Void and voidable acts: current trends in New Zealand

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In this note on the judgment of Fisher J in the recent case of Martin v Ryan, *Professor Peiris places that judgment in the context of current debate in administrative law about void and voidable acts.*

I INTRODUCTION

The void vs voidable debate in administrative law[1] has recently assumed practical importance in New Zealand where the High Court was required to adjudicate upon an unusual combination of circumstances in the setting of which legal consequences were decisively affected by the court's assessment of degrees of invalidity.[2] The reasoning of Fisher J brings into sharp relief many aspects of a vigorous controversy which, it would seem, continues to be very much a part of contemporary administrative law.

The facts of the case may be stated succinctly. The problem arose in the context of divorce proceedings instituted by the wife. The ensuing property settlement contemplated a sale of the husband's farm and division of the proceeds equally between the former spouses. An oral order delivered by the judge in the course of the proceedings adumbrated several conditions subject to which the farm should be sold eventually, but no sale was in fact ordered at this time. The wife began to take intending purchasers to see the property, but the husband raised no objection to this, as he felt secure in the knowledge that no alienation of the property could take place without his concurrence, or prior to a judicial decree of which he was entitled to timely notice. The subsequent course of events, however, took him entirely by surprise. Solicitors acting for the wife wrongly obtained from the court, by means of an *ex parte* application, an order for sale. The husband became aware of this development only when the order of sale was served upon him by the police. Moreover, the papers filed in court on the wife's behalf in support of her *ex parte* application contained a variety of misrepresentations. No sooner had the husband become aware of what had occurred, than he sought to intervene and to have the order of sale set aside, but this was refused by the District Court which had made the impugned order, on the ground that the farm had actually been sold.

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1 For a critical survey, see GL Peiris "Natural Justice and Degrees of Invalidity of Administrative Action" [1983] PL 634; compare MB Akehurst "Void or Voidable? - Natural Justice and Unnatural Meanings" (1968) 31 MLR 138.

2 *Martin* v *Ryan et al*, unreported, 8 March 1990, High Court, Hamilton Registry, M 188/89.

It was at this point that the husband invoked judicial review to have the order of sale set aside and to have it recognised that the registrar of the court, in purporting to sign the agreements on the husband's behalf, was performing an act which amounted to a legal nullity.

The central point of interest with regard to the issues which arose for determination by Fisher J related to the legal effect of a decision by the court that the order of sale, and the steps which resulted from it, were invalid. In particular, the question was whether the court's power was limited to setting aside the order for all purposes ab initio or whether there was room for other possibilities such as prospective invalidation only or invalidation for some purposes only. The latter course, arguably, provides a powerful lever for the protection of vulnerable third party interests in situations of this kind.

The "absolute theory of invalidity" had impeccable judicial support until very recently.[3] Lord Diplock has observed that:[4]

> It would ... be inconsistent with the doctrine of *ultra vires* as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that an [act] was *ultra vires* were to have any lesser consequence in the law than to render [it] incapable of ever having had any legal effect.

Academic espousal of the postulate of absolute voidness has been no less uncompromising. Sir William Wade has commented that:[5]

> The whole basis of civil liberty is that the acts of public authorities are white or black, lawful or unlawful, valid or void. A large area of grey where no one could be sure of his rights, would be a dangerous innovation indeed.

This unrelenting attitude derives, at bottom, from the doctrine of vires which sustains the conceptual basis of judicial review in English and Commonwealth law. Wade, indeed, has remarked:[6]

> So long as the *ultra vires* doctrine remains the basis of administrative law, the correct epithet must be "void".

But the conspicuous characteristic of the concept of jurisdiction in modern law is its almost infinite elasticity. Jurisdictional taint today envelops not only transgression of the prescribed limits of power by such methods as the violation of a condition precedent

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3 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 14; *Durayappah* v *Fernando* [1972] 2 AC 337, 354; *Stevenson* v *United Road Transport Union* [1977] 2 All ER 941, 951.

4 *Hoffman - La Roche (F) & Co AG* v *Secretary of the State for Trade and Industry* [1975] AC 295, 265.

5 HWR Wade "Unlawful Administrative Action: Void or Voidable?" (1968) 84 LQR 95, 113.

6 HWR Wade *Administrative Law* (6 ed, Claredon Press, Oxford, 1988) 350.

or the performance of unauthorised functions but a whole gamut of factors relating to improper motivation and reference to irrelevant considerations[7] and insubstantial evidentiary support for findings arrived at.[8] A legal regime which accords uniform treatment to distinct branches of the ultra vires doctrine, fundamentally distinguishable as to their substance and implications, is justifiably exposed to the criticism that it stultifies central objectives of policy by excluding essential nuances in respect of the avoidance of administrative action.

In opposition to Wade's theory, Professor Michael Taggart has supported the postulate of a "relative theory of invalidity".[9] While agreeing with the thrust of Wade's principle, that one must go to court to challenge allegedly invalid administrative action, Taggart has criticized as "unnecessary and confusing"[10] the continued linkage of this principle with the absolute theory of invalidity. Taggart comments:[11]

> A principal objection to Wade's principle is that it gives the Courts too much room for judicial manoeuvre ie too much room to revert back to the old 'void' language and nullity theory when it is thought to suit, without explaining why. In my view this is unnecessary and, in any event, bought at too high a price in terms of doctrinal clarity.

The present writer's conviction, however, is that the sacrifice in terms of doctrinal clarity is amply warranted by practical considerations connected in particular with the protection of rights of third parties. It is primarily for this reason that I have expressed emphatic support for the concept of voidability.[12] The essence of this approach is that, although a decision tainted by procedural error is valid unless and until it is invalidated by a court, the invalidation is prospective rather than retroactive. From a practical standpoint, the exercise of judicial discretion in regard to legal consequences flowing from the impugned act is essential to cater for equitable factors. I have no doubt that this dimension of voidability is not rendered superfluous by the discretionary bars. I have elsewhere developed in detail the argument that, since the grounds for refusing public law remedies are well settled and encompass, in the main, the core elements of fault in the applicant or futility or impracticability of judicial intervention, the criteria applied in this regard are too restricted to address realistically the gamut of problems relating to third party protection.[13] Consequently, there is pragmatic justification for adoption of the criterion of voidability.

It is a refreshing feature of the judgment of Fisher J in the New Zealand case that the need for a measure of judicial latitude in this field is acknowledged explicitly.

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7 For a discussion of relevant aspects of the ultra vires doctrine see DCM Yardley *A Source Book of English Administrative Law* (2 ed, Butterworths, London, 1970) 93; compare JF Garner *Administrative Law* (5 ed, Butterworths, London, 1979) 149-153.

8 *R* v *Steeves* (1921) 62 DLR 329, 343 (SC of NB).

9 M Taggart *Judicial Review of Administrative Action in the 1980s* (Oxford University Press in association with the Legal Research Foundation, Auckland, 1986) 90.

10 Above n 9, 91.

11 Above n 10.

12 GL Peiris, above n 1.

13 Above n 1, 648-654.

Fisher J, eschewing fictions and platitudes in an undisguisedly pragmatic spirit, recognised that the absolute theory of invalidity is impossible to reconcile with the wide sweep of judicial discretion integrally associated with administrative law remedies. It is part of the "inherently discretionary" nature of judicial review[14] that events occurring after the decision itself, such as the ameliorating effects of an appeal,[15] the post-decision conduct of the applicant[16] and subsequent irrevocable transactions involving third parties,[17] must all be taken into account, and it is only when the legal status of the decision is determined by a court in the light of all the circumstances since the original decision that the consequences of the decision will be known.[18]

The "metamorphosis of void action into valid action"[19] is achieved by the denial of remedies, for an act bereft of legal consequences at its inception becomes, for all intents and purposes, a valid act in the absence of means of demonstrating its nullity. It is obviously disingenuous to try to reconcile the notion that a vitiated decision is void ab initio with the possibility that, on account of subsequent circumstances and the favourable exercise of discretion, the decision may for all practical purposes be treated as if it not only is now, but always has been, legally impeccable.[20]

These considerations led Fisher J, quite cogently, to the conclusion that in most, if not all, cases the judgment of a court acting by way of judicial review to impeach an administrative decision "is more usefully regarded as constitutive than declaratory".[21] Indeed, in the picturesque language of the judge, "[i]f the superior court does ultimately strike down the decision, the act of the superior court is not so much the passive discovery of the still-born as selective euthanasia of the congenitally deformed".[22]

Clearly, the thrust of Fisher J's reasoning is that the judicial function in this area entails a degree of creativity and discrimination which are indispensable for the attainment of vital aims of social policy. Against the backdrop of this consistent emphasis on the role of judicial discretion, it is much to be regretted that Fisher J sees fit to curtail that discretion in a crucial (and, in the present writer's opinion, counter-productive) way. Fisher J was content to accept, as a general rule, that "[i]f the court does decide to invalidate a decision on the ground of administrative law deficiencies, the impugned decision is invalidated retrospectively and for all purposes".[23] In other words,

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14 *London & Clydeside Estate Ltd* v *Aberdeen District Council*[(1979] 3 All ER 876, 883, per Lord Hailsham of St Marylebone.

15 *Reid* v *Rowley* [1977] 2 NZLR 472, 478-484; *Calvin* v *Carr* [1980] AC 574, 589-590.

16 *Hill* v *Wellington District Transport Licensing Authority* [1984] 2 NZLR 314.

17 *R* v *Hewborough* (1869) LR 4 QB 585; *R* v *Logan Licensing Authority, ex parte Bahr* [1910] QSR 391.

18 At p 64 of the judgment of Fisher J.

19 HWR Wade "Unlawful Adminstrative Action: Void or Voidable?" (1967) 83 LQR 499, 515.

20 See p 64 of the judgment of Fisher J.

21 At p 65.

22 At p 65.

23 At p 69.

the court has a discretion to take into account all relevant circumstances and to determine whether intervention is warranted or not.

If it decides in the negative, the validity of the act remains unimpaired simply for want of an effective legal remedy. On the other hand, if the court considers it proper to strike down the act assailed, the supervening invalidation necessarily relates back to the commencement of the transaction, with no scope available for a partial concession in the form of recognition of the continuing validity of legal consequences which had been generated in the meantime.

The dichotomy between void and voidable acts had its origins and customary application in the law of contract, but the suitability of the distinction has been repudiated traditionally with regard to the legal effects of the exercise of public power. However, the complexities of contemporary life have prompted a fresh point of departure. A distinguished Australian judge, for example, has entertained no doubt that the terminology has an even more convincing application in the latter area of law than it has always had in the former.[24]

It is a pity that Fisher J, having gone a considerable part of the way towards recognising useful nuances and gradations within the spectrum of invalidity, chose to constrain some aspects of the legal policy to which he seemed in principle committed, by lending implicit support to a sterile conception of "voidability". He cited with approval[25] a judicial reference to a potentially vulnerable juristic act that "[t]hough it is merely voidable, when it is declared to be contrary to natural justice, *the consequence is that it is deemed to have been void ab initio*".[26]

It is plain, however, that if the notion of "voidable" administrative acts is to have intrinsic value in the public law field, it should contemplate not potentially vulnerable acts which, once they are set aside in judicial proceedings, are considered a nullity from the outset, but the distinct category of acts which, even after a judicial order deprives them of force, are declared to give rise to legal consequences during the period intervening between the commission of the acts and their avoidance as the result of judicial intervention.

There can be no doubt that, in relation to the facts of the case with which Fisher J was concerned, the appropriate judicial policy in the matter of exercise of discretion was all or nothing. If the court were inclined to regard the protection of accrued rights of third parties as the dominant consideration (a view hardly justified by the facts of the case), it might as well have declined relief absolutely to the husband. There was clearly no practical virtue in identifying a point of time, subsequent to the making of the transfer, at which the validity of the effects of the alienation was to be impaired.

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24 *Posner* v *Collector of Inter-State Destitute Persons* (1946) 74 CLR 461, 483, per Dixon J (HCA).

25 At p 69 of the judgment of Fisher J.

26 *Forbes* v *New South Wales Trotting Club Ltd* (1979) 53 ALJR 356, 549, per Aicken J (emphasis added).

But this analysis is not, by any means, universally applicable. There are contexts in which an intermediary notion resilient enough to cater for a mediating technique as to the time-span of juristic consequences has indisputable practical advantages.

The facts of two decided cases, both having to do with planning permission, offer some insight into the nature of situations in which the lack of such a conceptual mediating instrumentality would indeed constitute a reproach to the law.

R v *Hendon Rural District Council, Ex parte Chorley*[27] was a case in which an application was made to a council for permission to develop certain premises in an area covered by a proposed town planning scheme. Objections were invited and in due course considered by the council which unanimously decided to permit the proposed development, pending final approval by the Minister of Health of the town planning scheme. The owner of an adjacent property sought certiorari to quash the council's decision. He succeeded on the ground that one of the councillors voting in favour of the resolution to grant permission to develop had such an interest in the matter as to disqualify him from participating in the decision making process, on account of bias.

This is a situation in which a landowner, after obtaining development permission and prior to its being quashed by certiorari, could well have alienated the property to a third party in good faith. The third party, in the meantime, may have begun constructing a building on the land or otherwise improving it in a substantial way. If the grant of planning permission were held voidable, in the sense that all future development would be forestalled, but without prejudice to activity already embarked upon by third parties lacking actual or constructive notice of any hazard, a beneficial purpose of policy would have been achieved. By contrast, if the conceptual framework of the law envisioned no hinterland between impeccable validity and absolute nullity of transactions, a lacuna would be manifest.

A slight variation of the facts of *Gregory* v *Camden London Borough Council*[28] provides another example. The trustees of a convent made two applications for planning permission, both of which were granted by the defendant local planning authority, to build a school on ground behind the plaintiffs' lands and an access to it between lands owned by the plaintiffs. The plaintiffs alleged that the development was not in accordance with the development plan for the area and that it injuriously affected the amenities of their lands. They sought declarations that the grant of planning permission was invalid, in that no copies or plans of the application had been furnished in the manner required by the law.[29] The action for a declaration proved abortive. The defendants succeeded in their submission that, since the plaintiffs had no right at common law over any land adjacent to their properties, and the trustees had an absolute right, subject to obtaining planning permission, to construct a school with more than

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27 [1933] 2 KB 696.

28 [1966] 1 WLR 899.

29 Article 10 of the Town & Country Planning General Development Order 1963, and the Town and Country Direction 1954.

one access, it was incumbent upon the plaintiffs to show that they had an interest in seeking a declaration under town and country planning legislation. The ruling of the Queen's Bench Division was that, principally because the governing legislation conferred rights only on the public and not on individuals, the plaintiffs were unable to demonstrate locus standi to secure declaratory relief.

The failure of the plaintiffs' action was attributable to a technical ground effectively invoked by the trustees in limine. However, if the relief sought had not been by way of declaration and if the preliminary consideration which proved decisive as to the outcome had not arisen, it is not inconceivable that planning permission would have been quashed at the instance of an owner of adjoining lands who was capable of demonstrating jeopardy to his rights.[30] In such a contingency, is there not a compelling case to be made out for a mechanism which enables, without undue strain, the protection of interests of third parties who had dealt with the property in unimpeachable good faith during the intervening period? The essential objection to the doctrine of absolute voidness of administrative action which offends against the rules of natural justice is that considerations having a bearing on the rights of third parties whose conduct is not exposed to censure are as much an integral component of public policy as the individual's right to natural justice.

The bases of the law regulating the use of discretion do not include considerations like interposition of the rights of third parties to whom no culpability is imputable. These considerations are not catered for by a body of independent legal principle but require a mechanism which addresses directly the intensity of judicial review and the extent of permissible dislocation of vested rights as the sequel to invalid administrative action. The incidents of a voidable act, then, make good a lacuna which is not necessarily supplied by principles relevant to the exercise of judicial discretion.

The core of the present comment on the judgment of Fisher J in the New Zealand case may be simply stated. The stark paradigm of complete voidness served the court well enough in the relatively uncomplicated circumstances of *Martin* v *Ryan*. But there are more complex permutations and combinations of fact which call for greater intricacy in the use of concepts. The notion of voidability, structured in the suggested manner, is probably the key to the vexed problem of third party protection in situations of this kind; and the refusal to incorporate such a notion in contemporary doctrine significantly impoverishes the law. In so far as Fisher J, in some passages of his judgment, seems inclined to commit himself to broad formulations of principle which transcend the requirements of the case before him, a note of caution is appropriate with regard to the insufficiency of voidness ab initio as an invariable corollary of jurisdictional error or deficiency.

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30 See, for example, *R (Bryson)* v *Ministry of Development* (1967) NI 180; *R* v *Hillingdon LBC ex parte Royco Homes Ltd* (1974) QB 720; *Murphy & Sons Ltd* v *Secretary of State for the Environment* (1973) 1 WLR 560; *R* v *Sheffield CC ex parte Mansfield* (1978) 77 LGR126.