The problems of *Ogilvie* v. *Ryan* could well be summed up with the words of Bagnall J. in *Cowcher* v. *Cowcher*[30] where he said

> "In any individual case, the appreciation of [*Pettitt* v. *Pettitt*[31] and *Gissing* v. *Gissing*[32]] may produce a result which appears unfair. So be it; in my view that is not injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity, the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate—by precedent out of principle."

C. BARTLETT*

SCHILLER v. SOUTHERN MEMORIAL HOSPITAL[1]

To what extent can objections be sustained upon an application for a town planning permit on the grounds that it contains technical defects? This question arose in *Schiller* v. *Southern Memorial Hospital* when the Supreme Court of Victoria heard an appeal from the Town Planning Appeals Tribunal pursuant to s. 22B(3) of the *Town and Country Planning Act* 1961, which enables the Court to hear appeals limited to questions of law.

By a Notice of Determination dated the 9th October 1975 the City of Moorabbin, which was a responsible authority under the Melbourne and Metropolitan Planning Scheme, granted to the Southern Memorial Hospital a town planning permit for the erection of a community health centre. The health centre was to provide medical care in the East Bentleigh area and was to be financed by the Commonwealth Government. The only persons to lodge objections against the development were five doctors in general practice in the area who feared the likely effect upon their practice of medical care being provided at the health centre. A Notice of Appeal was lodged with the Town Planning Appeals Tribunal by the doctors and subsequently some 79 other persons (most of whom were of a non-medical occupation) objected to the granting of the permit by the responsible authority.

The Tribunal rejected the appeal and upheld the determination of the responsible authority, but whilst doing so added certain restrictive conditions to the issue of the permit. These conditions related purely to the physical setting of the development, and included the provision of parking

30 [1972] 1 All E.R. 943, 948.
31 [1970] A.C. 777.
32 [1970] 2 All E.R. 780.
* B.Juris., LL.B. (Monash).

1 [1976] V.R. 484.

facilities and landscaping. Before the Tribunal it was not alleged that the Notice of Application was defective, nor was objection taken to the identity of the applicant.

In December 1975 the objectors appealed to the Supreme Court of Victoria pursuant to s. 22B(3) of the *Town and Country Planning Act* 1961. The first ground of appeal was based on the form of the application. The appellants contended that there was no proper application for the Appeals Tribunal to consider in that it did not state the existing use of the land, that the applicant's interest in the land was not disclosed, and finally that it was not clear whether the applicant was the Southern Memorial Hospital or the East Bentleigh Health Centre Society.

Prior to 1973 there was no express legislative power under the *Town and Country Planning Act* 1961 to remedy technical defects in the form of application, and appeals lapsed if there was such a defect. For example, in *Wajnberg* v. *Raynor and M.M.B.W.*[2] an application for a permit was made to the Board of Works by an architect, for the construction of a private hospital. Raynor, who purported to be the owner of the land, had given the architect his consent to apply for the permit. On appeal, the Tribunal upheld the determination of the responsible authority to issue the permit. The Supreme Court held that the applicant for a permit under s. 18(1) must either be the owner of the land as defined in s. 3(1) of the Act, or be an agent acting on behalf of such owner. McInerney J. held that the Tribunal may refer to any relevant material to determine the identity of the applicant, not merely being confined to the form of application. In the above case, the applicant was found not to have the required interest in the land and there was no proper application for the responsible authority to consider.

Section 18(1) was subsequently amended by s. 18A(1) which now requires that where the applicant is not the owner of the land the application must be signed by the owner and accompanied by sufficient evidence to satisfy the responsible authority that the application is made with the knowledge and consent of the owner. Failure to comply with this requirement does not make void any permit which has been issued.

Despite the problems created by failure to comply with s. 18 of the Act, the Tribunal had utilized s. 21(1) of the Act which provides that

> "On the hearing of any appeal the Appeals Tribunal shall act according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms. . . ."

In *Wajnberg* v. *Raynor and M.M.B.W.*[3] the Supreme Court discussed the effect and scope of s. 21(1) in the context of the powers and duties of the Tribunal. It was held that the section did not apply because it did not entitle the Tribunal "to act without evidentiary material or to draw inferences which did not follow fairly and reasonably from the material before it".[4]

[2] [1971] V.R. 665.
[3] [1971] V.R. 665.
[4] Ibid. p. 678.

However in *G.B. & G. Consolidated Pty. Ltd.* v. *M.M.B.W.*,[5] the applicant for the permit was not the owner of the land but a purchaser under a contract of sale. The application had not been signed by the vendors. Subsequent to the application, but prior to the appeal before the Tribunal, the vendors filed an affidavit stating that they consented to the application. The question before the Supreme Court was whether s. 21(1) would permit the Tribunal to ignore this technical defect and the absence of the owner's certification on the original application. Anderson J. stated

> "each case should be considered on its own facts—not merely what appears in the notice but all the relevant facts which are placed before the Tribunal—and when the informality under scrutiny is viewed in equity and good conscience against the substantial merits of the application, a conclusion is then to be reached as to whether the objection to the informality has sufficient merit to justify the rejection of the notice because of its defects."[6]

The Court directed the Tribunal to reconsider the matter and to have proper regard to s. 21(1) of the Act.

Because of continuing uncertainty surrounding the remedying of such defects in the form of application, the legislature in 1973 amended the *Town and Country Planning Act,* embodying s. 21A(1) which states

> "Where in any proceeding before the Tribunal it is submitted that there has been a failure to comply with this Act or the regulations in relation to the form or content of an application for a permit, a permit, a notice under section 18B, a statement of objections, a statement of the grounds of an appeal or other document the Tribunal shall note such submission but may refuse to hear argument or further argument thereon and any such failure shall not render the application, permit, notice or statement void but it may be rejected, amended or otherwise dealt with in such manner and upon such terms as the Tribunal thinks just."

This section is designed to ensure that legal technicalities in the form of application do not prevent the Tribunal from performing its work properly and do not lead to permits being rejected on the ground of failure to comply with defects in the form and content of the application. Subsection (2) of s. 21(A) provides that the granting of a permit shall be conclusive evidence that there has been no failure to comply with the Act or regulations, and that once this stage has been reached it will not be open to a party to appeal to the Supreme Court on the ground that there has been a failure of a technical nature.

Schiller's case was the first occasion upon which the Supreme Court invoked this new provision. The first ground of appeal was dismissed by the Court on the basis that the failure to comply with the requirements of the form of application in s. 18 of the *Town and Country Planning Act* 1961 did not invalidate the application. The Court stated that ss. 18B and 21A(1) of the Act made it clear that failure to slavishly follow the prescribed form of the application would not render an application void.

[5] [1972] V.R. 641.
[6] [1972] V.R. 644.

The purpose of s. 21A(1) is to enable the Tribunal to remedy defects in the form or content of the application. In *Schiller's* case, Dunn J. followed the reasoning of Anderson J. in *G.B. & G. Consolidated Pty. Ltd.* v. *M.M.B.W.*[7] in which it was emphasized that the powers and duties of the Tribunal are to determine issues of fact in accordance with the evidentiary material before it. In this particular case, the evidence before the Appeals Tribunal disclosed that the land was vacant and that the hospital was the applicant.

In addition, the appellants argued that:

(a) the Tribunal had not made a determination on the identity of the applicant, and

(b) had failed to consider the defects in the application because it had not given reasons for its determination in respect of these arguments.

Dunn J. held that the Tribunal had a statutory duty under s. 22(2) of the Act to give reasons for its determination if requested to do so by a party. However, his Honour went on to hold that the provisions of s. 22(2) did not extend to determinations by the Tribunal on technical defects but were concerned with reasons which affected the issue or non-issue of a permit or the matters set out in s. 22(1)(1A). Furthermore, it was held that the Tribunal's failure to state its reasons in respect of every argument raised before it did not invalidate its determination or justify an inference that these particular matters had been overlooked.

The appellants also argued that in considering the above matters the Tribunal could not derive assistance from s. 21(1) which obliges it to "act according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms", because this sub-section was confined to the merits of the appeal and did not apply to errors and defects contained in preliminary matters. Dunn J. rejected this argument and stated that in his opinion the requirement of s. 21(1) applied to any matters which had to be dealt with by the Tribunal. This sub-section therefore included considerations which raise the invalidity or fault alleged to have occurred at any stage of the proceedings including the application itself.

The other two grounds of appeal were that:

(1) the Tribunal had no power to direct the issue of a permit with conditions different to those imposed by the responsible authority, and

(2) the Tribunal was obliged to determine the precise use to which the building was to be put.

Referring to the second ground of appeal, his Honour stated that appeals before the Tribunal are by way of a rehearing, and s. 22(1)(b) empowers the Tribunal to issue a permit with or without conditions. The

[7] [1972] V.R. 641, 644.

section is wide enough to allow the Tribunal to direct the issue of a permit with different conditions from those imposed by the responsible authority. Dunn J. was of the opinion that there was no need for the Tribunal to publish the varied conditions for the consideration of the parties because the conditions imposed related to secondary matters which were of concern only to the applicant.

Regarding the final ground of appeal, his Honour held that the Tribunal acted correctly in not considering the proposed use to which the premises were to be put as it was not a town planning consideration, although indirectly the Tribunal had considered the use in determining the need for the service in the community. He held that in taking into account such need, the Tribunal had turned its attention to the use and the effect of the operation of the centre, and in the Court's opinion the consideration given was sufficient.

Consequently, as none of the three grounds of the appeal was substantiated, the appeal was dismissed.

The decision arrived at in this case was correctly decided in accordance with the principles set out above. However, the Tribunal's determination that the permit should be granted is consistent with the broader planning principle which is not discussed in the case, namely that personal economic loss to local residents or business interests, unless it is detrimental to the community as a whole, is not a proper town planning consideration. In cases such as *Woolworth Properties Limited* v. *Shire of Eltham*,[8] *Bullen's African Lion Safari Pty. Ltd* v. *M.M.B.W.*[9] and *Ewart* v. *M.M.B.W.*,[10] the Tribunal held that town planning was not concerned with maximizing or minimizing individual profits but with the effect of the development on the amenity of the area. Similarly in *Schiller's* case, the fact that the doctors feared that their incomes would have been reduced by the establishment of a community health centre was not relevant to the primary question of whether the establishment of a community health centre was a desirable addition to the local community.

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8 [1970] V.P.A. 267.
9 [1971] V.P.A. 124.
10 [1972] V.P.A. 201.
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