HIGH COURT OF JUSTICE (CHANCERY DIVISION)—18TH JULY 1967

COURT OF APPEAL—1ST NOVEMBER 1967

HOUSE OF LORDS—9TH, 10TH, 11TH, 12TH AND 16TH JUNE AND 29TH JULY 1969

Wiseman and Another *v.* Borneman and Others[1]

Surtax — Procedure — Tax advantage — Counteraction — Reference to Tribunal on whether prima facie case for proceeding—Taxpayer not entitled to be heard by Tribunal or to see certificate and counter-statement of Commissioners of Inland Revenue before decision reached—Finance Act 1960 (8 & 9 *Eliz.* 2 *c.* 44), *s.* 28(4) *and* (5).

Having been notified that the Commissioners of Inland Revenue had reason to believe that s. 28, *Finance Act* 1960, *might apply to them in respect of certain transactions, so as to require counteraction of the resulting tax advantages, the Plaintiffs, a husband and wife, delivered statutory declarations under s.* 28(4) *claiming that s.* 28 *did not apply. The Commissioners of Inland Revenue informed the Plaintiffs that they intended (pursuant to s.* 28(5)) *to submit the declarations, together with a counter-statement, to the Tribunal constituted under s.* 28, *and, in reply to an enquiry, that the Plaintiffs would be given a copy of the counter-statement if the Tribunal found that there was a prima facie case for proceeding. The Registrar of the Tribunal informed the Plaintiffs that it was not the practice of the Tribunal, when considering whether or not there was a prima facie case for proceeding, to hear the parties orally or to furnish the taxpayers with copies of the certificate or of any counter-statement submitted by the Commissioners of Inland Revenue. The Plaintiffs thereupon issued an originating summons against the members of the Tribunal individually and the Commissioners of Inland Revenue claiming declarations that the Tribunal were bound to give the Plaintiffs an opportunity* (a) *of dealing with the Commissioners' certificate and counter-statement and* (b) *of addressing argument to the Tribunal and adducing evidence.*

The members of the Tribunal and the Commissioners of Inland Revenue applied to the Chancery Division for an Order striking out the originating summons as disclosing no reasonable cause of action. It was contended for the Plaintiffs that the procedure adopted by the Tribunal was not in accordance with the principles of natural justice. For the members of the Tribunal and the Commissioners of Inland Revenue it was contended that the procedure under s. 28(4) *and* (5) *was not in the nature of a hearing or appeal, and that the Tribunal was required to decide whether or not there was a prima facie case on the basis only of the documents specified in s.* 28(5). *Before the House of Lords the question was, not whether the originating summons should have*

[1] Reported (Ch. D.) [1968] Ch. 334; [1967] 3 W.L.R. 1372; [1967] 3 All E.R. 546; 111 S.J. 606; (C.A.) [1968] Ch. 429; [1968] 2 W.L.R. 320; [1967] 3 All E.R. 1045; 111 S.J. 892; (H.L.) [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275.

been struck out, but whether the rules of natural justice required that the Plaintiffs should see any counter-statement and be entitled to reply and have their reply considered by the Tribunal.

Held, *in the Chancery Division, that the procedure under s.* 28(5) *did not include a hearing by the Tribunal.*

Held, *in the House of Lords,* (1) *that the Plaintiffs were not entitled to see the counter-statement before the Tribunal decided whether or not there was a prima facie case;* (2) *that the Tribunal had power to seek further comment from the taxpayer if in any unusual case they thought proper, but they must allow the Commissioners of Inland Revenue to reply to any such comment.*

The Plaintiffs issued an originating summons, to which the individual members of the Tribunal constituted under s. 28, Finance Act 1960, and the Commissioners of Inland Revenue were Defendants, asking for a declaration (1) whether, in determining under s. 28(5) whether there was a *prima facie* case for proceeding against them under s. 28 in respect of certain transactions, the Tribunal were bound to give the Plaintiffs an opportunity to deal with the certificate and counter-statement of the Commissioners of Inland Revenue, and (2) whether the procedure under the practice of the Tribunal was in accordance with natural justice. The Defendants applied for an Order striking out the summons on the ground that it disclosed no reasonable cause of action.

The case came before Pennycuick J. in the Chancery Division on 18th July 1967, when judgment was given in favour of the Defendants, with costs, ordering the summons to be struck out.

J. P. Warner for the first five Defendants (the members of the Tribunal).

Peter Scott for the sixth Defendant, the Commissioners of Inland Revenue.

Peter Foster Q.C. and *Michael Miller* for the Plaintiffs.

The following cases were cited in argument in addition to that referred to in the judgment: *Anisminic Ltd.* v. *Foreign Compensation Commission* [1968] 2 Q.B. 862; *Punton* v. *Ministry of Pensions and National Insurance* [1963] 1 W.L.R. 186.

Pennycuick J.—In this originating summons the Plaintiffs are Mr. Cyril Robert Wiseman and his wife, Mrs. Millicent Edith Wiseman. There are six Defendants, the first five of whom are Tribunal constituted by s. 28 of the Finance Act 1960. The sixth Defendant are the Commissioners of Inland Revenue. By the originating summons the Plaintiffs seek certain declarations as to the manner in which the Tribunal ought to carry out their duties at a certain stage in the procedure under s. 28. I have before me today two motions, one on behalf of the members of the Tribunal, the first five Defendants, and the other on behalf of the Commissioners of Inland Revenue, the sixth Defendant, whereby they seek an order striking out the originating summons on the ground that it discloses no reasonable cause of action, and there are alternative grounds.

The facts of the case are quite simple. In order that they may be intelligible I will first read the statutory provisions under which the issue arises.

Section 28 provides as follows:

"(1) Where—(*a*) in any such circumstances as are mentioned in the next following subsection, and (*b*) in consequence of a transaction in

(Pennycuick J.)

securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained, a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions". There is a proviso which I need not read. Then subs. (2) sets out at length the circumstances mentioned in subs. (1). I need not read them. The procedural provisions are contained in the following subsections. "(3) Where this section applies to a person in respect of any transaction or transactions, the tax advantage obtained or obtainable by him in consequence thereof shall be counteracted by such of the following adjustments, that is to say an assessment or additional assessment, the nullifying of a right to repayment or the requiring of the return of a repayment already made (the amount to be returned being chargeable under Case VI of Schedule D and recoverable accordingly), or the computation or recomputation of profits or gains, or liability to tax, on such basis as the Commissioners of Inland Revenue may specify by notice in writing served on him as being requisite for counteracting the tax advantage so obtained or obtainable. (4) The Commissioners of Inland Revenue shall not give a notice under the foregoing subsection until they have notified the person in question that they have reason to believe that this section may apply to him in respect of a transaction or transactions specified in the notification; and if within thirty days of the issue of the notification the said person, being of opinion that this section does not apply to him as aforesaid, makes a statutory declaration to that effect stating the facts and circumstances upon which his opinion is based, and sends it to the Commissioners, then subject to the next following subsection this section shall not apply to him in respect of the transaction or transactions. (5) If, when a statutory declaration has been sent to the Commissioners under the foregoing subsection, they see reason to take further action in the matter—(*a*) the Commissioners shall send to the tribunal a certificate to that effect, together with the statutory declaration, and may also send therewith a counter-statement with reference to the matter; (*b*) the tribunal shall take into consideration the declaration and the certificate, and the counter-statement, if any, and shall determine whether there is or is not a prima facie case for proceeding in the matter, and if they determine that there is no such case this section shall not apply to the person in question in respect of the transaction or transactions". There is a proviso I need not read. "(6) Any person to whom notice has been given under subsection (3) of this section may within thirty days by notice to the clerk to the Special Commissioners appeal to the Special Commissioners on the grounds that this section does not apply to him in respect of the transaction or transactions in question, or that the adjustments directed to be made are inappropriate; and if he or the Commissioners of Inland Revenue are dissatisfied with the determination of the Special Commissioners they may require the appeal to be re-heard by the tribunal. (7) For the purposes of this section the tribunal shall consist of—(*a*) a chairman, being either the chairman of the Board of Referees or a person appointed by the Lord Chancellor, for a specified period or in relation to a specified case, to act as chairman of the tribunal in the absence of the chairman of the Board of Referees on account of illness or for any other reason, and (*b*) two or more persons appointed by the Lord Chancellor as having special knowledge

A of and experience in financial or commercial matters. (8) The provisions of section two hundred and forty-seven of the Act of 1952 (appeals against directions as to undistributed income) as to the giving of notices, the application of provisions of that Act relating to appeals, and the powers and duties of the Special Commissioners, shall with the necessary modifications apply in relation to appeals under this section; and subsections B (3) and (4) of the said section two hundred and forty-seven (rehearings, statement of case on a point of law, etc.) shall apply in relation to appeals under this section and to the said tribunal as they apply in relation to appeals under that section and to the Board of Referees."

The scheme of that section then is that the Commissioners of Inland Revenue may specify by notice in writing under subs. (3) to the person in question C whatever step is requisite for counteracting the tax advantage obtained by him. Against that notice there is under subs. (6) an appeal to the Special Commissioners with an optional further appeal to the Tribunal. Interposed between the notice under subs. (3) and the appeal under subs. (6) are subss. (4) and (5), under which, before giving the notice, the Commissioners are bound to notify the person in question that they have reason to believe the section may apply D to him and he has the right, if he is of the opinion that the section does not apply to him, to make a statutory declaration to that effect, stating the facts and circumstances upon which his opinion is based. The Commissioners, if they wish to proceed with the matter, are to send a certificate to that effect to the Tribunal, together with a counter-statement. The Tribunal then has to take into consideration the declaration, certificate and counter-statement and deter- E mine whether there is a *prima facie* case for proceeding in the matter. That intermediate procedure is wholly for the advantage of the taxpayer, for this reason, that if the Tribunal at that stage determines that there is not a *prima facie* case that is the end of the matter and it is not open to the Commissioners to take the matter any further. On the other hand, if the Tribunal does determine there is a *prima facie* case, then the matter proceeds on the notice subject F to any decision made on appeal.

It will be remembered that subs. (8) incorporates certain provisions of the Income Tax Act 1952 relating to appeals. It is necessary to refer to those sections, not only for the particular provisions relating to appeals, but because those provisions are part of a scheme relating to surtax directions which is in many respects comparable to the scheme under s. 28 of the Finance Act 1960. G I should refer first to s. 245 of the Income Tax Act 1952, which confers upon the Special Commissioners powers to direct that income of corporate bodies is to be deemed to be income of their members for the purposes of surtax. Section 247(1) is in these terms:

> "A company which is aggrieved by any direction given under section two hundred and forty-five of this Act may appeal to the Special Com- H missioners against the direction by giving notice of appeal to the clerk to the Commissioners within twenty-one days"—it is now 30 days—"after the date of the notice, and the Commissioners shall hear and determine the appeal, subject as herein provided, and the provisions of this Act relating to appeals against assessments shall, with any necessary modification, apply for the purposes of an appeal under this subsection."

I The earlier provisions of the Act relating to appeals will be found in s. 51 and subsequent sections of the Act. They contain provisions as to notice, representation, evidence, discovery, appeal to the High Court and other matters. Those provisions are all incorporated by s. 28 into the procedure under that section.

(Pennycuick J.)

It is necessary now to refer to s. 251 of the 1952 Act, because that section contains provisions closely related to those contained in subss. (4) and (5) of s. 28 of the 1960 Act. Section 251 reads, so far as now material, as follows:

> "(1) Where the Special Commissioners have—(*a*) issued a notice requiring any company to furnish them with particulars under subsection (1) of the last preceding section as respects any year or other period; or (*b*) given a direction under section two hundred and forty-five of this Act as respects any year or other period in relation to any company to which no such notice has been issued as respects that year or period, the directors of the company, if they are of opinion that there has not been and will not be any avoidance of the payment of surtax through failure to distribute to the members of the company a reasonable part of its income for that year or period, may make a statutory declaration to that effect stating the facts and circumstances upon which their opinion is based. (2) In any case where such a statutory declaration as aforesaid is sent to the Special Commissioners within twenty-eight days of the issue of such a notice or the giving of such a direction as aforesaid, the Special Commissioners shall not, unless they see reason to the contrary, take any further action in the matter. (3) If in any such case the Commissioners see reason to the contrary, they shall send to the Board of Referees a certificate to that effect, together with the said statutory declaration, and shall at the same time transmit a copy of the certificate and of the statutory declaration to the Commissioners of Inland Revenue. (4) The Commissioners of Inland Revenue may at any time within twenty-eight days after receiving the copy of the certificate and the copy of the statutory declaration submit to the Board of Referees a counter-statement with reference to the matter. (5) The Board of Referees shall in any such case take into consideration the declaration and the certificate, and the counter-statement, if any, and shall determine whether there is or is not a *prima facie* case for proceeding in the matter. (6) The determination of the Board of Referees under this section shall be final and conclusive, and, where the Board of Referees determines that there is a *prima facie* case for proceeding, the notice or direction aforesaid shall have effect as if it had been issued or given on the date on which notice of the determination of the Board is given to the company."

It will be seen that there is close resemblance between the provisions of s. 251 and those in subss. (4) and (5) of s. 28.

I will interpose at this stage that it so happens that I was myself the chairman of the Board of Referees for about ten years and I have inevitably a considerable recollection of how s. 251 worked in practice. I had some doubt as to whether I ought to hear this motion, but I mentioned my difficulty and I was pressed by counsel for all parties to continue with the hearing of the motion.

The facts in this case are that the Commissioners of Inland Revenue have taken preliminary steps under s. 28 of the 1960 Act with a view to making adjustments as a result of certain transactions carried out by the Plaintiffs a good many years ago. I am not at all concerned with the merits of the claim by the Commissioners of Inland Revenue. What has happened procedurally is set out in the evidence, and I think I cannot do better than read a few paragraphs from some three affidavits.

Mr. Weston, an assistant solicitor to the Inland Revenue, says this:

> "The Originating Summons in this matter issued by the Plaintiffs arises out of the action of the Commissioners of Inland Revenue in pro-

A ceeding against the plaintiffs under section 28 of the Finance Act, 1960, in respect of transactions relating to shares in Meyers Brooks & Co., Ltd. On 23rd February 1967, the Commissioners of Inland Revenue issued a Notification to each of the Plaintiffs in accordance with section 28(4) of the Finance Act, 1960, that they had reason to believe that the said section 28 as amended by section 25 of the Finance Act, 1962, might apply to each of B them in respect of the said transactions which were described in the notification. On 23rd March 1967, there were delivered to the the Commissioners of Inland Revenue by hand Statutory Declarations made by the respective Plaintiffs in pursuance of Section 28(4) stating the facts and circumstances upon which their opinions that Section 28 did not apply to him or her in respect of the transactions in question were based. The Com- C missioners of Inland Revenue considered the said statutory declarations and saw reason to take further action in the matter and accordingly instructed the Solicitor of Inland Revenue to prepare a Counterstatement and subsequently in accordance with Section 28(5) to submit the matter to the Tribunal constituted for the purposes of Section 28. Messrs. Beer & Company, solicitors for the Plaintiffs, were informed that the Commis- D sioners intended to submit the papers to the Tribunal and on 7th June 1967, I wrote to Messrs. Beer & Company stating that the matter had not yet been submitted to the Tribunal but that in accordance with the usual practice I would inform them when it had been submitted to the Tribunal."

The affidavit then goes on to deal with another point, which is the subject E matter of different proceedings and as to which I will say nothing.

The history is taken up by Mr. Cowper, who is the Registrar of the Tribunal. He says:

"My first knowledge of this matter was when I received a letter from Messrs. Beer & Company, the Plaintiffs' solicitors, dated 12th May 1967, telling me that a certain case would be referred to the Tribunal, and that F their clients, the Plaintiffs, wished to be represented by Counsel at the hearing before the Tribunal, and asking me (*inter alia*) to arrange for copies of any certificate given by the Commissioners of Inland Revenue under s. 28 of the Finance Act, 1960, and of any counter-statement made by the Commissioners to be furnished to them." Then he exhibits a bundle of correspondence. He proceeds: "After receiving the said letter I G spoke by telephone to Mr. J. F. Beer, a member of the firm of Messrs. Beer & Co., and explained that it would not be in accordance with the practice of the Tribunal, when considering whether or not there was a *prima facie* case for proceeding, to hear the parties orally or to supply the taxpayers with copies of the certificate or of any counter-statement by the Commissioners; but that, if the Tribunal were to rule that there was a H *prima facie* case, and his clients in due course appealed to the Tribunal they would be supplied with copies of such documents and would be allowed representation at the hearing of the appeal." Further on, he proceeds: "I then received a letter from the Plaintiffs' solicitors dated 1st June 1967, in which they expressed their view that a party was entitled to be heard by the Tribunal, informed me that their clients intended to launch I proceedings forthwith to determine their rights, and asked to be supplied with a list of the names of members of the Tribunal".

Mr. Beer, the Plaintiffs' solicitor, has sworn an affidavit in answer, to which he exhibits the principal correspondence. He says:

(Pennycuick J.)

"The Plaintiffs' contention in this Action sufficiently appears from my letter of 5th May 1967". Then, later on: "The sale referred to in the Notices issued by the sixth Defendants took place in May 1957, and it is the Plaintiffs' contention that in these circumstances there is 'no *prima facie* case for proceeding in the matter'. The Plaintiffs therefore attach particular importance to the intended proceedings before the Tribunal under section 28(5) aforesaid, which will protect them, if they are successful, from further proceedings under section 28 in relation to a transaction now already ten years old. For these reasons the Plaintiffs will wish to adduce argument before the Tribunal and any necessary further evidence, should it be held that they are entitled to do so."

He then goes on to deal with the other action.

So the contention on behalf of the Plaintiffs is that at this stage, when the Tribunal is concerned to decide whether there is a *prima facie* case, the Plaintiffs should be entitled to be represented before the Tribunal and to adduce argument and evidence. The Tribunal does not accept that contention, and says that the Plaintiffs are not entitled to be represented at all at this stage or to produce any argument or further evidence to the Tribunal. In order to have this matter decided the Plaintiffs have issued the present originating summons. The summons does not set out altogether accurately the declarations which the Plaintiffs seek, and Mr. Foster, who appears for the Plaintiffs, has indicated that if the summons is allowed to proceed the questions he would like determined are these:

"(1) Whether the said Tribunal in determining the questions aforesaid, is bound to give the Plaintiffs an opportunity of dealing with the certificate and any counter-statement of the Commissioners of Inland Revenue of the kind mentioned in the said paragraph"—viz., s. 28(5) (*b*); "(2) whether the said Tribunal in determining the questions aforesaid is bound to give the Plaintiffs an opportunity of addressing argument to the Tribunal and of adducing evidence bearing on the said questions; and (3) whether the procedure which the said Tribunal intends to adopt in relation to the Plaintiffs is in accordance with the principles of natural justice."

Mr. Warner appears on the present motion for the five members of the Tribunal, and Mr. Scott, for the Commissioners of Inland Revenue, adopted his argument. Mr. Warner contended that for more than one reason the originating summons discloses no reasonable cause of action and that it would be right to strike it out accordingly. The principal ground upon which Mr. Warner relies is that the procedure under s. 28(4) and (5) is not in the nature of a hearing or appeal at all. It is a special procedure, designed wholly for the benefit of the taxpayer, under which the taxpayer and the Commissioners each send certain documents to the Tribunal. The Tribunal then, without hearing any argument or further evidence, decides whether on these documents there is a *prima facie* case for proceeding in the matter. If it decides there is not, the matter is killed stone dead. If, on the other hand, it decides there is a *prima facie case*, then, at that stage, the taxpayer has a full opportunity of appealing first to the Special Commissioners and then to the Tribunal. Mr. Warner points out that there is no provision in subss. (4) and (5) as to the hearing of an appeal. There is simply a provision for determining as to whether or not there is a *prima facie* case. An appeal comes in at the next stage, and it is at the next stage that all the provisions relating to appeals, including representation, argument and evidence, are available to both parties.

It seems to me that that contention is certainly well founded. The whole scheme of s. 28 is that this procedure under subss. (4) and (5) is interposed

A between formal notice by the Commissioners and appeals against that notice, and that particular procedure under subss. (4) and (5) is not intended to be by way of hearing at all. There is nothing in those subsections which in any way could import an intention that there should be something in the nature of a hearing, nor is there any injustice in the matter. There would of course be injustice in fact if the decision of the Tribunal at that stage were binding upon
B the taxpayer, but if the decision of the Tribunal is against the taxpayer then the taxpayer has a full opportunity of appealing to the Special Commissioners at that stage.

Then Mr. Warner points out that s. 28 reproduces a procedure which in 1960 had already been in force for over 30 years. That is the procedure with regard to surtax directions under the comparable provisions in the Income Tax
C Act 1952 which reproduces the provisions from the Finance Act 1927. There is equally no provision for a hearing, and equally it must be known to everybody who has been concerned with Revenue matters that there never was anything in the nature of a hearing at that stage of the Board of Referees being asked to decide whether or not there was a *prima facie* case. It is, I think, hardly conceivable that, when that state of affairs had persisted, under the
D provisions introduced in 1927, for over 30 years everyone knowing there was nothing in the nature of a hearing at that stage, Parliament should have inserted in the 1960 Act closely comparable provisions without making any provision as to a hearing if it had been the intention that there should be something in the nature of a hearing. The inference is irresistible that in introducing the provisions it did in the 1960 Act Parliament was intending that the same pro-
E cedure should be adopted as had for over 30 years been adopted in relation to surtax directions in which there was no hearing.

It seems to me on that main ground of principle there can only be one possible answer to the question which it is now sought to raise by the originating summons, namely, that the Tribunal is not bound to give the Plaintiffs an opportunity, by way of argument, further evidence or the like, of dealing with
F the Commissioners' certificate and counter-statement at this stage.

Mr. Foster made one specific point. It was this. Even if subss. (4) and (5) do not contemplate a hearing, it would still be in accordance with natural justice that the taxpayer should at this stage see the Commissioners' counter-statement and have an opportunity of answering it. I see force in that argument, but the short answer, I think, is that it is not what the Act has provided. The Act pro-
G vides quite specifically for the sending to the Tribunal of the certificate, statutory declaration and counter-statement and nothing else, and provides quite specifically that the Tribunal shall take into consideration those three documents and on the basis of those documents make its determination. I do not think it is possible to read into those provisions the further provision that the taxpayer is to have the opportunity of replying to the counter-statement. If the
H taxpayers were to succeed at all they would have to establish that there was intended to be something in the nature of a hearing before the Tribunal at this stage with all that that imports in the way of the requirement of natural justice.

I should, I think, mention two other points which were stressed by Mr. Warner. The first is that, as appears from the evidence, the matter has not yet been submitted to the Tribunal, and so it is said that the questions upon
I which declarations are sought are all hypothetical and future questions, and that it is well established that the Court will not as a rule answer hypothetical and future questions or questions relating to future and hypothetical liability. I was referred to the decision of the Court of Appeal in In re *Barnato* [1949] Ch. 258. I would be very reluctant to strike out the summons on that

(Pennycuick J.)

ground. Although the matter has not yet been formally put before the Tribunal, the time has arrived at which it will certainly be put before the Tribunal in the immediate future. A

The other ground is that a summons for a declaration is inappropriate as a method of determining upon the duties of an inferior tribunal; the proper method, Mr. Warner says, is by way of certiorari at a later stage. He further says that it is particularly inappropriate to join the members of the Tribunal as parties. I would be disposed to accept that argument. I have not, however, heard full agreement upon the point. It is one of considerable general importance, and having decided the matter in favour of the Defendants on the first issue, I do not propose to express a concluded view upon this point, and I expressly abstain from resting my decision upon it. B

For the reasons I have given, it seems to me that this summons does not raise any question which is open to serious argument in this Court, and I propose to strike it out accordingly. C

Warner—Will your Lordship make an Order on the originating summons that these proceedings be dismissed accordingly? I ask that the Plaintiffs pay the Defendants their costs of the proceedings, including the costs of this motion.

Scott—I make the same application on behalf of the Commissioners of Inland Revenue. D

Foster Q.C.—I cannot resist that. I ask your Lordship for leave to appeal. Apparently this is about as final an Order as one can imagine, but it has been held that it is an interlocutory Order, and therefore I ought to ask for leave.

Pennycuick J.—An appeal against the Order might not be a bad way of getting the matter determined quickly. E

Warner—I cannot resist that.

The Plaintiffs having appealed against the above decision, the case came before the Court of Appeal (Lord Denning M.R. and Diplock and Edmund Davies L.JJ.) on 1st November 1967, when judgment was given unanimously in favour of the Defendants, with costs. F

Quintin Hogg Q.C., G. B. H. Dillon Q.C. and *Michael Miller* for the Plaintiffs.

W. A. Bagnall Q.C. and *J. P. Warner* for the members of the Tribunal.

J. Raymond Phillips for the Commissioners of Inland Revenue.

The following cases were cited in argument in addition to those referred to in the judgments:—*B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395; *Punton* v. *Ministry of National Insurance* [1963] 1 W.L.R. 186; *Stafford* v. *Minister of Health* [1946] 1 K.B. 621; *Rex* v. *City of Westminster Assessment Committee* [1941] 1 K.B. 53; *Boswell* v. *Partridge Jones & John Paton Ltd.* [1941] 2 K.B. 300; *Rex* v. *Architects' Registration Tribunal* [1945] 2 All E.R. 131; *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180; *Reg.* v. *Deputy Industrial Injuries Commissioner* [1965] 1 Q.B. 456; *Errington* v. *Minister of Health* [1935] 1 K.B. 249. G H

Lord Denning M.R.—We need not trouble you, Mr. Bagnall.

Some years ago the Plaintiffs, Mr. and Mrs. Wiseman, had a transaction in securities. Quite recently the Revenue authorities decided to put into operation s. 28 of the Finance Act 1960. They say that Mr. and Mrs. Wiseman obtained a tax advantage in that transaction: that it was not an ordinary commercial transaction: and they propose to make an adjustment to counteract that tax advantage. In order to cancel a tax advantage, the Commissioners of Inland Revenue have to serve a notice under s. 28(3) specifying the adjustment which they propose to make. I will call it a "s. 28 notice". On receiving that notice the taxpayer can appeal to the Special Commissioners under s. 28(6), and thence to the special Tribunal set up under s. 28(7).

But it is provided that before the s. 28 notice is given the Commissioners are to carry out certain preliminaries provided by subss. (4) and (5) of s. 28. These preliminaries are specially inserted to protect the taxpayer. They are designed to ensure that the taxpayer is not harassed by a s. 28 notice unless the circumstances justify it. Subsection (4) requires that the Commissioners are not to give a s. 28 notice until they have notified the taxpayer that they have reason to believe that s. 28 applies to him. That is what I may call the "preliminary notification". If the taxpayer is of opinion that the section does not apply to him, he can within 30 days make a "statutory declaration" to that effect, stating the facts and circumstances upon which his opinion is based. If the taxpayer makes such a statutory declaration, the Commissioners must consider whether to take further action in the matter. They may decide to take no action, in which case the taxpayer goes clear. But they may decide to take further action. In that case they must send to the special Tribunal a "certificate" saying they propose to take further action. They may also send with it a "counter-statement" if they so wish.

Then there is this important provision:

> "The Tribunal shall" in any such case " take into consideration the declaration"—that is the statutory declaration—"and the certificate"—that is the certificate of the Commissioners—"and the counter-statement, if any"—that is the counter-statement of the Commissioners—"and shall determine whether there is or is not a *prima facie* case for proceeding in the matter."

If the Tribunal determine that there is no *prima facie* case, the taxpayer goes clear. But if they decide that there is a *prima facie* case, the Commissioners can then proceed to give a s. 28 notice, stating the adjustments necessary to counteract the tax advantage. An illustration of this procedure is given in *Commissioners of Inland Revenue* v. *Cleary*(1) [1968] A.C. 766.

In the present case the Commissioners have given the preliminary notification. The taxpayers have made the statutory declaration. The Commissioners have decided to take further action. They have sent to the Tribunal a certificate and a counter-statement.

Now at this stage the taxpayers have taken out an originating summons. They claim that, before the Tribunal determines whether or not there is a *prima facie* case, they are entitled to be heard; or, if not to be heard, at least to see the counter-statement of the Commissioners and to correct any statement in it to which they object: in short, to see the case against them and to put in an answer to it. They contend that, although s. 28 does not so provide, nevertheless natural justice requires it. Before Pennycuick J. it was contended that the taxpayer was entitled to be represented before the Tribunal and to adduce argument and evidence. That was clearly untenable, and the Judge rightly so

(1) 44 T.C. 399.

(Lord Denning M.R.)

held. Before us Mr. Hogg put the case much more moderately and effectively. He reminded us of the words of Lord Loreburn L.C. in *Board of Education* v. *Rice* [1911] A.C. 179, at page 182, that statutory tribunals

> "have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

They can determine their own procedure. If they so determine, they can dispense with an oral hearing, and allow written representation only. They must, however, always give a party fair opportunity for correcting or contradicting any relevant statement prejudicial to his view.

Mr. Hogg has presented, clearly as always, the principles and the authorities to us. But I must say there is a great difference between, on the one hand, a tribunal which has to decide on the rights and wrongs of the parties, and on the other hand, a tribunal which has to determine simply whether there is or is not a *prima facie* case. In seeing whether there is a *prima facie* case, a tribunal has, of course, to consider the case presented by one side: but it need not at that stage hear the other side. Diplock L.J. reminded us of the grand jury. They had to decide whether there was a true bill, that is, a *prima facie* case. They only heard one side. They did not hear the accused. We have canvassed other instances, such as an *ex parte* application to serve a writ out of the jurisdiction. The Master has to see if there is a *prima facie* case or a good arguable case: and he does so without at that stage hearing the other side. On the other hand, in committal proceedings before magistrates the accused must be present and be heard to argue there is no *prima facie* case.

In this case the question is to my mind resolved by the words of the Statute. It says that the Tribunal are to take into consideration: "the declaration", that is, the declaration of the taxpayer; "the certificate", that is, the certificate of the Commissioners of Inland Revenue; "and the counter-statement, if any", that is, the counter-statement of the Commissioners; "and shall determine whether there is or is not a *prima facie* case". When Parliament thus expressly states the matters which are to be taken into consideration, it is difficult to say that there is an implied obligation to take other matters into consideration. If the Tribunal were at this stage empowered to make a final determination, the Courts would readily imply that the taxpayer ought to be given a fair opportunity to see the counter-statement and to correct anything in it prejudicial to his interests. But as the inquiry is only to see if there is a *prima facie* case, there is no reason to make any such implication. Natural justice does not require it: because a *prima facie* case decides nothing except that there is enough to call for an answer. If the Tribunal decide that there is a *prima facie* case, the taxpayer will have full opportunity to see the counter-statement and to make his case before the Special Commissioners and the Tribunal.

I may add, as Pennycuick J. did, that s. 28 reproduces a procedure which has been in force for over 30 years. It is the procedure about surtax directions in the Finance Act 1927. In those cases there never has been anything in the nature of a hearing. The Board of Referees have only the documents which are specified in the Statute, and nothing else. They too have only to decide whether there is a *prima facie* case.

I agree with Pennycuick J. that this originating summons discloses no cause of action and should be struck out. I would dismiss this appeal.

Diplock L.J—I agree, and but for the fact that the argument in this Court has been largely based on some observations of mine in *Anisminic Ltd.* v. *Foreign Compensation Commission*(1) I should be content to say no more than that.

I should, however, point out that the observations in the *Anisminic* case were directed to the jurisdiction of a tribunal to make a determination whether a described situation existed or not; that determination, when made, being final subject to any appeal that might be provided therefrom. The observations were in no way concerned with a preliminary decision whether a *prima facie* case had been made out that a described situation existed which merited further enquiry as to whether or not it did. Where such a jurisdiction is conferred by Statute upon a person or a tribunal, one must in my view look at the Statute to see what are the materials upon which that preliminary decision is to be based. There is no *prima facie* presumption that Parliament intended that the rules of natural justice applicable to final determinations, whether subject to appeal or not, should be applied to this preliminary decision. Indeed, one does not have to look far in the practice of this Court to see that that kind of enquiry is dealt with frequently *ex parte*, and I need only mention an application for leave to serve a writ out of the jurisdiction under R.S.C. Ord. 11, r. 4, or an application for leave to apply for an order of prohibition, mandamus or certiorari under Ord. 53, r. 1. All these and many similar ones are dealt with without hearing the other side at all upon material which is produced by the applicant.

When one examines the procedure laid down in s. 28 of the Finance Act 1960, it is in my view quite apparent that the kind of determination with which we are concerned at this stage is the latter kind of determination, that is to say, a preliminary one made on the application *ex parte* of the Commissioners of Inland Revenue. Subsection (4) requires the Commissioners in the first instance to notify the taxpayer of their intention to serve a notice, and entitles the taxpayer, if he so wishes, to make a statutory declaration of his opinion that the section does not apply to him, stating the facts and circumstances on which his opinion is based. If he does that, then the Commissioners of Inland Revenue, if they wish to proceed further in the matter (which they need not do), make an application under subs. (5), which is plainly an *ex parte* applications, to the Tribunal to determine whether there is or is not a *prima facie* case for proceeding in the matter. The material which the subsection lays down shall by put before the Tribunal are the statutory declaration of the taxpayer, a certificate and a counter-statement, if the Commissioners of Inland Revenue desire to submit one. It is that material which the Tribunal is required by the express words of the Statute to take into consideration, and no other material.

The question to which they have to address their minds is: do these documents disclose a case which merits further enquiry as to whether the circumstances described in s. 28(1) exist in the case of that taxpayer? There is in my view no room in this procedure, and in the face of the express words of the Statute, for the application of the well-known doctrine to which Mr. Hogg has referred, that you must give to the other side an opportunity of commenting upon the material on which a Tribunal intends to act which is adverse to a particular party. That kind of case has got nothing to do with this present case: nor was it being dealt with in any way in the *Anisminic* case, which has been relied upon.

I agree that this appeal should be dismissed.

Edmund Davies L.J.—Although I find myself in agreement with my brethren, for once that fact does not induce in me a state of unbridled happi-

(1) [1968] 2 Q.B. 862, at p. 890.

(Edmund Davies L.J.)

ness. Even though we are here concerned with the material upon which the Tribunal should determine simply whether a *prima facie* case for issuing a s. 28(3) notice has been made out, rather than a final determination of the rights of the parties, if the taxpayer equally with the Commissioners of Inland Revenue (*a*) knew what material was being placed before the Tribunal, and (*b*) had an opportunity of commenting upon that material, I entertain no doubt that greater satisfaction would enure to the taxpayer than under the present one-sided system, and it might well result in a saving of costs on both sides. These are important considerations, which might well be considered in another place hereafter. But, having said that, I find myself compelled by the wording of s. 28(5) to agree to the dismissal of this appeal. That provision requires that "the Tribunal shall take into consideration the [statutory] declaration and the certificate and the counter-statement", and nothing else. It is upon those documents alone that the Tribunal has to "determine whether there is or is not a *prima facie* case for proceeding in the matter", and I do not think that the Tribunal can look at other material outside that specified.

However desirable in some respects it might be that the taxpayer should have an opportunity of making his own comments upon the Commissioners' counter-statement, I do not consider that the rules of natural justice demand that the provisions of s. 28 should be so expanded or interpreted as to give the taxpayer a legal right to that opportunity. It is not without significance that, despite the mountain of authorities which have almost completely obscured our view of Counsel and the many reported decisions relating to the requirements of natural justice, not a single authority has been cited to this Court which applies the *audi alteram partem* rule to the determination of whether a *prima facie* case exists. *Rex* v. *Housing Appeal Tribunal* [1920] 3 K.B. 334, upon which Mr. Hogg very understandably—and commendably—sought to rely, was quite unlike the present case in at least two important respects: (1) the Court was there dealing with the nature of the material upon which the tribunal was to arrive at a *final* determination as to the legal position of the parties; and (2) the relevant Statute there required the appeal tribunal to consider, in addition to the specified documents, "any further particulars which may have been furnished by either party".

I am not oppressed by the fact that the procedure of s. 28 is virtually identical with that which has existed for 40 years, for the operation of that machinery is apparently now being subjected to judicial scrutiny for the first time. But, having been so scrutinised, I do not consider that the law requires its condemnation. Accordingly, though with no enthusiasm, I agree that this appeal should be dismissed.

Bagnall Q.C.—Will your Lordships then dismiss the appeal with costs?

Lord Denning M.R.—That must follow.

Phillips—I make a similar application.

Lord Denning M.R.—I am afraid Mr. Hogg's clients have to pay the costs.

Hogg Q.C.—I cannot resist costs, but having regard to the unfortunate result that has overtaken my case, I am instructed to ask for leave to appeal.

Lord Denning M.R.—I am afraid we do not grant leave, Mr. Hogg.

The Plaintiffs having been granted leave by the Appeal Committee to appeal against the above decision, and the parties having agreed that the question to be decided should be, not whether the originating summons should

A have been struck out, but whether the rules of natural justice required that the Plaintiffs should see any counter-statement and be entitled to reply and have their reply considered by the Tribunal, the case came before the House of Lords (Lords Reid, Morris of Borth-y-Gest, Guest, Donovan and Wilberforce) on 9th, 10th, 11th, 12th, and 16th June 1969, when judgment was reserved. On 29th July 1969 judgment was given unanimously in favour of the Defendants,
B with costs.

Michael Miller, Michael Mark and *A. E. W. Park* for the Plaintiffs.

W. A. Bagnall Q.C. and *J. P. Warner* for the members of the Tribunal.

J. Raymond Phillips Q.C. and *Henry Brooke* for the Commissioners of Inland Revenue.

C The following cases were cited in argument in addition to those referred to in the speeches:

Board of Education v. *Rice* [1911] A.C. 179; *Davies* v. *Davies Jenkins & Co. Ltd.* 44 T.C. 273; [1968] A.C. 1097; *Dean* v. *Wiesengrund* [1955] 2 Q.B. 120; *Goldsmiths' Company* v. *Wyatt* [1907] 1 K.B. 95; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal* [1906] A.C. 535;
D *Literature Board of Review* v. *H.M.H. Publishing Co. Inc.* [1964] Qd. R. 261 (Aust.); *Lowe* v. *Dorling & Son* [1906] 2 K.B. 772; *Reg.* v. *Ashford, Kent, JJ.* (ex parte *Richley*) [1955] 1 W.L.R. 562; *Reg.* v. *Dick* [1969] 1 Can. Cr. Cas. 147 (Can.); *Reg.* v. *Morley* (1966) 11 R.R.C. 390; *Reg.* v. *Randolph* [1966] S.C.R. 260 (Can.); *Ridge* v. *Baldwin* [1964] A.C. 40; *Stafford* v. *Minister of Health* [1946] K.B. 621; *Vitkovice Horni a Hutni Tezirstvo* v. *Korner* [1951]
E A.C. 869.

Lord Reid—My Lords, I agree with your Lordships that this appeal should be dismissed, and I shall only add a few observations. Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental
F general principle degenerate into a series of hard and fast rules. For a long time the Courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legis-
G lation.

In the great majority of cases which come before this Tribunal all the relevant facts are known to the taxpayer and he has a full opportunity to set out in his statutory declaration all the facts which he thinks are relevant and also all arguments on which he relies. The only advantage to him of having a right to see and reply to the counter-statement of the Commissioners of In-
H land Revenue would then be that he could reply to their arguments. If the Tribunal were entitled to pronounce a final judgment against the taxpayer justice would certainly require that he should have a right to see and reply to this statement, but all the Tribunal can do is to find that there is a *prima facie* case against him.

It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a

(Lord Reid)

prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party. Even where the decision is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him. I do not think that a case has been made out that it is unfair to proceed as the Statute directs. But I do not read the Statute as preventing the Tribunal from seeking further comment from the taxpayer if in any unusual case they think that they could carry out their task more effectively in that way. If they do that then they must allow the Commissioners to reply if so advised because any decision against the Commissioners is a final decision.

Lord Morris of Borth-y-Gest—My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J. called "the justice of the common law": *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, at page 194. I approach the present case by considering whether in all the circumstances the Tribunal acted unfairly. It is not now suggested on behalf of the Appellants that they had a right to insist upon being heard orally before the Tribunal. But the Tribunal declined to furnish the Appellants with a copy of the counter-statement of the Commissioners of Inland Revenue and declined to allow the Appellants to submit written comments or arguments in regard to such counter-statement before proceeding to a determination. Was that in all the circumstances unfair? In the careful address of counsel for the Appellants we were referred to many decisions. I think that it was helpful that we should have been. But ultimately I consider that the decision depends upon whether in the particular circumstances of this case the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded.

It is important to have in mind exactly what the Tribunal had to do. There was no question of their being required to come to a determination as to whether s. 28 of the Finance Act 1960 applied to the Appellants in respect of the transactions in question. There was to be no decision comparable to that in *Rex* v. *Housing Appeal Tribunal* [1920] 3 K.B. 334. The decision or determination that the Tribunal had to make was whether there was or was not a *prima facie* case "for proceeding in the matter". That was a most limited decision. A decision that there was such a case would mean that it could not be said that the Commissioners must definitely not give a notice under s. 28(3) because they would certainly be wrong if they gave one. It may well be unlikely, if a taxpayer could not in his statutory declaration point to the elimination of even "a *prima facie* case for proceeding in the matter", that he would be able to do so in some rebuttal of anything contained in the

A Commissioners' counter-statement. But having said this I feel bound to express my *prima facie* dislike of a situation in which the Tribunal has before it a document (which might contain both facts and arguments) which is calculated to influence the Tribunal but which has not been seen by a party who will be affected by the Tribunal's determination. If there is a determination that there is no "*prima facie* case for proceeding in the matter" the tax-
B payer will be free of any risk that a notice under s. 28(3) will be served upon him. The taxpayer might want to make use of resources which he will be retaining to meet any possible liability resulting from a notice. It is conceivable that some fact might be mistakenly set out in a counter-statement which unless corrected could result in a determination one way rather than another. These considerations lead me to the view that, if the
C Tribunal decided in any particular case that it would be fair to allow the taxpayer to see a counter-statement and to comment on it, even though this would involve giving further opportunity to the Commissioners of counter inspection and counter comment (and of similar processes to such extent as any Tribunal could reasonably control), they would not be acting beyond their powers. This, however, still leaves the question whether in this case it
D should be held that the Tribunal acted unfairly. Here it becomes necessary to consider the statutory provisions. The Tribunal is a statutory body. There are statutory directions to it. While I have expressed the view that the statutory provisions must not be read as in any way absolving the Tribunal from doing at all times what in all the circumstances is fair, even at a stage when no decision finally adverse to the taxpayer is being made, it is, I think,
E a positive consideration that Parliament has indicated what it is that the Tribunal must do and has set out that the Tribunal must take into consideration three documents: (*a*) the declaration, (*b*) the certificate and (*c*) the counter-statement if there is one. In his statutory declaration the taxpayer, who ought to know all about his affairs, will have been able to set out fully why he considers that s. 28 does not apply. If the Tribunal follows the course that
F Parliament has defined and decides not to extend that course I do not think that by reason of that circumstance alone it should be held that they have acted unfairly.

I would dismiss the appeal.

Lord Guest—My Lords, I have had the advantage of reading the speech of my noble and learned friend Lord Donovan, with which I agree. I have only
G a few observations of my own to make.

Where a question arises as to whether the principles of natural justice should be followed in any particular case it is important, in my view, that the principles upon which this question is to be decided should be reasonably clear and definite. Inferior tribunals should be in a position to know whether, in any particular case, they were called upon to apply the principles of natural
H justice and to what extent those principles should be followed. It would be unsatisfactory if cases where statutory tribunals had been set up were to be decided *ex post facto* upon some uncertain basis.

It is reasonably clear on the authorities that, where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the Statute is silent upon the question, the Courts will imply into the
I statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. The dictum of Byles J. in *Cooper*

(Lord Guest)

v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, at page 194, is clear to this effect and has been followed in many subsequent cases. A

Where, however, the matter which the tribunal has to decide is a preliminary point which does not finally decide the rights of parties, then the question arises whether, and if so to what extent, the principles of natural justice should be followed by the tribunal. In the present case it is common ground that the tribunal set up under s. 28 of the Finance Act 1960 is a judicial tribunal. I am not, however, prepared to accede to the extreme arguments advanced on either side of the Bar. For the Crown it was contended, first, that the terms of s. 28(5) of the Finance Act 1960 excluded the principles of natural justice and that there was no room for their implication into the subsection; alternatively it was contended that, as a general rule, where a preliminary point was to be decided the Court would not imply a term that the rules of natural justice should be applied. In my view, the answer to the first argument is that, to some extent at any rate, this is a judicial tribunal which has to apply the principles of natural justice in that the taxpayers are given an opportunity of stating their case. Upon the second point I can see no reason why, if the principles of natural justice have to be applied to a tribunal entrusted with a final decision, the same should not be true of a tribunal which has to decide a preliminary point which may affect parties' rights. There is, moreover, in my view, no authority for this latter proposition of the Crown. *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 330, which was cited in support of this contention, is not a satisfactory decision. The circumstances were special, and it should not, in my view, be followed as a matter of principle. For the Appellants it was contended that in the case where the tribunal was entrusted with the decision of a preliminary point which affected parties' rights the principles of natural justice in their full vigour must be employed. Your Lordships were urged to adopt the dissenting judgment of Salmon L.J. in *Cozens's* case. The true view, in my opinion, is that expressed by Tucker L.J. in *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, at page 118: B C D E F

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." G

In the present case I can see nothing manifestly unfair about the procedure which the Statute enjoins to be followed by the Tribunal set up under s. 28 of the Finance Act 1960. The provisions in s. 28(5) contain a safeguard or concession to the taxpayer which entitles him by taking certain preliminary procedure to have the case under s. 28 against him dismissed without further ado if the Tribunal so determine. If the Commissioners of Inland Revenue serve on the taxpayer a notice that they have reason to believe that s. 28 applies to him in respect of transactions specified in the notice, the taxpayer may, if he is of opinion that the section does not apply to him, make a statutory declaration stating the facts and circumstances upon which his opinion is based. This would entitle him to state all the facts within his knowledge and the arguments for his view that the section did not apply. The Commissioners are then given an opportunity, if they so desire, of submitting a counter-statement, in which, presumably, they would be able to state any additional H I

A facts within their knowledge and their contention as to the reason for the application of the section. The statutory declaration and counter-statement, if any, are then submitted to the Tribunal, who are to determine whether there is or is not a *prima facie* case for proceeding further. The complaint of the Appellants is that the taxpayer is not given an opportunity either of seeing the counter-statement or of answering it. It is possible, I suppose, that the counter-
B statement might contain additional facts. It is unlikely that these will not be within the knowledge of the taxpayer. If the taxpayer was given an opportunity of answering the counter-statement the Commissioners would then certainly require an opportunity to reply. There might be a demand for a reply. This would entail further delay in a procedure which was essentially designed to be fairly summary. It is clearly necessary that the Revenue should be
C given an opportunity of submitting a counter-statement, as, if the Tribunal decided against them, that is the end of the case and they can take the matter no further, whereas, on the other hand, if the Tribunal decide that there is a *prima facie* case under s. 28(5) (*b*), the taxpayer may go to the Special Commissioners and thereafter if dissatisfied with their decision have his appeal reheard by the Tribunal. Having regard to all these factors, the section
D does, in my opinion, give the taxpayer a sufficient opportunity of stating his contentions to the Tribunal, and there is nothing so unfair about the procedure as to entitle the Court to say that the principles of natural justice were not followed.

For these reasons I would dismiss the appeal.

Lord Donovan—My Lords, this appeal arises out of the provisions of
E s. 28 of the Finance Act 1960, which is intended to cancel tax advantages from certain transactions in securities. Where the circumstances defined in the section exist, and a person obtains a tax advantage in consequence of a transaction in securities, or is in a position to do so, then the Commissioners of Inland Revenue may cancel it by an assessment to tax, or by nullifying a right to repayment of tax, or the requiring of the return of a repayment
F already made, and so on. These consequences are not to follow, however, if the taxpayer shews that the transaction was carried out for *bona fide* commercial reasons, or in the ordinary course of making or managing investments, and that the obtaining of a tax advantage was not a main object, or one of the main objects, of the transaction. Section 29 of the same Act gives the Commissioners of Inland Revenue power to call for the information they require
G before setting s. 28 in motion. That is done by a notice served on the taxpayer by those Commissioners stating that they have reason to believe that s. 28 may apply to him in respect of a transaction or transactions specified in the notice. Such a notice was served on each of the two Appellants on 23rd February 1967.

This gave each of them the right under s. 28(4) to make a statutory
H declaration, within 30 days of the issue of the notice, stating the facts and circumstances which, in the opinion of the taxpayer, made s. 28 inapplicable in his or her case, and to send it to the said Commissioners. No doubt in most cases the taxpayer will seek to invoke one or other of the exemptions conferred by the section, and will set out in his declaration facts supporting such a claim. Each of the Appellants sent such a declaration to the Com-
I missioners of Inland Revenue on 23rd March 1967. If the Commissioners are satisfied by such a statutory declaration, s. 28 ceases to operate in relation to the transaction or transactions in question. But if they are not, and see reason to take further action in the matter, s. 28(5) directs them to send to a tribunal composed of the persons described in subs. (7) a certificate to the effect that they see reason to take further action, the statutory declara-

(Lord Donovan)

tion of the taxpayer, and, if the Commissioners wish, a counter-statement. This counter-statement is described in subs. (5)(*a*) as "a counter-statement with reference to the matter". No doubt it will set out facts and arguments supporting the Revenue's case. Such a counter-statement was prepared in the present case but because of the proceedings referred to below has not yet been submitted to the Tribunal. The first five Respondents to this appeal constitute the Tribunal.

When the Tribunal receives the aforesaid three documents its duty under s. 28(5)(*b*) is to take them into consideration and determine whether there is or is not a *prima facie* case for proceeding in the matter. If they determine that there is not, the section ceases to apply to the taxpayer in respect of the specified transaction or transactions. Otherwise the section remains applicable and the Commissioners may proceed with their authorised "adjustments" so as to cancel the tax advantage: see s. 28(3). Against these there is a right of appeal to the Special Commissioners, a further right of appeal by way of rehearing by the aforesaid Tribunal, and a right to appeal to the High Court by way of Case Stated on a point of law: s.28(6), (7) and (8). Where the Tribunal finds, on consideration of the three documents mentioned above, that there is a *prima facie* case for proceeding, they are not obliged under any express provision of the section so to notify either the Commissioners or the taxpayer. But they must obviously do so, and this matter is covered by their own rules. Likewise the Commissioners are under no express statutory obligation to tell the taxpayer that they intend to submit a counter-statement to the Tribunal, but their usual practice is to inform him when this has been done.

In the present case the taxpayers' solicitors were informed of the Commissioners' intention to seek a finding from the Tribunal as to the existence of a *prima facie* case for proceeding, and they asked for a copy of any counter-statement which the Commissioners intended to send to the Tribunal. The Commissioners replied that they would send a copy if the Tribunal found that there was a *prima facie* case for proceeding. The same solicitors then asked the Tribunal for a copy of any such counter-statement, but this was likewise refused. At this stage the taxpayers' solicitors were also asking for an oral hearing of the issue as to whether there was a *prima facie* case for proceeding and indicated that their clients would wish to be represented by counsel. They were told by the Tribunal that there would be no such hearing.

In these circumstances an originating summons was taken out in the Chancery Division by the two Appellants in June 1967. The questions it posed were (to summarise the matter) whether in determining questions under s. 28(5) of the Finance Act 1960 the Tribunal was bound to observe the principles of natural justice; whether the taxpayer was entitled to have an opportunity to deal with any counter-statement by the Commissioners, and of addressing arguments to the Tribunal and adducing evidence. Both the Tribunal and the Commissioners of Inland Revenue countered this move by motions to strike out the originating summons on a number of grounds, the chief of which was that it disclosed no reasonable cause of action: and the proceedings were heard by Pennycuick J. in July 1967. After allowing the originating summons to be amended so as to refer specifically to the two Appellants, he decided, as a matter of construction of s. 28, first, that they had no right to an oral hearing by the Tribunal at this stage, and, secondly, no right to a copy of any counter-statement of the Commissioners and an opportunity of replying to it. He therefore struck out the originating summons on the ground that it raised no question open to serious argument. Upon appeal by the two Appellants to the Court of Appeal this decision was upheld without counsel for the Respondents being called upon. Lord

Denning M.R. and Diplock and Edmund Davies L.JJ. decided, as I read their judgments: (1) that where a tribunal is simply called upon to decide whether a *prima facie* case exists, there is no initial presumption that the rules of natural justice must apply; (2) that in the present case the language of s. 28 in any event precluded any such presumption. The Court therefore upheld the decision of Pennycuick J. that the originating summons disclosed no cause of action and should be struck out. In the Court of Appeal the Appellants abandoned their claim to an oral hearing by the Tribunal.

Before your Lordships it was agreed that the question to be decided should not be whether the originating summons should have been struck out, but that the substantive issue should be decided, namely, whether the rules of natural justice required that the Appellants should see any counter-statement of the Commissioners of Inland Revenue, and be entitled to reply to it and have their reply taken into consideration by the Tribunal. This issue must be decided by considering s. 28 and its purpose as a whole.

I start by adopting the words of Tucker L.J. in *Russell* v. *Duke of Norfolk* (1949) 65 T.L.R. 225, at page 231, which I think are in point. He said:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned . . . should have a reasonable opportunity of presenting his case."

If the Commissioners of Inland Revenue decide to nullify an alleged tax advantage by adjustments made pursuant to s. 28(3) the taxpayer is given ample rights of challenge by the section. He may appeal first to the Special Commissioners. If dissatisfied by their determination he may require a re-hearing before the Tribunal. Thence he may go to the High Court by way of Case Stated on a point of law. These rights fully satisfy the requirements of natural justice once the Commissioners of Inland Revenue have decided to proceed. The taxpayer is, however, given an additional right, namely, to stop the whole proceedings at the outset if he can satisfy the Tribunal that there is no *prima facie* case for proceeding. In the statutory declaration which he is authorised to make for this purpose he would (or should) set out all the facts and circumstances supporting his opinion and there is nothing to prevent him from adding argument as well. The Commissioners of Inland Revenue see this statutory declaration, for it has to be sent to them; and only if they still see reason to proceed do they send it to the Tribunal together with their certificate to that effect, plus any counter-statement that they desire to make. This the taxpayer does not see before the Tribunal makes up its mind whether there is a *prima facie* case or not.

This certainly looks, at first sight, unfair. But to give the taxpayer the right to see the counter-statement would be useless unless he were also allowed to comment upon it, and have his comments taken into consideration by the Tribunal together with the other documents already specified by the section. And if this was allowed, then inevitably the Commissioners of Inland Revenue would have to be given an opportunity of considering the taxpayer's comments, and of submitting a further counter-statement to the Tribunal. For the decision of the Tribunal is conclusive if it is adverse to the Commissioners though not so to the taxpayer. The exchanges might not stop even there. I do not believe

(Lord Donovan)

that Parliament intended that the additional safeguard given to the taxpayer by this preliminary procedure should develop into something like a round-by-round contest conducted on paper. I think that, by specifying three documents only, it was intended that these three documents only were the ones to be considered by the Tribunal at this stage. All the issues would be open, and each side's documents submitted to the Tribunal would be available at the subsequent appeal hearings if any took place. Moreover, any unfairness to the taxpayer in his not seeing the counter-statement before it is considered by the Tribunal is, in my view, more apparent than real. In view of the complexity of fiscal legislation, transactions which have a tax advantage in view, whether as a main object or not, have to be planned with considerable care and usually with professional assistance. It is well known to the taxpayer or his advisers what has to be done and when; and if other persons are to play a part, just what they have to do and when; and what tax advantage is expected to accrue, and when. The taxpayer or his adviser will also have a fairly shrewd idea where any weaknesses of the scheme lie in relation to s. 28, and, therefore, to what points any eventual counter-statement of the Commissioners is likely to be directed. Accordingly, while it is possible that that counter-statement may introduce new facts outside the taxpayer's knowledge, the cases where this would happen are likely to be much more the exception than the rule.

Moreover, if your Lordships were to hold that natural justice nevertheless required that he should see the Commissioners' counter-statement, be allowed to reply to it, and have that reply taken into consideration by the Tribunal, the decision could not stop there. It would have to deal with such questions as whether any such reply should also be by way of statutory declaration, and within what time limit it had to be lodged. I think the Commissioners' right to put in a further counter-statement would also inevitably have to be conceded; and we should have to consider whether the closure was to be applied at that stage or not. All this would go beyond merely inserting into s. 28 provisions which Parliament would be presumed to have intended in order to conform to rules of natural justice. It would be equivalent to new legislation; and none the less so if, as the Appellants suggested, these matters could be provided for by the rules of the Tribunal itself.

In support of his case, which he ably presented, the Appellants' counsel more than once stressed that, unless the taxpayer saw the counter-statement and was allowed to reply to it before the Tribunal decided whether there was a *prima facie* case for proceeding, then the taxpayer and his property were being put to a new hazard without his being allowed to reply to the Commissioners' case. I doubt if this is the right way to regard the matter. I think the better view is that the taxpayer, having set out in his statutory declaration all the facts and grounds upon which he bases his opinion that s. 28 does not apply to him, has, if the Tribunal nevertheless finds that a *prima facie* case exists, simply failed to qualify for the special advantage which he sought.

I agree that one cannot dismiss the present appeal simply by saying that proceedings before the Tribunal at this stage are merely for the purpose of deciding whether there is a *prima facie* case and that accordingly the rules of natural justice do not apply. Otherwise it would be permissible for a member of the Tribunal to sit even though he had advised the taxpayer in the particular transaction under scrutiny. Nor, on a careful reading of the judgments in the Court of Appeal, do I think that they take any such short cut to a decision. For myself, I agree with their conclusion that reading the section as a whole it is clear that Parliament intended the three specified documents to be considered by the Tribunal at this preliminary stage, and those three documents

A alone; and I reach this conclusion bearing in mind the full rights of appeal against subsequent proceedings which the section confers; and also the further considerations which I have mentioned above.

I do not myself think that the previous practice with regard to the somewhat similar procedure regarding surtax introduced in relation to the Board of Referees in the Finance Act 1927 is of any assistance here. In the Finance Act B 1928 a different procedure was introduced, involving the Special Commissioners of Income Tax instead: and, for reasons which are here immaterial, it became much more popular with surtax-payers. My recollection is that thereafter the right to go to the Board of Referees under the 1927 Act was rarely exercised.

Both sides apparently agreed that the proceedings before the Tribunal C would be judicial. It would make no difference to my view whether they were or were not. But since this question could easily arise in some other context and require specific decision, I reserve my opinion upon it: and I do so having in mind what was said in the Court of Appeal on a cognate point in *Commissioners of Inland Revenue* v. *Sneath*[1] [1932] 2 K.B. 362 and *Rex* v. *Special Commissioners of Income Tax* (ex parte *Elmhirst*)[2] [1936] 1 K.B. 487.

D I would dismiss the appeal with costs.

Lord Wilberforce—My Lords, I agree that this appeal should be dismissed, but I would base the decision on rather broader grounds than those stated in the Courts below, for I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions and those which are not final, for example, decisions that as to some matter E there is a *prima facie* case for taking action. The suggestion that there is some such difference which was sought to be extracted from the decision of the Court of Appeal and from the later case of *Parry-Jones* v. *Law Society* [1969] 1 Ch. 1 is one that I cannot accept. Even if there were anything to be said in favour of treating one class of decision in a different manner from the other, this would be of little value, so great is the range of difference between *prima facie* deci- F sions themselves. At one end, the decision may be merely that of an administrative authority that a *prima facie* case exists for taking some action or proceedings as to which the person concerned is to be able in due course to state his case; at the other end, a decision that a *prima facie* case has been made out may have substantive and serious effects as regards the person affected, as by removing from him an otherwise good defence (*Cozens* v. *North Devon Hos-* G *pital Management Committee* [1966] 2 Q.B. 330) or by exposing him to a new hazard, or as when he is prevented, however temporarily, from taking action which he wishes to take. In the present case the decision of the Tribunal may have the effect of denying the taxpayer the opportunity of eliminating *in limine* a claim which may otherwise have to be fought expensively through a chain of courts.

H I am not, therefore, satisfied with an approach which merely takes the relevant statutory provision (Finance Act 1960, s. 28(5), subjects it to a literal analysis and cuts straight through to the conclusion that Parliament has laid down a fixed procedure which only has to be literally followed to be immune from attack. It is necessary to look at the procedure in its setting and ask the question whether it operates unfairly to the taxpayer to a point where the I Courts must supply the legislative omission. I echo the well-known language of Byles J. in *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. N.S. 180, at page 194. I need not restate the numerous authorities in which the general prin-

(1) 17 T.C. 149. (2) 20 T.C. 381.

(Lord Wilberforce)

ciple has been affirmed. The strength and pervasiveness of them has been asserted and reasserted by decisions, English, Australian, Canadian and South African which were cited at the bar. I confine myself to three points particularly emphasised in the present case.

First, it is clear that the question, how far the general principle is to be carried, is a relative one. A striking example of this is In re *K (Infants)* [1965] A.C. 201, where this House had to decide whether, in infancy proceedings, confidential reports obtained by the guardian *ad litem* ought to be disclosed to the parties. Lord Hodson pointed out, at page 234, in language very apposite here, the force of the argument that it is contrary to natural justice that the contentions of a party in a judicial proceeding may be overruled by considerations in the judicial mind which the party has no opportunity of criticising or controverting, and that the undisclosed evidence may, if subjected to criticism, prove to be misconceived or based on false premises. But as Lord Evershed said, at page 217, it was not enough to say that the proceeding was a judicial proceeding. It was necessary to define or to have in mind what was the true character of the judicial proceeding and what was its end or purpose. Each of these considerations is relevant in this appeal.

Secondly, the Legislature may certainly exclude or limit the application of the general rules. But it has always been insisted that this must be done, clearly and expressly: "Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment": *Commissioner of Police* v. *Tanos* (1958) 98 C.L.R. 383, at page 396, *per* Dixon C.J. and Webb J.; " . . . il ne faudrait rien moins qu'une déclaration expresse du législateur pour mettre de côté cette exigence qui s'applique à tous les tribunaux et à tous les corps appelés à rendre une décision qui aurait pour effet d'annuler un droit possédé par un individu": *Alliance des Professeurs* v. *Labour Relations Board* [1953] 2 S.C.R. 140, at page 154, *per* Rinfret C.J.; and see *Reg.* v. *Ngwevela* [1954] 1 S.A.L.R. 123, at page 131, *per* Centlivres C.J. and *Rex* v. *Housing Appeal Tribunal* [1920] 3 K.B. 334. I do not find anything in the context of s. 28 of the Finance Act 1960, which by implication or contrast limits or excludes the general rule.

Thirdly, it is true, as the judgments in the Court of Appeal point out, that ex parte applications are frequently made to the Courts and granted without hearing the party affected: but merely to say this overlooks that procedure invariably exists, and is where necessary invoked, for enabling the party affected rapidly to seek annulment or amendment of the order made against him. The decision on which the Crown mainly relied, In re *Hammersmith Rent-Charge* (1849) 4 Ex. 87, so far from supporting an argument that orders of an interim kind may normally be made ex parte, shows to me the contrary, since all the learned Judges, though differing in their ultimate conclusions, proceeded on the basis that ex parte procedure was only tolerable if, in one way or the other, the party affected had a way open to him to have any order set aside. On this point there are two other decisions of relevance. On the side of the Crown, *Cozens's* case[1] was invoked to show that an order vitally affecting a party's interest may be made ex parte if the relevant Act of Parliament so requires. I must say that I find great force in the dissenting judgment of Salmon L.J., but whether that judgment is to be preferred or not as to cases arising under the Limitation Act 1963—a matter which must be left open—I cannot find in the majority decision on that unsatisfactory statute a principle to be extended to such a case as the

[1] [1966] 2 Q.B. 330.

present. The Appellants' strongest case was *Rex* v. *Housing Appeal Tribunal* [1920] 3 K.B. 334. There, in the face of a rule which explicitly entitled the Tribunal to dispense with a hearing, it was held by the King's Bench Divisional Court that this only entitled them to dispense with an oral hearing and that they must give the appellants an opportunity of making out their case. This certainly illustrates the strength of the underlying principles of natural justice, but the particular requirement which the Court held to follow from them must be related to the fact that the Tribunal was a tribunal of appeal whose decisions finally affected substantive rights. In neither respect is it strictly comparable to the present case.

It is against this background that the Finance Act 1960, s. 28, must be considered. As appears from its face, and also from such cases under it as have reached the Courts, it is a section of considerable severity. It places in the hands of the Commissioners of Inland Revenue a means, which they are under a duty to use, to take action against any taxpayer who is in a position to obtain or has obtained a tax advantage. So pervasive is the present tax system that in the world of commerce or investment only the naive or the incompetent would make decisions without regard to tax considerations, yet on the face of the section every such decision is exposed to attack, or at least may require justification. No doubt because of this it was thought fit to interpose between the taxpayer and the Commissioners a specialised body—the Tribunal—composed of a learned chairman and laymen of a wide range of experience, with power to determine, conclusively as against the Revenue, whether a *prima facie* case for proceeding exists. I think their proceedings under subs. (5), which involve considerable responsibility, are judicial in character. Moreover, I do not accept the argument of the Crown that, as this procedure represents an "uncovenanted benefit" or a kind of bonus to the taxpayer, he must gratefully take it as he finds it in all its nudity from the section. Whether the benefit represents generosity or bare justice, he is entitled, if offered a proceeding of a judicial character, to insist that its judicial character should be a reality, that the procedure should be fair.

The procedure laid down is as follows. First, the Commissioners of Inland Revenue must notify the taxpayer that they have reason to believe that the section may apply to him in respect of a transaction or transactions. These must be specified in the notification, but no doubt this may be done in very general terms—in the present case we find a reference to "all other transactions of whatever description relating thereto". Then the taxpayer may make a statutory declaration stating the facts and circumstances on which he bases his opinion that the section does not apply and send this to the Commissioners. It is then for the Commissioners to decide whether they wish to proceed, and if so they send to the Tribunal a certificate to that effect with the statutory declaration and, if they wish, a counter-statement. This may contain fresh facts, or arguments of law, or both. The question to be answered, in my opinion, is this: is it fair that the Tribunal should decide on this material or, in the interests of natural justice, or fairness, ought there to be read in a requirement either to allow the taxpayer an opportunity to see and answer the counter-statement or—perhaps and—to allow him some kind of hearing? Thus this is not a case where the Court has to supply the requirement *audi alteram partem*. The requirement is, up to a point, already and expressly there. The question is whether it is so imperfectly or inadequately imposed that the Court should extend it. I do not find this easy to decide.

On the taxpayer's side, there is the natural aversion against allowing a decision to be made on the basis of material he has not seen: and he can

(Lord Wilberforce)

meet the objection that to allow him to see the counter-statement and comment on it invites an infinite process of contestation with the argument that in practice this will not result, since it will be exceptional that after a counter-statement has gone in the taxpayer can show there is no *prima facie* case. On the side of the Crown it can be said that the taxpayer already has the essentials of justice in his right to put in a statutory declaration. In the normal case in which the section is likely to be invoked the taxpayer will know quite well what are the relevant circumstances, will be aware of the case against him, and will know as much as—probably more than—the Commissioners of Inland Revenue themselves. A case where he is unable to convince the Tribunal that there is no *prima facie* case for proceeding on the strength of his statutory declaration is in the nature of things one which will have to be decided.

My Lords, not without some hesitation, and although cases can be imagined in which the taxpayer may be at some disadvantage, still upon a broad view of the matter, and taking the normal case, I have come to the conclusion that the Crown's contention ought to be accepted. The system, intended to be fair, might be or might be made to appear fairer still, but the roughness in justice does not in my view reach the point where the Courts ought to intervene. I consider, therefore, that the Tribunal is entitled to make its determination on the documents specified. But I would add two qualifications. The first is that if the matter proceeds the taxpayer should be entitled to see the counter-statement: certainly he should if an appeal goes to the Tribunal under s. 28(6), since it would be wrong that as an appeal body they should be in possession of a document which one side has not seen, and I think the same should be done if the case goes to the Special Commissioners. Secondly, in my opinion, a residual duty of fairness rests with the Tribunal. I would, therefore, think them empowered, if in any case where they are exercising their function under s. 28(5) they consider exceptionally that material has been introduced of such a character that to decide upon it ex parte would be unfair, to take appropriate steps to eliminate that unfairness. I do not think that rules need be formulated or procedures laid down. The Tribunal can deal with these exceptional cases as they think best, and I have no doubt that they will have in mind that justice to the Revenue requires that, since a decision one way is conclusive, the Revenue ought to have the last word.

In reaching the above conclusion I have not been influenced by the procedure said to have been followed over many years by the Board of Referees, established with a similar jurisdiction under similar statutory language. There may have been good reasons why taxpayers never insisted on a right to a hearing before this Board, or to see the Revenue's statement, in connection with the surtax assessments to which the Board's jurisdiction related—in fact, for reasons into which I need not enter, the whole procedure of recourse to the Board was little used. I cannot find in the fact that Parliament has taken over for use in quite a different context the procedure and language used in setting up the Board any warrant for supposing that Parliament has given its endorsement or approval to any pre-existing practice. The manner in which, in a contested matter, the section is to be applied is entirely open in the Courts. I should add that the particular procedure by which this case reached the High Court and ultimately this House has not been the subject of argument, both sides having been content that the substantive question, as to the scope of s. 28, should be decided.

I would dismiss the appeal.

A *Questions put:*

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

B [Solicitors:—Beer & Co.; Treasury Solicitor (for the members of the Tribunal); Solicitor of Inland Revenue.]