High Court, relying on *Gill's* case, and to a certain extent *Ramsay v. Aberfoyle,* to establish the proposition that the Council could not show a sufficient public interest on which to base an injunction. However Menzies J., with whom Kitto, Taylor and Windeyer JJ. concurred on this point,[44] (Dixon C.J. finding it unnecessary to express an opinion), said:[45]

> It would, I think, be contrary to the trend of authority since 1927 to accept now the limitation adopted in *Gill's Case* upon the jurisdiction of a court of equity to grant injunctions.
> . . . Whatever was the position in 1927, it is now apparent from a line of cases in New South Wales and in England that the courts have granted injunctions . . . to protect benefits or advantages . . . that could not be regarded as having any resemblance at all to proprietary rights.

His Honour pointed out that *Ramsay v. Aberfoyle* had left the question undecided, as only Starke and McTiernan JJ. had expressed an opinion on *Gill's* case. He also said that section 587 Local Government Act, which enabled a municipal council to take proceedings usually taken by the Attorney-General, must have been designed with the present type of suit in mind. Menzies J. concluded that a proper case for an injunction was made out when it was shown that some person, bound by a municipal law imposing a restriction on the use of land, had broken and would, unless restrained, continue to break that restriction, to the disadvantage of other persons living in the locality. 'The wide discretion of the court is an adequate safeguard against abuse of a salutary procedure'.[46]

M. WRIGHT

TESTRO v. TAIT[1]

Companies—Special Investigation—Whether inspector required to act judicially—Right of company to appear and be heard—Companies Act 1961-1963, ss. 171 (10), 222 (1) (g).

Pursuant to section 173 (1) of the Companies Act 1961, the respondent was appointed to investigate the affairs of a group of companies which included the appellant company. An inspector under Division 4 of Part VI of the Act has power to require the attendance for examination of any officer or agent of any corporation the affairs of which are being investigated.[2] R. C. Testro was required to appear for examination. Testro was the chairman and managing director of the appellant company. Counsel for Testro and for the company asked leave to appear for the witness, and to be present for the company throughout the taking of evidence with liberty to cross-examine and adduce evidence. Counsel

[44] It is interesting to note that three of this four have at some stage practised at the N.S.W. Bar.
[45] (1963) 37 A.L.J.R. 212, 220-221.
[46] *Ibid.* 221.
[1] (1963) 37 A.L.J.R. 100. High Court of Australia; McTiernan, Kitto, Taylor, Menzies and Owen JJ.
[2] This is the combined effect of s. 173 (2) and s. 171 (3) of the Act.

further asked that the company be informed of all allegations occurring during the investigation which reflected on the administration of the company. In the alternative he requested that all allegations should be made known to the company and that a full opportunity be given of meeting such allegations by evidence. The respondent, relying on *R. v. Coppel; Ex parte Viney Industries Pty Ltd,*[3] rejected each of these applications. The matter went before O'Bryan J., in the Supreme Court of Victoria, who refused to grant an order *nisi* for a writ of prohibition or mandamus, basing his refusal on the *Viney Industries Case.* The appellant (Testro) and the appellant company appealed to the High Court which, by a majority,[4] dismissed the company's appeal and rescinded the special leave granted to Testro himself.[5]

Before the High Court the broad contention of the company was, to use the words of the majority judgment:

> that an investigation of a company's affairs by an inspector appointed under Division 4 of Part VI of the Companies Act 1961 is in the nature of a judicial proceeding; that a report made by such an inspector upon the affairs of a company may prejudicially affect its rights; that in these circumstances the inspector is bound to conduct his investigation in accordance with the rules of natural justice and that, before he makes a report on the company's affairs, he is bound to give the company an opportunity of answering or explaining matters which, if unanswered or unexplained, might give rise to adverse findings or comment in the report.[6]

The majority judges, in a joint judgment, first examined the *Viney Industries Case,* a decision of the Full Court of the Supreme Court of Victoria dealing with an enquiry under the Companies Act 1958. They rejected the submission that that case was wrongly decided, agreeing with the two principal conclusions of the Full Court—that 'the Act imposed no obligation upon an inspector to act judicially or to conduct his investigation by a process analogous to the judicial process', and that it could not be said that a report 'could of its own force prejudicially affect the rights of the company'.[7] The Full Court in the *Viney Industries Case* relied on *R. v. Church Assembly Legislative Committee; Ex parte Haynes-Smith;*[8] *Nakkuda Ali v. M. F. de S. Jayaratne,*[9] and *Re Grosvenor and West-End Railway Terminus Hotel Co. Ltd.*[10]

Counsel for the company had then argued that even if the *Viney Industries Case* was correctly decided, certain provisions added to the Companies Act in 1961 showed 'such a change of legislative intention' that the investigation ought now to be regarded as being in the nature of a

[3] [1962] V.R. 630.

[4] McTiernan, Taylor and Owen JJ.; Kitto and Menzies JJ. dissenting. (Dixon C.J. was present for part of the hearing, but was replaced by Menzies J. before the case concluded.)

[5] The appeal of Testro gave rise to an interesting situation, for counsel for the respondent informed the court that the inspector had misunderstood the nature of the application and was now prepared to grant it. The court unanimously agreed that the special leave granted to Testro should be rescinded.

[6] (1963) 37 A.L.J.R. 100, 101. [7] *Ibid.* [8] [1928] 1 K.B. 411, 415.

[9] [1951] A.C. 66, 75. Privy Council. [10] (1897) 76 L.T. 337.

judicial proceeding. It was contended that the addition of section 171 (10) and section 222 (1) (g) (ii) produced this result. Section 171 (10)[11] provides that 'a copy of the report of any inspector . . . certified as correct by the Minister shall be admissible in any legal proceeding as evidence of the opinion and of the facts upon which his opinion is based of the inspector in relation to any matter contained in the report'. The change produced by this section when compared with its predecessor section 146 (9) of the Act of 1958 is the addition of the words 'and of the facts upon which his opinion is based'. The majority thought that this was an unimportant addition and not such as would justify the conclusion that 'the legislature intended to make such a fundamental change as is suggested in the character of an investigation'.[12] Both Kitto and Menzies JJ. disagreed, Kitto J. calling it 'no minor alteration'. The dissenters also joined issue with the majority over the expression by the latter of the opinion that 'the report of an inspector has no evidentiary value at all except when the fact of his opinion is a relevant issue in any particular proceedings'.[13] It is thought that the approach of Kitto J. was more in accord with the natural meaning of the words, when he said:

> I see no ground for so constructing the provision. It does not say that the report is evidence of the facts as being those upon which the opinion is based. Its literal meaning is that any facts stated in the report, and forming part of those upon which any opinion expressed in the report is based, may be proved prima facie, in any proceedings, whether under the Act or not, by production of the report.[14]

The second addition on which reliance was placed was section 222 (1) (g) (ii). Section 222 (1) (g) sets out two grounds upon which a winding up order may be made by the court. The first section 222 (1) (g) (i) which appeared in the 1958 Act, is that an inspector has reported that he is of opinion that the company cannot pay its debts and should be wound up. The second, not in the 1958 Act, is that an inspector has reported that he is of opinion that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up.[15] Again the majority considered that this was not a consideration which changed the nature of an investigation and they adopted the reasoning of the Full Court of the Supreme Court of Victoria in the *Viney Industries Case* when that court was considering section 222 (1) (g) (i). (Section 160 (1) (h) of 1958 Act.)

In a strong opinion Menzies J. considered that section 222 (1) (g) was of major importance. First he said:

[11] S. 171 (10) is in Div. 3 of Pt. VI and by s. 173 (2) the provisions of that division with certain exceptions not here material are made applicable 'with such adaptations as are necessary' in the case of an investigation under Div. 4.

[12] (1963) 37 A.L.J.R. 100, 102.

[13] *Ibid.*

[14] *Ibid.* 103.

[15] As originally enacted s. 222 (1) (g) applied only to the report of an inspector appointed under s. 169 or s. 170. By Act No. 6985 which came into operation on 1 July 1962 the section was amended by adding the words 'or s. 173'. This amendment was not discovered until after the hearing before the High Court Commenced.

> It is apparent that one of the principal objects of instituting a special investigation is to obtain for the Minister information upon which he may base his decisions and actions and, were this all, the intervention of the court could not be invoked to control the investigation . . . this was in substance established . . . in *Re Grosvenor & West-End Railway Terminus Hotel Co. Ltd.*[16] An enquiry of such a nature is outside the law but, as soon as findings or opinions are given legal consequences and are made the foundation in law for further proceedings in relation to the Company, then the position changes and well-established principles require that the enquiry be subject to the control of the law to prevent departures from those basic principles of justice which are commonly described as natural justice and which include giving a person upon whom a legal detriment may be inflicted the opportunity of being heard.[17]

His Honour then examined the legislation and observed that under section 222 (1) (e) a company cannot be wound up unless the court decides that it is unable to pay its debts: and what section 222 (1) (g) does is to constitute the opinion of an inspector that a company is unable to pay its debts and should be wound up—the virtual equivalent of a decision of the court that the company is unable to pay its debts. This of course fits the legislation into the framework of the passage quoted above. 'An investigation which could result in a report having such consequences is in my opinion one at which the company, in the absence of any expression of legislative intention to the contrary, is entitled to a fair hearing'.[18]

These reasons, based as they are on section 222 (1) (g) (i) which had its place in section 160 (1) (h) of the 1958 Act necessarily involved a finding that *R. v. Coppel; Ex parte Viney Industries Pty Ltd*, had been wrongly decided. Kitto J. also thought that the case was not correctly decided. In that case the Court relied to some extent on *Hearts of Oak Assurance Co. Ltd v. Attorney-General*,[19] and to a larger extent on *Grosvenor & West-End Case* but in the latter case Chitty L.J. said of the Companies Act then under consideration (1862) (U.K.) 25 and 26 Vict. c. 89:

> The beginning and the end of the duty of an inspector . . . is to examine and report. As has been pointed out, the whole business begins and ends with the enquiry and report. The report cannot be made the foundation of any subsequent action, it is merely evidence of the opinion of the inspector.[20]

How different the current Victorian legislation is, when, as Kitto J. says a petitioner asserting the company's inability to pay its debts must prove the fact to the court: the same applies when the just and equitable ground is relied upon, and yet if an inspector under Division 4 has reported an opinion in accordance either with parts (i) or (ii) of section 222 (1) (g) that the company cannot pay its debts and should be wound up, or that in his opinion it is in the interest of the public, the share-

[16] (1897) 76 L.T. 337. [17] (1963) 37 A.L.J.R. 106. [18] *Ibid.*
[19] [1932] A.C. 392. [20] (1897) 76 L.T. 337, 339.

holders, or the creditors that the company should be wound up a competent petitioner only has to prove the report and he has a prima facie case for a winding up order.[21]

The case is important at two levels; first as a decision on a certain set of legislative provisions and secondly in the wider field of the rules of natural justice recently canvassed by the House of Lords in *Ridge v. Baldwin*.[22] It is worth commenting briefly on both aspects of the case. As a decision on the various sections of the Companies Act 1961 it is difficult to accept the majority decision which, it is thought, does not allow sufficiently for the difference in relevant legislative content between the Companies Act 1862 and that operative in Victoria in 1961. It is thought that on the interpretation of the Act, which all the justices agreed was the only way to divine the legislative intention in a case such as this when Parliament is silent on the question of the right to a hearing, the view of the minority judges is distinctly preferable allowing as it does for the difference between *Grosvenor's Case* and the case under consideration. This brings one to the wider question of natural justice and the House of Lords decision in *Ridge v. Baldwin*.[23] Surprisingly, some language in the majority opinion, as commentators have noticed,[24] supports the proposition that the duty to act judicially will not be implied from a mere power to affect rights, but can only arise from statutory provisions presenting a procedure 'analogous to the judicial process', which is, of course, precisely what Lord Reid was objecting to when he said, referring to Lord Hewart's judgment in *R. v. Legislative Committee of the Church Assembly; Ex parte Haynes-Smith*:[25]

> If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities.[26]

Lord Reid observed that this incorrect notion of Lord Hewart's, based as it was upon a dubious construction of what Atkin, L.J., said in his well known dictum in *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co.*,[27] had been carried over into the Privy Council's opinion in *Nakkuda Ali v. M. F. de S. Jayaratne*,[28] and was accepted by the Board without references to a substantial body of more ancient authority.[29] Thus the proposition established after a lengthy

[21] (1963) 37 A.L.J.R. 103. [22] [1963] 2 W.L.R. 935. [23] *Ibid.*

[24] Benjafield and Whitmore, 'The House of Lords and Natural Justice' (1963) *Australian Law Journal* 140, 147. [25] [1928] 1 K.B. 411.

[26] [1963] 2 W.L.R. 935, 948.

[27] [1924] 1 K.B. 171, 205. Lord Atkin (then Atkin L.J.) said: 'Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to [the prerogative writs]'.

[28] [1951] A.C. 66 *per* Lord Radcliffe.

[29] Older authority included: *Bagg's Case* (1611) 11 Co. Rep. 93 B, *Osgood v. Nelson* (1872) L.R. 5 H.L. 636, 649: *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.N.S. 180.

review of the authorities in *Ridge v. Baldwin* is that in order for a body to be subject to the controlling jurisdiction of the prerogative writs it is not usually necessary to prove that, in addition to possessing authority to determine questions affecting the rights of subjects, there is also a duty to act judicially to be implied from the relevant statutory materials.[30]

The majority opinion in the *Testro Case* does not even refer to the House of Lords decision, and it has been suggested that it had not been drawn to the court's attention. But counsel for the appellant company, although the decision was not available during the hearing, in a note to the court, respectfully drew their Honours' attention to the decision, and Kitto J. had certainly read the case. But he does little more than comment that:

> the subject is somewhat embarrassed by the difference of opinion between, on the one side, Lord Hewart in *R. v. Church Assembly Legislative Committee,* and Lord Radcliffe in *Nakkuda Ali's Case* and on the other side, Lord Reid in *Ridge v. Baldwin.* as to the meaning of the passage in the judgment of Atkin L.J. . . .[31]

Even Kitto J. draws the distinction between administrative and executive powers on the one hand and judicial powers on the other,[32] which again is an approach disapproved in *Ridge's Case;* and he seems to be unaffected by the disapproval of *Nakkuda Ali's Case* as he cites it as authority in his judgment saying: 'Even if an otherwise unfettered discretion is subject to the condition that the repository has reasonable ground for a belief, the power is nevertheless executive and no obligation to act judicially attaches to it,'[33] and he cites *Nakkuda Ali* and goes on: 'The reason is that there is no duty to decide anything upon enquiry. It is the duty of antecedent decision upon some question that makes the analogy of judicial powers at once appropriate and compelling.'[34] This is a rationalization of the decision in *Nakkuda Ali* but does not, it is thought, explain the defects in reasoning, occasioned by what was in effect a decision *per incuriam,* which Lord Reid pointed out. Nevertheless, Kitto J's discussion of the relevant authorities and his statements of principle are useful, if bewildering for his refusal to exploit the ground available for discussing *Ridge's Case.* Two reasons may be advanced in explanation of this failure of the majority to mention the case and of Kitto J's avoidance of discussion. First, this was a case which was concerned with a particular set of statutory provisions relating to a special type of enquiry under the Companies Act where it might be thought (though not as I think, with great accuracy) that the efficient functioning of such an enquiry would be encumbered by providing the opportunity of the companies being investigated to be heard. Secondly,

[30] This seems to have been assumed in Australia in *Re Gosling* 43 S.R. (N.S.W.) 312, *per* Jordan C.J. at 316-317. See also Salter J. in [1928] 1 K.B. 411, 419.

[31] (1963) 37 A.L.J.R. 104. [32] *Ibid.*

[33] Which is surely the proposition which Lord Reid had in mind when he disapproved the decision. See [1963] 2 W.L.R. 935, 950-952.

[34] (1963) 37 A.L.J.R. 104.

it may be thought that, in the circumstances, the subsequent observations of Kitto J. in *Mobil Oil Australia Pty Ltd v. Commissioner of Taxation (Cth)*[35] are relevant when he pointed out that the notion of natural justice does not embody a fixed code of rules applicable to every kind of enquiry and every kind of tribunal,[36] and may help to explain the reluctance of the majority to reach what can only be regarded as a more satisfactory conclusion.

It is thought that the decision and observations in the *Testro Case* should not be taken as an indication that the High Court is not disposed to follow the House of Lords in *Ridge v. Baldwin.* It might be said that a resolution of the *Testro Case* did not absolutely require an examination of the decision and we would be wrong to be unduly concerned that what is clearly a very good and correct decision will not be followed in Australia.

R. A. SUNDBERG

[35] (1963) 37 A.L.J.R. 182, 190. This was a case in which questions were referred to the High Court asking what were the duties and powers of the Taxation Board of Review in respect of excluding representatives of the taxpayer from access to certain evidence, and whether the Board's decision would be valid if there was such exclusion.

[36] See also Lord Evershed and Lord Reid in *Official Solicitor to the Supreme Court v. K.* [1963] 3 W.L.R. 408, 416-417, a case where a mother contended that she had a right to see certain confidential reports of the Official Solicitor. The House of Lords rejected her claim. Lord Evershed said: 'My Lords, I think it is not enough to say that the proceeding is a judicial proceeding. It is necessary to define or have in mind what is the true character of this judicial proceeding and what is its end or purpose. . . . As Tucker L.J. said in *Russell v. Duke of Norfolk* (1949) 65 T.L.R. 225, 231, in a passage approved by the Privy Council in *Ceylon University v. Fernando* [1960] 1 W.L.R. 223, 231: "There are, in my view, no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter under consideration and so forth".'