Privy Council Appeal No. 61 of 1986

Wallace Edward Rowling and The Attorney-General — *Appellants*

v.

Takaro Properties Limited — *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER 1987

Present at the Hearing:

THE LORD CHANCELLOR
(LORD MACKAY OF CLASHFERN)
LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Keith of Kinkel**]*

In 1968 Richard Stockton Rush Junior ("Mr. Rush"), a citizen of the United States of America, came to New Zealand. He had the idea of establishing in a remote part of that country a high class tourist lodge which would attract wealthy visitors interested in fishing and other sporting activities. In February 1969 Mr. Rush entered into an agreement with the Crown, acting through the Lands and Survey Department, for the purchase of about 2,591 acres of land in the Upukerora Valley, which is situated near Lake Te Anau about 22 miles from the township of Te Anau in the south of the South Island. On 18th February 1969 he incorporated a company called Takaro Properties Limited ("Takaro") with a share capital of $250,000 divided into 250,000 ordinary shares of $1 each, all fully paid. Of these Mr. Rush, who was governing director of the company, owned 194,000, his wife and trustees for their children owned 30,000, and the other directors, who were New Zealanders, owned 26,000. Takaro set about building the proposed tourist lodge on the land acquired from the Crown. This was an expensive business, involving *inter alia* the construction of a 17.7 km. access road. Takaro

used for the purpose part of the subscribed capital and the proceeds of a loan of $1m by the Bank of California. The loan was guaranteed by Mr. R.K. Davies, a resident of California who was Mr. Rush's father-in-law. The lodge opened for business on 16th October 1970. The facilities of the lodge were of a very high standard and the tariffs were very expensive. Few New Zealanders were interested, and most of the visitors were wealthy Americans. The lodge stayed open for the season November to April inclusive till May 1973 when it closed and did not re-open. The occupancy rate never exceeded 19.3 per cent. Heavy losses were incurred. Mr. R.K. Davies died in September 1971. His executors repaid the loan by the Bank of California and took it over. They obtained the security of a mortgage over the land and lodge and a charge upon Takaro's undertaking. Their fiduciary status required that something should be done about the money owing to them.

If the project was to be revivified some new sources of finance had to be found. Mr. Rush, having had no success in New Zealand or the United States, looked to Japan. He was acquainted with some businessmen there. He negotiated with Mitsubishi Rayon Company ("Mitsubishi") and on 22nd February 1973 reached agreement with Mitsubishi that it would purchase a 90 per cent holding in Takaro from him and his children's trustees for the price of $1.6m. There was to be a lease by Mitsubishi of the facilities of the lodge, and the purchase price was to be applied partly to discharge the liability to the Davies estate and partly in carrying out improvements at the lodge.

This proposed transaction required the consent of the Minister of Finance under the Overseas Takeover Regulations 1964, and Takaro applied for such consent by letter to the Reserve Bank dated 30th January 1973. The Minister of Finance was Mr. Rowling, the present appellant, being a member of the Labour Government which had taken office in December 1972. While in opposition he had expressed disapproval of the sale by the Crown in 1969 of the land at Upukerora Valley to Takaro. Mr. Rush and his solicitor had a meeting with Mr. Rowling who indicated a desire that the land should revert to New Zealand interests. The transaction was in any event well outside the normal guidelines for the sale of shares in a New Zealand company to foreigners. Refusal of consent to it was signified by the Reserve Bank on 14th March 1973. A renewed application pleading extreme hardship was made on 3rd July 1973. This was considered by Mr. Rowling and he referred it to the Cabinet Economic Committee, a body of seven senior Ministers with a quorum of three. It was decided that the previous refusal of the application

should be adhered to. In August 1973 attorneys and solicitors acting for the Davies estate had a meeting with Mr. Rowling, explained the difficulties confronting the estate and pressed for approval of the application. Mr. Rowling asked the Foreign Investment Committee to consider the matter and make recommendations for the Cabinet Economic Committee. In the result, however, the Registrar of Overseas Takeovers wrote to Takaro's solicitors on 31st August 1973 a letter which amounted to a final refusal of the application, while indicating that any revised proposal would receive consideration.

Mr. Rush then sought to negotiate a different arrangement with Mitsubishi, and at this stage he brought in Tse Group Consultants, a development advisory agency headed by Cedric Jack Tse ("Mr. Tse"). An outline agreement was reached involving Takaro, Mitsubishi, the Tse Group and the Davies trustees. This involved (1) that Mitsubishi should subscribe for 80,000 ordinary $1 shares and 120,000 non-cumulative preference $1 shares in the capital of Takaro; (2) that of the resultant $200,000 Takaro, having reopened the lodge, would apply $39,000 in improvements to it, including the construction of tennis courts, and the balance of $161,000 as working capital; (3) that Mr. Tse would form a consortium, which he indicated would include himself and also Sir Clifford Plimmer and Mr. A.D. Myers, well known businessmen in New Zealand, which would provide a capital sum of $850,000; (4) that this sum should be applied partly in constructing a championship standard golf course on Takaro's land and partly in developing the first phase of a planned 136 holiday homes project, each on a section of up to 5 acres; (5) that the Davies trustees would refrain from requiring any payment of capital or interest in respect of the sums due to them for two years or, if the project went well, for five years. A draft deed drawn up by Mr. Tse in May 1974 provided that 10 holiday homes were to be built and sold by 31st December 1975, 20 more by 31st December 1977 and yet others by 31st December 1978. The houses were to be subject to severe restrictive covenants, including covenants that the purchasers were not to have occupation for more than two months in each year. The proceeds of the homes, after payment to the consortium of development costs with interest at 10%, were to be applied initially in paying off capital and interest due to the Davies trustees, and when that had been achieved were to be divided 75 per cent to the consortium and 25 per cent to Takaro.

The issue of shares in Takaro to Mitsubishi required, by virtue of the Capital Issues (Overseas) Regulations 1965, ("the Regulations of 1965") the consent of the Minister of Finance. These Regulations were made under section 28 of the Reserve

Bank of New Zealand Act 1964 ("the Act of 1964") which, so far as relevant for present purposes, provides:-

"28. Control of overseas exchange and other transactions -

(1) In addition to any other power to make regulations conferred by this Act, the Governor-General may from time to time, by Order in Council, if he is satisfied that it is necessary to do so for the purpose of safeguarding in the public interest the credit, overseas resources, or development of New Zealand, make regulations providing for the prohibition, restriction, regulation, and control of overseas exchange transactions, and of other transactions affecting or likely to affect at any time the overseas resources of New Zealand.

(2) Without limiting the generality of subsection (1) of this section, regulations may be made for the purposes of that subsection in respect of all or any of the following matters:

(a) The taking, sending, or transfer of money or securities to or from New Zealand:

(b) The registration of securities in the names of, or the issue, transfer, or delivery of securities to, or the furnishing of information in relation to the ownership or acquisition of or control over securities or rights or interests therein by, persons not ordinarily resident in New Zealand, or companies that are under the effective control of such persons or of bodies corporate incorporated outside New Zealand, or nominees, trustees, or agents of such persons or of such companies or bodies corporate; or the transfer to overseas registers of securities:

(c) The commencement of business in New Zealand by companies incorporated outside New Zealand:

(d) The disposal of foreign currency and foreign securities accruing to, held by, or at the disposal of persons resident, whether permanently or temporarily, in New Zealand:

(e) Any dealing or transaction having the effect of a purchase, borrowing, sale,

loan, or exchange of foreign currency or foreign securities:

(f) The consideration for, and methods of settlement for, exports (including re-exports) from and imports into New Zealand, and the disposal of the overseas proceeds of exports and re-exports:

(g) The acquisition, surrender, transfer, disposition, or provision of, or other dealings in, property, goods, money, securities, services, or work, or rights or interests in respect of any such things, or any other benefit, in New Zealand in consideration in whole or in part for the acquisition, surrender, transfer, disposition, or provision of, or other dealings in, property, goods, money, securities, services, or work, or rights or interests in respect of any such things, or any other benefit, outside New Zealand; or any arrangement or transaction having the like effect."

By sub-section (5) "securities" are defined as including shares. Section 50 of the Act defines in wide terms the ambit of the Governor-General's regulation-making powers, covering *inter alia* the provision for the granting, refusal and revocation of consents in respect of any matters to which any regulations made under the Act relate.

Regulation 3 of the Capital Issues (Overseas) Regulations of 1965, so far as material, provides:-

"3. Borrowing or raising money outside New Zealand -

(1) Except with the consent of the Minister, it shall not be lawful -

(a) For any body corporate incorporated in New Zealand, or any unincorporated body of persons (other than a partnership in which none of the partners is a body corporate incorporated in New Zealand) carrying on business in New Zealand, or any person acting as trustee or agent for or on behalf of any such body corporate or unincorporated body as aforesaid, to borrow money outside New Zealand; or

(b) For any body corporate incorporated in New Zealand to raise money outside New Zealand by the issue, whether in New Zealand or elsewhere, of any shares in that body corporate; or

(c) For any body corporate incorporated in New Zealand to make any call in respect of any shares issued by that body corporate to a person not ordinarily resident in New Zealand; or

(d) For any body corporate to issue for any purpose shares in or securities of that body corporate to a person not ordinarily resident in New Zealand, if either the body corporate is incorporated in New Zealand or the shares or securities are, or are to be, registered in New Zealand; or

...

(5) Nothing in this regulation shall apply to any transaction entered into by or in respect of any person if the amount borrowed or raised, or, as the case may be, the amount called up or the amount of the shares or securities issued or offered for subscription, sale, or exchange, in that transaction, together with the total of all other amounts borrowed, raised, called up, or offered by or in respect of the same person in all other transactions to which this regulation applies within one year immediately preceding the first-mentioned transaction, does not exceed £10,000."

Since their Lordships consider, for reasons to be given hereafter, that it has a bearing upon the proper construction of the provisions directly in point, it is convenient to cite here also Regulation 6:-

"6. Overseas companies commencing business in New Zealand - Except with the consent of the Minister, it shall not be lawful for any company incorporated outside New Zealand and not lawfully carrying on business in New Zealand at the commencement of these regulations to register or commence to carry on business in New Zealand."

"The Minister" is defined by Regulation 2 as meaning the Minister of Finance.

By letter dated 28th January 1974 Takaro applied for the Minister's consent under Regulation 3 to the proposed issue of shares to Mitsubishi. At the same time the consent of the Reserve Bank, under the Exchange Control Regulations 1965, was asked for. No issue now arises as regards the latter consent, and the matter need not be alluded to further. In the ordinary way the application for the Minister's consent would have been dealt with by the Reserve Bank under delegated authority because the proposed

issue, since it did not involve more than 25% of the voting capital of Takaro (it actually amounted to 24.2%), fell within guidelines made public in 1972. However, since the earlier application for the sale of 90% of the shares in Takaro to Mitsubishi had been handled by Mr. Rowling personally, this new application was referred to him as a matter of policy. The appellant consulted the Cabinet Economic Committee, a quorum of which met and considered the application on 20th March 1974. They took the view that it should be refused. The appellant then made the formal decision to refuse consent, which was intimated to Takaro's solicitors by letter dated 21st March 1974.

Takaro thereupon applied to the High Court (then known as the Supreme Court) for judicial review of the appellant's decision. By a judgment dated 22nd August 1974 Wild C.J. quashed the decision and directed that the appellant should consider Takaro's application anew. The appellant appealed against this judgment, but it was affirmed by the Court of Appeal on 25th February 1975 ([1975] 2 NZLR 62). Their Lordships will have occasion at a later stage to consider in some detail the grounds of these two decisions, but for the present it suffices to say that they proceeded on the basis that the appellant's refusal of consent was primarily motivated by a desire that Takaro's land should revert to indigenous New Zealand ownership, and that this was a consideration which the Court of Appeal held that, on a proper construction of the Regulations of 1965, he was not entitled to take into account.

In the meantime the Tse Group had prepared an outline plan for the development of Takaro's land by building a golf course and holiday homes and on 21st May 1974 submitted it to the local planning authority, Wallace County Council, for approval. Approval in principle was notified on 7th June 1974. On 3rd October 1974, however, the Tse Group wrote to Mr. Rush withdrawing from the scheme. They cited as their reasons for doing so the delay caused by refusal of Takaro's application for consent to the capital issue to Mitsubishi and also "the steadily worsening local and international liquidity situation". It will be recalled that, following the Yom Kippur War in October 1973, the ensuent show of teeth by OPEC and the dramatic surge in oil prices thus engendered, the economy of the free world was at this time indeed in a parlous condition, the property development scene being particularly seriously affected. Then on 7th April 1975 Mitsubishi also intimated to Mr. Rush its withdrawal, on the grounds of unexpected circumstances on Takaro's side and "the worst recession in our textile trade industry".

In these circumstances the whole scheme for the attempted rescue of Takaro fell to the ground. Takaro never asked the appellant to reconsider its application and he did not do so. The Davies trustees appointed a receiver to Takaro in March 1975, and the chattels in the lodge were sold by auction shortly afterwards. On 24th June 1975 Takaro and Mr. Rush instituted against Mr. Rowling the proceedings which give rise to the present appeal. The proceedings originally claimed damages for losses sustained through failure of the rescue scheme upon various grounds, including negligence on the part of the appellant in the exercise of his statutory powers, knowingly acting in excess of those powers and malicious exercise of them. The appellant applied for the statement of claim to be struck out as disclosing no reasonable cause of action. On 21st July 1976 Beattie J. struck out all the alleged causes of action apart from those based upon malicious exercise of power and wilful excess of power ([1976] 2 NZLR 657). On appeal by Takaro and Mr. Rush the Court of Appeal restored the cause of action based upon allegations of negligence ([1978] 2 NZLR 314). The action eventually came to trial before Quilliam J. upon a fourth amended statement of claim, the material allegations in which, as regards the grounds upon which liability was sought to be established, were as follows:-

> "By reason of the particulars set out hereunder the Defendant knew that the First Plaintiff was in a serious financial position and knew or ought to have known that if he refused his consent as aforesaid to the First Plaintiff, the First Plaintiff would be unable to raise the sum of $200,000 elsewhere and would either be unable to reopen Takaro Lodge or would be forced to sell Takaro Lodge to the New Zealand Government or to New Zealand interests or would be prevented from subdividing any of the land at Takaro Lodge for resale, and would thereby suffer serious financial loss.
>
> .....
>
> In considering the First Plaintiff's application, and in refusing his consent thereto as aforesaid, the Defendant was negligent in all or any of the following respects in that:-
>
> (a) He allowed his decisions to be dominated by an irrelevant consideration, namely a desire that the ownership of Takaro Lodge should revert to New Zealand;
>
> (b) He acted for a purpose, namely the desire that the ownership of Takaro Lodge should revert to New Zealand which purpose was alien to that for which his powers were granted.

(c) He failed in the circumstances to exercise his discretion at all in that he allowed his decision to refuse the said application to be dominated by the taking into account of an irrelevant consideration and the pursuit of an improper purpose.

(d) By not following the guidelines set for such applications by the Reserve Bank of New Zealand in accordance with the policy of the Government of New Zealand as administered by him he refused his consent in circumstances in which no Minister of Finance could reasonably have refused his consent to the said application. Particulars of the guidelines referred to:-

The guidelines are contained partly in the Reserve Bank of New Zealand Booklet 'Exchange Control Investment in New Zealand by Overseas Residents' (R.B.E.C. 14); and in the Press Statement of the Defendant dated 12 January 1973 headed 'Overseas Investment in New Zealand'. There are also general guidelines followed by the Reserve Bank which are referred to by Mr. Hardie in evidence given in *Takaro Properties Limited v. Rowling and The Reserve Bank* (A. No. 186/74).

(e) He failed to consider the application fairly in that he allowed himself to be influenced by a strong personal desire that the land should revert to New Zealand interests;

(f) He failed to take reasonable care to ascertain the extent of his powers at law in considering the application and refusing his consent;

(g) He failed to take reasonable care as aforesaid in considering the said application in the actual or constructive knowledge of the facts set out in Paragraph 9 hereof.

In refusing his consent as aforesaid the Defendant maliciously (in the sense that he exercised his statutory powers in acting for a purpose which he knew was not a lawful purpose namely that the ownership of Takaro Lodge would revert to New Zealand) and/or knowingly acted ultra vires the terms of the said statutory regulations and/or negligently set out to force and/or forced the First Plaintiff into a situation where the First Plaintiff:-

(a) Would be unable to reopen Takaro Lodge and/or

(b) Would be prevented from selling Takaro Lodge other than to the New Zealand Government or New Zealand interests and/or

(c) Would be forced to sell Takaro Lodge to the New Zealand Government or New Zealand interests and/or

(d) Was prevented from subdividing any of the land of Takaro Lodge for resale."

Quilliam J. gave judgment on 10th December 1982 ([1986] 1 NZLR 22) in favour of Mr. Rowling. He held (1) that Mr. Rowling was under a *prima facie* duty of care, (2) that on the facts no breach of that duty had been established, (3) that no malicious exercise of statutory powers had been established, and (4) that, assuming that liability had been established, it had not been shown that negligence or malice, as the case might be, was a cause of any loss to the plaintiffs. The last holding was based upon the judge's finding that the rescue project for Takaro was not viable, and was doomed to failure even if Mr. Rowling had not withheld his consent to the issue of shares to Mitsubishi - as the judge put it, he could see nothing but disaster for the scheme.

Upon appeal by Takaro and Mr. Rush the Court of Appeal on 1st May 1986 reversed the judgment of Quilliam J. as regards Takaro's claim in negligence but sustained it as regards the claim based on malicious exercise of statutory powers. Mr. Rush's appeal was dismissed on the ground that Mr. Rowling did not owe him any duty of care independent of that owed to Takaro. Damages payable to Takaro were assessed at $300,000, with interest at 11% per annum from 21st March 1974 to the date of judgment. Despite Quilliam J.'s express finding of fact that he could see nothing but disaster for the scheme, damages were calculated by reference to the loss of the chance that Takaro, which was probably insolvent on 21st March 1974, might have become prosperous if Mr. Rowling had on that date legalised the issue of shares to Mitsubishi. Upon the issue of negligence, Woodhouse P., Richardson and McMullin JJ. held that Mr. Rowling was at fault in taking into account what was described as "the reversion factor", i.e. the desire that the Takaro land should revert to New Zealand interests. Cooke and Somers JJ. held that he was at fault in not taking legal advice upon the question whether he was entitled to take the reversion factor into account. Mr. Rowling now appeals, with leave of the Court of Appeal, to Her Majesty in Council. There is no cross-appeal by Mr. Rush, nor by Takaro on the malicious exercise of powers issue.

In his consideration of Takaro's application for consent to the proposed share issue Mr. Rowling was acting as guardian of the public interest of New Zealand. The Governor-General, under powers conferred upon him by the legislature, had enacted that such issues to foreigners were illegal unless made with the consent of the Minister of Finance. The Minister could not properly consent to a particular issue unless satisfied that it was in the interests of New Zealand, or at least not contrary to those interests. In this case Mr. Rowling decided, having consulted the Cabinet Economic Committee, that the proposed issue was contrary to the interests of New Zealand. Wild C.J., affirmed by the Court of Appeal, held that on a proper construction of the relevant Act and Regulations Mr. Rowling had made a mistake. The considerations affecting the interests of New Zealand which he was entitled to take into account were not so wide as he had thought. In particular, he was not entitled to take into account the desirability, as he saw it, of the Takaro land reverting to New Zealand controlled ownership. There is no suggestion that from a broad point of view such reversion would not have been a good thing for New Zealand, or that Mr. Rowling was not at any rate entitled to think it would be. It was simply decided that that particular aspect of the interests of New Zealand was an irrelevant one. So Mr. Rowling was required to consider afresh whether or not he should consent to the issue. The legal proceedings resulted in delay and, because of that delay, combined with deteriorating economic circumstances, the main sponsors of the rescue package for Takaro pulled out. Takaro claimed that they had suffered economic loss because of that event, that the event came about because of Mr. Rowling's mistake, and that Mr. Rowling was liable to them in damages for negligence, because he owed them a duty of care not to make a mistake about the matters he was entitled to take into account in considering whether or not to consent to the proposed share issue, and was in breach of that duty.

The character of the claim is novel. So far as their Lordships are aware, it has never previously been been held that where a Minister or other governmental agency mistakes the extent of its powers and makes a decision which is later quashed on the ground of excess of statutory powers or of an irrelevant matter having been taken into account, an aggrieved party has a remedy in damages for negligence. The issue was canvassed in *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, where Lord Diplock at p. 171 expressed doubts as to whether a duty of care could exist in such circumstances, but found it unnecessary to decide the issue since, on the assumption that a duty existed, there had clearly, on the facts, been no breach of it.

The argument in the appeal traversed the following issues:

(1) duty of care;
(2) the proper construction of the relevant legislation;
(3) breach of duty;
(4) causation;
(5) quantum of damages; and
(6) rate of interest on damages.

Their Lordships will consider these in turn.

1. Duty of care

The Court of Appeal found no difficulty in holding that a duty of care rested upon the Minister; indeed, Cooke J. (as he then was) went so far as to observe that the question of liability to Takaro seemed to him to be relatively straightforward.

For reasons which will appear, their Lordships do not find it necessary to reach any final conclusion on the question of the existence, or (if it exists) the scope, of the duty of care resting upon a Minister in a case such as the present; and they have come to the conclusion that it would not be right for them to do so, because the matter was not fully exposed before them in argument. In particular, no reference was made in argument to the extensive academic literature on the subject of the liability of public authorities in negligence, study of which can be of such great assistance to the courts in considering areas of the law which, as in the case of negligence, are in a continuing state of development. Even so, such is the importance of the present case, especially in New Zealand, that their Lordships feel that it would be inappropriate, and perhaps be felt to be discourteous, if they were to make no reference to the relevant considerations affecting the decision whether a duty of care should arise in a case such as the present.

Quilliam J. considered the question with particular reference to the distinction between policy (or planning) decisions and operational decisions. His conclusion was expressed as follows ([1986] 1 NZLR 35):-

> "The distinction between the policy and the operational areas can be both fine and confusing. Various expressions have been used instead of operational, e.g. 'administrative' or 'business powers'. It may not be easy to attach any of these labels to the decision of the Minister in this case, but what appears to me to emerge clearly enough is that for the reasons I have indicated his decision was the antithesis of

> policy or discretion. I therefore equate it with having been operational. The result of that conclusion is that I consider the *prima facie* existence of a duty of care has been established."

Their Lordships feel considerable sympathy with Quilliam J.'s difficulty in solving the problem by simple reference to this distinction. They are well aware of the references in the literature to this distinction (which appears to have originated in the United States of America), and of the critical analysis to which it has been subjected. They incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks (see especially the discussion in Craig on *Administrative Law* at pp. 534-538). If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.

It is at this stage that it is necessary, before concluding that a duty of care should be imposed, to consider all the relevant circumstances. One of the considerations underlying certain recent decisions of the House of Lords (*Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210) and of the Privy Council (*Yuen Kun Yeu v. The Attorney General* [1987] 3 W.L.R. 776) is the fear that a too literal application of the well-known observation of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728 at pp. 751-752 may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed. Their Lordships consider that question to be of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis. It is one upon which all common law jurisdictions can learn much from each other; because, apart from exceptional cases, no sensible distinction can be drawn in this respect between the various countries and the social conditions existing in them. It is incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions; but what they are all searching for in others, and each of them striving to achieve, is a careful analysis and weighing of the relevant competing considerations.

It is in this spirit that a case such as the present has, in their Lordships' opinion, to be approached. They recognise that the decision of the Minister is capable of being described as having been of a policy rather than an operational character; but, if the function of the policy/operational dichotomy is as they have already described it, the allegation of negligence in the present case is not, they consider, of itself of such a character as to render the case unsuitable for judicial decision. Be that as it may, there are certain considerations which militate against imposition of liability in a case such as the present.

Their Lordships wish to refer in particular to certain matters which they consider to be of importance. The first is that the only effect of a negligent decision, such as is here alleged to have been made, is delay. This is because the processes of judicial review are available to the aggrieved party; and, assuming that the alleged error of law is so serious that it can properly be described as negligent, the decision will assuredly be quashed by a process which, in New Zealand as in the United Kingdom, will normally be carried out with promptitude. The second is that, in the nature of things, it is likely to be very rare indeed that an error of law of this kind by a Minister or other public authority can properly be categorised as negligent. As is well known, anybody, even a judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs, can be severely criticised without attracting the epithet "negligent". Obviously, this simple fact points rather to the extreme unlikelihood of a breach of duty being established in these cases, a point to which their Lordships will return; but it is nevertheless a relevant factor to be taken into account when considering whether liability in negligence should properly be imposed.

The third is the danger of overkill. It is to be hoped that, as a general rule, imposition of liability in negligence will lead to a higher standard of care in the performance of the relevant type of act; but sometimes not only may this not be so, but the imposition of liability may even lead to harmful consequences. In other words, the cure may be worse than the disease. There are reasons for believing that this may be so in cases where liability is imposed upon local authorities whose building inspectors have been negligent in relation to the inspection of foundations, as in the case of *Anns* itself; because there is a danger that the building inspectors of some local authorities may react to that decision by simply increasing, unnecessarily, the requisite depth of foundations, thereby imposing a very substantial and unnecessary

financial burden upon members of the community. A comparable danger may exist in cases such as the present, because, once it became known that liability in negligence may be imposed on the ground that a Minister has misconstrued a statute and so acted ultra vires, the cautious civil servant may go to extreme lengths in ensuring that legal advice, or even the opinion of the court, is obtained before decisions are taken, thereby leading to unnecessary delay in a considerable number of cases.

Fourth, it is very difficult to identify any particular case in which it can properly be said that a Minister is under a duty to seek legal advice. It cannot, their Lordships consider, reasonably be said that a Minister is under a duty to seek legal advice in every case in which he is called upon to exercise a discretionary power conferred upon him by legislation; and their Lordships find it difficult to see how cases in which a duty to seek legal advice should be imposed should be segregated from those in which it should not. In any event, the officers of the relevant department will be involved; the matter will be processed and presented to the Minister for decision in the usual way, and by this means his mind will be focussed upon the relevant issue. Again, it is not to be forgotten that the Minister, in exercising his statutory discretion, is acting essentially as a guardian of the public interest; in the present case, for example, he was acting under legislation enacted not for the benefit of applicants for consent to share issues but for the protection of the community as a whole. Furthermore he is, so far as their Lordships are aware, normally under no duty to exercise his discretion within any particular time; and if, through a mistaken construction of the statute, he acts ultra vires and delay thereby occurs before he makes an intra vires decision, he will have in any event to exercise his discretion anew and, if his discretion is then exercised in the plaintiff's favour, the effect of the delay will only be to postpone the receipt by the plaintiff of a benefit which he had no absolute right to receive.

No doubt there may be possible answers to some of these points, taken individually. But if the matter is looked at as a whole, it cannot be said to be free from difficulty. Indeed their Lordships share the opinion expressed by Richmond P. in *Takaro Properties Ltd. v. Rowling (No. 1)* [1978] 2 NZLR 314, at p. 318, that the whole subject is of the greatest importance and difficulty, as is well demonstrated by the valuable, though understandably inconclusive, discussions of the problem by Woodhouse J. (as he then was) and Richardson J. in the same case. Doubtless it was considerations such as those to which their Lordships have already referred that led Lord Diplock, in *Dunlop v. Woollahra Municipal*

Council [1982] A.C. 158, at p. 171, to express doubts whether a duty of care can exist in such circumstances. In particular, it is being suggested that liability in negligence should be imposed in cases such as the present, when the effect of any such imposition of liability will on the one hand lead to recovery only in very rare cases and then only for the consequences of delay which should not be long; and may, on the other hand, lead to considerable delay occurring in a greater number of cases, for which there can be no redress. In all the circumstances, it must be a serious question for consideration whether it would be appropriate to impose liability in negligence in these cases, or whether it would not rather be in the public interest that citizens should be confined to their remedy, as at present, in those cases where the Minister or public authority has acted in bad faith.

Their Lordships do not think it would be right for them to answer that question in the present case; indeed they must not be thought to be expressing any opinion on the point. This is partly because, as they have said, the matter was not fully exposed in argument. But in any event they are very conscious of the fact, already referred to, that, in the great majority of cases where it is alleged that there has been negligence in the construction of a statute, it is likely to prove that the error cannot be described as negligent; and they have come to the conclusion that, on the findings of fact of Quilliam J., the present is quite simply a typical example of such a case. They will therefore leave the question of the duty of care and turn to what appears to them to be the more relevant question of breach of duty, which they consider to be the central question in the case. However, consideration of that question involves in the first instance an examination of the legislation which conferred the ministerial powers and duties.

2. The relevant legislation

In the judicial review proceedings before Wild C.J. and the Court of Appeal a certain view was taken about the proper construction of the relevant provisions of the Act of 1964 and the Regulations of 1965, leading to the conclusion that Mr. Rowling was not entitled to take the reversion factor into account in his consideration of Takaro's application. That conclusion may be *res judicata* as between the parties to the present appeal, but the view taken of the proper construction of the Act and Regulations is not binding upon this Board. Counsel for the respondent did not maintain the contrary, and the matter was fully argued before their Lordships. Mr. Rowling did not give evidence in the judicial review proceedings. Wild C.J. found that the reversion factor played the dominant part in his decision on

the basis of what he had said to Mr. Smith, Takaro's solicitor, in the course of a meeting held to discuss the earlier application for consent to the sale to Mitsubishi of 90% of the shares in Takaro. Mr. Rowling did give evidence in the present proceedings, and in the course of it he said that in addition to the reversion factor he had taken into account, and been influenced by, eight additional considerations which were listed by Quilliam J. ([1986] 1 NZLR 33, 34) as follows:-

"1. The doubtful viability of the project.

2. It involved an unwise deployment of resources and particularly building resources at a time when New Zealand was suffering acute pressures in the building industry.

3. A luxury tourist resort and the construction of a championship golf course could not rate as a high economic priority.

4. The company was badly under-capitalised.

5. The company's total indebtedness.

6. The likelihood that the company would in the future show a continued pattern of operating losses.

7. The lodge was not situated in a desirable area.

8. The lack of clear benefit to New Zealand as a whole."

Having regard to the views expressed in the judicial review proceedings, Quilliam J. and the Court of Appeal held that these considerations also were irrelevant. That matter is admittedly not *res judicata* between the parties in the instant proceedings, since it was not raised in the judicial review action.

In the course of his unreported judgment in the judicial review proceedings, Wild C.J. expressed the opinion that the scope of the discretion conferred on the Minister by Regulation 3 was limited by the words in section 28(1) of the Act of 1964 "control of overseas exchange transactions, and of other transactions affecting or likely to affect at any time the overseas resources of New Zealand". He did not regard the recital of the matters as to which the Governor-General was to be satisfied before making regulations as giving any guidance as to the ambit of the discretion. He gave his view that the ownership of land by overseas persons was an entirely distinct and different matter relating to private ownership of

land within New Zealand and not to New Zealand's resources outside that country, and accordingly held that the reversion factor was irrelevant. In the Court of Appeal Woodhouse P., giving the judgment of the court, did address himself to the purposes of the regulation-making power as expressed in section 28(1). He said ([1975] 2 NZLR 62, 68):-

> "The object and purposes of Part IV of the Act do not seem to be in doubt. Part IV is concerned with safeguarding the overseas resources of New Zealand. And the specific power to make regulations follows immediately upon s 27 which speaks of the maintenance of an adequate level of overseas exchange reserves. The policy which Parliament intends should underlie the regulation-making power contained in s 28(1) is specifically stated in that subsection to be 'for the purpose of safeguarding in the public interest the credit, overseas resources, or development of New Zealand'. Some argument might perhaps be advanced that the reference to development of New Zealand is intended to embrace every type of development whether economic, sociological or otherwise. But in the close context of Part IV of the Act and particularly the references in s 28(1) to credit and overseas resources we believe that the expression 'development of New Zealand' must be read in the sense of economic and financial development and by reference to the essential need of the country to maintain its overseas resources and exchange - a situation that does not arise and has not been relied on in this case. Moreover, s 28(1) expressly provides that the regulations that may be made for such purposes are intended to provide 'for the prohibition, restriction, regulation, and control of overseas exchange transactions, and of other transactions affecting or likely to affect at any time the overseas resources of New Zealand'. It will be noticed that the reference to 'other transactions' is qualified to the extent that they affect or may affect 'the overseas resources of New Zealand'. That is a necessary qualification to the expression 'other transactions' but it was not needed in relation to the earlier reference to 'overseas exchange transactions' which inevitably would have some effect on overseas resources. We think that the Chief Justice was right when he took the view that the ownership of land by overseas persons in the context of the present case is 'an entirely distinct and different matter relating to private ownership of land within New Zealand and not to New Zealand's resources outside this country'."

Their Lordships respectfully doubt whether it was correct to put such a narrow construction upon the

words "safeguarding in the public interest the credit, overseas resources or development of New Zealand", though agreeing that these words do indicate not only the ambit of the regulation-making power but also the general purposes for which the powers conferred by the Regulations may be exercised. Regulation 3 of the Regulations of 1965 prohibits the issue of securites to persons not ordinarily resident in New Zealand. The Governor in Council acting on the advice of the New Zealand Government must have been satisfied when regulation 3 was issued that pursuant to the Act of 1964 the prohibition was necessary "for the purpose of safeguarding in the public interest the credit, overseas resources or development of New Zealand". The prohibition was a burden on any company incorporated in New Zealand which wished for any reason to issue shares to persons not ordinarily resident in New Zealand. The regulation conferred a discretion on the Minister to consent to a particular issue. In considering the exercise of that discretion the Minister was entitled to consider whether the maintenance of the prohibition was necessary for the purpose of safeguarding in the public interest the credit, overseas resources or development of New Zealand. The three matters to be safeguarded, "credit", "overseas resources", and "development of New Zealand", are all expressed disjunctively. They are not all the same in character, and their Lordships doubt whether there is good reason for construing "development of New Zealand" as narrowly as did the Court of Appeal. It is true that the only type of transactions which may be subjected to control are those which affect or are likely to affect overseas resources, but that only goes to definition, not to the purposes for which such transactions may lawfully be controlled. It is not disputed that the proposed issue of shares to Mitsubishi was a transaction which affected or was likely to affect to some extent the overseas resources of New Zealand. It involved an increase of capital provided by non-residents, an increase in the claims of non-residents to the payment of income and profits derived from New Zealand land, and a dilution in the already small interest of New Zealand residents.

The correctness of giving a wide construction to the expression "development of New Zealand" appears to be supported by section 28(2)(c), authorising the making of regulations in respect of the commencement of business in New Zealand by companies incorporated outside New Zealand. Regulation 6 of the Regulations of 1965, quoted above, makes unlawful such commencement of business, save with the consent of the Minister. It appears that there is no other legislative provision directed to control of the commencement of business in New Zealand by overseas companies. The effect on the overseas resources of

New Zealand cannot reasonably have been intended by the legislature to be the only relevant aspect for consideration by the Minister when presented with an application under this Regulation. The guidelines on "Investment in New Zealand by Overseas Residents", on page 2, detail seven policy considerations to be applied in respect of proposals to commence business in New Zealand, a number of which, including the likely effect on competition, clearly have no relevance to overseas resources. Current Government policy is stated to be the governing consideration. This is only reasonable. A powerful overseas corporation might be seeking to compete with an infant New Zealand motor industry; an overseas company might be proposing to introduce a business of a type reasonably regarded by the Minister as socially harmful to New Zealand; or a company incorporated in a foreign country governed by a regime which was anathema to the elected representatives of New Zealand might be proposing to set up business there. It would be strange if the Minister were to have no power to refuse his consent to any such proposal unless an adverse effect on overseas resources could be shown. If, however, a wide meaning be given to "development of New Zealand" so as to embrace all aspects of such development, social, economic, cultural and environmental, reasonably considered important by the responsible Minister, then the undesirable consequences envisaged would be avoided. In their Lordships' opinion there is much to be said for the view that that is indeed the proper construction to be attributed to the words.

That view is clearly a tenable one. Mr. Rowling could not be regarded as unreasonable or negligent in holding it. If he did hold it, he could reasonably regard the reversion factor, and also the eight additional factors to which he spoke, as being matters bearing on the safeguarding of the development of New Zealand, such as were proper to influence his decision.

3. Breach of duty

In his judgment, Quilliam J. summarised the alleged negligence as amounting to two basic complaints: (1) that the Minister was obsessed by a determination to ensure the reversion of the land to New Zealand ownership - which he called the reversion factor; and (2) that the Minister negligently failed to take legal advice. He rejected both allegations of negligence.

It is, in their Lordships' opinion, most important to observe the grounds upon which he did so. They take first the reversion factor. Quilliam J. said ([1986] 1 NZLR at p. 37):-

"The principal allegation against Mr. Rowling is that he knew he was not entitled to take the reversion factor into account so that there was no question of mistake involved. It was said that with the knowledge he had he was simply careless in his approach to the matter. I am altogether unable to reach that conclusion. The submission starts from a wrong premise. Mr. Rowling at no stage acknowledged that he knew he was not entitled to take the reversion factor into account. His evidence was to the contrary, and I must make it clear that although I believe he acted beyond his powers in certain respects, I have no hesitation in saying that I accept his evidence as having been honestly given. He said he believed then, and still believes, that he acted within his powers in taking it into account. Perhaps some force is lent to that evidence by reflecting that he pursued that belief as far as the Court of Appeal before being obliged to accept that it was wrong. The concession which he made in his evidence was that he knew he had no right to take the reversion factor into account if it stood alone. He believed there were other factors as well and, moreover, that they were factors which alone would have justified a refusal of consent. There can, I think, be little doubt that if those other factors had been properly available to him for consideration they would, indeed, have entitled him to conclude that the project would have failed and this was a matter which he regarded as important. Mr. Rowling has said that these other matters were given full consideration and I have indicated that I accept his evidence upon that. It also finds confirmation from other circumstances. If he had been so obsessed by the reversion factor as to have been negligent in the sense that he was not prepared to consider anything else, then one might expect to find that he had dealt with the application in a peremptory manner. There is no suggestion in the evidence that he did so."

He then said (at pp. 37-38):-

"It must also be observed that, although the consent required under the various regulations was that of the Minister, in practice the Minister acted upon the decision of the Cabinet Economic Committee in respect of any matter which went before that Committee. Moreover, once a matter had been referred to the Committee then it went back to that Committee when it arose on any subsequent occasion. The result was that although the hardship petition involved a 90 per cent transfer of shares, even when the very much modified application in respect of a new issue of

> less than 25 per cent of the capital was made, that also went before the Committee. The Takaro matter, in one form or another, went to that Committee on three or four occasions and it was that Committee which made the final decision to refuse consent. Accepting that both the Committee and the Minister acted upon a wrong basis, nevertheless, it cannot, in my view, be said that either acted negligently in any of the respects set out in para. 10(a) to (e) of the statement of claim."

On the second allegation, Quilliam J. had this to say (at p. 38):-

> "... even were such a duty to exist I can see no evidence to suggest that there was a breach of that duty. There seems to me to have been no more reason for Mr. Rowling to have felt under an obligation to take legal advice on the implications of Takaro's application for consent than upon any other of the wide range of matters which must have gone to him for decision. It is true that he had available to him the services of the Crown Law Office, and no doubt also of legal advisers employed within his department. It seems inconceivable that there was a duty to take advice in respect of every matter and application coming before him. I can see nothing to suggest that he ought to have recognised that there was or may have been involved an aspect of the law which was beyond the scope of his normal understanding of the regulations which he was required to administer."

The Court of Appeal however reversed his decision. The leading judgment was delivered by Woodhouse P. who said (at p. 60):-

> "It is apparent that in reaching that conclusion the judge considered that because an honest mistake had been made by the Minister himself when he used the reversion factor it could not be regarded as a negligent mistake; or alternatively that when he shared his responsibility and his opinion with his colleagues he had been careful enough. But that assessment fails to recognise that honest though the Minister's assumption was, he arrived at it well knowing that the reversion factor was not legally or practically relevant in the statutory context of the application before him. By itself the honest use of material known to be irrelevant involves an illogicality which hardly meets the standard of care to be expected. And in any event honesty is no answer to the complaint that the Minister assumed too much too easily. The complaint is not that the mistake he made was dishonest or deliberate. It is simply that it was careless. To put the matter in

another way, a subjective belief that something could properly be done is no answer to a claim of negligence. The standard of care and whether it was met or not must be assessed objectively - by asking what might reasonably have been expected in the circumstances. Finally, whatever the general conclusion of the Committee it was the Minister who still had to make the formal decision to refuse or grant the consent.

In the result I am satisfied that neither the Minister's belief nor the reference to the Committee is enough to excuse the mistake he made. Taking into account his entirely candid admission that he knew he could not allow the reversion factor to influence his decision if it stood alone it remained his duty to ignore it."

Cooke J. said (at p. 68):-

"In the present case the Minister's evidence was to the effect that he knew that he had no right to take the reversion factor into account if it stood alone, but that on his understanding of the regulations he was entitled to take it into account provided that he also took into account other considerations. That is such an unusual supposition that I cannot help thinking that the Minister should reasonably have seen it as crying out for legal advice. Quilliam J. thought that there was no more reason to take advice on this matter than upon any others of the wide range going to the Minister for decision. On that point, with respect, I must differ from the judge.

Moreover it was conceded before this court that, if legal advice had been taken, it would have been that the reversion factor could not be taken into account. That being so, the company can rightly say that the refusal of 21 March 1974 was at least contributed to by the negligent taking into account of an irrelevant consideration."

Richardson J. agreed with Woodhouse P.; McMullin and Somers JJ. gave separate judgments to the same effect.

With the utmost respect to the Court of Appeal, their approach appears to have ignored the important finding of fact by Quilliam J., contained in a passage in his judgment already quoted but which, for the sake of clarity, their Lordships will repeat:-

"Mr. Rowling at no stage acknowledged that he knew he was not entitled to take the reversion factor into account. His evidence was to the contrary, and I must make it clear that although I believe

> he acted beyond his powers in certain respects, I have no hesitation in saying that I accept his evidence as having been honestly given. He said he believed then, and still believes, that he acted within his powers in taking it into account. Perhaps some force is lent to that evidence by reflecting that he pursued that belief as far as the Court of Appeal before being obliged to accept that it was wrong."

Furthermore, Quilliam J. plainly regarded that finding of fact as consistent with the evidence of the Minister, which he recorded in the very next sentence in his judgment, as being to the effect that the Minister "knew he had no right to take the reversion factor into account if it stood alone". In these circumstances, their Lordships do not consider that the Minister's evidence can properly be interpreted as having meant, or that Quilliam J. could have understood it to mean, that the Minister knew that it was not open to him to take the reversion factor into account. The only fair interpretation, in the light of Quilliam J.'s express finding that the Minister himself believed that he was entitled to take the reversion factor into account, is that he considered that that factor alone could not justify him in reaching his decision. Their Lordships wish to add that their conclusion on this point has been reinforced by reading a transcript of the relevant passage of the Minister's evidence.

The interpretation favoured by the Court of Appeal requires that the Minister must have been in a most extraordinary state of mind, as is revealed by the fact that Cooke J. was driven to conclude that the Minister's understanding of the position (as he saw it) amounted to "such an unusual supposition that I cannot help thinking that the Minister should reasonably have seen it as crying out for legal advice". Their Lordships respectfully agree that it would, if it had existed, have been unusual to the point of absurdity; but they can see no proper basis upon which so absurd a view should be attributed to a Minister of the Crown, when his evidence, fairly read, leads to a perfectly sensible result. For this simple reason, their Lordships consider that the Court of Appeal were not, with all respect, entitled to depart from the conclusion reached by Quilliam J. on the issue of the reversion factor. Furthermore, it follows that there was no basis for interfering with Quilliam J.'s conclusion that, even assuming that there was any duty on the Minister to take legal advice, there was no evidence to suggest that there was any breach of such duty, for there was no more reason for the Minister to seek legal advice in this case than in many other of the wide range of cases which must have gone before him for decision.

In his judgment, Woodhouse P. said that it was apparent that, in reaching his conclusion, Quilliam J. considered that because an honest mistake had been made it could not be a negligent mistake. Their Lordships do not however consider that, in so interpreting Quilliam J.'s judgment, Woodhouse P. was being entirely fair to the learned judge. It appears from his judgment that matters which influenced the judge were that the Minister acted upon the advice of the Cabinet Economic Committee; and that the matter went before the Committee on three or four occasions, it being the Committee which made the final decision to refuse consent. The point being made by Quilliam J., as their Lordships see it, was that in these circumstances he was unable to hold that there was, in point of fact, any negligence in the construction of the statute in the present case; and it is to be borne in mind that, at an earlier stage in his judgment, he referred to the fact that when the new proposals came before the Committee on 20th March 1974, there were departmental officers in attendance on the Committee and the application was the only matter on the agenda for that meeting. These are matters which the judge was, in the opinion of their Lordships, fully entitled to take into account, as a matter of commonsense, in reaching his decision that there had in fact been no negligence in the interpretation of the statute and regulations. The circumstance that the view which the Minister did take upon that interpretation was, in their Lordships' opinion, a perfectly tenable one, also goes to negative any breach of duty.

It will be observed that, in their judgments, both Cooke J. and Somers J. stated that it had been conceded before the Court of Appeal that, if legal advice had been taken, it would have been to the effect that the reversion factor could not be taken into account. Before their Lordships, it was asserted by counsel for the appellants, and not disputed by counsel for the respondent, that no such concession had been made. However their Lordships have since been informed that, on their return to New Zealand, counsel were called to the Court of Appeal; and, after discussion with certain members of that Court, it was accepted that counsel for the Minister had conceded to the Court of Appeal that the Minister said that he knew that he could not take the reversion factor into account if it stood alone, and further that, if legal advice had been taken, the advice would have been that the reversion factor could not be taken into account. The former concession certainly reflects the actual words used by Quilliam J. in summarising the effect of the Minister's evidence (though not the actual words used by the Minister himself as recorded in the transcript), but begs the question of the proper interpretation to be placed upon those words, as to

which their Lordships have nothing further to add. On their Lordships' view of the case, the second concession is of no relevance since they can see no basis for departing from the decision of Quilliam J. that the Minister was not negligent in failing to seek legal advice. They have difficulty in seeing, however, on what basis counsel came to make any such concession, bearing in mind that the Minister not only contested the application for judicial review on the ground that he was entitled to take the reversion factor into account, but that he also appealed to the Court of Appeal from the adverse decision of Wild C.J. on that point, and that he roundly asserted, in evidence accepted by Quilliam J., that he had always believed, and still believed, that he was entitled to take it into account.

Their Lordships wish, in conclusion on this aspect, to stand back from the case and look at it in the round. The real attack on the Minister was that he was so obsessed by the reversion factor that he was not prepared to consider anything else. That allegation was rejected by Quilliam J. on the evidence. In these circumstances, the plaintiffs were left with the simple allegation that the Minister was guilty of negligence in construing the relevant legislation. But what emerges from the evidence is a picture of a Minister (whose evidence was accepted by the judge as having been honestly given) acting in accordance with what he conceived to be his duty under the relevant legislation, and acting moreover, at all times, on the advice of the relevant Cabinet Committee, upon which departmental officers were in attendance. The Court of Appeal considered that he had in fact exceeded his powers; but, in reaching that conclusion, they proceeded on a somewhat different view from that acted upon by Wild C.J. in reaching the same conclusion on a matter which, in the respectful opinion of their Lordships, must in any event have been open to serious argument. As a matter of sheer commonsense, it must be unlikely that the Minister should, in such circumstances, have been guilty of negligence; and their Lordships are satisfied, for the reasons given by Quilliam J. in his very careful judgment, that he was not, and that there were no grounds upon which the Court of Appeal could properly interfere with the decision of Quilliam J.

4. Causation and
5. Damages

Since their Lordships have reached the clear conclusion that, on the assumption that he was under a duty of care, the Minister committed no breach of duty, it is unnecessary for them to deal with the issue of causation (as to which there was an acute division of opinion between Quilliam J. and the Court of Appeal) or with the issue of damages.

6. Interest on damages

This point was not raised before the Court of Appeal, but it was fully argued before the Board. Though the point cannot in the circumstances have any practical result in the present case, it is one of some general importance upon which it may be useful for their Lordships to express an opinion.

The Court of Appeal allowed interest at the rate of 11% per annum for the whole of the period from 21st March 1974 to the date of judgment upon the sum of $300,000 which they awarded as damages. 11% was at the time the maximum rate prescribed under Article 2 of the Judicature (Interest on Debts and Damages) Order 1980, which came into force on 1st April 1980. The Order was made under the substituted section 87 of the Judicature Act 1908 as amended. The section provides:-

"87. Power of Courts to award interest on debts and damages -

(1) In any proceedings in [the High Court or Court of Appeal] for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding [the prescribed rate] as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this subsection shall -

(a) Authorise the giving of interest upon interest; or

(b) Apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement, enactment, or rule of law, or otherwise; or

(c) Affect the damages recoverable for the dishonour of a bill of exchange.

(2) In any proceedings in [the High Court or the Court of Appeal] for the recovery of any debt upon which interest is payable as of right, and in respect of which the rate of interest is not agreed upon, prescribed, or ascertained under any agreement, enactment, or rule of law or otherwise, there shall be included in the sum for which judgment is given interest at such rate, not exceeding [the prescribed rate] as the Court thinks fit

for the period between the date as from which the interest became payable and the date of the judgment.

(3) In this section the term 'the prescribed rate' means the rate of 7½ percent per annum, or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order in Council."

Articles 2 and 3 of the Order of 1980 provide:-

"2. Rates of interest prescribed -

(1) The maximum rate of interest that a Court may, pursuant to subsection (1) of section 87 of the Judicature Act 1908, include in the sum for which judgment is given in any proceedings for the recovery of any debt or damages shall be 11 percent.

(2) The maximum rate of interest that a Court may, pursuant to subsection (2) of that section, include in the sum for which judgment is given in any proceedings for the recovery of any debt upon which interest (at an undetermined rate) is payable as of right shall be 11 percent.

3. Application - This order applies in respect of every judgment given on or after the 1st day of April 1980, whether the proceedings were instituted before or after that date."

The rates of interest current at various times under the substituted section 87 were: from 21st March 1974 until 20th October 1974 - 5% per annum; from 21st October 1974 until 31st March 1980 - 7½% per annum; from 1st April 1980 until the date of judgment - 11% per annum.

The argument for Mr. Rowling was that the power to award interest conferred upon the court by section 87, upon a proper construction of that enactment, did not allow the award, for any part of the period between the arising of a cause of action and the date of judgment, of interest at a higher rate than had for the time being been prescribed as the maximum during that part of the period. In their Lordships' opinion the argument is correct. The rate of 11% per annum was not the prescribed rate for the whole of the period from 21st March 1974 to the date of judgment. It was so only from 1st April 1980 to the date of judgment. Their Lordships are unable to infer an intention on the part of the legislature that the prescribed rate should be retrospective. The results if it were so would be unfair and even

bizarre. Thus a litigant who recovered judgment on 1st April 1980 upon a cause of action arising five years earlier might be awarded interest at 11% for the whole period, while one whose judgment was delivered on 31st March could be awarded only a lower rate for the whole period. If the prescribed rate were to be reduced by Order in Council, the maximum rate of interest which could be awarded would be only the reduced rate for the whole period since the cause of action arose, notwithstanding that for most of that period the prescribed rate was much higher. The respondent's only answer to the last anomaly was that in such a situation legislation might be expected to be passed to alleviate its consequences. That does not appear to their Lordships to be a sufficient answer. They are clearly of the opinion that the intention of the enactment was that regard should be had to the rate of interest from time to time prescribed during the period between the arising of the cause of action and judgment, and that the maximum rate of interest for each part of the period should be reckoned accordingly.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the order of Quilliam J. restored, with costs here and in the Court of Appeal.