CASE NOTE

CALVIN v. CARR AND OTHERS[1]

Administrative law — Breach of natural justice — "Void" decision with consequences sufficient in law to justify an appeal — Whether fair appellate hearing cures defects at original hearing

The Privy Council decision in *Calvin* v. *Carr* tackled two problem areas in administrative law. First, while supporting the view that breach of natural justice renders a decision void, the Board sees this as no barrier to an appeal from that decision. Secondly, the Privy Council outlined a general approach to the question of whether defects in natural justice appearing at an original hearing can be "cured" by properly conducted appeal proceedings.

The appellant, Calvin, entered his horse in a race run at Randwick on 13th March 1976. Contrary to form the horse ran poorly and there was an inquiry by the stewards. A week later the stewards informed the applicant that they proposed to bring charges against him under rule 135 of the Rules of Racing of the Australian Jockey Club. At a hearing a week later further evidence was called and the stewards found the applicant guilty of an offence against rule 135(a)—"that every horse shall be run on its merits"—and disqualified him from racing for one year. He also lost his membership of the Australian Jockey Club.

Pursuant to his rights under the Rules, Calvin appealed to the Committee of the Australian Jockey Club and an appeal hearing took place at which the applicant was represented by counsel and given a full right of cross-examination. The Committee dismissed the appeal. As a result the applicant brought an action[2] in the New South Wales Supreme Court against the Chairman, Committee members and the stipendiary stewards claiming a declaration that the purported disqualification by the stewards and the purported dismissal of the applicant's appeal by the Committee were void, and an injunction restraining the defendants from giving effect to the purported disqualification.

Rath J., in the Equity Division of the Supreme Court, found that the stewards had failed to accord natural justice but that the hearing before the Committee constituted a hearing *de novo* and that the defects in the stewards' inquiry were thereby cured. The plaintiff appealed to the Privy Council on two grounds: that the Committee lacked jurisdiction to hear the appeal, and that even if it did not the fair appeal proceedings had not cured the original defect.

Appellate Jurisdiction and Void Decisions

The appellant argued that since the breach of natural justice by the

[1] (1979) 22 A.L.R. 417; (1979) 53 A.L.J.R. 471. Judicial Committee of the Privy Council; Lord Wilberforce, Viscount Dilhorne, Lord Hailsham of Saint Marylebone, Lord Keith of Kinkel and Lord Scarman.

[2] *Calvin* v. *Carr* [1977] 2 N.S.W.L.R. 308. Equity Division; Rath J.

stewards rendered their decision void, there was no "decision" against which an appeal could be heard and that therefore the Committee had no jurisdiction to enter upon the appeal. In rejecting this argument the Board noted the difficulties in distinguishing void and voidable decisions but stated that:

> Their Lordships' opinion would be, if it became necessary to fix upon one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence in law.[3]

This *obiter dictum* adds further weight to the "void" line of authority in the now notorious "void/voidable" controversy concerning the effect of a breach of natural justice.[4] It is in line with the weight of academic opinion[5] and it is significant that no distinction is made between the breach of the hearing and breach of the no-bias rules.[6]

Perhaps the most striking feature of the Board's statement is that it appears to be at odds with the common notion that voidness is synonymous with nullity. Yet as Wade has persuasively argued, in administrative law "void" does not and cannot have this simple meaning.[7] He argues[8] that in English law the emphasis is on remedies not rights and just as there are statutory analogies where a void act is converted into a valid one by the cutting-off of remedies, so too at common law voidness is a relative thing: the question is void against whom? Unless the law will grant a remedy against a decision it is senseless to speak of it as void. It must be regarded as valid, that is of legal consequence, if it is unchallenged or unchallengeable at law. A decision reached in breach of the rules of natural justice must be treated as valid if no person can establish *locus standi* or convince the court to exercise its discretion with respect to remedies:[9]

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[3] (1979) 22 A.L.R. 417, 425.

[4] The most recent commentaries are Sykes, Lanham and Tracey, *General Principles of Administrative Law* (1979) Ch. 28; Whitmore and Aronson, *Review of Administrative Action* (1978) 12-15, 133-142.

[5] *E.g.* Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 L.Q.R. 499, (1968) 84 L.Q.R. 95; Clark, "Natural Justice: Substance and Shadow" [1975] Public Law 27; Akehurst, "Void or Voidable? Natural Justice and Unnatural Meanings" (1968) 31 Modern Law Review 2, 138; Wade, *Administrative Law* (4th ed. 1977) 296-301.

[6] Nor is any distinction made in the major cases supporting the "void" view: *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; *Ridge* v. *Baldwin* [1964] A.C. 40, 79 *per* Lord Reid. See also *Forbes* v. *New South Wales Trotting Club Ltd* (1979) 25 A.L.R. 1.

[7] Wade, "Unlawful Administrative Action: Void or Voidable" (1967) 83 L.Q.R. 499.

[8] *Id.* 510.

[9] A court may choose not to exercise its discretion on various grounds *e.g.* because the applicant has waived the breach, delayed bringing an action or because no injustice would be suffered by allowing the decision to stand. For similar reasoning see de Smith, *Judicial Review of Administrative Action* (1973) 132; Whitmore and Aronson, *op. cit.* 14-15, 136; *Hounslow L.B.C.* v. *Twickenham Garden Developments Ltd* [1971] Ch. 233, 259 *per* Megarry J. Such an analysis has recently found approval in the High Court: *Forbes* v. *New South Wales Trotting Club Ltd* (1979) 25 A.L.R. 1.

> At most then, a breach of natural justice renders a decision void—(only) when challenged by the right person[10]

and until then the decision may have legal consequences.

> Thus if the Brighton Watch Committee dismiss their chief constable unlawfully, but he does not contest his dismissal, the watch committee's action has the legal consequences of a valid dismissal.[11]

Wade[12] cites Kelsen in support of his view. In his *General Theory of Law and State*, Kelsen states that the determination by a competent authority that a decision is null is really an annulment with retroactive force of something which legally exists. In other words since there are legal rules which govern whether or not a decision is a nullity and since the determination of nullity has a definite legal effect, the decision itself which is the subject of those rules and legal effect must have some legal significance.

Although the Board appears to have adopted this reasoning, it is not without its critics. Sykes[13] believes that the Wade analysis confuses the actual result of the decision—the issue of substantive validity—with the principles attaching to a particular remedy. He argues that if a decision is rendered void by a breach of natural justice, it remains void *ab initio* irrespective of whether a particular remedy is granted. As an example he argues that if a tribunal which only has authority to award maintenance payments purports to award custody such an act is *ultra vires* and null irrespective of whether it is successfully challenged.

Initially, Wade's view on this point[14] was that void acts will only have the legal consequences of valid acts where the authors of the void act are "in authority". This seems to mean that they possess the substantive power to make the purported decision but have erred in some other way, for example breached the rules of natural justice. Thus

> If the Eastborne Watch Committee purported to dismiss the Brighton chief constable . . . the Brighton Watch Committee . . . would take no notice. Since the authors of (the) decision would have no physical power to carry them out, no legal consequences would be produced.[15]

Wade glossed over this point but it seems erroneous that the legal consequences which he claimed may flow from a void decision depend on the "muscle" of the authority to enforce their decisions. Wade[16] now extends his general approach to such blatantly *ultra vires* acts. Thus, although any *ultra vires* decision is void, it must still be treated as valid until successfully challenged—even where the error is clear on

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[10] (1976) 83 L.Q.R. 499, 525.
[11] *Id.* 516.
[12] *Id.* 517.
[13] Sykes, Lanham and Tracey, *op. cit.* 233-235.
[14] (1967) 83 L.Q.R. 499, 517.
[15] *Ibid.*
[16] Wade, *Administrative Law* (4th ed. 1977) 300; In a note, (1974) 90 L.Q.R. 154, 155 Wade gives the following example: "If in *Ridge* v. *Baldwin* . . . the order for the chief constable's dismissal had stated that it was because he had red hair, he would still have had to go to the court to recover his office effectively."

the face of the decision.[17]

The Privy Council did not allude to the jurisprudential views of Wade or Kelsen but expressed its view in practical terms: until the decision of disqualification was declared void it had the practical consequences of a legal disqualification and this constituted a sufficient existence in law to render the decision susceptible to an appeal.

Thus appellate bodies may have jurisdiction to entertain appeals from a conviction resulting from a trial rendered a "nullity" by irregularities[18] or from an administrative decision tainted by breach of natural justice[19] or otherwise made without jurisdiction.[20]

"Curing" by Fair Appellate Proceedings

The appellant also argued that the defects of natural justice which occurred at the original hearing before the stewards could not be cured by the, albeit fair, appeal proceedings before the Australian Jockey Club Committee. There were conflicting lines of authority on this point. The Board approved its own decision in *Pillai's* case[21] and those of the High Court in the *Bowen* and *Twist* cases[22] where the "curing" argument was accepted. However, the Board held that certain cases, especially those touching livelihood or property rights, required a fair hearing at both levels. Three situations were distinguished.

(i) Where the rules of an organisation to which a member belongs on a contractual basis—the social club situation— provide a full hearing of the original body or some enlarged form of it, it would not be difficult to infer that the member has agreed to abide by the appeal decision. In such cases earlier defects can be cured by a fair appeal.

(ii) There is an intermediate category where
the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organization, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect.[23]

(iii) There are also cases where
after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment etc), the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage.[24]

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[17] On the point of *ultra vires* decisions by bodies "with no vestige of legal authority" compare de Smith, *op. cit.* 377, 342.

[18] *Crane* v. *Director of Public Prosecutions* [1921] 2 A.C. 299.

[19] *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945, where the hearing rule was breached: *Australian Workers' Union* v. *Bowen (No. 2)* (1948) 77 C.L.R. 601, breach of the no bias rule.

[20] *Meyers* v. *Casey* (1913) 17 C.L.R. 90. In this regard see also *Re Brian Lawlor Automative Pty Ltd and Collector of Customs (N.S.W.)* The Australian Administrative Law Service 1 A.L.D. 167, 180.

[21] *M. Vasudevan Pillai* v. *City Council of Singapore* [1968] 1 W.L.R. 1278.

[22] *Australian Workers' Union* v. *Bowen (No. 2)* (1948) 77 C.L.R. 601; *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379.

[23] *Calvin* v. *Carr* (1979) 22 A.L.R. 417, 428-429.

[24] *Id.* 428.

The first criticism to be levelled at these loosely drawn categories is that they have no unifying principle. It is said that cases in the first category are likely to allow curing presumably because in the social club context this is what the members have impliedly agreed to. Yet the same argument might be applied in all cases where there is an appellate structure within the organisation. By submitting to that organisational structure does every member impliedly accept that appellate hearings will overcome earlier defects? How then do the third class of cases arise where curing does not operate? Moreover such reasoning may lead to the controversial implication that a member ought to exhaust all such internal remedies before approaching the courts, since he has impliedly agreed, it is said, that adequate redress is available therefrom.[25]

Presumably the principle lying behind the denial of "curing" in the third class of cases is that where important rights such as livelihood and property are affected there should be a requirement of a fair hearing at both levels to ensure protection of these rights. Thus trade union membership is cited as one context where a fair appeal is thought an insufficient safeguard of the applicant's interests. Yet later the Board supported the decision in *Bowen's* case where a fair appeal was held to have cured defects in an original decision to expel a trade union member—the case being characterised by the Board as in the intermediate category.

Clearly then, the livelihood/property principle is not determinative but, like the implied term principle in the first class, it is merely one factor to consider. Thus since the only principles enunciated to describe the first and third categories do not do so definitively, all cases fall to be considered as intermediate cases. In dealing with such intermediate cases, the Board states that:

> it is for the court . . . to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association.[26]

Only two guidelines are put forward by the Board. First, that courts should look unfavourably on flagrant breaches of natural justice or those which have severe consequences so "that the most perfect of appeals . . . will not be sufficient to produce a just result".[27] Secondly, that courts should be reluctant to interfere with the internal processes of domestic bodies which have established appeal procedures agreed upon by the members.

Overall, however, the language used by the Board gives little guidance to a court so that it will remain a matter of weighing up competing principles in the light of the particular facts of the case. Thus, as Mason J. has pointed out, there will be cases where the court

> will be compelled to take account of the public interest in the efficiency of the administrative process and the necessity for reason-

[25] See *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945, 956.
[26] *Calvin* v. *Carr* (1979) 22 A.L.R. 417, 429.
[27] *Ibid.*

> ably prompt despatch of public business and balance that interest against the countervailing interest of the individual in securing a fair hearing—in appropriate cases that balance will be achieved if the individual secures a fair hearing on his appeal.[28]

In dealing with the particular facts of this case, the Privy Council felt obliged to take into consideration the "reality" behind the formal rules governing the appeal structure. It was clear to all that pressure of time would sometimes result in errors occurring at the stewards' hearing. The appeal structure which existed to deal with such errors, was "an essentially domestic proceeding, in which experience and opinions as to what is in the interest of racing as a whole play a large part".[29] Those who participate in such appeals are taken to have accepted to be bound by the resultant decision so long as "they can be said, by an objective observer, to have had fair treatment and consideration of their case on its merits".[30] The Board held that since this had been afforded in this case, the appeal before it failed.

Finally, it should be remembered that if the appeal hearing is itself defective, it will not cure earlier defects and the applicant will not be bound by it.[31]

Conclusion

In conclusion two points can be made. First, in this case the Privy Council has recognised the theory that decisions void due to a breach of natural justice may have legal consequences unless and until successfully challenged. It remains unclear whether, as Wade contends, this is but one manifestation of a general "presumption of validity"[32] which all unlawful administrative actions attract.

Secondly, the Board, in attempting to resolve the conflicting authorities with respect to the curing effect of fair appeal proceedings, has merely concluded that there is "no automatic rule" to guide the courts. One is left with the question as to why the Privy Council did not take this opportunity to clarify the situation. Such guidelines as it did give are too broad to be of particular assistance and it seems therefore that courts must resort to a general assessment of the facts in each case. Thus even though the status of Privy Council decisions in State Supreme Courts remains unclear,[33] it is suggested that in practice *Calvin* v. *Carr* will have little more than the negative effect of preserving both lines of argument on the point.

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[28] *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379, 388: approved by the Privy Council in *Calvin* v. *Carr* 430.
[29] (1979) 22 A.L.R. 417, 432.
[30] *Ibid.*
[31] *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945.
[32] Wade, *Administrative Law* (4th ed. 1977) 299.
[33] *Viro* v. *R.* (1978) 18 A.L.R. 257.

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