

Judgment
22, 1966

~~P-8,~~
G.E.G.6

No. 8 of 1966.

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

10 JAMES EDWARD JEFFS, JOHN GORDON
ROBINSON, COLIN EDWARD PEARCE all of
Ruawai and BERTRAM EARLE DREADON
of Tokatoka all of them Farmers suing on
behalf of themselves and 88 Dairy Farmers in the
Ruawai District *Appellants*

AND

THE NEW ZEALAND DAIRY PRODUCTION
AND MARKETING BOARD a body corporate
established under the Dairy Production and
Marketing Board Act, 1961, having its office in
Wellington *First Respondent*

AND

20 THE RUAWAI CO-OPERATIVE DAIRY
COMPANY LIMITED a duly incorporated
company having its registered office at Ruawai *Second Respondent*

AND

THE NORTHERN WAIROA CO-OPERATIVE
DAIRY COMPANY LIMITED a duly incor-
porated company having its registered office at
Dargaville *Third Respondent*

AND

30 THE MAUNGATUROTO CO-OPERATIVE DAIRY
COMPANY LIMITED a duly incorporated com-
pany having its registered office at Maungaturoto *Fourth Respondent*

AND

ERIC BAKER of Ruawai, Farmer, sued on behalf of
himself and 125 Dairy Farmers in the Ruawai
District *Fifth Respondent.*

Case for the Appellants.

RECORD

This is an Appeal from a Judgment dated the 30th day of July, 1965, p. 91.
of the Court of Appeal of New Zealand (North, P., McCarthy and
McGregor, JJ.) disallowing an appeal from a decision of the Supreme

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RECORD

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p. 33.

Court of New Zealand (Hardie Boys, J.) dated the 21st day of December, 1964, holding by majority (North, P., dissenting) that the Appellants were not entitled to the issue of—

(i) A Writ of Certiorari against the First Respondent to quash a Zoning Order No. 11B purported to be made by the First Respondent on the 30th day of May, 1963, and to quash all proceedings of incidental to and consequent upon a hearing by a Committee of the First Respondent on the 29th and 30th days of April, 1963, in the Ruawai-Tokatoka Memorial Hall, Ruawai, consequent upon an application by the Second Respondent to the First Respondent for the definition of a milk zone pursuant to powers vested in the First Respondent under the Dairy Factory Supply Regulations, 1936, and

(ii) A Writ of Injunction against the First Respondent to restrain it from taking any steps to assess compensation to be paid by the Third Respondent to the Second Respondent pursuant to the said Zoning Order and pursuant to the said Regulations.

The following are the facts relevant to this Appeal :—

1. The First Respondent Board was established by the New Zealand Dairy Production and Marketing Board Act, 1961 (hereinafter called "the 1961 Act"). In effect this Act provided for the new Board thereby created to take over the functions of two formerly separate bodies, viz. :—

(i) The New Zealand Dairy Board established by earlier legislation and continued by the Dairy Board Act, 1953, and

(ii) The Dairy Production Marketing Commission established by the Dairy Products Marketing Commission Act, 1947.

2. By virtue of Section 71 (2) of the 1961 Act the new Board (the First Respondent) took over the functions of the New Zealand Dairy Board under the Dairy Factory Supply Regulations, 1936 (hereinafter called "the 1936 Regulations"). These Regulations had vested originally in a body known as the Executive Commission of Agriculture (set up under the Agriculture (Emergency Powers) Act, 1934) and then subsequently, by amendment in 1948, the New Zealand Dairy Board, powers to zone suppliers of dairy produce to certain dairy factories.

3. In 1937, pursuant to the zoning powers conferred on it by the 1936 Regulations, the Executive Commission of Agriculture defined zones for both the Second Respondent, the Ruawai Co-operative Dairy Company Limited and the Third Respondent, the Northern Wairoa Co-operative Dairy Company Limited. The effect of this zoning order was to compel suppliers of cream, operating supplying dairies in either zone, to supply their cream to one or other of the Respondents depending on the zone.

4. In 1953 a number of Dairy Factories including the Second and Third Respondents agreed that for 10 years they would treat the zoning order for the supply of cream as applicable equally to the supply of whole milk.

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p. 57.

p. 32, ll 7-17.

p. 32, ll. 37-43.

5. Although a majority of the shareholders of the Second Respondent desired that the Second Respondent should amalgamate with the Third Respondent, a majority of shareholders sufficient to put the Second Respondent into voluntary liquidation could not be obtained. p. 32, l. 43.
p. 100, ll. 20-24.
p. 5.
6. In the absence of any zoning order, upon the expiration on the 31st day of May, 1963 of the Zoning Agreement referred to in paragraph 5, it would have been competent for any supplier of the Second Respondent to have transferred his supply of whole milk but not cream to the Third Respondent. It was acknowledged that there was a substantially better p. 32, ll. 34-36.
p. 95, ll. 38-40.
10 pay-out to its suppliers by the Third Respondent than the pay-out to its suppliers by the Second Respondent and that this difference had continued for many years.
7. The Second Respondent, as a company, opposed any change in the existing zoning arrangements and, with the imminence of the expiry of the Zoning Agreement referred to in paragraph 5, applied to the First Respondent for the definition of a milk zone with the same boundaries as the existing cream zone. p. 33, ll. 43-48.
8. The First Respondent then advised all shareholders of the Second Respondent and advertised to the public at large that a Committee of the p. 34, ll. 25-30.
p. 92.
20 First Respondent would hold a public hearing in the Ruawai-Tokatoka War Memorial Hall on Monday, the 29th day of April, 1963. The Committee consisted of three members of the Board assisted by the Director of the Dairy Division of the Department of Agriculture and the Board's Secretary.
9. The Report of the Committee reproduced at pp. 94-95 of the p. 34, l. 35.
p. 35, l. 10.
Record indicates the representation at the hearing and the various applications before the Board. The present Appellants were represented by Counsel and opposed the creation of a milk zone or alternatively they wished to be zoned to the Third Respondent or wished no zoning order at all.
10. The Second Respondent pressed for the creation of a milk zone p. 95, ll. 16-36.
30 with the same boundaries as the existing cream zone. At the hearing before the said Committee, Counsel for the Appellants and Counsel for the Third Respondent objected to the jurisdiction of the First Respondent in two respects namely :—
- (A) The procedure of appointing a Committee to conduct a public hearing of a zoning application and
- (B) The financial interest of the First Respondent in the proceedings.
11. At all material times and at the time of the hearing referred to p. 43, ll. 3-8.
40 above the Second Respondent was indebted to the First Respondent—
- (i) In the sum of £87,152 by virtue of a Debenture given on the 29th day of January, 1960, to the New Zealand Dairy Products Marketing Commission, a body whose assets became vested in the First Respondent.
- (ii) In the sum of £35,000 by virtue of a Debenture given on the 6th day of November, 1961.

p. 55, l. 47.
p. 56, l. 28.

12. The hearing before the said Committee lasted two days ; the proceedings consisted of written statements of witnesses (on which they were cross-examined) some oral evidence and submissions of Counsel. Counsel also made oral submissions. There was no shorthand writer or stenographer but the Secretary of the Board took what he described as " brief notes " in longhand of the proceedings. At the conclusion of the hearing the parties were given permission to send in written submissions within a reasonable time. This they did.

pp. 94-98.

13. The Secretary of the Committee then prepared a report after consultation with members of the Committee. This report is reproduced on pages 94-98 of the Record. It consisted of a short summary of submissions made by Counsel and of the Committee's recommendations. The Committee did not attach to its report the written statements of evidence tendered by witnesses, the Secretary's longhand notes of the proceedings or the written submissions later received from Counsel. This report was made available to the members of the Board only on the day of the meeting on which the zoning decision was taken. 10

p. 56, ll. 11-21.

p. 50, ll. 18-20.

p. 56, ll. 14-18.

14. When the Board considered the report of the Committee on the 30th day of May, 1963, the members of the Committee and the Secretary who had conducted the zoning hearing were present and there was some discussion by various Board members which is to be found at pages 98-100 of the Record. The Board members did not examine or consider a record of the proceedings at Ruawai but contented themselves by studying the Committee's comparatively short report and recommendations. 20

p. 56, ll. 18-21.

p. 56, ll. 21-27.

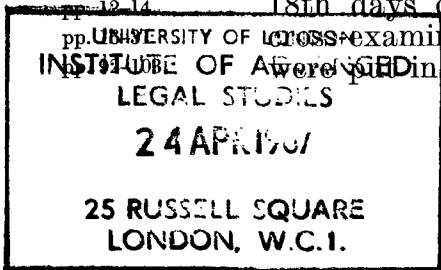
15. Either on the same day or on the following day the Board adopted *in toto* the recommendations of the Committee and issued a Zoning Order which it stated was made " in pursuance and exercise of the powers and authorities vested in it by the Dairy Factory Supply Regulations, 1936, the New Zealand Dairy Production and Marketing Board having made due inquiry into the matters hereinafter set forth." 30

p. 98, ll. 7-20.
p. 100, ll. 10-16.
p. 100, l. 40.
p. 101, l. 35.

16. The Committee's recommendation and the First Respondent's Order in effect extended the existing cream zone in favour of the Second Respondent and zoned to it suppliers of whole milk with the exception of those suppliers living on the Poutu Peninsula who were zoned to the Third Respondent. There was a condition that the Third Respondent pay compensation to the Second Respondent for the loss of these suppliers at Poutu. Accordingly, the present Appellants became zoned against their will to supply the Second Respondent with whole milk and are prohibited from supplying whole milk to the Third Respondent or indeed any other dairy factory of their choice. 40

pp. 1-6.

17. The Appellants brought their action in the Supreme Court of New Zealand, Whangarei Registry, on the 20th day of August, 1963. The action was heard in Auckland by Hardie Boys, J., on the 16th, 17th and 18th days of November, 1964. Evidence was given by Affidavit with cross-examination of the Secretary of the Board. A number of documents were produced in evidence by consent.



The Appellants claimed—

p. 5.

(A) To have the whole of the zoning order of the 31st day of May, 1963, quashed and

(B) To have an injunction issued restraining the First Respondent from taking any steps to assess the compensation to be paid by the Third Respondent to the Second Respondent consequent upon the zoning order.

18. The Plaintiffs advanced four grounds :—

p. 36, ll. 26-40.

10 (i) That the powers of zoning conferred on the old Board by the 1936 Regulations did not vest in the new Board so that in purporting to make the zoning order and to assess compensation the Board acted *ultra vires*.

(ii) That if the power to zone was in fact vested in the new Board, that power was subject to certain provisions in the 1961 Act and in particular subject to the making of new regulations which had never been made so that again the actions of the Board were *ultra vires*.

20 (iii) That the Board had a financial interest in the subject-matter of the zoning application and in any compensation payable and accordingly that the Board was judge in its own course contrary to the principles of natural justice.

(iv) That the Board had improperly delegated the function of hearing to its Committee and improperly delegated the judicial task of decision to the Committee.

The learned Judge in the Supreme Court found against the Appellants on all grounds. p. 53, ll. 10-15.

19. The Appellants then appealed to the Court of Appeal of New Zealand at Wellington. The Appeal was heard on the 12th, 13th and 14th days of May, 1965. By a Judgment dated the 30th day of July, 1965, the Court disallowed the Appellants' appeal. All members of the Court were unanimous in rejecting grounds (i), (ii) and (iii) mentioned in paragraph 18 above. The majority rejected ground (iv), but North, P., would have allowed the appeal on that ground. p. 91.

20. The Appellants do not now advance grounds (i) and (ii) above before the Judicial Committee.

21. Both Courts below accepted that the First Respondent was under a duty to act judicially in dealing with zoning applications, following the decision of the Court of Appeal in *New Zealand Dairy Board v. Okitu Co-operative Dairy Company Limited* (1953) N.Z.L.R. 366. The Appellants will rely on this decision before the Judicial Committee. p. 34, ll. 1-13. p. 59, ll. 20-31.

p. 44, ll. 1-5 ;
10-13.

p. 46, ll. 38-47.

22. With regard to ground (iii) in paragraph 18, in the Supreme Court, Hardie Boys, J., found as a fact that the Board had a financial interest in the zoning hearing and that, therefore, bias was to be presumed. He held, however, that Parliament had deliberately reposed in the Board the responsibility of being judge in matters that would affect its financial interest, relying upon it to act judicially none the less.

p. 60, ll. 25-30.

p. 61, ll. 23-27.

23. In the Court of Appeal, North, P., considered that it had to be accepted that the Board had a direct pecuniary interest in the zoning proposals. He considered, however, that the clear intention of the Legislature was that it primarily intended the Board to act as zoning authority in all cases whether or not it had a pecuniary interest in the result. 10

p. 71, ll. 19-27.

p. 71, l. 46.

p. 72, l. 3.

24. In the Court of Appeal McCarthy, J., believed that Parliament intended that the Board should have powers to zone and that it could from time to time have a financial interest in a particular area in respect of which a Zoning Order would be sought and could find it necessary to exercise its power notwithstanding that interest. He believed that legislation of this character should not be approached in the spirit of overreadiness to conclude that the Legislature always intended to keep administrative and quasi-judicial functions separate from one another. 20

p. 82, ll. 3-4.

p. 82, ll. 30-35.

25. In the Court of Appeal, McGregor, J., held that the Board was a substantial creditor of the Ruawai Company and that it was in its interests that the Ruawai Company should be able to continue its business profitably. He held that the Legislature had empowered the Board to exercise jurisdiction generally in matters affecting the dairy industry and in certain respects in matters pertaining to Companies associated therewith : he considered that it was not disqualified from such exercise, including the exercise of zoning powers, by the fact that it administered the other financial functions also conferred on it by the Legislature.

pp. 49-53.

p. 52, ll. 12-21.

p. 50, ll. 21-25.

p. 53, ll. 4-9.

26. With regard to the fourth ground of the Appellants as stated in Paragraph 18, in the Supreme Court, Hardie Boys, J., considered that it was competent for the Board to delegate to a Committee, as an administrative function, the task of hearing the evidence, considering the submissions and reporting to the Board thereon : that it was not necessary for the Board as a whole to have before it all the matters which had been canvassed before the Committee. He considered that the situation of the Ruawai District was well known to members of the Board and that they would be entitled to draw on their local knowledge. Although the evidence before the Court showed that the Board, when making the Zoning Order, did not have before it the evidence tendered to the Committee or the written submissions of Counsel, His Honour found that the report of the Committee added to the knowledge of the local situation possessed by Board members from long acquaintance with the problem which existed there, enabled it and each member of the Board to act judicially and that they had so acted in making the zoning and compensation orders. 30 40

27. In the Court of Appeal, the majority upheld Hardie Boys, J., on this point. McCarthy, J., acknowledged that there was no current statutory power of delegation of the First Respondent's judicial authority. He acknowledged the distinction between Section 13 of the 1961 Act which reads—

10 “13. COMMITTEES—(1) The Board may from time to time appoint a committee or committees, consisting of two or more persons, to advise the Board on such matters concerning the dairy industry or the production or marketing of any dairy produce as are referred to them by the Board.

(2) Every Committee may, in addition, furnish to the Board reports on any matter concerning the dairy industry or the production or marketing of any dairy produce in respect of which the members of the committee have special knowledge or experience.

(3) Any person may be appointed to be a member of any committee, notwithstanding that he is not a member of the Board.”

and Section 11 of the Dairy Board Act, 1953, which was repealed by the 1961 Act, which reads—

20 “11. COMMITTEES—(1) The Board may from time to time appoint a committee or committees, consisting of two or more persons, and may from time to time, with the consent of the Minister, delegate to any such committee any of the powers or functions of the Board, other than the power to fix the amount of any levy which the Board is authorised by this Act to impose.

(2) Any person may be appointed to be a member of a committee under this section, notwithstanding that he is not a member of the Board.”

30 He acknowledged that the standard to be observed in the giving of a hearing was not a constant one and that it could be varied according to the nature of the tribunal and the nature of the inquiry. He held that the appointment of the Committee to record evidence and submissions for later consideration by a tribunal invested with the power of decision is not of itself a delegation of a quasi-judicial power. He considered that a judicial body, such as the Board, could not in the absence of a statutory power, delegate wholly the power of decision but that there could be a degree of delegation especially when the power is quasi-judicial with a substantially administrative constituent. In his view the Board was entitled to act on the summary and was not obliged to read in full the evidence and submissions given before the Committee. He stated that the Board was comprised of men of great experience and ability in matters pertaining to the dairy industry. None knew better the matters and implications of a zoning system and of the financing of dairy factories. They knew the existing policy of the Board in relation to such matters and would apply it if they could justly do so. He considered that each member having been given a copy of the report and having been aware of the difficulties and dissensions in the areas was in a position to evaluate and decide the various issues raised. His Honour implied that the onus was on the Appellants to show the Committee's distillation of the evidence

p. 72, ll. 33-45.

p. 73, ll. 1-18.

p. 72, ll. 35-47.

p. 77, ll. 10-32.

p. 76, l. 31.

p. 77, l. 9.

p. 78, ll. 3-9. and submissions was not correct. He concluded by being of the opinion that the Board gave the parties a sufficient hearing and the zoning order could not be impugned for want of such a hearing.

p. 89, l. 14.
p. 90, ll. 3-16. 28. McGregor, J., the other member of the majority in the Court of Appeal, after considering the facts, agreed with the Judgment of Hardie Boys, J., on this point. He considered that the final determination of the dispute was that of the Board, given after due consideration. He did not think it advisable or competent for a Court to establish rules of procedure for domestic tribunals. He considered that the Board acted in good faith, fairly listened to all parties and fully complied with the requirements of natural justice. He considered it was incumbent on the Appellants to produce evidence that the summary of the Board was not adequate. 10

p. 62, ll. 17-21.
p. 62, ll. 21-35. 29. North, P., in his dissenting Judgment took a different view. His Honour concluded that the basic matter for decision was whether the Appellants were given an adequate opportunity to present their case to the deciding body, namely, the Board. He considered that there was no doubt that they were given ample opportunity to present the case to the Committee; whilst he considered that the Board was entitled to appoint a Committee to conduct an inquiry, to record the evidence and submissions, and even to submit its own report, he was not prepared to accept that the Committee's report, standing alone, was a sufficient compliance with the principles of natural justice. He considered that the responsibility lay with the Board to satisfy the Court that the report of the Committee was adequate. He did not consider that it could possibly be said that the Board complied with its duty to hear interested parties unless the Board could be held to have had a limited power of delegation of its judicial function. He pointed out that in the cases of *Osgood v. Nelson* (1872), L.R. 5 H.L. 636, and *Local Government Board v. Arlidge* (1915) A.C. 120 the deciding body had before it the whole of the evidence presented, in the first case to a Committee, and in the second case to an inspector. North, P., considered that if he were to find for the Board he would gravely weaken the rule *audi alteram partem*. It would mean that a tribunal such as the Board could appoint a Committee not merely to record the evidence, to sift the evidence and make its report for the assistance of the Tribunal, but also could direct the Committee and determine for itself what was relevant and then make a recommendation upon which the tribunal was free to act. He considered that once the principle were adopted he did not know where the limit could be drawn. 20 30

p. 63, ll. 29-31.
p. 63, l. 38.
p. 63, ll. 8-11.
p. 65, ll. 34-47.

30. The Appellants respectfully submit that the judgment of the Court of Appeal was wrong in holding that the Board was not disqualified from adjudicating on the zoning dispute by reason of its financial interest. Whilst it is competent for Parliament by express words or necessary implication to make the Board "judge in its own cause", it is submitted that such a result requires plain language and is only to be inferred when it is the only possible interpretation of the legislation. Particularly is this so when Parliament has by virtue of Section 55 of the "1961 Act" made the First Respondent a Commission of Inquiry under the Commissions of Inquiry Act, 1908. This gives the First Respondent (*inter alia*) the 40

power and status of a Magistrate in respect of citing parties interested in the inquiry, summoning witnesses, administering oaths, hearing evidence and conducting and maintaining order at the inquiry as well as the power to refer disputed points of law arising in the course of an inquiry to the Supreme Court for decision. These powers, were not possessed by the New Zealand Dairy Board (the First Respondent's predecessor in zoning matters) at the time of *Okitu* case (*supra*). The fact that the First Respondent is a Commission of Inquiry means that it can do many of the things an administrative tribunal normally cannot do. In the case of
 10 such a body thus specifically invested with judicial trappings, an intention by the Legislature to make it judge in its own cause must be even more plainly manifest if it is to so act. The Appellants submit that such an intention is absent because—

(A) It would have been competent for the First Respondent to have had its zoning power transferred in any case where it had a financial interest (which would not be every case) to an independent person, viz., the Minister of Agriculture, by virtue of Section 7 of the Agriculture (Emergency Powers) Act, 1934, the relevant parts of which read as follows—

20 “ 7. Provision for transfer to the Minister of Agriculture of certain powers vested in other authorities—

(1) Subject to the provisions of subsection three hereof, the Governor-General may from time to time, by Order in Council, transfer to (the Minister of Agriculture) any powers conferred by statute or otherwise on any of the following bodies namely—

* * * * *

(b) The New Zealand Dairy Board being the Board established under the Dairy Board Act, 1953.

* * * * *

30 (2) On the transfer of any powers to (the Minister of Agriculture) pursuant to the last preceding subsection, the Board in which such powers were theretofore vested may exercise any of such powers with the authority of (the Minister of Agriculture), and subject to such conditions (if any) as (the Minister of Agriculture) may approve but not otherwise.

40 (3) No powers that are vested in any of the Boards referred to in subsection one hereof shall be transferred to (the Minister of Agriculture) pursuant to this section except after consultation between (the Minister of Agriculture) and the Board in which such powers are so vested.”

Parliament must be deemed to have known of this section when it passed the 1961 Act.

(B) The First Respondent could conceivably have divested itself of its financial interest.

(C) The First Respondent could have declined to operate under the 1936 Regulations on the grounds of its financial interest. It could have had regulations promulgated under Sections 40 and 69 of the 1961 Act in which some method of dealing with the present situation might have been devised.

(D) An independent tribunal might have been set up as was done in the case of *Low v. Earthquake and War Damage Commission* [1962] N.Z.L.R. 189.

31. The Appellants respectfully submit that the judgment of the majority of the Court of Appeal was wrong in not holding that the First Respondent improperly delegated to a Committee its judicial function. In the absence of statutory authority to delegate to a Committee, because of the importance of matters decided at a zoning hearing, the full Board should have heard the evidence. Any suggestion of inconvenience would be met with the following facts—

(A) That there are few zoning applications.

(B) That a zoning hearing is of great importance to the individuals concerned and ultimately to the national economy.

(C) The Board can sit with a quorum of 7 members present (s. 12 (4) of the “1961 Act”).

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32. Even if the First Respondent was permitted to delegate its function of hearing evidence and submissions to a Committee, the Committee should have acted merely as a “recording machine” and should have presented all the evidence, submissions and notes to the full Board. This it did not do but merely gave the Board a short précis and its recommendations. Thus there was too great a risk of the Committee missing out in its report things in favour of one party or giving undue emphasis to things against him. In the circumstances where Board members had had prior knowledge of the disputes in the Ruawai area, and could thus have preconceived ideas on the subject-matter of the zoning dispute, it was essential that they approached their judicial task in full possession of all the evidence. The Appellants respectfully adopt that part of the dissenting judgment of North, P., which deals with this topic. It is to be found in the Record at pp. 62–65.

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33. The Appellants respectfully submit that the judgment of the Court of Appeal of New Zealand was wrong and ought to be reversed and that the Appellants be granted the Writs of Certiorari and Injunction claimed in the Supreme Court for the following (amongst other)

REASONS

- (1) BECAUSE the First Respondent being under a duty to act judicially, was disqualified from making Zoning Order 11B by its financial interest and was a judge in its own cause contrary to the principles of natural justice.

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- (2) BECAUSE the First Respondent improperly delegated its judicial task of hearing evidence and submissions to a Committee.
- (3) BECAUSE the First Respondent itself was obliged to consider all the evidence notes and submissions relative to the zoning application and it should not have relied on the report of its Committee.
- (4) BECAUSE the First Respondent for the reasons advanced herein, being under a duty to act judicially, did not sufficiently comply with the rule of natural justice *audi alteram partem*.

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IAN BARKER.

In the Privy Council.

ON APPEAL

from the Court of Appeal of New Zealand.

BETWEEN

**JAMES EDWARD JEFFS, JOHN GORDON
ROBINSON, COLIN EDWARD PEARCE
and BERTRAM EARLE DREADON** *Appellants*

AND

**THE NEW ZEALAND DAIRY PRODUCTION
AND MARKETING BOARD** *First Respondent*

AND

**THE RUAWAI CO-OPERATIVE DAIRY
COMPANY LIMITED** *Second Respondent*

AND

**THE NORTHERN WAIROA CO-OPERATIVE
DAIRY COMPANY LIMITED** *Third Respondent*

AND

**THE MAUNGATUROTO CO-OPERATIVE
DAIRY COMPANY LIMITED** *Fourth Respondent*

AND

ERIC BAKER *Fifth Respondent.*

Case for the Appellants

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