CASE NOTES

R. v. HILLINGDON LONDON BOROUGH COUNCIL, *EX PARTE* ROYCO HOMES LTD.[1]

R. v. INDUSTRIAL APPEALS COURT, *EX PARTE* VICTORIAN CHAMBER OF MANUFACTURES[2]

The major criticism levelled at the prerogative writs as a method of judicial review in administrative law has been the uncertainty regarding the principles governing their availability. Much of this doubt stemmed from the 'conceptual' interpretation placed upon the *dictum* of Atkin L.J. in *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd.*,[3] an interpretation which prevailed in the English courts until 1963[4] and in the Australian courts until at least 1968.[5] Both *R. v. Hillingdon London Borough Council, ex parte Royco Homes Ltd.*[6] and *R. v. Industrial Appeals Court, ex parte Victorian Chamber of Manufactures*[7] deal, *inter alia*, with the meaning of a particular section of that *dictum*: that the body concerned must be under '[t]he duty to act judicially . . .'.[8] *R. v. Hillingdon London Borough Council*[9] also deals with several other factors that may influence the availability of the writs.

(i) THE NATURE OF THE FUNCTION — 'LEGISLATIVE' POWER AND THE PREROGATIVE WRITS

In *R. v. Hillingdon London Borough Council*,[10] Lord Widgery C.J., who delivered the main judgment of the Divisional Court,[11] considered the function performed by a local planning authority pursuant to its statutory discretion to grant planning permission to developers.[12] Permission had been granted but subject to conditions. Conditions 2 and 3 sought to control the space, heating and building costs of houses built under the permission while conditions 4 and 5 sought to ensure that these houses should be occupied by people on the authority's housing waiting list and to control the terms of the tenure they received.[13] The developer sought *certiorari* and

[1] [1974] 1 Q.B. 720; *sub nom. R. v. London Borough of Hillingdon, ex parte Royco Homes Ltd.* [1974] 2 All E.R. 643, [1974] 2 W.L.R. 805. Lord Widgery C.J., Melford Stevenson and Bridge JJ.

[2] [1975] V.R. 84. Pape, Gillard and Dunn JJ.

[3] [1924] 1 K.B. 171, 205.

[4] *Ridge v. Baldwin* [1964] A.C. 40.

[5] As a result of *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, 233 *per* Barwick C.J.

[6] [1974] 1 Q.B. 720.

[7] [1975] V.R. 84.

[8] *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 K.B. 171, 205 (*per* Atkin L.J.).

[9] [1974] 1 Q.B. 720.

[10] *Ibid.*

[11] Melford Stevenson J. concurred with Lord Widgery C.J. Bridge J. delivered a separate judgment but also agreed with the Lord Chief Justice.

[12] Town and Country Planning Act 1971 (Eng.) s. 29(1).

[13] The conditions are quoted: *R. v. Hillingdon London Borough Council* [1974] 1 Q.B. 720, 725-6 (*per* Lord Widgery C.J.).

mandamus[14] to quash the planning permission, alleging the conditions were *ultra vires* the authority.

Although this was the first occasion on which *certiorari* had been sought against the local authorities under the present English legislation, as grantors of planning permission, Lord Widgery C.J. had little difficulty in deciding that the writ was available to control this activity. The Lord Chief Justice thought the novelty of the application to be due to that part of Atkin L.J.'s *dictum* quoted above.[15] However since the judgment of Lord Reid in *Ridge v. Baldwin*,[16] Lord Widgery C.J. thought that any such obstacle had been shown to be unfounded.[17]

The emphatic attitude of Lord Widgery C.J. to the 'judicial' requirement is further evidence of the back-lash against traces of conceptualism in the allied fields of the availability of the prerogative writs and the procedural requirements of natural justice that has occurred in English decisions in the last decade. There has been a consistent denial of any value in the practice of labelling the functions of a body as 'judicial' or 'quasi-judicial' as opposed to 'administrative'.[18] However even when such distinctions were in favour it is probable that the prerogative writs would have been available when a landowner's right to develop his property was in issue. Traditional indicators of a 'judicial' process will still often be present in bodies against which the writs are available, but their presence in a particular case is not decisive. Thus in *R. v. Hillingdon London Borough Council*[19] there was no real dispute between contesting parties as to their respective rights.[20]

The Australian judicial approach is still somewhat different in form, if not in substance. Superficial respect is still often paid to the 'conceptual' distinctions. On an application for *certiorari* or prohibition, the power being exercised by the body in question is usually labelled as 'judicial', 'quasi-judicial' or 'administrative' but only after its features including the procedure stipulated and the effect of the decision on individuals' rights have been analysed.[21] An Australian court faced with the facts of *R. v. Hillingdon London Borough Council*[22] may well have stated that the local authority had to act 'quasi-judicially' because of the property interest involved.

But there is one area where 'conceptual' terminology and distinctions do still have some role in determining the availability of the writs. This is when the power being exercised is classified as 'legislative' which in a wide sense can include all exercises of subordinate legislative power and similar functions. The extent of any such

[14] Lord Widgery C.J. thought the *mandamus* application premature and it was adjourned *sine die* till necessity forced its grant, see *R. v. Hillingdon London Borough Council* [1974] 1 Q.B. 720, 732.

[15] *i.e. R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 K.B. 171, 205.

[16] [1964] A.C. 40.

[17] [1974] 1 Q.B. 720, 728.

[18] *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170 (*per* Lord Denning M.R.); *R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299 (C.A.), and *Furnell v. Whangarei High Schools Board* [1973] A.C. 660 (P.C.). For criticisms of this 'trend', see Mathieson, 'Executive Decisions and Audi Alteram Partem' [1974] *New Zealand Law Journal* 277, 282-3.

[19] [1974] 1 Q.B. 720.

[20] *Cf.* Purdue, 'The Use of *Certiorari* to challenge a Planning Determination' [1974] *Journal of Planning and Environment Law* 342, 343.

[21] *E.g. R. v. Brewer; ex parte Renzella* [1973] V.R. 375, 378-9 where an 'analytical' approach was adopted. Here however it was held that natural justice was partly excluded by the rules of the body concerned.

[22] [1974] 1 Q.B. 720.

exception to the present 'analytical' approach was the major issue in the Victorian Full Supreme Court decision *R. v. Industrial Appeals Court, ex parte Victorian Chamber of Manufactures*.[23] There, two union claims to Wages Boards had been referred by the Minister to the Victorian Industrial Appeals Court under the Labour and Industry Act 1958, s. 45B(1). Four employer groups obtained an order *nisi* for a writ of prohibition addressed to the Court, alleging that it was acting outside its jurisdiction. The union opposed the issuing of the writ and the Full Court decision rested on two grounds: first whether the writ would go to the Industrial Appeals Court and secondly the extent of the Court's actual jurisdiction. Only the former concerns us in this note.[24]

The argument put against the availability of prohibition was that the Court's determination would in effect be that of a subordinate legislature, resulting in 'a common rule for the various trades for which the . . . Wages Boards were appointed'[25] and that the writ would not be available against such a function. It may be thought incongruous that a body with such a title, which has been operating since 1903 and under its present name since 1941[26] could face this contention. No doubt this is partly due to the lack of case-law on the extent of the 'legislative' exception, although the 'legislative' function was considered recently to include the determination of a common rule for a large number of people.[27] In addition the section of the Act in issue, s. 45B, is of recent origin.[28]

The nature of the Industrial Appeal Court's function had been considered by the Supreme Court previously. In *R. v. Industrial Appeals Court, ex parte Frieze*[29] Sholl J. discussed s. 45A of the Act under which appeals from Wages Boards' determinations are heard and consequently conditions for the future regulation of employment are laid down. His Honour at the least thought arguable '[t]he more difficult question . . . whether the functions of the Court are so legislative in character as to fall outside the writ's [*i.e.* prohibition's] scope'.[30] Sholl J. did not refer to two earlier Supreme Court decisions where it was presumed that the writs could be available against the Industrial Appeals Court.[31] But in neither case does the 'legislative' argument appear to have been submitted. At any rate, s. 45B was not under consideration, and if there are valid doubts as to appeals under s. 45A, *a fortiori* they would apply to S. 45B where claims reach the Court in a non-curial manner, upon a reference from the Minister.

The main Australian authority on the nature of the 'legislative' function, the High Court decision *R. v. Wright, ex parte Waterside Workers' Federation of Australia*[32] was at the basis of the union's argument. Prohibition there was sought against the then Court of Conciliation and Arbitration, which had statutory powers to '[r]egulate

[23] [1975] V.R. 84.
[24] On the second point the Full Court held (a) the Industrial Appeals Court did have jurisdiction to determine the stopwork meeting claim to the extent that it encompassed matters necessarily involved in regulating industrial relations (b) but had no jurisdiction to determine the medical and hospital expenses claim.
[25] [1975] V.R. 84, 86.
[26] Alley, *Industrial Law in Victoria* (1973) 46-7.
[27] *Bates v. Lord Hailsham of St. Marylebone* [1972] 1 W.L.R. 1373, 1378 (*per* Megarry J.).
[28] Act No. 7273 (1965).
[29] [1963] V.R. 709.
[30] *Ibid.* 714. O'Bryan and Smith JJ. did not comment on the question.
[31] *R. v. Industrial Appeals Court; ex parte Henry Berry & Co. (Australia) Ltd.* [1955] V.L.R. 156 and *R. v. Industrial Appeals Court; ex parte Melbourne Fire Brigades Board* [1959] V.R. 345, 353 (*per* Dean J.).
[32] (1955), 93 C.L.R. 528.

industrial matters in connection with stevedoring operations'[33] and was considering an application for changes in worker engagement regulations. The High Court refused the application stating that a clear example of legislative power was in issue. In fact there was:

> no determination affecting existing rights, no question of fact or law submitted for decision, no exercise of a discretionary authority to the prejudice of person or property, nothing sought or proposed but the promulgation of a set of provisions regulating the future conduct of persons when they engage in defined activities.[34]

Yet there are few other examples of statutory powers which have been analysed in a similar manner. It is insufficient that the result of the body's process is the formulation of general principles if its procedure does not fit the High Court's description. Thus in *Attorney-General of Queensland v. Wilkinson*[35] the majority of the High Court decided that prohibition could be directed to the then Queensland Industrial Court when performing the role of award variation. Certainly this process did directly affect rights, but those of a large number of people. Fullagar J. admitted that some of the Court's other functions might be essentially legislative in character but thought that the procedure stipulated for the award variation role by statute showed that the power had to be exercised judicially.[36]

A strictly 'analytical' approach allows little room for the public policy considerations which must influence decisions on whether bodies such as the Industrial Appeals Court should be subject to judicial review.[37] As the Full Court stressed in the case noted, if the union argument was successful, the Industrial Appeals Court might 'by an erroneous decision in law confer jurisdiction on itself possibly to affect prejudicially the rights of and impose duties on members of the community by the exercise of powers which in law it did not possess'.[38]

The Full Court only rejected the union's submission after a close examination of the procedures and powers involved in the Court's operations and a consideration of the two previous occasions when the Supreme Court had presumed the writs were available.[39] Their Honours then concluded that the Industrial Appeals Court would be expected to deal with the Ministerial reference at least quasi-judicially and in a curial manner. The Full Court stated that 'All the features of a curial proceeding were present — parties, a hearing and an adjudication on law'.[40] Among the features of the Court's operation most influential in the decision reached were: that the Industrial Appeals Court was presided over by a County Court judge who was to decide all questions of law before it,[41] interested parties could be represented before the Court,[42] public notification had to be given of the fact of the reference,[43] the determining of a reference was assimilated with the hearing of an appeal from a

[33] Stevedoring Industry Act 1949 (Cth) s. 34.
[34] (1955), 93 C.L.R. 528, 542.
[35] (1958), 100 C.L.R. 422.
[36] *Attorney-General of Queensland v. Wilkinson* (1958), 100 C.L.R. 422, 432-3.
[37] Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed.) 201.
[38] *R. v. Industrial Appeals Court* [1975] V.R. 84, 92. Also *Re Gilmore's Application* [1957] 1 All E.R. 796, 803 (*per* Romer L.J.) quoted by the Full Court.
[39] *i.e. R. v. Industrial Appeals Court; ex parte Henry Berry & Co. (Australia) Ltd.* [1955] V.L.R. 156 and *R. v. Industrial Appeals Court; ex parte Melbourne Fire Brigades Board* [1959] V.R. 345.
[40] *R. v. Industrial Appeals Court* [1975] V.R. 84, 90.
[41] Labour and Industry Act 1958 s. 44(3).
[42] *Ibid.* s. 45B(5) and s. 45A(4).
[43] *Ibid.* s. 45B(3).

Wages Board[44] and the fact that the Court's determination was final.[45] More generally the Court was directed to be 'guided by the real justice of the matter without regard to legal forms and solemnities'.[46]

The Full Court stated its decision in a series of propositions that serve as illustrations of the factors that are now considered important in determining the questions of the availability of the prerogative writs and the closely allied question of when natural justice might be granted. The Industrial Appeals Court could make 'a determination which would affect existing rights and impose new duties' and could exercise discretionary authority to the prejudice of personal property.[47] The determination would do more than regulate employment, it 'could prejudically affect the employers concerned'.[48]

The union argument that the Court could bring down a common rule which would be 'legislative' in character was not rejected by the Full Court, but this very function also meant that the Court had 'legal authority to determine questions affecting the rights of subjects'.[49] The reasoning is very similar to that of Hutchinson J. in *Jackson v. Price Tribunal (No. 2)*.[50] In that case it was decided that a statutory price order was 'legislative' in form, substance and result, as it did prescribe what the law would be in future cases arising under it. However in making the order, the Price Tribunal imposed new legal liabilities from which individuals were previously free, so in its procedure it did have to act 'judicially'. By distinguishing the procedure followed and the result adopted, much of the potential ambit of this 'legislative' exception disappears.

Professor De Smith suggested that there was no policy reason why subordinate legislative instruments should not be subject to the prerogative writs.[51] The approach of the Full Court to the question supports this view. Their Honours' favourable attitude to the Court of Appeal decision *R. v. Liverpool Corporation, ex parte Liverpool Taxi Owners' Association*,[52] where a body with clearly 'administrative' functions was held to be subject to prohibition illustrates that some Australian resurgence has taken place in the availability of the prerogative writs. The phrase 'the duty to act judicially' now signifies no more than that after an analysis of the power in question the Court has concluded that the body in question is subject to review by the writs. The unsatisfactory nature of conceptual distinctions have made them untenable. The 'analytical' approach applied liberally, as in recent years, appears the most satisfactory? of deciding which functions will be subject to judicial review, short of extending it to all bodies. As is inevitable, especially where different types of power are combined in the same body, somewhat arbitrary distinctions will result when decisions have to be made as to the most decisive aspects of the power being exercised.[53]

R. v. Hillingdon London Borough Council[54] raised additional issues which can be conveniently discussed as follows:

[44] *Ibid.* s. 45B(5).
[45] *Ibid.* s. 45A(6).
[46] *Ibid.* s. 44(1).
[47] *R. v. Industrial Appeals Court* [1975] V.R. 84, 91.
[48] *Ibid.*
[49] *Ibid.*
[50] [1950] N.Z.L.R. 433.
[51] De Smith, *Judicial Review of Administrative Action*, (3rd ed. 1973) 349.
[52] [1972] 2 Q.B. 299 (C.A.).
[53] *Cf. R. v. Whalley; ex parte Bordin & Co.* [1972] V.R. 748 and *West End Service v. Innisfail* (1958), 11 D.L.R. 2d.) 368. See also *R. v. Minister of Health; ex parte Yaffe* [1931] A.C. 494.
[54] [1974] 1 Q.B. 720.

(ii) THE ULTRA VIRES ISSUE

The main question in the case was whether the conditions described above were *ultra vires* the planning authority. Not surprisingly the Court held that at least conditions 4 and 5 clearly were. Conditions 2 and 3 were less clear cut and the Court did not find it necessary to reach a final decision on them. Previous decisions on the limits to be placed upon the local planning authorities' statutory discretion were followed. The conditions must reasonably relate to the permitted development.[55] In deciding that the conditions were *ultra vires,* Lord Widgery C.J. relied on the ground of unreasonableness in the sense that the conditions resulted in the developer having to assume part of the authority's housing role; they went beyond anything that Parliament could have intended or any reasonable authority could have imposed.[56] Bridge J. appears to have preferred the wide *ultra vires* ground of the improper purpose shown by the authority.[57] Different approaches are common in this area and demonstrate the difficulty of attempting to categorize the grounds of *ultra vires.* This is especially so now the extent of unreasonableness has been extended beyond the narrow test expressed by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.*[58]

Certiorari for error of law on the face of the decision was the remedy used to quash the planning permission. One commentator has suggested that this was because of the difficulty found by the Courts '[i]n defining unreasonableness in its wider sense as a basis of judicial review'.[59] No doubt there are difficulties in deciding the legitimate use of planning powers couched in wide terms, although several of the fact situations in this area have been clear cut. Nevertheless if the error had not appeared on the face of the decision, the developer may well have been able to argue that the improper purpose or even unreasonableness of the local planning authority involved a jurisdictional error against which *certiorari* was available.[60]

(iii) DISCRETIONARY NATURE OF THE PREROGATIVE WRITS

Alternative remedies were available to the developer. An appeal was possible from the local authority decision to the Secretary of State for the Environment by which all issues arising from the planning permission application, whether of law, fact, policy or opinion could have been disposed of.[61] A further appeal on 'questions of law' lay from the Minister's decision to the Divisional Court.[62] Other remedies such as a declaration could have been sought. On the question of the relevance of these alternatives to the remedy sought, Lord Widgery C.J. stated: 'certiorari will go only where there is no other equally effective and convenient remedy'.[63] Although there is little authority, this principle is usually expressed as a matter for the Court's dis-

[55] *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572 (*per* Denning L.J.).
[56] [1974] 1 Q.B. 720, 731-2.
[57] *Ibid.* 731. Bridge J. did agree at the beginning of his judgment with Lord Widgery C.J.
[58] [1948] 1 K.B. 223, 228-9 and De Smith *op.cit.* 310-11. See also *271 William Street Pty. Ltd. v. City of Melbourne* [1975] V.R. 156.
[59] Hawke, '*Certiorari* and Decisions of the Local Planning Authority' [1974] *New Law Journal* 673, 674. See also Purdue *op.cit.*
[60] As a result of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147. See also De Smith *op.cit.* 350.
[61] Town and Country Planning Act 1971 (Eng.) s. 36(1) and *R. v. Hillingdon London Borough Council* [1974] 2 Q.B. 720, 728-9.
[62] Town and Country Planning Act 1971 (Eng.) s. 245(1)(b).
[63] *R. v. Hillington London Borough Council* (1974) 1 Q.B. 720.

cretion. However on the facts Lord Widgery C.J. had no doubt that *certiorari* was still available, it was 'speedier and cheaper than the other methods',[64] and the present was a proper case for it to be issued, as 'the decision [was] liable to be upset as a matter of law because on its face it [was] clearly made . . . in consequence of an error of law'.[65] Bridge J. expressed a similar view.[66] The Court's decision was no doubt influenced by the fact that the wording of the appeal was not mandatory in form. Whilst recognizing the existence of the Court's discretion in granting the prerogative writs, it seems difficult to justify the limitations suggested by their Lordships. Surely the applicant should be able to select the remedy he thinks most suitable, with the Court's role remaining that of safeguarding as many common law avenues of relief as possible, even when the legislature introduces alternatives.

(iv) LIMITATIONS ON SEVERANCE

Although the Court doubted, without deciding, that conditions 2 and 3 were clearly *ultra vires*, their Lordships considered that they were fundamental to both the local planning authority's unreasonableness scheme and the permission granted.[67] Thus the Court refused to sever the clearly *ultra vires* conditions (4 and 5) and leave the permission standing, with conditions 2 and 3 attached. Nor would the Court grant unfettered planning permission immediately, by severing all four conditions and leaving the permission standing. Both these courses would have removed the basis upon which the authority had intended the permission to rest. The proper procedure to be followed in such circumstances is not completely settled. As to principle the better view seems to be that 'if some condition is seen to be a part . . . of the structure of the permission so that if the condition is hewn away the permission falls with it',[68] that condition cannot be severed.

After quashing the planning permission, the Court in fact did not have to grant *mandamus* at a later date. The local authority did grant planning permission without conditions 2 to 5. However its municipal objectives were not completely prevented as it did later acquire the land by agreement to achieve the purposes for which it had imposed the conditions.[69]

It is to be hoped that the flexible attitude evident in these two cases is followed. Recently Courts have shown some desire to prevent applications for the writs being thwarted by unwanted technicalities. The demise of 'conceptual' distinctions has directly increased the ambit of the writs; but their discretionary nature is still capable of imposing limits. Nevertheless in an age when the use of declarations and the availability of statutory appeals in administrative law has grown the prerogative writs once again can provide powerful remedies.

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[64] *Ibid.* 729.
[65] *Ibid.*
[66] *Ibid.* 732.
[67] *R. v. Hillingdon London Borough Council* [1974] 1 Q.B. 720, 732.
[68] *Kent County Council v. Kingsway Investments (Kent) Ltd.* [1971] A.C. 71, 102 (*per* Lord Morris of Borth-y-Gest). See also *Spurling v. Development Underwriting (Vic.) Pty. Ltd.* [1973] V.R. 1, 4-5 (*per* Stephen J.).
[69] The later history of the case can be traced through letters appearing in [1974] *Journal of Planning and Environment Law* 410 and 470. See also Markson, '*Certiorari* and *Mandamus* in Planning Law' (1974) 118 *Solicitors' Journal* 724.