

12/83

IN THE PRIVY COUNCIL

No. 8 of 1982

O N A P P E A L
FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N:

WILLIAM DAVID WISEMAN (Defendant)

Appellant

- and -

THE CANTERBURY BYE-PRODUCTS
COMPANY LIMITED (Plaintiff)

Respondent

CASE OF THE RESPONDENT

within the hands of local authorities. The local authorities were empowered to provide abattoirs and to grant licences for other slaughterhouses. They had total control then over lawful slaughtering of beasts for consumption except for slaughtering cattle (used as a general term to include sheep) for family use. There was a severe penalty of 10 Pounds for each and every head of cattle slaughtered without a licence. It is clear that one of the consequences of this scheme was to enable the local authority to protect the viability of its abattoir by not granting licences to other slaughterhouses or limiting the licences so granted.

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20 4. The 1977 Act was replaced by the Abattoirs and Slaughterhouses Act of 1894, which still left total control to the local authorities but exempted freezing works from certain inspection provisions.

X
30 5. The 1984 Act was replaced by the Slaughtering and Inspections Act 1900. This Act made significant changes. It distinguished meat export slaughterhouses and took them out of the control of local authorities. However, Section 27 of the Act provided that meat from stock slaughtered in a meat export slaughterhouse should not be sold or exposed for sale in a district in which there existed a registered abattoir available for the slaughter of stock except upon terms of paying to the controlling authority of the abattoir such fees as were agreed upon, being in no case less than the fees that would be chargeable for the use of the abattoir exclusive of the cost of slaughtering if the stock had been slaughtered therein. It also provided that the money paid in fees should not in any one year be more than sufficient to defray the annual cost of the abattoir and provided for an appeal to the Minister should the fees be excessive. This is the origin of the 'hanging' fees, the subject of this case.

40 6. The same Act also establishes a duty by Section 5 on a local authority having a population of 2,000 or more to establish an

abattoir. It left the power to license other slaughterhouses not being export meat slaughterhouses with the local authority, but provided that no licence would be granted for a slaughterhouse in any district where there was established a registered abattoir.

7. At the same time as establishing a duty on a local authority to establish an abattoir, the 1900 Act in Section 14
10 empowered:

"The local authority or authorities, with the exception of the local authorities respectively of the cities of Wellington, Dunedin, Christchurch, Auckland and the Borough of Invercargill, and any local authorities within a radius of 8 miles of the aforesaid cities and borough, may
20 delegate to any fit person or persons the power to establish the same (an abattoir), upon such terms and conditions as, with the previous approval of the Minister, are agreed on."

8. The Slaughtering and Inspection Act 1900 was consolidated in 1908 without any significant change.

9. The next important Act is a local act, The Auckland City Abattoir Act of 1936. It
30 is plain from the preamble of this statute that it followed litigation in Auckland between the Auckland City and the owners of certain meat export slaughterhouses over the obligation of the City to refund part of the hanging fees that had been paid. The Act developed the proviso of Section 27 discussed above into a far more sophisticated system. It provided that the fee to be paid should be
40 charged on the actual weight of the meat so sold, it empowered the local authority to sue for the recovery of the fees, it included a lot more detail into the assessment of overheads and the provision of annual returns to make sure that the Council did not collect too much money from this source of revenue and widened the powers to make bylaws so that the meat export slaughterhouses would have to

make returns. It is the forerunner of the significant provisions of the Meat Act 1939.

10 10. The Meat Act 1939 took the provisions in the Auckland City Abattoir Act 1936 and applied them nationally, and also extended them so as to make the hanging fee payable for the first time, not only by export meat slaughterhouses but also by vendors selling meat within an abattoir district which may have been slaughtered in the abattoir of another district.

11. The 1939 Act also widened the power to delegate by removing the exception in respect of the major metropolitan areas and Invercargill and provided also that the terms and conditions of the delegation now be contained in a Deed.

20 12. The net effect of this legislation is that local authorities like the Christchurch City Council were required to provide an abattoir but the economic operation of this abattoir was protected by imposing a penalty on people selling meat within the abattoir district slaughtered elsewhere. They had to pay a premium for this privilege.

30 13. In 1976 the situation changed. The Meat Amendment Act 1976 repealed Section 6 of the principal Act requiring local authorities like the Christchurch City to provide city abattoirs.

40 14. The combined effect of Sections 4, 12 and 19 of the Meat Amendment Act 1976 was that as at the 1st July, 1981, by operation of a new sub-section 11 of Section 14, all Deeds of Delegation terminated. From the same date the obligation to pay hanging fees ceased as the empowering provisions to make the Rules in Section 23 (1) (c) and sub-section 3 and 4, and sub-section 5, were repealed on that day by Section 20 sub-section 2 of the Meat Amendment Act 1976.

15. The Meat Act 1964 and the 1976 Amending Acts, along with all other amending Acts, were replaced by the Meat Act 1981, which makes no reference to the hanging fees. This litigation continues pursuant to the provision of Section 20(d) of the Acts

Interpretation Act 1924.

16. The issues to be disposed of in this appeal depend upon the proper construction of sections 23 and 14 of the 1964 Act, in the main. These and other equivalent sections in the 1939 Act are analysed in the Appellant's case.

Background Matters of Fact

10 17. It is submitted that all the material facts are found in the judgments of Mr Justice Cook and the Court of Appeal, they are not disputed.

18. However the Appellant's case sets out certain Matters of Fact. They are not disputed except for paragraphs 9 and 10. It is submitted the dispute is no longer relevant given the concurrent findings of fact in both the High Court and the Court of Appeal on all material issues of fact.

20 However, in the event that the Board considers these paragraphs relevant the Respondent's submissions on them are as follows.

19. Paragraph 9 contains two sentences. The first is a proposition of fact which stated baldly is misleading. Mr Justice Cook found a series of facts which reveal that whether or not the Respondent formally requested an extension in writing, the Council envisaged renewal and made specific decisions which presume continued communication with the company on matters germane to the review. The findings of Mr Justice Cook are further illuminated by reference to the Council Minutes of 19/10/70. The second sentence of paragraph 9 is a conclusion of law and is disputed.

20. The second sentence of paragraph 10 is disputed. As the last four lines of Clause 12 (e) make clear it is addressed to proposed rules. As is apparent from the Judgment the Rules were amended from time to time to adjust charges. The proper construction of the Rule is that during the delegation all proposed rules are to be submitted to the Council for approval and approval obtained before referring them to the Minister.

21. The Respondent would express the first

(Appellant's Case
pg. 2-7)

(Judgment Cook J.
pg. 461 l. 51-pg.
462 l. 23)

(Record Exh. 5 pg.
67 l. 13- pg. 68
l. 26)

(Judgment Cook J.
pg. 461 l. 13-15)

sentence of the second sub-paragraph of paragraph 10 as:

"This deed was not excuted by the Minister until the 15th January 1974."

10 22. It is clear that the 1973 deed was drafted, unlike the 1961 Deed of Renewal, to be a self contained document, to replace the 1950 deed. The first recital is simply lifted from the 1950 deed and is plainly, on the facts found by Mr Justice Cook, incorrect. The difference between the form of a fresh delegation and the reality reveals that the form was simply an accident of drafting rather than reflecting an intention to, in fact, shift the status of controlling authority from the Council to the Respondent.

(Judgment Cook J.
pg. 463 l. 30-32)

20 23. With reference to paragaph 11, the facts as separate elements are not disputed, but as appears later in this argument the conclusions sought to be drawn are disputed.

CHAPTER 3

The Respondent's Argument Supporting the Decision of the Court of Appeal

30 24. The Appellant's case rests on a very simple proposition that the Rules lapsed or expired on the termination of either the 1950 or the 1961 Deed. The Respondents company's reply to this proposition is a very simple one, that whether or not the 1950 and 1961 Deed terminated is irrelevant. At the time that the Respondent was trading the 1973 Deed was in force and it has always been common ground that the Respondent was the controlling authority. (Although the company did not know in detail the trading activities of the Respondent it was accepted between the parties that these took place during the life of the 1973 Deed).

40 25. The Court of Appeal held that the Rules being delegated legislation and duly made could only be repealed, disallowed by the Minister (pursuant to Section 23 (7) of the Meat Act 1964) or cease to have effect on the repeal of the statutory empowering provision. There is no principle of law that links that life of the delegated legislation to the continued jurisdiction of the legislator

to the legislature. Further, there was nothing in the Act to suggest that the Rules would lapse or expire for the reasons put forward by the Respondent.

(Relevant Judgment references set out hereafter)

10 26. It is submitted that the Rules made pursuant to Section 22 of the 1939 Act or 23 of the 1964 Act are delegated legislation. The reasoning of the Court of Appeal is adopted. See the passage in the judgment of the President and of Mr Justice McMullin

(Judgment Richmond P. pg. 474 l. 14)
(Judgment McMullin J. pg. 472 l. 12-2)

20 27. Judicial review of delegated legislation is circumscribed by the principles of statutory construction. It presupposes the constitutional principle of the supremacy of Parliament and is worked out pursuant to the concept of ultra vires. In essence, the inquiry of the Court is limited to determining whether or not the Rules were made by the person to whom the authority was given, in the manner contemplated (if a procedure was provided for), and within the scope of the delegated subject matter. The Courts have been prepared to qualify the scope of the delegate's jurisdiction by preventing him from abusing it, e.g. using it for the wrong purpose, but one can search the law report in vain for an indication that the Courts are prepared to impose upon Parliament limits to its powers to delegate and enable subordinate legislation.

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28. The the reasoning of Mr Justice McMullin is adopted

(Judgment McMullin J. pg. 472 l. 32-46)

40 29. I know of no case where it has been held that termination of the jurisdiction of a particular delegate also terminates delegated legislation made by him. It is, of course, within Parliament's sovereign power to provide for the consequence, but I submit that a Court would require very clear evidence of its intent before so finding. Otherwise the Court runs the risk of appearing to fetter the power of Parliament.

30. To put it another way, delegated legislation derives its authority from the wish of Parliament expressed in the enabling

provision. It is not dependent upon or derived from the manner in which the delegate acquired his jurisdiction to delegate, nor the subsequent duration of that jurisdiction.

31. In this particular case the Meat Acts follow the normal form of drafting. The sections empowering the subordinate legislation (S. 22(1939) and 23 (1964)) make no reference to the life of the Rules
10 depending upon the continued delegation.

32. I adopt the reasoning of the President, and of Mr Justice McMullin.

(Judgment Richmond
P. pg. 475 l. 16-39)
(Judgment McMullin
P. pg. 472 l. 47
pg. 473 l. 17.

Further Submissions on Implying a Limit on
the Life of Rules

33. It is submitted that while the principles of statutory construction leave room for implying some additional limit of the life of subordinate legislation, for the constitutional reasons noted above, the Court
20 must be driven to any implication as a necessary conclusion.

34. It is submitted that there is no indication in the 1939 or 1964 Acts that Parliament intended the Rules to lapse upon termination of the delegate's status as controlling authority. Parliament did provide a special power to the Minister to disallow bylaws and rules (sub-section 7 of Sections 22 (1939) and 23 1964)). Had it
30 intended that rules expire upon the loss of status of controlling authority, it could easily have said so. By the same token it would, no doubt, also have provided that in the event of a local authority, maintaining an abattoir, delegating its function, its bylaws hitherto in force would lapse.

35. It is submitted if any parliamentary intent is to be presumed the appropriate question is whether it is manifestly inconceivable that a person resuming his status as a controlling authority should

be able to apply bylaws or rules he made previously. If so, this may indicate that Parliament could not have intended such a result. This question can be considered against the facts in this case, and generally.

10 36. The facts upon which the judgments of the Court of Appeal were based were concurrent with those found by Cook J. In this context the important facts were that the break in the deeds of delegation in 1970-73 was only a technical break. In reality all parties worked together on the basis of a continuing delegation. See the judgment of Mr Justice Cook

(Judgment Cook J.
pg. 464 l. 29-37)

20 37. There are no grounds for departing from the established practice of this Committee against departing from concurrent findings of fact. The findings are amply supported by the evidence. Your Lordships can be taken through the evidence, if this is required. (See Appendix)

38. Submissions against the Appellant who asks Your Lordships to make fresh findings of fact are more fully dealt with in the Respondent's submissions hereafter, under the heading "Appellant's Case on Delegated Legislation" (para. 41-52) and in the Appendix (para. 82-91).

30 39. The President in some obita dicta leaves open the possibility that "in other more radical situations a different result would follow, as for example the termination of a deed of delegation for misconduct of the delegate, followed by appointment of a new delegate." His Honour is there dealing with a hypothetical situation which would give rise to the Courts asking themselves a different question as to any implied intent of Parliament as to the life of Rules than in this case.

(Judgment Richmond
P. pg. 476 l. 7-9)

40 40. But when we consider generally the Acts, it is plain that there are adequate safeguards to prevent bylaws or rules applying where circumstances have so changed as to render them unjust or inappropriate. Parliament clearly

contemplated that abattoirs could change hands, by providing for delegation. But it also gave the Minister what it considered were ample powers to supervise their operation. Ministers would obviously only approve responsible persons as delegates. Local authorities may be presumed to be responsible. Ministers had to approve all rules and should a set of rules or bylaws in whole or in part become inappropriate, the Minister had the power to revoke them. See sub-section 7, (the same sub-section appears in both the 1939 Act S. 22 and the 1964 Act S. 23). Given these circumstances, it is submitted that there is no reason for taking the extraordinary step of implying an additional ground for termination of the legislation.

Appellant's Case on Delegated Legislation

(a) Their Character as Delegated Legislation

41. The Appellant seeks to upset the Court of Appeal's findings firstly by distinguishing the Rules from regulations and bylaws and then by grouping them with rules of private bodies. The argument, it is respectfully submitted, falters from the outset.

42. The reference to the Regulations Act 1936 does not assist. S. 2 (1) of that Act expressly contemplates regulations not covered by that Act nor made by local authorities.

(Appellant's
Case pg. 19-20)

43. There is no dispute that the Rules are not bylaws.

44. Delegated legislation need not be termed either a regulation or a bylaw, consider "Proclamations", "Orders in Council", "Rules" - as used in the Acts Interpretation Act 1924, S. 7, 11, 12, 20 etc. On the topic of validity there is no recognized classification in New Zealand of subordinate legislation according to nomenclature, beyond the sub-category of by-laws.

45. The Appellant seeks to support the proposition that the Rules are not delegated

(Appellant's Case
pg. 24 and 26)

legislation by equating the Rules with the Private law of Articles of Association of Companies and rules and by-laws of incorporated societies. These articles, rules and by-laws are directed to the private purposes of the incorporations and bind only the members. Not so here, the Rules made under the Meat Acts have a totally different context. Contrary to the Appellants argument, they do apply to the public at large. Every person who sells meat in breach of the Rules, is caught by the Rules and commits an offence - Meat Act 1939 S. 22 (8), Meat Act 1964 S. 23 (8). These Rules are the detailed working out and enforcement of the Public Policy of providing and maintaining abattoirs reflected in the Meat Act legislation as explained in Chapter 2 of this Case. They fall naturally within the core concept of legislation made by a non-parliamentary body acting pursuant to an Act of Parliament.

(Appellant's Case pg. 22)

(Judgment McMullin J. pg. 472 l. 5)

(b) Findings of Fact

46. The Appellant's challenge to the finding of facts adopted by the Court of Appeal and which the Appellant says represents merely a version of them "traversed" by Mr Justice Cook, is not expressly linked to the submissions against the Court of Appeal.

47. In any event, it is submitted that here the Appellant is seeking to reopen issues of fact canvassed in the High Court and decided against it. The Appellant says that Mr Justice Cook was merely "recording" what the Respondent's servants believed to be the position and even that in some respects there was "no evidence".

48. Mr Justice Cook had a purpose in traversing the evidence of the Respondent's witnesses. They were the only witnesses. They were cross-examined. The Judge was performing the essential task of any instance judge, finding the facts. His summations, indicate that he accepted their evidence.

(Appellant's Case pg. 18)

(Appellant's Case pg. 18, 19)

"The picture is one of continuing discussions and negotiations between the Council, the company and the Department,

(Judgment Cook J. pg. 463 l. 28-32)

culminating in agreement which was recorded in the 1973 deed. During this period everyone concerned acted on the assumption that the delegation continued in force...."

10 "During this period (1970-73) it seems to have been presumed by the Council, the company and the Department that the delegation embodied in the 1950 deed, with the minor modifications contained in the 1957 deed and with the extension of the term continued in the 1961 deed, continued in being."

(Judgment Cook J. pg. 464 l. 33-37)

20 49. The findings were an essential preliminary step to considering the Plaintiff's argument, in the alternative to its first and main argument, of substantial compliance. See Chapters 4 and 5 of this Case. Mr Justice Cook's findings were clearly adopted by the Court of Appeal, see Mr Justice Mc Mullin and the President. Indeed they were not seriously challenged in that Court by the Appellant. They are concurrent findings of fact.

(Judgment McMullin J. pg. 470 l. 31 - 471 l.2)

(Judgment Richmond P. pg. 476 l. 1-6)

30 50. Contrary to the Appellant's argument there was evidence from the witnesses and their exhibits of an agreement between the Council and the Respondent that the delegations was renewed as from 1970, and that the Minister approved. If the matter is going to be explored in this Court, contrary to the usual practice, the details of this material are set out in an appendix hereto.

40 51. The Appellant seeks to justify a departure from the established rule by relying on two cases which do not establish exceptions to the rule. McCaul v. Fraser [1917] NZPCC 152, is explicable on its own facts, and in any event did not attempt a detailed examination of the facts. Whitehouse v. Jordan [1981] 1All E.R. 267, a decision of the House of Lords is on the facts distinguishable as it dealt with a narrow point of professional negligence. Here, the Appellant seeks a total reassessment of the relationship between the parties over a period of three years, involving asking the

Board to master all the detail in the Record of the evidence and then come to a fundamentally different view of the facts, from that found by the High Court and adopted by the Court of Appeal. See also Australian Mutual Provident Society v. Commissioner of Inland Revenue [1962] NZLR 449, 452 per Lord Devlin:

10 "It is hopeless for the Appellant to contest before the Board the concurrent findings of fact by the Courts below unless they can satisfy the Board, as they have tried to do, that those findings are based upon a misconstruction of the statute."

20 52. The essential facts are that there were at best only technical gaps between 1960-61 and 1970-74 with all three important parties, the Council, the Company and the Crown, unaware of the defects and proceeding as though the company was the Controlling Authority.

CHAPTER 4

In the Alternative to the Court of Appeal - No Break in Status as Controlling Authority

53. The Court of Appeal's reasoning did not depend upon any finding that there was no break in the status of the company as Controlling Authority since 1950.

30 54. The Respondent had argued both that there was a break and that the break was relevant as the life of the Rules depended upon the Respondent continuing at all times to be the controlling authority.

40 55. The Appellant has always met the argument of the Respondent with a second subsidiary argument, to the first adopted by the Court of Appeal, namely that at all times the Company continued to be the Controlling Authority. This argument was rejected by both the High Court and the Court of Appeal

(Judgment Cook
J. pg. 467 l.
39-47 McMullin
J. pg. 473 l.
17-20)

56. Relying on the fact that the 1973 Deed did not take effect until 1 June 1973 Mr Justice Cook found that there was no instrument in force between 1970-1973. The Court of Appeal agreed.

57. On the facts as found by Mr Justice Cook

and adopted in the Court of Appeal it is submitted that there were no gaps in the delegation.

58. As summarized in the Appellant's case there are five important provisions in the delegation sections of the Acts.

(Appellant's
Case eg. 8-11)

- (1) Local Authorities may delegate their obligations to establish an abattoir with the consent of the Minister.
- 10 (2) Delegations shall be by deed.
- (3) The terms of the Deed shall be approved by the Minister.
- (4) The Delegate is controlling authority while the instrument of delegation continues in force.
- (5) On termination of the delegation the obligations of the local authority immediately revive.

20 59. Provisions (1), (in as much as Ministerial consent is necessary), (2), and (3) are requirements. Provisions (4) and (5) are consequences.

60. It is submitted that at all times these provisions were sufficiently complied with so that there was no break in delegation.

First Provision Consent of Minister

30 61. With respect to sub-section (1) (both Acts) the delegation of the abattoir to the company has always had the approval of the Minister.

(Judgment Cook
J. pg. 461 l.
50, pg, 463 l.
42-45, pg. 464
l. 33-38)

Second and Third Provisions - Delegation by Deed -terms approved by the Minister

(For C.A. referenc:
see para. 49)

40 62. With respect to the, S. 16 (2) and (3) (1939) and S. 14 (7) and (8) (1964), all instruments of delegation have been by Deed containing terms and conditions approved by the Minister. These Deeds have contained the terms by which the Council and the company have regulated their relationship.

(common ground)

(Judgment Cook
J. pg. 461 l.
17-50 pg. 464
l. 21-37) (For
C.A. references
see para. 49)

63. There are two questions here, whether these sub-sections require agreements to extend terms of delegation to be always contained in Deeds and, if so, whether there has been substantial compliance with that requirement.

64. It is submitted that the object of these sub-sections is to provide that the terms of the relationship between the local authority

and the delegate are clearly defined and that they are approved by the Minister. The need for clear definition draws more from considerations relating to the day to day operation and provision of the abattoir facility than to questions as to the duration of the ongoing relationship between the local authority and the delegate.

10 65. If it is considered that sub-sections 7 and 9 of Section 14 and their equivalents in the earlier Act were not precisely complied with, then it is submitted that their compliance was not essential to maintain the status of controlling authority and that if it is essential there was at all times substantial compliance. I will deal with this point further, after considering the fourth provision.

20 Fourth Provision - Controlling Authority
While Instruments Continue in Force

30 66. The phrase "while the instruments of delegation continue in force" contained in sub-section 4 (1939) or sub-section 9 (1964) is susceptible of a number of constructions. It can be construed as referring to the position at common law, excluding an informal agreement between the parties. Secondly, it may be seen as encompassing the result produced by equity. Thirdly, it may have a meaning which encompasses a simple situation where the parties agree to continue to be bound by a Deed; without any need for an inquiry into the precise situation at common law or equity.

40 67. The construction that the Court adopts must, of course, be one which will best ensure the attainment of the object of the section and the Act according to its true intent, meaning and spirit. (A paraphrase of parts of Section 5 (j) of the Acts Interpretation Act 1924).

68. "Controlling authority" is defined in Section 2 of the Act:-

"In relation to an abattoir, means the local authority for the time being having control of the abattoir; and includes any person whom a local

authority has delegated its power to establish or maintain an abattoir."

69. The purpose of sub-section 9 of the 1964 Act (sub-section 3 of the 1939 Act), is to provide that there shall be only one controlling authority at any one time. It is not a status shared by the local authority and the delegate. This point is left open in the definition section. With this object in
10 view the phrase "be the person or company operating the abattoir under the instrument of delegation" places the phrase "while the instrument of delegation continues in force" in its proper perspective. The Legislature presumed that the person actually operating the abattoir would be doing so under an instrument of delegation.

70. At common law there is an established principle "that a covenant cannot be varied
20 or dispensed with, but by a contract of equal value, so that where a contract is contained in a Deed any variation has also to be contained in a Deed". (See West v. Blakeway 10 L.J. (C.P.) 173, 177 and Berry v. Berry (1929) 2 K.B. 316. But that is not the position in equity, see Berry v. Berry. Equity will intervene to recognise and enforce the less formal agreement. Of
30 course, equity does this by remedies against the parties rather than by declaring the Deed to be varied by the subsequent agreement.

71. If the strict technical niceties of the common law relating to Deed are introduced into the sub-section by the phrase "while the instrument of delegation continues in force" there is the very real danger that the otherwise straightforward provision that the delegate is the controlling authority while operating the abattoir under the instrument
40 of delegation, leads to a position which does not reflect reality. I submit that the legislature never intended a chaotic situation where the parties assumed a delegate was the controlling authority and acted accordingly but, because of strict application of the common law on Deeds, contrary to appearances, the delegate was not

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40 of delegation, leads to a position which does not reflect reality. I submit that the legislature never intended a chaotic situation where the parties assumed a delegate was the controlling authority and acted accordingly but, because of strict application of the common law on Deeds, contrary to appearances, the delegate was not

the controlling authority. Moreover, in such a situation, neither would the local authority because it would not comply with the definition in Section 2 and be "for the time being having control of the abattoir". At the most you would have the very unsatisfactory situation where sub-section 10 was applicable and there was a revival of the continuing obligation of the local authority to establish the abattoir.

72. It is submitted that these considerations as to the purpose of sub-section 9 (3), to provide for one controlling authority, lead to the conclusion that it is the third of the possible constructions of the phrase "while the instrument of delegation continues in force" that should be adopted.

73. On the facts, there is no doubt that, adopting this third construction, there has always been an instrument of delegation continuing in force. In 1960 it was the 1950 Deed which continued in force by reason of agreement, confirmed by the Council in September, 1960. In 1970, it was the 1961 Deed extending the terms of the 1950 Deed, so that the 1950 and 1961 Deed continued to be the instruments by reference to which the rights of the parties were determined.

(Judgment Cook
J. pg 61 l. 17-
50)

(Judgment Cook
J. pg. 464 l.
21-37) (For C.A.
references see
para 49)

30. Fifth Provision Revival of Local Authority's Obligations Upon Termination

74. The fifth provision was allowed for in Clauses 13 of both the 1950 and 1973 Deeds.

75. It is submitted that Section 14 of the Meat Act 1964 and Section 16 of the 1939 Act have at all times been satisfied and that the company has maintained its status as controlling authority since 1950.

CHAPTER 5

40 Sufficient Compliance Meat Act Provision (Part of Alternative Argument)

76. If it be held that there has not been absolute compliance with sub-sections 7 and 8 of the 1964 Act (sub-section 2 and 3 of the 1939 Act), it is submitted:-

- (a) That compliance with these sub-sections is not essential to the continued status

of controlling authority.

(b) That if compliance is essential, then the conditions have always been satisfied.

77. As submitted earlier, the duration of the status of a delegate as controlling authority is provided for in sub-section 9 of the 1964 Act (sub-section 4 1939). It is submitted that sub-section 9 may apply, notwithstanding something less than absolute compliance with the sub-sections 7 and 8. The scheme and object of the Act does not demand that the status of controlling authority automatically lapse, despite the intention of the parties involved, because of a breach of sub-sections 7 and 8. A construction of these three sub-sections to the contrary would, it is submitted, be in conflict with the obvious scheme of the Act to have a workable system of delegation with the identity of the controlling authority reasonably ascertainable at all times. The purpose of sub-section 7 is clearly that the instrument of delegation be not only in writing but be by Deed. This makes it more likely that the terms will be found in one document and thus be more readily ascertainable. The purpose of sub-section 8 is clearly to enable the Minister to exercise his supervisory control, in the public interest. It is made clear, however, that the Minister is not a party to the Deed, which operates solely as an agreement between the local authority and the delegate.

78. To make sub-section 7 the sole criterion of the status of controlling authority is to elevate this sub-section to a function for which it was not intended and to render sub-section 9 largely redundant. Parliament clearly intended that instruments of delegation be in the form of Deeds but it is sub-section 9 which identifies the controlling authority.

79. If compliance with sub-sections 7 and 8 is essential, it is in the sense that the parties operate by reference to Deeds. In this respect it is submitted that there has

(Judgment Cook J.
pg. 461 l. 17-50
pg. 464 l. 21-37)
(For C.A. reference
see para. 49)

been substantial or adequate compliance with this requirement.

80. In the decision of the Court of Appeal in N.Z.I.A.S. v. Ellesmere County (1976) 1 NZLR 630, 636, His Honour Mr Justice Cook succinctly states the proper approach to non-compliance:-

10 "Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree of seriousness of non-compliance."

20 This approach to judicial review of the consequences of failure to comply with statutory provisions is more comprehensively stated by Lord Hailsham in London and Clydeside Estates v. Aberdeen D.C. [1979] 3AllER 876, 833 (c-j).

30 81. If there is non-compliance, it is clear that it will be found to be that at times the 1950 and 1961 Deeds continued in force, not by reference to Deeds of extension or renewal of terms, but by reference to agreements (not yet enshrined in Deeds) that the term of delegation be renewed. I have already submitted that it is not the purpose of sub-sections 7 and 8 to provide for the indentification of the controlling authority. Rather the main purpose is to ensure that the terms under which the abattoir is being maintained are clearly defined and approved by the Minister. In the light of this object it is seen that the want of a Deed of extension at all times is not serious when the parties involved have a clear appreciation of the situation.

(For Judgment References see paras. 48 and 49)

APPENDIX

40 Evidence in Support of Findings of Fact Disrupted by Appellant

82. Pending the commencement of the 1973 Deed (Record Mr Scoular all the evidence showed that the parties continued to act according to the terms and conditions contained in the earlier deeds, and considered themselves bound to do so. The changes brought about by the 1973 Deed did not

(Record Mr Scoular pg. 14 l. 12-20)
(Mr Marshall pg. 28. l. 23-28)
(Record Mr Marshall pg. 21 l. 21-32)

take effect until completion of that Deed.

83. Had the parties considered it essential, a simple Deed recording extension of duration of the delegation would have been executed pro tem and would have reflected the status quo down to the 1st June, 1973.
84. The Appellant seeks to suggest that the delegation was in doubt between 1970-73, that is that there was a real prospect that the delegation would not continue. (Appellant's Case pg. 18-19)
- 10
85. The Respondent never considered ceasing to operate the abattoir and had every reason to want to continue, as it was a co-operative company of local meat wholesalers and retailers in the Christchurch area naturally concerned with the supply of meat to the local market. Similarly the Council did not want to resume operation. The Council never entertained the possibility of another delegate and accepted that the company was entitled to another ten years from 1st October 1970. (Record Mr Marshall pg. 21 1. 1-21)
(Record Mr Scoular pg. 14 1. 7-11)
(Record Exhibit 4 pg. pg. 64 Mr Scoular pg. 18 1. 1-6)
- 20
86. As appears generally from the evidence of Messrs Marshall and Scoular, the parties were and had to be in constant communication of an ongoing programme of modernisation envisaging the operation of the plant beyond 1980. The programme of modernisation required the co-operation of both parties because the 1950 Deed provided for a limited delegation to the company to operate and maintain the abattoir but did not empower the company to improve it. The Council had retained the right to control the level of upgrading (Record 1950 Deed Clause 3 (c) pg. 31, Clause 4 pg. 32, Clause 14 pg. 36, Clause 15 pg. 37)
- 30
87. During the period 1970 - 1973, the parties were agreed that there was a need to amend various terms of the delegation. On the 21st October, 1970, the Council approved an agreement reached between its abattoir sub-committee and the company on some minor variations to be incorporated in the new "supplemental" Deed. However, the continuing need to modernise the premises to comply with the Department's requirement obviously overtook this agreement and ultimately a readiness by the Council to extend the scope (Record Mr Scoular pg. 20 1. 19-21)
(Record Exhibit 5 pg. 67, 68, 69)
- 40

of the delegation and give the company more control over the upgrading of the premises, though retaining ownership to itself, led to new terms upon which the abattoir was to be operated which were incorporated in a new Deed of Delegation dated 23rd May, 1973 which took effect from the 1st June, 1973

(Record Mr Marshall pg. 22 l. 27-31, pg. 23 l. 13-21 Mr Scanlon pg. 13 l. 24-34 1973 Deed Clause 1 (b) to pg. 47)

88. The Appellants case suggests:

10 (a) That there was no evidence from the Department of Agriculture and therefore no basis for inferences as to the Minister's view during 1970-74

(b) There was no evidence to conclude that Ministerial approval had been given either to the 1960 or 1970 renewals.

(Appellant's case pg. 19)

89. These arguments ignore:

(i) The evidence as to continuity of delegation since 1950

(Record Mr Scoular pg. 11 l. 21-27)

20 (ii) The letter from the Department of Agriculture dated 13/3/61 advising of Ministerial Approval to the extension from 1960

(Record Exhibit 13 pg. 107)

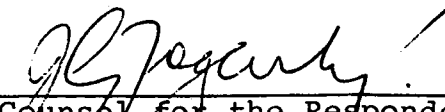
(iii) The Certificates of Renewal of Registration of the Abattoir issued to the Respondent as Controlling Authority between 1970-73.

(Record pg. 102-5)

30 90. It is important to appreciate that the modernization of the plant had nothing to do with the issue of whether there would be delegation or not. It was directed to meat hygiene and only affected the 1973 deed because it involved expenditure of funds.

(Record Mr Scoular pg. 12 l. 26- pg. 14 l. 12)

91. The reference to the threatened withdrawal of the 'licence' in Mr Scoular's evidence is to the abattoir licence (Meat Act 1964 S. 17) and has nothing to do with Ministerial approval to the delegation under S. 16.


Counsel for the Respondent
J.G. FOGARTY

IN THE PRIVY COUNCIL

No.

O N A P P E A L
FROM THE COURT OF APPEAL OF
NEW ZEALAND

BETWEEN WILLIAM DAVID WISEMAN
Defendant

AND THE CANTERBURY BY-PRODUCTS
 COMPANY LIMITED
Plaintiff

SUMMARY OF RESPONDENTS CASE

WESTON WARD & LASCELLES
SOLICITORS
CHRISTCHURCH