statute is such that usually no choice of law problems remain. But both interpretation problems and choice of law problems depend for their solution upon the same principles. Interpretation is really one small part of choice of law. Thus the choice of law problem is: what laws out of the laws of all the various countries with which the contract is connected should be applied to this contract? The interpretation problem is the more particular question: should this particular New South Wales law be applied to the contract? It is not enough simply to look at the words of the statute. It is necessary to look to fundamental principles both of choice of law[41] and statutory interpretation.[42] Failure to regard these principles as relevant can result in a decision unrelated to the real questions of justice involved.

S. M. DENNING, Case Editor — Third Year Student.

CONTROL OF THE ADMINISTRATOR

HALL & CO. LTD. v. *SHOREHAM-BY-SEA URBAN DISTRICT COUNCIL AND ANOTHER*

Included in the armoury of ancient and modern weapons which the judiciary may be prepared to use to strike down administrative action are those which require a finding that the administrator has acted "unreasonably" or has failed to act with "certainty". Emphasis must be placed on the word "may" since many *dicta* may be found to the effect that such findings do not justify judicial interference with administrative decisions. Judicial interference was nevertheless sought in *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council and Anor.*,[1] with rather unexpected results.

The Case

The plaintiff owned a strip of land lying between the north bank of the River Adur and the main Brighton Road, a road which carries a large volume of traffic. It applied to the defendants[2] for permission to develop part of its land for industrial purposes, and for permission to establish a new means of access from the Brighton Road to the land to be developed. The United Kingdom Town and Country Planning Act, 1947, now incorporated in the Town and Country Planning Act, 1962, provided:

> Subject to this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.[3]

The defendants granted permission for the proposed development subject to a number of conditions, those contested being:

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[41] Such as the appropriate role of the proper law of the contract.

[42] Such as recognition of the inherent ambiguity and the necessity of applying some form of the mischief rule.

[1] (1964) 1 All E.R. 1.

[2] Or rather, to the defendant Urban District Council as authorised delegate of the defendant County Council.

[3] S. 14(1).

(3). The applicants shall construct an ancillary road over the entire frontage of the site at their own expense, as and when required by the local planning authority, and shall give right of passage over it to and from such ancillary roads as may be constructed on the adjoining land. The ancillary road shall consist of a carriageway twenty feet wide with a margin three feet wide on each side.

(4). The new access shall be temporary for a period of five years initially, but the local planning authority will not enforce its closure until the ancillary roads referred to in condition 3 shall have been constructed and alternative access is available within 150 yards of the temporary access.

The following reasons were given for the imposition of these conditions:

(3) and (4). The local planning authority are of the opinion that in the interests of highway safety an ancillary road should be constructed along this frontage but are prepared to allow the access now proposed as a temporary expedient pending the completion of the new road.

The plaintiff sought a declaration that conditions 3 and 4 were, (a) void for uncertainty, (b) void as being *ultra vires*, and (c) that the planning permission took effect with the conditions struck out. The defendants argued that the conditions were neither *ultra vires* nor void for uncertainty, and that if there was any uncertainty it was only in some phrases which were severable from the conditions challenged. Further, they claimed, should the conditions be declared invalid on any ground, the whole planning permission would lapse. Glyn-Jones, J., at first instance,[4] held that the conditions were within power and could not be avoided on the ground of uncertainty. In a supplementary judgment delivered at the request of the parties he expressed the view that no part of the conditions could be severed from the rest, and that if the conditions challenged were held invalid the whole grant of permission would lapse. The plaintiff appealed to the Court of Appeal against the dismissal of its claim, and the defendants cross-appealed on the severability issue.

The Court of Appeal held that the conditions challenged were not void for uncertainty,[5] that condition 3 was *ultra vires* and void for unreasonableness, that condition 4, being dependent on condition 3, fell with it, and that, conditions 3 and 4 not being severable from the balance of the grant of permission, the whole grant was void. The judges delivered separate judgments but each approached the case in similar fashion; they were agreed that the main issues were whether any interpretation could be given to the conditions at all, and if so, whether the conditions as interpreted were void for unreasonableness.

Certainty

The question whether uncertainty exists as a general and separate ground for invalidating executive or subordinate legislative action has not clearly been resolved. Language used in many of the cases indicates that there is such a ground. The general approach to the construction of delegated legislation was established in *Kruse* v. *Johnson*.[6] The court, it was said, must construe "benevolently" the legislative acts of an elected local authority; such acts should, if at all possible, be given a definite meaning by a process of construction rather than be allowed to fail altogether. In the *Fawcett Properties Case*,[7] Lord Denning adopted the *Kruse* v. *Johnson*[8] approach, without, it

[4] (1963) 61 L.G.R. 508.
[5] Harman, L.J., dissenting as to condition 3.
[6] (1898) 2 Q.B. 91.
[7] *Fawcett Properties, Ltd.* v. *Buckinghamshire County Council* (1961) A.C. 636.
[8] *Supra* n. 6.

should be noted, distinguishing between executive and legislative action, when he said, ". . . a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results".[9] The principle which appears to be established by these cases is that a court must, wherever possible, resolve mere ambiguities in language, but if it is unable to give any meaning at all to the executive or legislative instrument it should declare it void for uncertainty.

Australian courts, insofar as it has been raised before them, have adopted a very similar approach to the question of whether uncertainty is an available ground for challenge to executive or subordinate legislative action. In *King Gee Clothing Company Pty. Limited* v. *The Commonwealth*,[10] and in *Cann's Pty. Ltd.* v. *The Commonwealth*,[11] Prices Regulation Orders were held invalid on the ground that they did not supply a precise method of calculation of the prices they purported to fix. Dixon, J. in the latter case,[12] repeating views he had expressed in the former, said that to resolve mere ambiguities and uncertainties in the meaning of any writing is the function of interpretation, but that what is expressed unintelligibly, as opposed to ambiguously, might fail. This approach is remarkably similar to that adopted by the English courts; the court is to do its utmost to place some meaning on the words used. The most recent Australian pronouncement on the subject is that of Kitto, J., in *Television Corporation Limited* v. *The Commonwealth*.[13] He was asked to set aside conditions inserted in commercial television licenses. He said:

> The point is not that the proposed conditions offend against a general principle that uncertainty in executive instruments spells legal invalidity, for there is no such general principle: see *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth*;[14] *Cann's Pty. Ltd.* v. *The Commonwealth*.[15,16]

It will be noted that the *King Gee Clothing Case* and *Cann's Case*, despite their results, are taken by Kitto, J. as establishing that there is no general requirement of certainty in executive instruments. He limits the cases where "uncertainty" is a permissible ground for invalidating the conditions imposed to those in which "a requirement of certainty . . . is inherent in the provisions by which the . . . power is created",[17] one of such cases being that where a valuable right (such as a television broadcast licence) is at stake. It is submitted that in practice this will amount to saying that a requirement of certainty exists in respect of all delegated legislation and executive action, for it is difficult to imagine an enabling Act being interpreted to permit action by way of instruments which the courts find impossible to interpret.

The result, then, would seem to be that, both in England and Australia, once an administrative instrument is held to be meaningless and not merely ambiguous, it may be set aside by the courts. Judges may, of course, disagree as to when that point is reached. In *Hall's Case*[18] Willmer, L.J. specifically adopted[19] the words of Lord Denning in the *Fawcett Properties Case*,[20] and Pearson, L.J. referred to them.[21] Both Willmer and Pearson, L.JJ. found themselves able to assign some meaning to the challenged conditions,[22] and

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[9] *Supra* n. 7 at 677.
[10] (1945) 71 C.L.R. 184.
[11] (1946) 71 C.L.R. 210.
[12] *Supra* n. 11. N.B. 227.
[13] (1963) 109 C.L.R. 59.
[14] *Supra* n. 10.
[15] *Supra* n. 11.
[16] *Supra* n. 13 at 71.
[17] *Ibid.*
[18] (1964) 1 All E.R. 1.
[19] *Supra* n. 18 at 5.
[20] *Supra* n. 9.
[21] *Supra* n. 18 at 16.
[22] *Supra* n. 18 *per* Willmer, L.J. at 7: "I certainly do not feel able to say that it is impossible to give any sensible meaning to the words used. In these circumstances I am of opinion that conditions 3 and 4 cannot be held void for uncertainty." See also Pearson, L.J. at 16-17.

therefore refused to declare them void for uncertainty. Harman, L.J., because "I find myself quite unable to make up my mind what the intention is, and what is the extent of the obligation of the plaintiffs if they accept condition 3"[23] would have declared that condition void for uncertainty.

Reasonableness

Having placed a particular construction on the conditions imposed, it became necessary for the Court to consider whether the conditions were invalid as being "unreasonable". In the event it was held that condition 3 was unreasonable and that condition 4 fell with it. But "unreasonable" is a vague term to which many meanings might be assigned; indeed it has been given a wide variety of meanings in the field of administrative law alone.

The test of unreasonableness most favoured in recent years is that enunciated by Lord Greene, M.R., in *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation*:[24] it may be possible to say that the local authority has "come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case . . . the court can interfere. The power of court to interfere in each case is not as an appellate authority to override a decision of a local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them".[25] His Lordship in this passage strictly limits unreasonableness as a separate ground for invalidating a condition imposed by a local authority. Elsewhere he admits the use of "unreasonableness" in a wider sense, as a generic term apt to describe a variety of other grounds which have been used from time to time for invalidating administrative action, but seems to prefer to reserve the term for the limited ground indicated in the passage just quoted. This limitation of "unreasonableness" has been approved by the House of Lords[26] and is now beyond doubt. So strict is the limitation, that de Smith was in 1959 able to say:[27]

> It is easier to give hypothetical examples of preposterous conduct—the most familiar is that of the local authority which dismisses a woman teacher because she has red hair[28]—than to point to actual cases in the law reports. Perhaps the only modern case of this character was that of the New South Wales Public Service Board which purported to exercise its power of awarding a gratuity by granting an applicant one penny for each year of service.[29]

In *Kruse* v. *Johnson*[30] Lord Russell, C.J. used rather different language to describe what he meant by "unreasonable" by-laws:

> I do not mean to say that there may not be cases in which it will be the duty of the court to condemn by-laws . . . as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires". But it is in this sense, and in this sense only, as I conceive, that

[23] At 13.
[24] (1948) 1 K.B. 223.
[25] *Supra* n. 23 at 233.
[26] *Supra* n. 7.
[27] S. A. de Smith, *Judicial Review of Administrative Actions* (London, 1959).
[28] Put forward in *Short* v. *Poole Corporation* (1926) Ch. 69, 91.
[29] *Williams* v. *Giddy* (1911) A.C. 381.
[30] (1898) 2 Q.B. 91.

the question of unreasonableness can properly be regarded.[31]

Kruse v. *Johnson*[32] was not referred to in the *Wednesbury Corporation Case*,[33] and it may be that courts will prefer to rely on Lord Russell's explanation of unreasonableness. It is submited, however, that the effect will be no different from that produced by reliance on Lord Greene's exposition.

In *Hall's Case*[34] the meaning of "unreasonableness" which was applied by the majority was the narrower meaning suggested by Lord Greene. Willmer, L.J. stated the test which he and Harman, L.J. applied when he said:

> . . . it is not sufficient merely to say that the conditions are unreasonable or unduly onerous. . . . In order to justify the court in granting a declaration that the conditions are *ultra vires* it must be shown that no reasonable council could have imposed them.[35]

Pearson, L.J., while expressing his agreement with Willmer, L.J., said[36] that condition 3 was also *ultra vires* as being unreasonable in the sense explained in *Kruse* v. *Johnson*.[37] The conditions imposed in *Hall's Case*[38] could be said to be unreasonable as involving "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men", since the effect of the conditions was to require the plaintiff to dedicate a twenty-six foot wide strip of land to the public without compensation.[39] But it should be noted that this is very close to the sense of "unreasonable" put forward in the *Wednesbury Corporation Case*;[40] it could clearly be argued that the conditions were, in view of the effect just mentioned, so unreasonable that no reasonable authority could have imposed them.

The question which now arises is whether the Court of Appeal has furthered the objectives of administrative justice by this particular application of the vague concept of unreasonableness. It may be doubted, indeed, whether such application could be justified on the facts of the case. It has already been seen that the circumstances in which such a finding might be justified were thought to be limited to preposterous conduct. It has even been suggested by one Australian judge that unreasonableness is never a ground for invalidating administrative action.[41] While this is an extreme position, it seems difficult to justify the claim that the conditions imposed in the present case were so unreasonable that no reasonable authority could have imposed them. Willmer, L.J. was able to say:

> . . . it is not disputed that the defendant councils, as planning authorities, are rightly concerned as to the effect of the proposed development and of

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[31] *Supra* n. 29 at 99.
[32] *Supra* n. 29.
[33] *Supra* n. 24.
[34] *Supra* n. 1.
[35] (1964) 1 All E.R. 1, 8. See also *per* Harman, L.J. at 13.
[36] *Supra* n. 1 at 17.
[37] *Supra* n. 3.
[38] *Supra* n. 1.
[39] This is the interpretation of the effect of the conditions which the court considered to be the correct one. See *per* Willmer, L.J. at 9, *per* Pearson, L.J. at 17. Harman, L.J., who found himself unable to construe the condition in question, admitted this as one possible interpretation, at 14.
[40] *Supra* n. 24.
[41] In *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1945) 71 C.L.R. 184, Dixon, J., after a careful review of the cases, said, at 194: "In Australia, as a result, I think, of early decisions of this court, unreasonableness is not treated as an independent ground of invalidity" of a by-law. His Honour was here repeating a view expressed in *Williams* v. *Melbourne Corporation* (1933) 49 C.L.R. 142, 154-5, based on earlier cases such as *Ferrier* v. *Wilson* (1906) 4 C.L.R. 785, 801-2, *per* Isaacs, J.: *Widgee Shire Council* v. *Bonney* (1907) 4 C.L.R. 977, 982, *per* Griffith, C.J.; *Tungamah Shire* v. *Merrett* (1912) 15 C.L.R. 407, 425, *per* Isaacs, J., and *Cook* v. *Buckle* (1917) 23 C.L.R. 311, 317, *per* Barton, J. But all the abovementioned cases were before the decision in the *Wednesbury Corporation Case* (1948) 1 K.B. 223, and the House of Lords decision adopting it, *Fawcett Properties Case* (1961) A.C. 636.

possible future development of land further west on the traffic conditions on an already overloaded road.[42]

It is submitted that the tacit reason for the decision was that the imposition of conditions 3 and 4 involved, not merely interference with the property rights of the subject,[43] but interference with property rights by way of expropriating the plaintiff's property without compensation when this could have been done with compensation under the Highways Act, 1959.

There is a way in which this reason could have been made explicit. There is clear authority for the proposition that a discretionary power may not be used for improper purposes.[44] Do the facts of *Hall's Case* satisfy the conditions for establishing that a power has been used for improper purposes? In *Williams* v. *The Mayor, etc., of the City of Melbourne*,[45] Dixon, J. said that the true nature of the power and of the by-law (the particular exercise of power in the case was the passing of a by-law) must be determined, and "the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the end of the power".[46] In *Hall's Case* the Court decided that the true purpose of the conditions was to have a road constructed and dedicated to the public without the payment of compensation.[47] It remains, then, to consider the true purpose of the enabling legislation and whether the conditions imposed could reasonably be said to further this purpose. The Town and Country Planning Act, 1947, may have had many purposes but, it is submitted, no court could have found that one of these purposes was to enable, without specific words, the resumption of land for a public road without compensation to the owner either for the value of the land or for the value of work done by him in construction of the road, when there is, in the Highways Act, 1959, an express power for such resumption but allowing compensation. It is suggested, therefore, that the case could have been disposed of on the ground of improper purposes in the exercise of a discretion rendering the exercise *ultra vires* the power granted.

From the foregoing discussion it will have been observed that the basic concepts of administrative law, those upon which the right to relief against administrative action depends, are decidedly vague. So vast is the volume of administrative law cases before the courts that a fourth division of the High Court of Judicature, an Administrative Division, has been canvassed. This makes it all the more surprising that the leading judgment in the area

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[42] *Supra* n. 1 at 4.

[43] Since Willmer, L.J. said, at 7:

> merely to say that the conditions sought to be imposed interfere with the plaintiff's rights of property, for example, to prevent other people from passing over their land, is not, in my judgment, sufficient of itself to warrant the conclusion that the conditions go beyond what is authorised by the statute. The whole scheme and purpose of the Town and Country Planning Act is to limit the exercise of an owner's property rights. The statute in question here does to my mind clearly and unambiguously authorise the imposition of conditions which will necessarily interfere with an owner's rights of property.

[44] *Municipal Council of Sydney* v. *Campbell* (1925) A.C. 338; *Thompson* v. *Council of the Municipality of Randwick* (1950) 81 C.L.R. 87. There is some confusion between the grounds of "bad faith" and of "improper purposes". In *Thompson* v. *Randwick* the High Court said at 105-6, in holding that the Council was acting for an improper purpose, that it was not acting in good faith, and stressed that it was not meant by this that it was acting dishonestly. But to use "bad faith" in the sense it is there used is to make the ground of "improper purposes" redundant, and it seems that the aim of clarity would better be served if "bad faith" was restricted to dishonest dealing, leaving "improper purposes" to cover situations where the end aimed at in exercising the power is not authorised by the statute conferring the power, though no dishonesty is imputed. This is the sense in which de Smith used the term when he says (*Op. cit. supra* n. 27 at 199-200): "if a discretionary power has been exercised for an unauthorised purpose it is generally immaterial whether its repository was acting in good faith or bad faith."

[45] (1933) 49 C.L.R. 142.

[46] At 155.

[47] *Supra* n. 37.

of administrative law at present under discussion is an *ex tempore* judgment of one judge, albeit Lord Greene, in the Court of Appeal. Administrative law has been discounted by some as having no significant part in the scheme of British justice; it has certainly been neglected until recent years. Until it is realised that control of the administrator is a distinct branch of law, no coherent development of its basic concepts can take place.

Remedy

It is of some significance that the remedy sought in *Hall's Case*[48] was a declaration. In New South Wales the remedy of declaratory decree is not generally available, and a plaintiff in an administrative law case is still forced to rely on the highly technical prerogative writs or on the limited remedy of injunction. If a general judicature system is not to be introduced into New South Wales, it would at least be desirable for the possibility of making available the declaratory decree as a general remedy to be considered, perhaps by the present Law Reform Commission in the course of its examination of review of discretionary powers. Simplified rules of availability of the remedy would materially aid plaintiffs and leave the courts free to develop the grounds on which the remedy might be based.

Footnote

After the Court of Appeal decision in *Hall's Case* the Company made fresh application to the Council for the planning permission originally sought. The Council granted the permission subject to substantially similar conditions to those previously imposed. The Company proposes to appeal.

S. J. FERGUSON, Case Editor—Third Year Student.

INNOCENT PURCHASERS AND THE SALE OF GOODS ACT

PACIFIC MOTOR AUCTIONS PTY. LTD. v. *MOTOR CREDITS (HIRE FINANCE) LTD.*[1]

The Sale of Goods Act in s. 26(1)[2] gives statutory force to the common law rule *nemo dat quod non habet.* The concluding words of the section, however, recognize an exception where "the owner of the goods is by his conduct precluded from denying the seller's authority to sell". This is, of course, the principle of estoppel and it was with this principle that the Australian Courts[3] in the *Motor Credits Case* were primarily concerned. The fact that the judges in the High Court and Supreme Court[4] were equally divided on the question bears testimony to the uncertainty surrounding this area of the law.

On appeal to the Privy Council[5] the Judicial Committee found it un-

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[48] *Supra* n. 1.

[1] (1965) A.C. 867.

[2] 26(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

[3] High Court (McTiernan, Taylor and Owen, JJ.) (1963) 109 C.L.R. 87, and Supreme Court (Walsh, J.) 79 W.N. (N.S.W.) 684.

[4] McTiernan and Walsh, JJ. held there was estoppel; Taylor and Owen, JJ. *contra.*

[5] (1965) A.C. 867.