CASE COMMENTS AND NOTES

THE ADMINISTRATIVE DIVISION OF THE NEW ZEALAND SUPREME COURT—A POSTSCRIPT*

There is a continuing interest in remedies in administrative law.[1] For that reason, the work of the Administrative Division of the Supreme Court continues to attract attention both here and abroad. If the New Zealand experiment is seen to have been a success, it may influence developments elsewhere. The Division was created in 1968 on the recommendation of a majority of the members of the Public & Administrative Law Reform Committee. The dissenting member, Mr. G. S. Orr, advocated the creation of an administrative court.[2] The major objection to the establishment of a new court was the uncertainty that would arise concerning its relationship to the Supreme Court. A few years ago, the author attempted to assess the achievements of the Division at that time.[3] In that article it was stated that the Public & Administrative Law Reform Committee, whose report had led to the creation of the Division, had five principal objectives in mind when making their recommendation:[4]

(a) the Division would replace a number of *ad hoc* administrative appeal authorities;
(b) the Division would enable litigants to secure more authoritative rulings on questions of law;
(c) the Division would be able to dispose of appeals on law, fact and merits more speedily than the existing appeal authorities;
(d) the Division consisting of three or four judges would introduce consistency into decision-making and permit specialization within the judiciary;
(e) the Division would be seen as possessing jurisdiction to make "the really important decisions affecting the citizen".[5]

Certainly the decisions taken by the Division in the Administrative Law field have more important consequences for the public generally and the persons immediately concerned than most of the decisions taken in the Supreme Court.

The earlier article examined the record of the Division, and attempted to determine whether the objectives outlined above were likely to be attained; guarded optimism was then expressed. There seemed no reason to doubt that the judiciary could perform the appellate work at least as

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* The reader is directed to Dean Northley's articles in (1969)7 Alta. L. Rev. 62 and (1974) 6 N.Z.U.L.R. 25 dealing with the same subject matter.

[1] See for example the recent report of the Law Commission, *Report on Remedies in Administrative Law* (Law Com. No. 73) published as Cmnd. 6407 (1976).

[2] See *First Report of the Public & Administrative Law Reform Committee*, 1968 and G. S. Orr, *An Administrative Court, its Scope and Purpose*, 1965 published by the New Zealand Institute of Public Administration.

[3] J. F. Northey, *A Decade of Change in Administrative Law* (1974) 6 N.Z.U.L.R. 25, 27-42.

[4] *Id* at 27-28.

[5] Rt. Hon. Sir Richard Wild, *The Place of the Administrative Tribunal in 1965* included in the Record of the Third Commonwealth and Empire Law Conference 1965, (1966$ at 80. The author does not share the learned Chief Justice's assumption that judges are necessarily better at decision-making than persons qualified in fields other than the law.

satisfactorily as the *ad hoc* appellate tribunals which had been replaced. Moreover, there was no evidence that the new system involved longer delays in disposing of appeals than the earlier one.

It would be presumptuous to offer conclusions about the work of the Division, the jurisdiction of which continues to expand each year.[6] Though there are some twenty-five separate acts conferring jurisdiction, the appeals, as will be seen, tend to be confined to three or four areas. The explanation for the modest number of appeals (and the yearly workload is less than the Public & Administrative Law Reform Committee expected) may be the high degree of satisfaction with the decisions of the tribunals at first instance or some defect or lack of confidence in the appellate body itself.[7]

When the Public & Administrative Law Reform Committee reported in favour of the establishment of the Administrative Division, it confidently expected that the Division would not only have a steadily increasing appellate jurisdiction, but also that it would handle all or most of the applications for review. It was thought that eventually members of the Division would be engaged full time with the work of the Division and be relieved of their other judicial duties. There are obvious advantages in the same small group of judges concentrating on administrative law problems and handling both appeals and review applications, which in many cases raise the same issues. Questions of law, including the construction of statutes, call for determination in both instances. But the 1968 act which created the Division did not provide for all applications for review to be automatically remitted to the Division. Instead, and it is understood that the change was made at the request of the judiciary, the Judicature Amendment Act 1968 authorized the Division to hear and determine such applications or classes of applications for certiorari, prohibition, mandamus, declaratory orders, or injunctions as might from time to time be referred to the Division by the Chief Justice. When the new remedy, called an application for review, was created by the Judicature Amendment Act 1972,[8] the disadvantages of separating the two jurisdictions became more obvious. It was absurd to have appeals from a statutory tribunal heard by the Division while review applications in respect of the same tribunal might be taken by judges of the Supreme Court who were not members of the Division. In 1975 the Chief Justice issued a practice note in these terms:[9]

> Applications for review under Part I which involve matters dealt with by tribunals in respect of whose decisions there is a right of appeal to the Administrative Division will be referred to the Division.
>
> Other applications for review will be dealt with by the Court in its general jurisdiction. If in any particular instance counsel or the solicitors concerned consider that the case is one which might appropriately be referred to the Administrative Division they may file a request accordingly, which the Registrar will refer to the Chief Justice for decision.

Henceforth, if the Division has appellate jurisdiction in respect of decisions of a tribunal, it will also hear applications for review of the determinations of that tribunal.

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[6] See the Appendix to the *Eight Report of the Public & Administrative Law Reform Committee*, 1975, for a list of the statutes conferring appellate jurisdiction on the Administrative Division.

[7] The possibilities include cost and lack of specialised knowledge on the part of members of the Division. There may be other reasons.

[8] *Supra*, n. 3 at 42-47, for comments on the new remedy.

[9] [1975] 2 N.Z.L.R. 345.

The work-load resulting from appeals and applications for review will now be analyzed. Table I is a statement of the number of appeals that have been set down for hearing since the Administrative Division was created in 1968 and the subject matters to which the appeals related. Table II analyzes the time taken to dispose of the appeals lodged with the Division.[10]

TABLE I

Proceedings set down by the Administrative Division 1969-July 1976

Year	*Number of cases set down for hearing*	*Number of cases proceeding to judgment*	*Number of cases pending as at 24/7/1976*	*Land Valuation and Acquisition*
1969	13	10	—	9
1970	31	26	—	19
1971	24	16	—	12
1972	16	13	—	4
1973	21	20	—	7
1974	15	11	—	8
1975	20	14	1	13
1976	5	2	1	1
Totals	145	112	2	73

Year	*Liquor Licensing*	*Town and Country Planning*	*Broadcasting*	*Other cases*
1969	1	—	—	3
1970	7	—	2	3
1971	4	2†	2	4
1972	3	6	2	1
1973	5	7	1	1
1974	2	4	—	1
1975	2	5	—	—
1976	—	1	—	3
Totals	24	25	7*	16

† The appeal right was created in 1971.

* It is unlikely that any further appeals will be taken in view of changes in policy towards broadcasting.

This table demonstrates that, despite the expanding jurisdiction of the Division, the work-load has not increased. It is also significant that three areas, land valuation and acquisition, liquor licensing and town and country planning account for all but a small fraction of the work-load of the Division. The explanation may lie in the fact that the

[10] These tables include the information contained in the tables appearing in (1974) 6 N.Z.U.L.R. 25, 38 and 39.

Supreme Court has made a substantial contribution to the development of the law in these areas, either when it possessed appellate jurisdiction[11] or in its supervisory jurisdiction. The town and country planning legislation has often been before the Supreme Court for interpretation in review cases. Though these reasons may explain the large number of appeals in these three areas, the dearth of appeals under the remaining statutes remains unexplained. Admittedly, land valuation and acquisition, liquor licensing and town and country planning legislation all affect valuable rights or privileges and those concerned can be expected to be ready to shoulder the expense incurred in their protection. But some of the other statutes affect equally valuable interests. Possibly the Commerce Act 1975, with its rights of appeal in respect of trade practices, monopolies, mergers and take overs, will produce a significant number of appeals.

The explanation for the dearth of appeals under most of the statutes conferring appellate jurisdiction on the Division may be the confidence of those affected in the decisions made by the inferior tribunal and a corresponding lack of confidence in the Division. It is possible that the expectations of the Public and Administrative Law Reform Committee that the Division would show at least as much competence as the *ad hoc* appellate tribunals have not been realized. Further speculation on the inferences to be drawn from the table will be postponed until table II and the information on applications for review have been presented.

TABLE II

Time elapsed between notification[11a] and judgment in the Administrative Division

Year	*0-14 days*	*15 days-1 mth*	*1-2 mths*	*Over 2 mths*	*Average time in days*	*Settled withdrawn adjourned etc.*	*Pending as at 24/7/1976*
1969	1	2	—	7	103	3	—
1970	4	5	12	5	57	5	—
1971	5	5	4	2	38	8	—
1972	2	—	4	7	75	3	—
1973	3	4	4	9	72	1	—
1974	1	—	5	5	56	4	—
1975	—	1	5	8	81	5	1
1976	—	—	2	—	48	2	1
Total	16	17	36	43	66	31	2

An average of 66 days elapses between notification and decision. Because some of the delays are not attributable to the Division but to the lawyers concerned and their clients, it may also be interesting to have the figures as to the periods which elapse between hearing and judgement. Of the 112 cases that have been decided, judgement was given in 75 cases within 14 days of the hearing, in a further 23 within one month of the hearing and only 14 exceeded that period. There appears to have been a slight slackening of effort to secure the speedy disposition of appeals. An analysis of the records suggests that decisions in respect of land

[11] The Supreme Court had appellate jurisdiction in respect of land valuation and liquor licensing; see *supra*, n. 3 at 39.

[11a] Notification does not mean filing. Under R21 of the Supreme Court (Administrative Division) Rules 1969 (SR 1969/145), the Registrar of the Supreme Court where the documents are filed is to notify the Registrar at Wellington when the parties have certified that the proceedings are ready for hearing. The Registrar at Wellington, a subject to directions from the Chief Justice, then arranges a hearing.

valuation and acquisition seem to take longer to write than any of the others and that some members of the Division, even in relation to appeals of the same kind, take much longer to give their decisions than others. The statistics in table II show that the Division has a respectable record in terms of the time taken to dispose of appeals. It is doubtful if the former appellate tribunals, about whose work comparable data is not available, performed better in this respect. The close interest of the Chief Justice is no doubt part of the explanation for the speedy disposition of appeals by the Division.

As already stated, the Judicature Amendment Act 1972 created a new remedy, called an application for review.[12] It is not possible to analyse the applications for review in the same way as has been done in respect of the appellate jurisdiction of the Administrative Division.[13] However, the annual reports of the Public and Administrative Law Reform Committee include details of many of the applications for review that were made during the period covered by each report. On the basis of the information contained in the last three reports, only a small minority of applications were made in respect of decisions where an appeal right existed. The definition of "statutory power" in respect of which an application for review may be made is so wide that decisions taken by Ministers, government officials, local bodies and their officers, statutory tribunals and inferior courts can be made the subject of an application. About half of the applications for review have been heard by judges who are or were members of the Administrative Division. This is a higher proportion than would result from random assignment of cases.

When the Supreme Court is exercising its common law powers of review or the powers conferred by the Judicature Amendment Act 1972, it is concerned solely with the legality of what has been done. The Court's function is to ensure that the tribunal has exercised its powers according to law. But the powers of the Division, when it is exercising its appellate jurisdiction, are necessarily wider than the review powers of the Supreme Court. Depending upon the breadth of the appeal right given, the Division may examine the law, the facts and the merits and, if necessary, substitute its own decision for that being appealed against. The major criticism that must be levelled at the Division in the exercise of its appellate jurisdiction is that it has acted as if it were confined to powers of review. It has not enthusiastically embraced the new powers which enable it to go beyond sterile questions of law to an examination of the economic and social policies the legislation was designed to achieve. On questions of law the Division has moved with confidence, as was to have been expected. But the Public and Administrative Law Reform Committee hoped for more than this. In its *First Report* which lead to the creation of the Division it observed:

> Persons appointed to the Administrative Division should have a full appreciation of the need to give effect to the economic and social policies the legislation was designed to implement. It is perhaps hardly necessary to add, but to avoid any possible misunderstanding we do so, that they should also possess the other qualities appropriate to Supreme Court judges.[14]

Some members of the Division have tended to show great respect for

[12] The legislation was inspired by the Ontario Judicial Review Procedure Act 1971, S.O. 1971, c. 48.

[13] A central register is maintained in Wellington in respect of all appeals, but there is no comparable record of applications for review.

[14] *First Report*, 1968, para. 36(ii).

the conclusions reached by the specialized tribunals whose determination is the subject of the appeal. This is natural when a judge is exercising appellate jurisdiction for the first time. But there have been enough appeals in relation to land valuation, liquor licensing and town and country planning for the members of the Division to have acquired the same mastery in the field as is assumed to be possessed by the inferior tribunal. There is little or no evidence of the Division contributing to the development of "doctrine" as distinct from statutory interpretation. Unless the Division does this, its position as the appellate body under present and future legislation may not be secure or unchallengeable. There is little point in appointing the Administrative Division as the appellate body if its intervention is limited to what it could have achieved under the common law or statutory powers of review. Those of us who shared in the creation of the Division and others who are watching its progress expected to see the Division exert greater influence than it has achieved so far over the development of Administrative Law.

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LAND TITLES ACT—ASSURANCE FUND: *BARTY* v. *KERR AND THE REGISTRAR*

Alberta authority on the liability of the assurance fund is scanty. For that reason, among others, it is unfortunate that the only reference in the law reports to the judgment of Haddad D.C.J., as he then was, in *Barty* v. *Kerr and the Registrar* (D.C. 186832, Edmonton, January 7, 1975) is a note at [1975] W.W.D. 59 which casts less than complete illumination on the case.

Mrs. Barty, an elderly widow, executed a transfer of land in favour of Kerr. Over a period of years she had advanced money to Kerr to finance a salvage operation designed to lift a ship in the Great Lakes containing walnut. In 1970 he told her that it was necessary to raise $50,000 to prevent the salvage operation from being taken over by another party. He induced her to transfer the land to him to raise the money. In fact, there was no such venture, and Kerr sold the property to bona fide purchasers who acquired title and from whom Mrs. Barty found herself obliged to repurchase the land. The judge held that the transfer was induced by fraud.

The greater part of the judgment deals with the plaintiff's contention that the doctrine of *non est factum* applied to the transfer. In order to understand why that doctrine would affect the liability of the assurance fund it is necessary to analyze section 165 of the Land Titles Act which reads as follows:

> 165. Any person sustaining loss or damage through an omission, mistake or misfeasance of the Registrar or an official in his office in the execution of his duties, and any persons deprived of any land or encumbrance or of an estate or interest therein through the bringing of it under this Act, or by the registration of another person as owner of the land or encumbrance or by an error, omission or misdescription in a certificate of title, and who by the provisions of this Act is barred from bringing an