IN THE COURT OF APPEAL [1998] QCA 233

SUPREME COURT OF QUEENSLAND

Appeal No. 2582 of 1998

Brisbane

[CJC v. QPCU]

BETWEEN:

CRIMINAL JUSTICE COMMISSION
(Defendant) Appellant

AND:

QUEENSLAND POLICE CREDIT UNION LIMITED
(Plaintiff) Respondent

Pincus J.A.
McPherson J.A.
Derrington J.

Judgment delivered 21 August 1998

Separate reasons for judgment of each member of the Court; each concurring as to the orders made.

APPEAL ALLOWED TO THE EXTENT OF VARYING THE DECLARATION OF THE SUPREME COURT BY ADDING AFTER THE WORDS "PROCEDURAL FAIRNESS" THE FOLLOWING:

> **"IN RESPECT OF OBSERVATIONS CONCERNING THE PLAINTIFF MADE IN A REPORT DATED 8 OCTOBER 1997 BY THE DEFENDANT AND APPEARING AT PAGES 23 TO 24 OF THAT REPORT."**

APPEAL OTHERWISE DISMISSED WITH COSTS.

CATCHWORDS: **CRIMINAL JUSTICE COMMISSION - investigations - whether CJC failed to observe the requirements of procedural fairness - whether report criticised the respondent's conduct - respondent not given opportunity before CJC to refute allegations in CJC report - relevance of later opportunity in Supreme Court - whether respondent had to establish the use it would have made of opportunity to be heard**

Criminal Justice Act **1989 s. 22**
Ainsworth v. Criminal Justice Commission **(1992) 175 C.L.R. 564**
Malloch v. Aberdeen Corporation **[1971] 1 W.L.R. 1578**
John v. Rees **[1970] Ch. 345**
The Commercial Banking Company of Sydney Limited v. George Hudson Pty. Limited **(1973) 131 C.L.R. 605**
Wall v. Windridge **(Appeal No. 4615 of 1997, 11 November 1997)**

Counsel: Mr P.A. Keane Q.C., with him Mr G. Newton, for the appellant
Mr R.V. Hanson Q.C., with him Mr R. Perry, for the respondent

Solicitors: Official Solicitor of the CJC for the appellant
Gilshennan & Luton for the respondent

Hearing Date: 29July1998

IN THE COURT OF APPEAL

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Before Pincus J.A.
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[CJC v. QPCU]

BETWEEN:

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(Defendant) Appellant

AND:

QUEENSLAND POLICE CREDIT UNION LIMITED
(Plaintiff) Respondent

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 21 August 1998

I have read and agree with the reasons of McPherson J.A. I also agree with the orders his Honour proposes.

IN THE COURT OF APPEAL

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Before Pincus J.A.
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[CJC v. QPCU]

BETWEEN:

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(Defendant) Appellant

AND:

QUEENSLAND POLICE CREDIT UNION LIMITED
(Plaintiff) Respondent

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 21 August 1998

This is an appeal by the Criminal Justice Commission against a decision of Shepherdson J. in an action in the Supreme Court commenced by writ indorsed under O.57, r.2 with a claim for a declaration that, in a report entitled "Police and Drugs: A report of an investigation of cases involving Queensland Police Officers", the defendant Commission (a) had failed to observe the requirements of procedural fairness; or (b), in breach of s.22 of the *Criminal Justice Act 1989*, had failed to act fairly or impartially towards the plaintiff. The learned judge refused a further claim by the plaintiff for an injunction seeking to restrain the defendant acting on the part of the report objected to by the plaintiff, but made the declaration claimed in (a). In holding that the plaintiff was entitled to procedural fairness, in the form of an

opportunity to be heard before a report was published damaging to the plaintiff's reputation, his Honour followed and applied the decision of the High Court in *Ainsworth v. Criminal Justice Commission* (1992) 175 C.L.R. 564.

The statutory functions of the Commission are described in the decision of the High Court in *Ainsworth v. Criminal Justice Commission*; and it is not necessary to repeat them here. Suffice to say they include investigation of suspected misconduct by members of the Queensland Police Force, and that, by resolution adopted on 29 October 1996, the Commission resolved to conduct an investigation in relation to trafficking in dangerous drugs, and to engage Hon. W.J. Carter Q.C. to conduct the investigation. He was authorised to conduct public or private hearings and to report to the Commission. Having done so, Mr Carter on 8 October 1997 forwarded his Report to the Commission which, in accordance with its statutory obligations, furnished copies to the Attorney-General, the Speaker of the Legislative Assembly, and the Chairman of the Parliamentary Criminal Justice Committee. Either by that means or otherwise, the Report became public.

The contents of the Report, which is some 90 or more pages in length, are directed primarily to specific matters investigated by the Commissioner and to recommendations in relation to them; but they also included at pp.23-24 the following passages that were the subject of complaint by the plaintiff Credit Union:

> "The analysis of the financial affairs of a corrupt suspect is often a fruitful exercise and section 69 of the *Criminal Justice Act* is designed to facilitate the investigation. This section permits the Chairperson of the Commission, in certain circumstances, to issue a notice to a person to furnish information and/or documents. This facility is frequently used to obtain financial information and/or documents from various financial institutions. Although there is no statutory obligation imposed on the institution to refrain from informing the suspect of the fact of the issue of the notice, the Commission has over several years enjoyed the confidence of several major financial institutions which have kept secure the fact of the Commission's interest in the suspect. It

> should be mentioned in passing that a statutory obligation to maintain security in similar circumstances is available to the National Crime Authority.
>
> I recommend the introduction of a similar statutory prohibition in the *Criminal Justice Act*.
>
> The CJC is inhibited in its investigation of corrupt police by the unavailability of a power to prohibit the financial institution from disclosing the interest of the suspect. Although, as pointed out above, the major financial institutions in the State assist the Commission in maintaining the security of its investigations, it is somewhat paradoxical that the same measure of security is not afforded the Commission by the Queensland Police Credit Union, the financial institution which acts as banker for most, if not all, serving police.
>
> It is seemingly the stated policy of the Queensland Police Credit Union that any request by the CJC to the Credit Union for financial information which may be relevant to an investigation of a police suspect is immediately relayed to that police officer. It is the only financial institution that deals with the Commission's notices to produce in this way.
>
> This creates very serious difficulties in the investigation of suspected corrupt police. Maintaining security for an investigation in this kind of operation is paramount. The policy of the Queensland Police Credit Union effectively compromises any such investigation. The consequence is that the effectiveness of any investigation of corruption which requires access to Police Credit Union information is significantly reduced. It seems that only a legislative prohibition upon disclosure of the Commission's interest can effectively meet this idiosyncratic policy of the Queensland Police Credit Union."

The plaintiff Queensland Police Credit Union is a body corporate incorporated under the Financial Institutions (Queensland) Code, but is said to have been first established in 1964 under earlier legislation. Under its Rules, membership is open to employees of the Queensland Police Service, members of the Australian Federal Police, Government employees resident in Queensland, employees of Queensland taxi companies, and so on. In practice its membership consists mainly of, but is not confined to, serving members of the Queensland Police Force. Membership involves subscription for shares, but the plaintiff, which is a financial co-operative, has as one of its objects the raising of funds from members by deposit or otherwise and the issuing of securities. As such, it has a business reputation or goodwill which attracts

protection by law. The passages complained of in the Report can only have been damaging to the plaintiff's business reputation and commercial standing. After the report of Commissioner Carter became public, his observations concerning the practice being followed by the plaintiff of informing members that notices under s.69 had been received from the Commission was given prominence in an item on the front page of a daily issue of *The Courier-Mail*.

At the trial, Shepherdson J. decided that the statements in question contained imputations adverse to the reputation of the plaintiff. It was an issue which continued to be contested on appeal, although in what was perhaps a more limited form. It was submitted by Mr Keane Q.C., who appeared for the Commission on appeal, that the statements in the Report were altogether factually correct, and that the plaintiff's practice of alerting those members in respect of whom notices under s.69 had been received from the Commission was nowhere suggested to be unlawful. Indeed, the Commissioner went on to specifically recommend the enactment of legislation that would, if adopted, make it so. It was a part of his statutory function to recommend legislation, and no complaint could therefore be made about his having done so.

In my respectful opinion, it was open to the primary judge to conclude that the statements in question would harm the commercial viability and business reputation of the plaintiff. His Honour was justified in finding or in holding that those statements carried the imputation that the plaintiff was, by its actions in informing members of the receipt of notices, engaged in obstructing the Commission's investigation of corrupt police who happened to be among its members. While that was no doubt factually correct, the Commissioner specifically contrasted, and in a way that was unfavourable, the attitude or practice adopted by the plaintiff with that of other and "major" financial institutions in the State, whose "confidence" the Commission enjoyed. He described it as "somewhat paradoxical" that the same measure of

"security" was not afforded to the Commission by the plaintiff, and he went on to stigmatise the policy of the plaintiff as "idiosyncratic". As such, it was said to be creating "very serious difficulties" in the investigation of suspected corrupt police and significantly reducing the effectiveness of any investigation of corruption requiring access to information held by the plaintiff in relation to those suspected.

It is true that the Commissioner did not say that there was anything unlawful in what the plaintiff was doing. Equally, however, what he said fell well short of confirming that it was perfectly lawful. The use of the expressions quoted above do, on an ordinary reading of this part of the Report, involve or imply criticism of the plaintiff's conduct in notifying members that a s.69 notice had been received and that a Commission investigation of those individuals was or might be taking place, as well as emphasising the contrast afforded by the conduct or policy of other or "major" financial institutions. The clear impression intended and conveyed is that, unlike those other institutions, the plaintiff was unique and peculiar in following a course which tended to obstruct the proper investigation of police corruption. While others were prepared to co-operate, the plaintiff's policy "compromised" such investigations. Even if technically not in breach of the law, the practice being deliberately followed by the plaintiff was, in some unspecified way, diminishing the success of the Commission's efforts to detect criminal activity.

On appeal, the Commission's submissions on this aspect of the matter tended to merge with its other and principal submission before us. This was that the Commissioner's observations on the subject were factually correct, and that the plaintiff had done nothing to refute or dispute them. Of course, it is of the essence of the plaintiff's complaint that in the proceedings before the Commissioner it was never afforded the opportunity of doing so. The practice or "policy" of informing members of the receipt of s.69 notices had been followed for

some years. It was well known to the Commission, and the plaintiff had never been asked to refrain from applying it. It therefore had no reason to expect that any such observations would be made in the Report, and consequently no occasion for anticipating them by presenting evidence or making submissions to the Commissioner which might have served either to contradict or "palliate" his findings or to lead to his qualifying or moderating those observations.

To this, the Commission's response on appeal was that the opportunity of doing so was nevertheless available before Shepherdson J. At the trial the plaintiff had not chosen to make use of that opportunity, and it was consequently not now in a position to complain of any procedural unfairness in the proceedings before the Commissioner. Reference was made to the plaintiff's written submissions on appeal, which, so far as material, were as follows:

> "3(a) There is no requirement for an applicant for relief such as the plaintiff seeks here to particularise what facts it would have, could have, might have contested, and what contrary facts it might have advanced. The right to relief is established once it is established that there was a *right* to be heard, and that the *opportunity* to be heard was denied. No case imposes any further requirement.
>
> (b) The opportunity to be heard is not confined to adducing or challenging evidence, as ground 1(iii) seems to suggest. The respondent may have wished to make *submissions*, and may have made, e.g. submissions to the following effect:
>
> (i) that there was nothing wrong with its practice, pointing to the fact that the CJC was aware of the practice and had never asked the respondent to change - see affidavit of Dunne, paras 4 and 5; affidavit of Duffy, para. 9;
>
> (ii) that the respondent was entitled to do what it did;
>
> (iii) that the respondent was obliged by its duty to members to do what it did;
>
> (iv) that its obligations to its members stood above any consequence the CJC found inconvenient;

(v) that the practice of other financial institution was irrelevant."

Having ventured to say no more (and then only in written argument on the appeal) that it *may* have wished to make submissions to specified effect, it failed, so it was submitted, to show that, given the opportunity, it *would* have done so.

With great respect, it seems to me that accepting this submission would reduce to vanishing point the need for tribunals to observe the rules of procedural fairness when acting in the exercise of statutory powers to investigate and report in a way that affects, or has a real potential to affect, the reputation or rights of persons. The question is not whether, by resorting to courts of law after the power has been exercised, a person so affected may be able to secure a belated measure of the justice or fairness to which he, she, or it was originally entitled, but whether such an opportunity was afforded, as it ought to have been, by the tribunal itself in the course of the proceedings before it. The opportunity of which the aggrieved party complains it was deprived is not that of being heard by a court (which has not been denied), but of being heard by the appointed tribunal before it exercises the statutory power vested exclusively in it to produce the result complained of. Judicial insistence that the rule be observed is prophylactic in character, for which the power of the courts to right a wrong after it has been done is not an adequate substitute. In practice, it would mean that procedural justice would be assured only to those who could afford to litigate the matter in a court.

In substance, the Commission's submission before us amounts to saying that there would have been no utility in affording the plaintiff an opportunity of being heard. Either the plaintiff would not have availed itself of the opportunity or it would not have done so successfully. As to this, the most recent authorities are almost uniformly opposed to such a proposition. In *Malloch v. Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1582, to which

Pincus J.A. referred in the course of argument, Lord Reid, in addressing a similar submission, said:

> "Then it was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer. But I need not decide that because there was here, I think, a substantial possibility that a sufficient number of the committee might have been persuaded not to vote for the appellant's dismissal ... The appellant might have been able to persuade them ...".

Confronted by a similar argument in *John v. Rees* [1970] Ch. 345, Megarry J. had this to say ([1970] Ch. 345, 402):

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

Turning to authorities binding on us, the decision in *Commercial Banking Company of Sydney Ltd v. George Hudson Pty. Ltd* (1973) 131 C.L.R. 605 seems to me to go some way to disposing directly of the present point. In rejecting a submission that an *ex parte* application for an order to extend the time for registering a company charge was "unopposed" because it was never capable of being effectively controverted, Walsh J. said ((1973) 131 C.L.R. 605, 618):

> "The argument for the appellant that no person had an interest to oppose the application depends in part on a submission that there was no valid and applicable statutory provision which brought about the consequence that the non-registration of the debenture affected its validity in Queensland and with

> respect to the Queensland liquidator and the Queensland creditors. This submission means really that if some person had been heard on the application, it would have been shown by argument that his interest would not be affected by the order sought and, indeed, it would have been shown that that order was unnecessary. ... Concerning this argument it is enough to say that the question as to the right to be heard in opposition to the order ought not to be determined by considering whether, if he had been heard, the person concerned would or would not have been successful. It is important to insist that such a person should be given a chance to present his arguments, particularly in a case where the order in question may have the effect of making unassailable the position of the moving party with respect to a matter in which otherwise its claim would depend upon its success or failure in debating legal questions of some complexity."

Menzies J. disposed of the same point in a slightly different, but not wholly dissimilar, way by saying (131 C.L.R. 605, 612), simply that it was "necessary and sufficient to show that no person entitled to oppose has done so after having been given the opportunity to do so". Stephen J. considered (131 C.L.R. 605, 621) that the order was not one which should have been made "without affording some opportunity for representation of the interests of those who might thereby be adversely affected". In reaching their conclusion, their Honours deliberately refrained from passing on the validity of all of the submissions which it was urged would have been fatal to any opposition to the order if an opportunity had been afforded of presenting it.

In *Wall v. Windridge* [1999] 1 Qd.R. 329, the applicant for a mining lease supplied information to the warden, who received it privately without referring it to the appellant, who was an objector to the granting of the lease. In upholding an appeal against the warden's recommendation for such a lease, Pincus J.A. said at 336-337:

> "Mr Lennon made strenuous efforts to defend this process as being essentially harmless. He submitted, as I understood him, that the excessive area point was of no real consequence. He argued that before the primary judge the appellant could have produced evidence as to the submissions, cross-examination or other steps he would have engaged in had the Warden given him an opportunity of being present when there was, in effect, a further hearing dealing with the area of the lease and when further evidence was submitted in relation to that subject. That the Court does not have before it evidence along the lines mentioned may be a factor to be taken into account in determining whether, as Mr Lennon

> contended, the Court should in the exercise of its discretion refuse the appellant relief, in order to avoid making a futile order. But it does not seem to be essential for parties complaining of not having been given a fair opportunity to contest an issue to go into detail as to what questions they might have asked, or evidence they might have adduced, if not so treated. For example, in *Kioa v. West* (1985) 159 C.L.R. 550, where prospective deportees were given relief against a deportation order on the ground that they had been given no opportunity to deal with matters adverse to their interests which had been placed before the decision-maker, the appellants did not, it appears, prove what they would have put forward. Nevertheless, they succeeded; the same may be said of the 1992 mining case referred to above, *R. v. Windridge.*"

Moynihan and Ambrose JJ., in their concurring reasons for judgment, said at 340 that "the course of events clearly violated the rule of natural justice that a decision maker is to hear a person before making a decision affecting that person"; and further that it was "not necessary to establish that the deprivation of natural justice was to the prejudice of the appellant", citing *Kioa v. West* (1985) 159 C.L.R. 550.

That there is a requirement that the person aggrieved by failure to accord procedural justice is bound to demonstrate that successful advantage would have been taken, and in what particulars, of the opportunity, if granted, of being heard is not a matter that emerges from any of the judgments delivered in the leading decision in *Ainsworth v. Criminal Justice Commission* (1992) 175 C.L.R. 564. It was submitted that it was nevertheless implicit in what was said in the reasons of the learned Justices of the High Court in that case that the party there aggrieved had succeeded in exhibiting a disposition to dispute the adverse findings made against it, and that their Honours had in fact approached the issue there on that footing. Reference was made to passages in the reasons of Mason C.J., Dawson, Toohey, and Gaudron JJ. at 175 C.L.R. 564, at 578-579, and of Brennan J. at 594. Having studied those passages with close attention, I am not persuaded they support the submission to that effect of the Commission on this appeal.

Reference was also made to a passage in my own unreported reasons for judgment in the Full Court in those proceedings (OSC 28 of 1990 in that Court) before they were successfully taken on appeal to the High Court. The passage in question records that, in the investigations leading to the Report in the *Ainsworth* case, use had been made by the Commission of earlier reports by investigators in other States, and that many of the matters in the Commission's Report that were complained of as inaccurate or as unfairly reflecting on the applicants in that matter had been derived from those reports. I have taken the precaution of perusing the original record in that matter O.S.C. 28 of 1990, but have been unable to locate in the supporting affidavits any sworn material which proved or asserted that those matters were inaccurate or that they unfairly reflected on those applicants. In the result, it seems likely that the complaint referred to in my reasons was one that was simply stated from the Bar table. If that is so, then it appears that the decision in that case proceeded on the footing that the applicants there had, in the course of the Commission investigation, been deprived of the opportunity of challenging that information, without in fact adducing any affirmative evidence in O.S.C. 28 of 1990 that the information complained of was inaccurate or unfair. Far from supporting the Commission in this instance, it thus tends to suggest that *Ainsworth v. Criminal Justice Commission* is an authority against the submission now being advanced on this appeal.

In the end, however, there does not appear to be any case in which the precise point has been raised or decided in the past other than perhaps by Pincus J.A. in *Wall v. Windridge*. That being so, it can and must be resolved only as one of principle. Once it is shown that there is a right to procedural fairness in the form of an opportunity of being heard in a proceeding, a person aggrieved is ordinarily entitled to relief against adverse consequences of being denied that right without having to establish in detail how the opportunity would have been made use of. The position may, in some instances, be different where it is shown that the opportunity,

even if granted, would in fact or law have been of no avail. In practice, however, cases of that kind are, for the reasons referred to by Megarry J. in *John v. Rees* [1970] Ch. 345, 402, necessarily rare. In so far as they turn on onus of proof or persuasion, they are in substance an appeal to the discretion of the court to refuse relief on the ground that granting it would be futile. In the present case there is no reason for supposing that use of the opportunity which was withheld in this instance would have had no perceptible impact on the conclusions or remarks, or on the form in which they were expressed, in the portion of the Report complained of; or that the plaintiff would not have made use of the opportunity if it had been presented. Indeed, it is only on being afforded the opportunity that the plaintiff would have been alerted to the need to take the requisite advice that would have enabled it to decide whether or not it was worth availing itself of the opportunity of being heard.

As a matter of caution, it should perhaps be added that it is not every criticism or adverse comment on collateral matters or events which arise in the course of proceedings that will attract the need for procedural fairness of this kind. The function of judicially hearing, investigating, reporting or deciding would be effectively stultified if nothing in the least degree adverse could legitimately be said without first affording the opportunity to be heard to anyone who supposed himself or herself to be in some way detrimentally affected by it. In the present instance, however, the criticism implicit in the Commissioner's observations had a real potential to prejudice the plaintiff's reputation and business interests and to do so in a way that was plainly bound to become a matter of public interest and concern. In those circumstances, the Commissioner ought to have afforded the plaintiff the opportunity of presenting its side of the matter to him before making the strictures which were passed upon it in the Report which he published.

The only matter that remains is to say that the declaration in the form in which it was sought and made below was wider than was justified. It declared simply that the plaintiff was denied procedural fairness without specifically identifying the subject matter or occasion. The declaration so made should be varied by adding after the words "procedural fairness" the following:

> "in respect of observations concerning the plaintiff made in a Report dated 8 October 1997 by the defendant and appearing at pages 23 to 24 of that Report."

To that extent only, the appeal should be allowed. Otherwise it should be dismissed with costs.

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QUEENSLAND POLICE CREDIT UNION LIMITED
(Plaintiff) **Respondent**

REASONS FOR JUDGMENT - DERRINGTON J.

Judgment delivered 21 August 1998

I agree with the orders proposed by McPherson J.A. and with his reasons thereof.