

I accordingly overrule the application made by the defendant, and the note I make is this: defendant's application to set aside the originating summons is overruled, with costs.

Defendant's application to set aside originating summons overruled with costs.

Solicitors for the applicant (defendant): *Philip Malouf & Co.*

Solicitors for the respondent (plaintiff): *Freehill, Hollingdale & Page.*

O.M.L.D.

*BENNETTS v. BOARD OF FIRE COMMISSIONERS OF
NEW SOUTH WALES AND OTHERS

In Equity: Street J.

Sept. 8, 1967.

Statutory Board—Board member elected by members of trade union—Whether board member's duty to union or to board—Fire Brigades Act, 1909-1965, ss. 8, 9.

The Board of Fire Commissioners of New South Wales, constituted under the *Fire Brigades Act, 1909-1965*, comprises a president appointed by the Governor (s. 8) and four other members elected respectively as follows: one by the councils of the municipalities and shires to which the Act applies; one by the insurance companies; one by the volunteer firemen; and one by the permanent firemen who are members of the New South Wales Fire Brigade Employees' Union (s. 9).

During 1966 the union made an application for a new award to the Industrial Commission, and the Commission's decision was delivered in June 1967. At this time two of the board members were members of the union, B., who had been elected by the permanent firemen, and F. The finance committee of the board comprised the president and two other members, not including either B. or F.

The finance committee met on 9th August, 1967, to consider whether to appeal from the Commissioner's decision to the Full Industrial Commission and, in the light of counsel's opinion as to the prospects of such an appeal, resolved to recommend to the board that an appeal be instituted. On 23rd August, 1967, the board met to receive and consider this recommendation. B. asked whether the finance committee's recommendation was made on counsel's advice, and if so, whether such advice would be made available to him. The president said he would make counsel's advice available to B. only on an undertaking that its terms would not be disclosed to the union. This undertaking B. declined to give. In due course the board resolved by a three-two vote to adopt the finance committee's recommendation, with B. and F. dissenting.

B. commenced a suit by way of originating summons seeking (1) a declaration that the board was not entitled to refuse to produce the legal opinion to B. at the meeting on 23rd August, 1967; (2) a declaration that the resolution

to bring the appeal was void by reason of an alleged procedural defect, in that the opinion was withheld from B.; (3) an injunction to restrain the board from lodging an appeal against the Commissioner's decision.

Held: (1) That, in the case of a statutory board such as the Board of Fire Commissioners, once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board, in preference, on every occasion upon which any conflict may arise, to serving the interests of the group which elected him.

(2) That a member of such a board must respect the confidential nature of board affairs where the interests of the board so require.

(3) That a board member has no absolute right to see a document of importance, such as counsel's opinion; at most he has a right to see such a document in aid of the execution of the fiduciary duties cast upon him by his membership of the board; and he has no such right where, as here, he wishes to see the document in order to carry out a misconceived duty to further the interests of the group which elected him to the board.

Edman v. Ross (1922), 22 S.R. (N.S.W.) 351, at p. 361; 39 W.N. 86, at p. 89, referred to.

(4) That, in the exercise of its discretion, the court would not make the orders sought, nor grant the injunction.

ORIGINATING SUMMONS.

This was a suit in which the plaintiff, who was a member of a statutory board, sought declarations and an injunction against the defendants, the board and its four other members, arising out of the business transacted at a meeting of the board. The facts are set out in the judgment.

F. C. Hutley and *L. P. Robberds*, for the plaintiff.

D. A. Staff Q.C. and *K. R. Handley*, for the first, second, third and fifth defendants.

The fourth defendant in person.

Sept. 8.

STREET J. This is a suit instituted by originating summons in which the plaintiff seeks against the Board of Fire Commissioners declarations and an injunction arising out of the business transacted at a meeting of the board on 23rd August, 1967. The plaintiff is himself a member of the board, the remaining four members of that board, as well as the board itself, being the defendants in the suit.

It appears that in the middle of last year an application for a new award was made to the Industrial Commission by the New South Wales Fire Brigade Employees' Union. The decision on that application was delivered by the Commissioner towards the end of June 1967. An appeal lies from this decision of the Commissioner to the full Industrial Commission, and on 9th August, 1967, the finance committee of the board met and considered the bringing of such an appeal. There was before the finance committee counsel's opinion on the prospects of such an appeal, this opinion having been obtained by an officer of the board on behalf of the board. The finance committee resolved to recommend that an appeal be instituted.

The board meeting at which the finance committee's recommendation was brought forward is that from which the present suit stems, namely the meeting

of 23rd August. All five members of the board were present at that meeting. Of those five members three, including the president, had constituted the finance committee which had recommended in favour of bringing the appeal. The other two board members were Mr. Bennetts (the plaintiff) and Mr. Ford (one of the defendants). When this particular item of business was reached Mr. Bennetts asked whether legal advice had been obtained in connection with an appeal. He pointed out that he had not been present at the finance committee meeting and he was not aware of the considerations which had led to the recommendation from the finance committee. He was told by the president that legal advice had been obtained but that he (the president) was not prepared to make the legal advice available. In the course of discussion the president made it clear to Mr. Bennetts that the legal advice would be made available if an assurance was given that its terms would not be passed on to the Fire Brigade Employees' Union, of which both Mr. Bennetts and Mr. Ford are members. Mr. Bennetts replied to this: "I could not give this assurance; you know my position." After some further presently irrelevant discussion it was resolved, by a majority of three votes to two, that the finance committee's recommendation be adopted. The two dissentients were Mr. Bennetts and Mr. Ford.

The originating summons seeks, first, that it be declared that the board was not entitled to refuse to produce the legal opinion to Mr. Bennetts at the meeting on 23rd August; second, that it may be declared that the resolution to bring the appeal was void by reason of what is alleged to be the procedural defect in the opinion having been withheld from Mr. Bennetts; and third, that an injunction be granted restraining the board from lodging an appeal against the Commissioner's decision.

The direct concern of the present suit is merely this question of the bringing of an appeal to the Industrial Commission. But the dispute has its origin in what appears to be some misapprehensions as to the position occupied by members of this board. Accordingly I think it necessary to make some observations upon the responsibilities and duties of individual board members.

The Board of Fire Commissioners is set up under the *Fire Brigades Act*, 1909-1965. It comprises five persons. The president is appointed by the Governor pursuant to s. 8. The other four members are elected pursuant to s. 9. The first of these other four members is a member elected by the councils of the municipalities and shires to which the Act applies. The second is a person elected by the insurance companies. The third is a person elected by the volunteer firemen. And the fourth is a person elected by the permanent firemen who are members of the New South Wales Fire Brigade Employees' Union. Together these five members are constituted under s. 7 as a statutory body.

The duty of this statutory body is defined in s. 19 in general terms as being the taking of all practicable measures for preventing and extinguishing fires and protecting and saving life and property in case of fire in any municipality or shire to which the Act applies. The mere statement of this general duty is sufficient to mark the great public importance attaching to its pursuit; heavy responsibilities rest upon those who accept the public office of membership of this statutory board.

A great many public undertakings are controlled by boards or commissions set up in a manner consistent with the manner in which the present board is

set up. By the terms of their statutes, boards such as this comprise a number of persons nominated or chosen by various groups, each of which nominating or choosing groups has a direct interest in the public undertaking controlled by the board. Each of the persons on such a board owes his membership to a particular interested group; but a member will be derelict in his duty if he uses his membership as a means to promote the particular interests of the group which chose him.

The object of providing for interested groups to nominate the members of such a board as this might be said to be threefold: first, one can be confident that an interested group will select a man whose personal qualities and competence equip him for membership; second, it promotes the confidence of that particular group in the board, and provides a means of liaison between that group and the board; and third, it ensures that the board, as a single entity, has available in its deliberations the views of all the interested groups. The presence of the second and third elements necessitates in a board member the highest standards of integrity, both in his thinking and in his actions. The consideration which must in board affairs govern each individual member is the advancement of the public purpose for which parliament has set up the board. A member must never lose sight of this governing consideration. His position as a board member is not to be used as a mere opportunity to serve the group which elected him. In accepting election by a group to membership of the board he accepts the burdens and obligations of serving the community through the board. This demands constant vigilance on his part to ensure that he does not in the smallest degree compromise or surrender the integrity and independence that he must bring to bear in board affairs.

Undoubtedly there will be differences of opinion between board members. Indeed, it is well that this should be so: sound and wise decisions by the board can only be based upon a full and informed discussion of varying and conflicting views and considerations. Nomination of the individual members and their election to membership by interested groups ensures that the board as a whole has access to a wide range of views, and it is to be expected within this wide range of views that inevitably there will be differences in the opinions, approaches and philosophies of the board members. But the predominating element which each individual must constantly bear in mind is the promotion of the interests of the board itself. In particular, a board member must not allow himself to be compromised by looking to the interests of the group which appointed him rather than to the interests of the board exists. He is most certainly not a mere channel of communication or listening post on behalf of the group which elected him. There is cast upon him the ordinary obligation of respecting the confidential nature of board affairs where the interests of the board itself so require.

If the members of boards such as the present board constantly keep before them their overriding duty to the board to promote the purposes for which it exists, then they should have little difficulty in discharging honourably their public duty, and there will be perhaps little likelihood of litigation such as is presently before the court eventuating. Disagreement is to be expected from time to time, having regard to the wide range of problems with which such boards must deal, but it must be disagreement relating to what should best be done in the promotion of the purpose enshrined in the statute, this being the common interest which all the board members must serve.

I have referred earlier to misapprehension existing in relation to these basic truths. For example, in the course of argument in the present suit it was said at one point that the president himself would have to be representing government interests on the board. That was perhaps an incautious suggestion, and was quickly withdrawn by counsel once the error was pointed out. But the fact that suggestions of this sort are made is indicative of a view which is apparently held that, because a board member is appointed or elected by a particular group, he owes some overriding obligation or duty to the group which has conferred upon him his status as a member. The error inherent in this view must be exposed and, for purposes of emphasis, I repeat what I have earlier said. It is entirely foreign to the purpose for which this or any other board exists to contemplate a member of the board being representative of a particular group or a particular body. Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of the board in preference, on every occasion upon which any conflict might arise, to serving the interests of the group which appointed him. With this basic proposition there can be no room for compromise.

At the meeting on 23rd August Mr. Bennetts found himself in a position which I am sure presented real difficulties to him. He has given evidence before me. I am satisfied that he is a witness of credit, and I have no hesitation in accepting as correct the evidence which he gave. Indeed, I think it fair to say that, so far as appears from the evidence before me, Mr. Bennetts has sought to fill what he has found to be a somewhat difficult role with a commendable degree of dignity. He told the president quite clearly at the meeting of 23rd August that he could not give the assurance that he knew the president was about to seek from him, namely, an assurance that the contents of the opinion would not be conveyed by him to the union. Mr. Staff Q.C., who appeared for the board and three of its members who, together with Mr. Ford, were named as defendants, questioned Mr. Bennetts upon the purposes for which he may have used the contents of the opinion, if it had been made available to him. Rather than summarize the questions and answers I shall read them verbatim from the transcript:

“Q. If the advice was to the effect that there were grounds for appeal you would then have proposed to pass that material on to the union? A. Yes.

Q. That, I suppose, because the union would be the board's opponent in the appeal? A. That is right.

Q. And the union might get some benefit from knowing what advice the board had had? A. Yes.

Q. That is right? A. That is right.

Q. So that in substance what it comes to, Mr. Bennetts, is that if you had thought there was material in the advice the knowledge of which would benefit the union you would have passed it on, wouldn't you? A. Yes.”

And, lower down the page:

“Q. I suppose if the union had a remote prospect of success—that is, the legal advice had indicated remote prospects of success—you might have thought knowledge of that would have been of benefit to the union also? A. Yes.

Q. And you would have disclosed that also to the union, wouldn't you? A. Yes.

Q. And I suppose you would have regarded it as of benefit to the union not only in relation to an appeal if one were brought, but in relation to industrial relationships generally? A. Yes.

Q. Knowledge of that sort of advice would have provided the union with some ground for what I might call industrial agitation, wouldn't it? A. That is right.

Q. And that you would regard as knowledge which would benefit the union? A. Yes.

Q. And which you would pass on? A. That is right."

That evidence was given by Mr. Bennetts in the light of the view which he took of his particular position as a member of the board elected by the permanent firemen. Earlier in his evidence he described his view of his position in these terms: "As the representative of the permanent fireman I have an obligation to those firemen, and it would be incumbent upon me to make a report to my State Council upon any determinations of the board." It seems to me that it was this erroneous, but I am satisfied entirely bona fide, view held by Mr. Bennetts which provided the origin of the events at the meeting on 23rd August. Mr. Hutley, who appears for Mr. Bennetts, has argued that every member of the board has an absolute right to see a document such as this legal advice, being a document of importance and one which was before the finance committee whence came the recommendation being considered at the board meeting. His argument is that this being, so he contends, an absolute right, and it having been denied to Mr. Bennetts, it follows that the declaration of right should be made, and it also follows, so the argument runs, that the resolution adopting the recommendation to appeal was invalid by reason of this procedural defect in denying to Mr. Bennetts what is said to be his absolute right to see the legal opinion.

Mr. Staff Q.C., on the other hand, has taken issue with Mr. Hutley's basic proposition that a board member has an absolute right to see a document such as this. It is contended by Mr. Staff that the right of a board member, as, indeed, is said to be the right of other persons with similar fiduciary obligations such as company directors, is a right recognized by the courts as being necessary in aid of the execution of the fiduciary duties cast upon the members of the bodies within whose affairs contests such as these arise. Mr. Staff denies that a board member has an absolute right to inspect a document such as this, and contends that it is a right essentially and fundamentally linked to the execution of the duty cast upon a board member. He refers, by way of analogy, to an observation in the judgment in *Edman v. Ross*(1), a case concerning the right of a director of a company to inspect and take copies of company documents. The following passage appears: "The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true, nevertheless, that its exercise is, generally speaking, not a matter of discretion with the court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the court must assume that he will exercise it for the benefit of his company"(2).

(1) (1922) 22 S.R. (N.S.W.) 351;
39 W.N. 86.

(2) (1922) 22 S.R. (N.S.W.), at
p. 361; 39 W.N., at p. 89.

I agree with Mr. Staff's contention. It is the necessity for clear proof to the contrary which so frequently renders it impossible or impracticable to contemplate litigation being brought concerning such domestic and internal disputes as that which is now before me. However, it is here established by the evidence that the particular purpose that Mr. Bennetts had in mind, and which led to his requesting to see the opinion, was his wish to discharge what he described as, and erroneously believed to be, his obligation to the firemen whom he erroneously believed he represented on the board. In these circumstances the case is not one in which I should make such a declaration as is sought in the first paragraph of the originating summons. Mr. Bennetts has not made out a case justifying the grant of what is, in the ultimate, a discretionary remedy. Ordinarily, of course, at any meeting of individuals who constitute a board such as this, all of the material reasonably relevant to the matter that the board may be considering ought to be made available, and it is only rarely that there would arise a situation such as the present. The origin of the situation is, as I have already said, a wrong but bona fide view which Mr. Bennetts held as to the manner in which he should resolve what he felt to be his conflicting position. The principle governing the manner in which that conflict should be resolved is that the overriding duty is the duty to the board, and that that duty must not be compromised in any degree whatever. But the due application of that principle in the day-to-day affairs of the board may give rise to personal difficulties such as those which have troubled Mr. Bennetts in the present case. Confronted with what appeared to him to be a conflict of loyalties, the view which Mr. Bennetts formed was wrong and for that reason I decline to grant to him the declaration which he seeks in par. (1) of the originating summons. For the same reason I decline to make the declaration sought in par. (2) of the originating summons; nor am I prepared to grant the injunction which is sought in par. (3).

The order I make is: leave to the plaintiff to amend the originating summons by substituting in par. (1) the words "first-named defendant" for the words "second-named defendant"; I refuse to make the declarations and to grant the injunction sought in the originating summons; having regard to the special circumstances of this case I order the first defendant to pay the costs of all parties; I reserve liberty to apply on two days' notice for any necessary reframing of the order for costs in such a way as may be appropriate to achieve the result stated; exhibits to be handed out.

Order accordingly.

Solicitors for the plaintiff: *Geoffrey Edwards & Co.*

Solicitors for the first, second, third and fifth defendants: *Pigott, Stinson & Co.*

O.M.L.D.
