or before 26 November 1938; but it was not until 31 March—over four months later—that the proceedings were begun. The Divisional Court held that the delay was too long, and that in the circumstances it disentitled the local authority to the relief claimed. On appeal Sir Wilfrid Greene said at p 46:

> "Quite apart from what had happened before that, it seems to me that that delay of five months before applying to the Court is, in the circumstances, quite unwarrantable. I cannot see what justification there can be and what special privilege a local authority has got to take longer over urgent operations than anybody else. If, in November, the position was realized by the competent officer of the Council, a position which was realized after a considerable period had already

elapsed and operations were going on, it was at that time that quick and speedy application for relief was obviously called for, instead of which five months' delay took place before the application was launched. I should have considered myself that that circumstance alone was one which ought to prevent the Court from granting any relief on the facts of the case: but it is not necessary to rely on that alone. The delay, looking at the delay by itself, must in my judgment be carried back, not to November, 1938, but to January of that year, when the full facts as at the date of the granting of the certificate were known to the Council through their surveyor. That delay is a very long one, but in the interval the Council had, by their conduct, encouraged and permitted the builders to do something which, if the old highway had never been stopped up, was entirely illegal. So long as the old highway remains open, the builders have no right whatsoever to build houses across it, and the effect of taking any step which will open up that highway again will be to put the builders in the position of having illegally obstructed the old footpath by building houses upon it, which incidentally we are told they have sold to purchasers. The position would be really a ridiculous one, if this Court, at this stage, and in the light of what has happened, were to take a course which would result in reopening that old footpath as a public highway, with all the consequences which flow from its status as a public highway."

I have not failed to notice that the period of delay was four months, not five months as the learned Master of the Rolls stated it; but it does not seem to me to alter the principle expounded in the decision. It may be thought that the facts which gave rise to his observations bear some resemblance to those of the present case.

One other authority will suffice—*R v Aston University Senate* [1969] 2 QB 538; [1969] 2 All ER 964. That was a decision of a Divisional Court consisting of Lord Parker CJ and Donaldson and Blain JJ, the last part of the headnote of which reads:

> ". . . that accordingly there had been a breach of natural justice. But that inasmuch as prerogative orders were discretionary remedies and *should not be made available to those who slept upon their rights* the applicants by their inaction between December 1967 and July 1968 had forfeited any claim to relief."

At p 555; 976 Donaldson J, delivering the leading judgment, said:

> "In my judgment it is impossible to project subsequent attitudes backwards in point of time and to determine what the examiners would have done if they had heard the students' allegations, before making a decision.
>
> In this situation I regard the time factor as decisive. The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights. Mr Pantridge's complaint is that he was not allowed to re-sit the whole examination in June 1968, and, if successful, proceed to the pass degree in the 1968–69 academic year, yet he did not even apply to move this Court until July 1968. By such inaction, in my judgment he forfeited whatever claims he might otherwise have had to the Court's intervention."

At p 559; 979 Blain J came to a similar conclusion. Lord Parker CJ gave his general concurrence.

An instance in another jurisdiction of the refusal of the writ for delay in circumstances bearing some resemblance to those of this case may be found in *R v Board of Broadcast Governors* (1962) 33 DLR (2d) 449, a decision of the Ontario Court of Appeal.

Having regard to the chronological summary of events which appears earlier in this judgment, I have been driven quite inevitably to the conclusion that by 12–13 December 1968, or by 11 February 1969 at latest, the moment had arrived in this case when the respondents were faced with the necessity either of accepting the decision of the Board or of issuing proceedings in the Supreme Court immediately praying that Court to set aside whatever had already been done, and to prohibit any further determination of the matter by the Board. It might indeed be said, and I understood Mr Somers so to contend, that that moment had arrived even earlier; and that as at July 1968, the date of the hearing of the prohibition proceedings in the Supreme Court, the time had already come when an application to the Supreme Court to stay proceedings on the ground of bias could no longer be delayed. Whether this last submission be good or not I am of opinion that on 12–13 December 1968 when the Board proceeded in the face of counsel's protest to hear the specified departure application, or at least on 11 February 1969, when it issued its interim written decision upon it, the respondents could wait no longer.

At this moment they were fully seised of all the indicia of predetermination upon which they now rely, except numbers 11, 12, and 13 in the list which I have enumerated; but these add so very little to the rest that they must be held to amount to embroidery only. All the matters of real substance upon which the respondents relied before Wilson J or before us, had been fully brought to their attention by 11 February 1969, and indeed it seems to me some considerable time earlier. Now on this day, although it was perfectly clear from the contents of the written interim decision issued by the Board, that the Board intended to grant the application for a specified departure, it had still not yet formally done so. Some conditions still remained to be imposed, without the definition of which the Board was not willing to issue its formal final decision. It might be said that the conditions perhaps concerned peripheral matters only; but the Board was not willing to decide the matter formally leaving them to be resolved later. On the other hand it did not consider them of sufficient importance to warrant protracted detailed consideration by the whole Board. It therefore adopted the procedure of allowing the parties to confer, then sitting for a formal consideration of the matters remaining at issue, and in the event referring certain of the details to Miss Nancy Northcroft, to be settled by her on the spot. I must say something later in this judgment about the arguments raised by this reference. But for the purposes of the topic which I am now discussing—that of delay by the respondents—what is important is this: that by the date when the written interim decision of the Board was issued—11 February 1969—the respondents had in their hands all the material evidence supporting an inference of bias upon which they now rely; and yet they did not issue a writ praying the Supreme Court to halt the matter until 22 January 1970, nearly a year later.

Wilson J held that the delay of the respondents was excusable. In so holding he addressed himself only to the period supervening upon the final decision of the Board delivered on 4 September 1969. He considered that the delay from that date to 22 January 1970 was in the circumstances

shown not to be unreasonable. He began by dismissing that part of the delay between the reopening of the legal offices in January 1970 and the date of the issue and service of the writ. It was the period of two months before the vacation which might really be thought crucial, he said. The learned Judge thought that it was reasonable for the respondents to wait for a short time at least after 4 September 1969, to see if the other side approached them as to some compromise. Then, he said, Mr Marshall was a woolbuyer, and his business took him out of Christchurch. The fact that the respondents were represented by different solicitors appeared to Wilson J a matter of relevance. I think that these were all the factors he mentioned; and he came to the conclusion that the delay was not unreasonable.

I am of the clear opinion that in so concluding Wilson J wrongly directed himself as to the criteria by which the matter should have been governed, and took into account matters which were quite irrelevant to the question to be decided by him. It must have been small comfort to the appellants, for instance, to hear, in answer to their contention that they were lulled into security by the long delay, either that Mr Marshall was a woolbuyer and was out of Christchurch on his own business, or that the respondents were being advised by two different solicitors. What does seem to me of importance is the fact that, having in their hands all the evidence on which they now rely, they chose to wait from 11 February 1969—indeed one might as easily say from 13 December 1968—the date when the Board issued its oral interim decision on the specified departure application—for nearly a year before issuing a writ. That, it seems to me, is the crucial factor on this aspect of the matter.

During that year much was allowed to happen. It was argued before us for the respondents that the first significant event appears in the chronological summary under date 14 October 1969, when the appellant's contractors actually began physically to demolish the house on the Turner property. But much must have already happened before that; and the trouble and expense to which the appellants had been put in appearing before the County Council in May to discuss the conditions to be imposed, and in appearing before the Board on the same topic in August, on both of which occasions the respondents also made an appearance, must in themselves be a sufficient "detriment" to support a plea of election on the part of the respondents to accept the decision. It must be regarded as certain, moreover, that between February and October 1969 much preparatory work had already been done and very substantial expense incurred by the appellants with their engineers, architects, quantity surveyors and builders, for by 11 November things had gone so far that an oral contract was (as Wilson J found as a fact) entered into binding the parties, at a price already negotiated (subject to revision) at $196,000. In all the circumstances I have not the slightest doubt that Wilson J should have refused relief on this ground alone; and I am of opinion that he exercised his discretion in this regard on two errors of principle. First he considered the relevant delay as running from 14 October 1969, whereas he should have considered it as from December 1968 or February 1969. And second, he considered the justification of the delay exclusively from the point of view of the respondents, deciding that they might reasonably be excused, over the short period of delay which he considered relevant, for not making up their minds

sooner. He should have considered the matter from the point of view of the appellants, and have directed his mind to inquiring whether they had been led to alter their position to their detriment in reliance on the respondents' apparent acceptance of the Board's decision; and he did not.

It seems to me beside the point to say: but in February 1969 there was as yet no "decision" of the Board—only an intimation of its intention to give one. This is perfectly true, if one inquires whether the "decision" of 11 February was a formal one, or one from which the Board could still in law retreat. But it was a positive intimation of the Board's intention, in due course, formally to authorise the special departure. and I have no doubt that it was a sufficiently firm intimation to require the respondents, so soon as they received it, to make up their minds whether to accept the decision or to attack with proper formality the jurisdiction of the tribunal issuing it.

For the two reasons which I have endeavoured to state, I am of opinion that Wilson J should have refused the relief sought on the ground of delay. It remains to consider two other grounds on which the respondents sought, and obtained, relief—(a) the substitution of Mr Tutt for Mr Beaumont during the course of the special departure proceedings and (b) the "conditions" ultimately imposed, authorising Miss Northcroft to decide certain matters relating to the new building to be erected. I do not propose to deal with these matters; I have had the advantage of reading in advance what my brother Richmond has said about them in the judgment which he is about to deliver, and I agree with him.

I would allow the appeal.

RICHMOND J. I have had the advantage of reading in advance the judgments which have just been delivered by the Chief Justice and by Turner J. I agree with the conclusions at which they have arrived as regards the effect of delay in commencing the present proceedings. In these circumstances I prefer to leave open for future decision the exact test of "bias" which should be applied in the case of a Town and Country Planning Appeal Board. I do think however, that the question whether such a Board has so predetermined a particular issue as to be disqualified from sitting in a later but related case should be approached in a realistic and not an artificial way. As Turner J has pointed out. a decision arrived at by the Board in one case may virtually dictate the result of a different case and I agree with him that something more must be established than a recognition by the Board of the compulsive effect of the earlier decision.

Apart from the question of bias there were, however, two other submissions made on behalf of the respondents.

The first of these submissions arises out of a change of membership in the Board as between the original hearing in December 1968 of the application for a specified departure, and the final hearing on 14 August 1969. The Board at the first of these hearings comprised Mr Kealy (as Chairman) and Messrs Stephens, Beaumont and Macarthur (as members). At the final hearing Mr Beaumont did not sit as a member of the Board. His place was taken by a Mr Tutt. It appears that the reason for the change was quite a simple one. Mr Beaumont was a member of the then Special Town and Country Planning Appeal Board and sat as a member of the No 1 Board at the first hearing pursuant to a direction given by the Chairman under s 39A (5) of the Town and Country Planning Act 1953. In the meanwhile Mr Tutt was appointed a member of the

No 1 Board on 8 July 1969 in the place of a Mr Whittlestone and Mr Beaumont in the interim period had returned to his duties as a member of the Special Board.

Wilson J for reasons given in his judgment, took the view that the "interim" decision given after the first hearing was a statement of intention only and not technically a final decision upon the matter with which it dealt. I agree with this view and it follows, as Wilson J pointed out, that Mr Tutt was a party to the formal decision of a matter on which he had heard no evidence or submissions. The Judge held nevertheless that as the respondents had taken part in the final hearing without objection to Mr Tutt sitting as a member of the Board they were precluded from setting up this change of membership in the present proceedings. The learned Judge followed the decision of Stanton J in *Muir v Franklin Licensing Committee* [1954] NZLR 152. In this Court Mr Leggat contended that that case is distinguishable because Stanton J expressly found that no injustice had resulted. In my opinion the authorities referred to in the *Franklin Licensing* case clearly establish that a party who has acquiesced in the hearing of a matter by a tribunal one or more of the members of which has not sat throughout the whole of the hearing is normally precluded from afterwards raising that objection. In the present case the final hearing of the application for a special departure was entirely concerned with settling a number of conditions. There is no suggestion in the evidence that it formed any part of that hearing to review the substantial question which had been dealt with at the original hearing, namely whether or not the present appellants would be allowed to erect a supermarket on the site at all. Nor does it appear that any question arose of reviewing the earlier decision limiting the size of the supermarket to a floor area not exceeding 8,000 square feet or any of the other limitations then imposed, except only the requirement as to the minimum number of off-street parking spaces to be provided. In my view the questions dealt with at the second hearing were all of a kind with which Mr Tutt could sensibly and fairly deal notwithstanding his absence from the original hearing. There is no evidence of any such grave injustice as might persuade the Court, notwithstanding the acquiescence of the respondents in Mr Tutt sitting as a member of the Board, to grant a writ of certiorari on this particular ground. In my opinion therefore Wilson J was entirely correct in the opinion which he expressed on this particular branch of the case.

The final submission made by the respondents is that the eventual decision of the Board was void and of no legal effect by reason of the allegedly unlawful delegation to Miss Nancy Northcroft, a town planner and architect, of powers which were lawfully exercisable only by the Board itself. The particular conditions imposed by the Board in its final decision which are attacked on this ground are conditions, 2, 5, 7 and 18, which are as follows:

> "2 That the supermarket of 8,000 square feet be sited not closer than 20 feet to the widened line of Memorial Avenue or closer than 20 feet to the south-eastern boundary of the site and that the main door entrance to the supermarket be sited as far from Memorial Avenue as practicable, and further that the external appearance (including colour) of the supermarket be to the approval of Miss Nancy Northcroft.

"5 That the site be screened by suitable planting satisfactory to the said Miss Northcroft.

"7 That landscaping and planting be carried out at the earliest possible opportunity to the satisfaction of the said Miss Northcroft.

"18 That where practicable conditions be complied with before any business is commenced—any dispute to be settled by Miss Northcroft whose decision shall be final and binding on the parties."

Wilson J found on the evidence that the respondents did not object to the designation of Miss Northcroft in the foregoing conditions upon the ground of possible bias or impartiality arising from the fact that she had at all times been acting as a town planning consultant employed by the appellants. They did however, at the final hearing before the Board, object to her designation in the foregoing conditions on the ground that it was not legally competent for the Board to impose conditions which in effect delegated to some individual person functions which were exercisable by the Board alone. The learned Judge came to the conclusion that the effect of the conditions was to delegate to Miss Northcroft its own judicial functions under the guise of imposing conditions. Accordingly he held that the conditions in question were ultra vires the Board and invalid. He further held that the invalid conditions were not severable as the result would be to leave the Board's order incomplete and more detrimental to the respondents.

It was accepted by Mr Somers that except in cases of express provision to that effect or of necessary implication a tribunal entrusted with judicial as opposed to merely administrative duties cannot delegate the performance of such judicial duties to someone else. Reference in this connection may be made to *Barnard v National Dock Labour Board* [1953] 2 QB 18; [1952] 2 All ER 424, Mr Somers however contended that in the present case the Board acted intra vires the powers conferred upon it by s 35 (1) of the Town and Country Planning Act 1953 (as it stood prior to amendment by the Town and Country Planning Amendment Act 1966) whereby the Board was empowered to give its consent to a specified departure either unconditionally or "subject to such conditions as the Board thinks fit." I should add by way of explanation that it was common ground that the present application was properly considered by the Board pursuant to the provisions of s 35 as they stood prior to the 1966 amendment.

It seems to me that there is a fundamental difference between the duties conferred upon Miss Northcroft by conditions 2, 5 and 7, on the one hand, and by condition 18. Under the first three conditions her task is to set a standard using her own skill and judgment. It is a situation closely analogous to that which arises in building contracts and in commercial contracts containing provisions whereby something has to be done to the satisfaction or approval of an architect, engineer or other person having special technical skill and qualifications. The distinction between such a person (often referred to as a "certifier") and an arbitrator was discussed at length in *Nelson Carlton Construction Co Ltd (in Liquidation) v A C Hatrick (NZ) Ltd* [1964] NZLR 72 (SC); [1965] NZLR 144 (CA). Similar questions were dealt with by Devlin J in *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 WLR 963, 974; [1954] 3 All ER 136, 145. That learned Judge said:

"So far as I am aware, there is no case in which a certifier who has to certify only according to his own standards, has been held to be an arbitrator."

In my view the effect of conditions 2, 5 and 7 is to impose conditions whereby the external appearance of the supermarket and landscaping and planting are required to be carried out to standards set by Miss Northcroft by reference to her own skill and experience. They do not purport to confer upon her an arbitral status. In my opinion therefore those three conditions cannot be attacked upon the basis that they purport to confer on Miss Northcroft a judicial function. Mr Erber contends however that it is ultra vires the Board to confer upon any other person the function of settling some detail involved in any condition imposed by the Board. I cannot accept this view, nor do I see any good reason to restrict the ordinary meaning of the language of s 35 (1) of the Act empowing the Board to grant the consent "subject to such conditions as the Board thinks fit." If one person contracts to buy goods from another provided they are of a quality approved by, or to the satisfaction of, some named third person then in ordinary language such a provision is a condition of the contract. There is nothing in s 35 or elsewhere in the Act which requires the Board to settle every last detail of the conditions which it seeks to impose and in my view, in the case of conditions 2, 5 and 7, the Board neither abrogated its own functions nor delegated to Miss Northcroft a judicial function.

Condition 18, however, stands on a different footing. It contains the words "any dispute to be settled by Miss Northcroft whose decision shall be final and binding on the parties." These words clearly purport to confer upon Miss Northcroft the powers of an arbitrator.

I say at the outset that I agree with Mr Somers that the powers of Miss Northcroft under condition 18 are limited to the settlement of disputes as to whether or not the preceding words of condition 18 have been complied with, that is to say "that where practicable conditions be complied with before any business is commenced." These words in themselves are in my view a perfectly valid condition which it was within the powers of the Board to impose. The question therefore is whether the Board was also empowered to set up a special tribunal to determine whether or not a condition validly imposed by it had in fact been complied with. I am very doubtful whether it had this power. It is to be observed that there is no obligation cast upon a Town and Country Planning Appeal Board to police compliance with its own decisions. Such a duty is in effect cast upon the local body by s 33 (2) of the Act and one way in which conditions imposed by the Board may be enforced is by means of a prosecution under s 50A of the Act. That section makes it an offence (inter alia) to act in contravention of any condition imposed by the Board in exercising any power conferred by the Act. A breach of such a condition can also be the subject of ordinary proceedings by way of injunction. I am accordingly much inclined to the view that the final words of condition 18 go beyond the power of the Board to impose conditions. They purport to appoint an arbitrator whose decision would in effect oust the ordinary jurisdiction of the Courts to determine the question of compliance or non-compliance with a condition properly imposed by the Board.

It is not however necessary finally to decide this point, because in any event I am of opinion that the final part of condition 18 is severable. Similar questions have arisen in England in connection with conditions imposed as incidental to a planning permission. Mr Somers referred us to various authorities in this connection but it will suffice to mention only

Kent County Council v Kingsway Investments (Kent) Ltd [1970] 1 All ER 70 (HL). In that case the question of severance was discussed in some detail by their Lordships and the majority (Lord Reid, Lord Morris, Lord Upjohn and Lord Donovan) clearly took the view that severance of an ultra vires condition is permissible in proper cases. There was some difference of opinion as to the exact test to be applied in deciding whether or not severance is or is not permissible in any given case. For myself I would respectfully adopt what was said on this subject by Lord Morris (at p 86) in the course of delivering an opinion with which Lord Donovan agreed. He said:

> "There might be cases where permission is granted and where some conditions, perhaps unimportant or perhaps incidental, are merely superimposed. In such cases if the conditions are held to be void the permission might be held to endure just as a tree might survive with one or two of its branches pruned or lopped off. It will be otherwise if some condition is seen to be a part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it. In his judgment in *Hall and Co Ltd v Shoreham-by-Sea Urban District Council* Willmer LJ pointed to the contrast between a case in which one or two trivial conditions might be held to be ultra vires (where it would be difficult to justify saying that the whole permission failed) and a case in which conditions are 'fundamental to the whole of the planning permission' in which case the planning permission would fail. In the same case Pearson LJ differentiated between conditions which are 'essential, or at least important,' and those which are 'trivial or at least unimportant.' "

It will suffice to adopt the foregoing test for the purposes of the present case (while recognising that in some future case it may require to be decided whether a test more liberal in favour of severance should be adopted). In the present case the final words of condition 18 are in my view certainly not "fundamental to the whole of the planning permission" but are in their nature merely incidental and superimposed upon the condition validly imposed by the earlier words. I have no doubt that the final words can be severed and that when that is done the earlier words remain perfectly workable. Any dispute would be referable to the Courts.

For the reasons which I have endeavoured to express I am of opinion that the appeal should be allowed.

Appeal allowed.

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