café during her employment. There was no express term as to the duration of the contract. Her employers terminated the contract by giving her one month's salary in lieu of notice. Lord Denning M.R. said: 'The time has now come to state explicitly that there is no presumption of a yearly hiring. In the absence of express stipulation, the rule is that every contract of service is determinable by reasonable notice. The length of notice depends on the circumstances of the case'. Edmund Davies and Fenton Atkinson LL.J. agreed. This rule makes good sense in the complexities of modern commercial life in Australia and must surely be followed.

DOUGLAS BROWN

PETT v. GREYHOUND RACING ASSOCIATION LTD.

The Right to Legal Representation

Between April 1968 and February 1969, an unusually direct clash of judicial opinion has arisen between three of their Lordships of the Court of Appeal and a single judge of the Queen's Bench Division in England, which has resulted in the "variable content" of the *audi alteram partem* rule being left in even greater confusion than before.

The facts at least were never seriously in dispute.

The Greyhound Racing Association, an organization which exercised substantial control over dog-racing in Great Britain, issued licences to persons involved in the industry, including race-course proprietors and dog-trainers. The disciplinary powers of the Association were contained in a book of Rules, which provided for the holding of inquiries by track stewards employed by owners of licensed courses, and giving them the power to withdraw or suspend licences, but not prescribing any procedure to be followed in these inquiries. The Rules also provided for an 'appeal' to the Stewards of the National Greyhound Racing Club, who could at their discretion hold 'a further inquiry' into the matter and make such order as they thought fit. When the trainer or course proprietor was issued with the licence, he agreed to abide by these rules.

The plaintiff was a licensed trainer, which entitled him to race his dogs on licensed racecourses. On September 6th 1967 one of his greyhounds entered for a race on such a course was found to have been drugged and the stewards withdrew it from the race. An inquiry

was ordered, and the plaintiff was advised of the date, time and nature of the inquiry, and also of the nature of the charges that he would have to meet. The notice arrived the day before the scheduled hearing, and the plaintiff's solicitor immediately wrote requesting an adjournment so that he could be represented by counsel at the inquiry. The adjournment was granted, but subsequently, before the hearing, the plaintiff was told that he would not be allowed legal representation at the inquiry. He sought first a declaration that he was entitled to be represented by counsel at the inquiry, and secondly an injunction restraining the Association from holding the inquiry unless he was so represented. He then sought an interlocutory injunction for the same purpose, which was granted by Cusack J. (February 22nd 1968).

The defendants appealed to the Court of Appeal.[1]

To make out a case for interlocutory relief, the plaintiff needed to show that if it were not granted he would suffer irreparable injury, and also needed to establish a prima facie case for being subsequently awarded a perpetual injunction. On appeal, Lord Denning M.R., Davies L.J. and Russell L.J. held that a sufficient prima facie case had been made out and that the injunction must stand. Prima facie, therefore, the plaintiff was entitled to an oral hearing and had the right to appoint counsel or solicitor to appear for him. Russell L.J. added: 'How the case may ultimately turn out, I know not'.[2]

What ultimately happened was that on February 12th 1969 on an application by the plaintiff for the perpetual injunction and declaration, Lyell J., a single judge of the Queen's Bench Division, found himself unable to follow the lead of the Court of Appeal, even though the same law and the same facts were in issue.[3] The plaintiff was therefore not entitled to legal representation at the inquiry.

BASIS OF THE COURTS' JURISDICTION TO INTERVENE

It has always been clear that the courts may intervene in the proceedings of a statutory tribunal when it is acting *ultra vires* or in breach of the rules of natural justice, provided that the operation of those rules is not expressly or impliedly excluded by the enabling statute. However, for many years, the jurisdiction of the courts to intervene in *domestic* proceedings was thought to be based solely on the interference with the property rights of the complainant—see for

1 [1968] 2 All E.R. 545.
2 [1968] 2 All E.R. 545, 551.
3 [1969] 2 All E.R. 221.

example *Rigby v. Connol.*[4] The later tendency, as in, for instance, *Russell v. Duke of Norfolk*[5] was to base this jurisdiction on breach of contract. Thus, if a plaintiff impugned a decision of a domestic tribunal on the grounds of a breach of the rules of natural justice, the courts could not enforce them unless there were some express or implied agreement in the Rules of the organization which comprised the contract, that the parties to it would observe natural justice. The result of this approach is, logically, that if the Rules of the association expressly excluded the operation of natural justice rules, the courts could not intervene in the decision of a domestic tribunal reached in their breach.[6]

More recently, however, Lord Denning suggested that there are other cases where the courts can intervene to enforce the rules of natural justice. In cases such as *Russell v. Duke of Norfolk* and *Lee v. Showmen's Guild of Great Britain*[7] he based the courts' jurisdiction on "common justice" or public policy, so that, before a man may be found guilty of an offence entailing some serious penalty or the removal of his livelihood, a proper inquiry must be held and the accused given the opportunity of being heard, in accordance with natural justice. In *Lee* he went so far as to suggest that public policy would require the observance of natural justice *even if* the "contract" had expressly excluded it.

In the first *Pett* case, Lord Denning, who gave the most significant judgment in the Court of Appeal, says without further elaboration that on such an inquiry it is 'clear law' that the *audi alteram partem* rules must apply.[8] Later in his judgment, when he is discussing the content of the *audi alteram partem* rule, he makes much of the seriousness of the consequences of the exercise of the Association's power on the plaintiff, including the possible loss of his reputation and his livelihood. It seems apparent that it was these consequences which were decisive in his determining whether the courts could or should intervene at all.

In the second *Pett* case the defendants did not dispute that, if they were bound to hold an inquiry (under the Rules), they were also

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4 (1880) 14 Ch.D. 482, 487 per Jessell M.R.

5 [1949] 1 All E.R. 109.

6 See, e.g., Maugham J. in Maclean v. Workers Union, [1929] 1 Ch. 602, 623-625; Tucker and Goddard L.JJ. in Russell v. Duke of Norfolk, [1949] 1 All E.R. 109; Dennis Lloyd, *The Disciplinary Powers of Professional Bodies,* (1950) 13 M.L.R. 281, 303.

7 [1952] 2 Q.B. 329.

8 [1968] 2 All E.R. 548.

bound to observe the rules of natural justice. However, Lyell J. in his judgment referred in dicta to 'the many authorities that domestic tribunals are subject only to the duty of observing what are called the rules of natural justice *and* any procedure which is laid down or necessarily to be implied from the instrument that confers their power'.[9] *If* it was a considered opinion on his part, this indicates that Lyell J. has accepted that there *is* a duty, independent of contract, to observe the rules of natural justice.

This approach has the advantage of Lord Denning's "public policy" approach without its disadvantages: natural justice is implied into every situation and cannot be excluded expressly by the "contract", but there is no question of vague "public policy" involved—instead, the content of the rules of natural justice will vary where the different situations demand it. Thus, a higher degree of procedural protection will be required where the domestic tribunal involved is that of an organization, such as the Jockey Club, which holds what amounts to a monopoly over a particular trade or profession or sport, and where the contractual rules are 'more like by-laws than rules'.[10]

Whether this approach will eventually be taken or not is not clear, but it is at least true to say that the courts are extremely loth to interpret the rules of non-statutory bodies as excluding natural justice rules at all. In the recent case of *John v. Rees,*[11] Megarry J., after setting aside Lord Denning's "public policy" statements in *Lee* as merely obiter, cited himself in *Fountain v. Chester* (unreported):

> 'Where the terms in issue deal with the exercise of a power of peremptory suspension or termination of the rights of one of the parties to such a contract, then I think that the common expectation of mankind would be that the power would be exercised only in accordance with the principles of natural justice unless the contrary is made plain. . . . Even if the law permits the principles of natural justice to be effectually excluded by suitable drafting, I would not readily construe the rules as having achieved this result unless they left me in no doubt that this was the plain and manifest intention. . . . I would say that if there is any doubt, the applicability of the principles of natural justice will be given the benefit of that doubt' . . . Before resorting to public policy, let the rules of the club or other body be construed: and in the process of construction, the court will be slow to conclude that natural justice has been excluded.[12]

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9 [1969] 2 All E.R. 221, 228. (Emphasis added.)
10 Bonsor v. Musicians Union, [1954] Ch. 479, 485 per Denning L.J.
11 [1969] 2 W.L.R. 1294.
12 [1969] 2 W.L.R. 1294, 1333. (Emphasis added.)

In other words, in construing the contract, the court will presume that the parties intended to observe natural justice, unless the contrary is so clearly indicated in the contract that the court cannot avoid it. And even then, there is a possible hint from Megarry J. that this interpretation is '[*b*]*efore* resorting to public policy'.

Salmon L.J. once commented in *Nagle v. Fielden*:

> One of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function . . . I should be sorry to think that . . . we have grown so supine that today the courts are powerless to protect a man against unreasonable restraint upon his right to work . . . which a group, having no authority save that which it has conferred upon itself, seeks capriciously to impose upon him.[13]

If this is the true role of the court, then the same reasoning is evident both in the courts' conception of the basis of their jurisdiction to enforce natural justice in domesic proceedings, and also in their interpretation of the applicability and content of the rules of natural justice in any sphere. In both cases, courts have shown a willingness to protect the individual when his rights are being seriously threatened.

THE RIGHT TO LEGAL REPRESENTATION

There is no standard formula for measuring the requirements of natural justice in every circumstance in which the rules apply. Clearly, there is no prima facie right to an oral hearing, for instance, and in many cases natural justice has been held to have been satisfied by written representations only.[14]

Lord Denning recognized this when he rejected the defendant's argument based on *Local Government Board v. Arlidge*,[15] that since the applicant was not entitled to be heard orally he had no right to representation either, with: 'That again may be true in some matters; but I should have thought that it depended on the nature of the inquiry. In a case such as this, fairness may require an oral hearing; and with an oral hearing, then legal representation'.[16]

But does the *right* to an oral hearing automatically give rise to the right to legal representation at that hearing? The basic assumption is

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13 [1966] 2 Q.B. 633, 653.

14 See, e.g., O'Bryan J. in R. v. City of Melbourne; ex parte Whyte, [1949] V.L.R. 257, 266; sed contra DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (2nd ed.), 188-190.

15 [1915] A.C. 120.

16 [1968] 2 All E.R. 545, 550.

made that every person has a common law right to appoint an agent for any purpose whatever: *Jackson & Co. v. Napper. In re Schmidt's Trade-Mark.*[17] Then follow cases such as *R. v. St. Mary Abbots, Kensington (Assessment Committee)*[18] and *R. v. Board of Appeal, ex parte Kay,*[19] where it was held that this right to appoint an agent applied to representation before a statutory Assessment Committee and Appeals Board respectively.

However, in *R. v. City of Melbourne; ex parte Whyte,* O'Bryan J. considered both these cases, and concluded: 'the statute which gave a right to appeal to a tribunal was interpreted as giving to the appellant the right to appear before it and it is as ancillary to that right that it was held that the appellant was entitled to be represented before the tribunal by such agent as he chose'. There was, therefore, a common law right to be represented, but only (a) if the statute gives the plaintiff a right to appear in person; but on the other hand (b) 'provided the committee proceeds in a judicial manner to determine the relevant matters . . . and gives the licensee a fair and adequate opportunity of meeting the case made against him, it is not bound either to hear him in person or to allow him to be represented before them by a solicitor or any other agent'.[20] In other words, the Board must nevertheless observe the principles of natural justice.

On this reasoning it becomes unimportant whether Pett had the right to be heard orally, and unimportant that in *Maclean v. Workers Union*[21] Maugham J. expressly excluded that common law right to appoint an agent from proceedings before domestic tribunals. What is important is that in some cases natural justice will require that legal representation be allowed, irrespective of other "rights". In this light, when Lord Denning confined the doctrine in *Maclean* to cases where unimportant matters are being dealt with, as in *Re Macqueen and Nottingham Caledonian Society,*[22] he was in fact also declaring that in those cases natural justice did not require that the plaintiff be legally represented. Similarly, in his dismissal of the latter case with: 'All I would say is that much water has passed under the bridge since 1929', one is equally able to read an unspoken assertion that cases such as *Ridge v. Baldwin*[23] have now so far widened the field

17 (1886) 35 Ch.D. 162, 172.
18 [1891] 1 Q.B. 378.
19 (1916) 22 C.L.R. 183.
20 [1949] V.L.R. 257, 268.
21 [1929] 1 Ch. 602.
22 (1861) 9 C.B.N.S. 793.
23 [1964] A.C. 40.

of applicability of the rules of natural justice that such common law restrictions are now otiose.

It has never been suggested that the absence of a separate common law or statutory right to be heard orally or to legal representation before any tribunal at all thereby removes the right to have the principles of natural justice observed, and it is submitted that those rules may demand that the plaintiff be nonetheless legally represented.

Lord Denning's arguments for allowing such representation thus appear much stronger in determining the content of *audi alteram partem* in this case:

> It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. . . . A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.[24]

His reasons were endorsed by both Russell L.J. and Davies L.J.

However, Lyell J. took a narrower view. He rejected the plaintiff's argument that the defendants were estopped from denying him legal representation by their letter granting him the adjournment he requested, on the ground that that letter did not refer to representation, and was quite consistent with the intention, subsequently carried out, of considering the plaintiff's *claim* to be represented. On the plaintiff's right to counsel he considered, and rejected as not well founded, the views of the Court of Appeal even though based on the same facts and law.

He distinguished *R. v. St. Mary Abbotts* on the ground that in that case the rules of natural justice did not apply, as the tribunal in question was acting administratively—an unfortunate and unnecessary use of classificatory language, since the case is better distinguished on the basis of statutory interpretation. On the authorities, he then concluded that the common law right to representation was excluded in those circumstances in which there was no duty to allow representation in accordance with natural justice: with respect, that appears to be correct.

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24 [1968] 2 All E.R. 545, 549.

However, he followed the Privy Council case of *Ceylon University v. Fernando*[25] which had not been cited to the Court of Appeal in the application for the interlocutory injunction, in preference to that Court's decision, and held that on its authority the plaintiff was not entitled to representation.

Fernando involved the suspension of a student after an allegation of cheating, where the Privy Council held that no breach of natural justice had occurred when the student was not offered the opportunity to cross-examine witnesses. Lyell J. said that this *was* such a case as Lord Denning had referred to, where the result of a tribunal's deliberations could be highly damaging to the applicant both immediately and in the future. Therefore: 'If a right to question the witnesses brought against a man is not required by natural justice, then much of the force of the fact that many people are not good at formulating questions, that when invited to do so, they make speeches instead and, therefore, should have the assistance of an advocate, is destroyed'.[26]

But, with respect, it is submitted that the two cases are not 'irreconcilable' as Lyell J. says,[27] because whether or not the requirements of natural justice are satisfied is a question of fact, depending on the particular circumstances. Merely because the Privy Council had decided in one situation that the student was not entitled to cross-examine witnesses if he did not ask to, does not decide the question whether or not Pett was entitled to legal representation before an entirely different tribunal in a different place and under different circumstances. It may also be argued that the Privy Council decision, as well as not binding the English courts, was wrong. Could it convincingly be argued that a student who was unrepresented at either the original hearing or before the Judicial Committee should have known the importance and value to himself of such an examination?

CONCLUSIONS

Both in Australia and England, the basis of the court's jurisdiction to intervene in domestic proceedings appears to remain dependant on the interpretation of the "contract" between the plaintiff and the domestic tribunal, unless Lyell J. was giving a considered opinion that an independent duty could and did exist to observe natural

25 [1960] 1 W.L.R. 223.
26 [1969] 2 All E.R. 221, 229.
27 [1969] 2 All E.R. 221, 231.

justice in any event. Though any comments made on this matter must be obiter, both cases are at least examples of the unwillingness of courts to interpret any Rules as excluding natural justice. These cases could mark the beginning of a movement to refuse to construe any non-statutory instrument or agreement as excluding natural justice principles in any but the most freely consensual situations.

It is submitted that Lyell J. is correct in holding that there is no common law right to legal representation before a domestic tribunal unless either the Rules provide for it or natural justice demands it. This being the case, we are free to question his decision because he was not, as he seemed to think, bound by the decision, on different facts and law, of the Privy Council. As Tucker L.J. in *Russell v. Duke of Norfolk* made clear: 'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth'.[28] Decisions on other circumstances are no guide.

Although Lord Denning presented a very persuasive case for allowing legal representation in the *Pett* circumstances, there are many possible disadvantages.

Almost inevitably, proceedings would become more technical and much more formal affairs, and as a result would be so much more cumbrous and slow that the speed and finality of administrative proceedings, which is their main advantage, would be greatly reduced. It has also been argued that, as it may become necessary for *both* sides to retain counsel, along with mounting costs rises the risk of the results of the case depending on the relative merits of counsel rather than the intrinsic merits of the case. This last argument is, of course, equally applicable to normal legal representation in courts of law.

However, it is submitted that these reasons are not good enough where a man's livelihood or his reputation are seriously jeopardised. Perhaps Russell L.J. was applying the right criteria when he said: 'no sort of case is made out yet that legal representation on an occasion such as this will make the system unworkable', and 'Indeed I should have thought it would be contrary to natural justice for any other course to be taken in a case such as this'.[29] It is difficult to see what Lyell J. had in mind when he confined the right to representation to 'a society which has reached some degree of sophistication in its

28 [1949] 1 All E.R. 109, 118.
29 [1968] 2 All E.R. 545, 551.

affairs'.[30] This is so particularly when it is considered that the English Jockey Club, a body which is very similar in constitution and powers to the National Greyhound Racing Association, does itself allow legal representation before its stewards in practice.

WHERE TO NOW?

Neither decision is binding in Australia, nor is of particularly high authority—the Court of Appeal's decision, for instance, being on an interlocutory injunction only. However, due to a dearth of decisions on the same or similar issues in Australia, it is disturbing to note the lack of uniformity in the courts' approach to the requirements of natural justice in *exactly* the same factual and legal circumstances. For the plaintiff, it is surely unsatisfactory (and expensive) to be the victim of what, in the end, amounts to a straight-out difference of opinion.

M. E. STOCKWELL

As an ironical postscript, it should be noticed that on December 2nd 1969, the plaintiff appealed again, this time from the decision of Lyell J. to the Court of Appeal (Harman, Edmund Davies, and Widgery L.JJ.). However:

> At the hearing of the appeal, the Court of Appeal was informed by counsel that the Rules of Racing had been revised and that the proposed inquiry would now be held under the new Rules of Racing, which permitted the plaintiff to be legally represented at the inquiry.[31]

Agreement as to costs had been reached, and by consent the appeal was therefore dismissed.

M.E.S.

KING'S MOTORS (OXFORD) LTD. v. LAX[1]

Is an "agreement to agree" unenforceable?

The decision of Burgess, V.-C. in *King's Motors (Oxford) Ltd. v. Lax*[1] is neither startling in its result nor is it the result of an extensive analysis of the law but it is a useful starting point from which to

30 [1969] 2 All E.R. 221, 229.
31 [1970] 2 W.L.R. 256.
1 [1969] 3 All E.R. 665.