Chapter 3: The status of unlawful administrative action

Status of unlawful act; reliance by public authority on unlawfulness of own act: White v South Derbyshire District Council [2012] EWHC 3495 (Admin)

The appellants were successfully prosecuted by a local authority for allowing land to be used as a caravan site without a licence. In fact, a licence existed, but had been issued unlawfully. The appellants were convicted on the basis that no licence therefore existed in law, such that the offence had been committed. The appellants successfully appealed to the Divisional Court. Singh J, with whom Gross LJ agreed, referred with apparent approval to the second actor theory (on which see section 3.3.4 of the book) and suggested that the decision of the Court of Appeal in Percy v Hall [1997] QB 924 involved its judicial application. Singh J then went on (at [37]) to observe:

The present case raises a question which has not been the subject of direct authority: can a public authority which has acted ultra vires rely on the unlawfulness of its own act in order to found a criminal prosecution? However, the authorities to which I have referred provide helpful guidance as to the underlying policy of the law in this area which assists in the resolution of that problem. In particular, cases such as Percy v Hall indicate both that a void act may have some legal effect for some purposes, and that the law will strive to protect innocent third parties who have relied upon the apparent validity of that act.

Singh J concluded that the appeal should be allowed, because it was not open to the local authority, qua prosecutor, to rely upon the unlawfulness of its own act as the basis of the prosecution. However, although Singh J appeared to approve of the second actor theory, he also appeared to endorse what he referred to (at [32]) as ‘the relative, as opposed to an absolute, view of voidness’. And it appears that this idea—that unlawful administrative acts may have legal effect for some, even if not for all, purposes—underpinned Singh J’s conclusion that the unlawfulness of the licence could not be invoked by the local authority as prosecutor. Singh J appears to assume that the second actor theory is consistent with this sort of relevative conception of voidness. However, this arguably discloses a misunderstanding of that theory given that it holds that unlawful acts are void in law in an absolute sense (notwithstanding that their existence in fact may provide a foundation for certain subsequent acts).

Charles Terence Estates Ltd v Cornwall Council [2012] EWCA Civ 1439

The defendant local authority leased properties from the claimant. When the local authority stopped paying rent but continued to use the properties, the claimant sued for unpaid rent. At first instance, the claimant failed on the ground that when the leases were entered into, the defendant’s predecessors had failed to have regard to market rents when agreeing the terms of the leases and had thereby breached their fiduciary duties owed to council tax payers. The leases were therefore void.

The claimant successfully appealed, the Court of Appeal holding that there had been no breach of fiduciary duty. However, Maurice Kay LJ (with whom Moore-Bick and Etherton LJJ agreed) went on to consider what the position would be if there had been a breach of fiduciary duty meaning that the leases had been entered into unlawfully. In doing so, Maurice Kay LJ considered the Court of Appeal’s decision in Credit Suisse v Allerdale Borough Council [1997] QB 306, in which a council successfully argued that its lack of legal authority to enter into certain contractual arrangements made the contract void and unenforceable. In Credit Suisse (at 343-344) Neill LJ said:
I know of no authority for the proposition that the ultra vires decisions of local authorities can be classified into categories of invalidity. I do not think that it is open to this court to introduce such a classification. Where a public authority acts outside its jurisdiction in any of the ways indicated by Lord Reid in Anisminic [1969] 2 AC 147, the decision is void. In the case of a decision to enter into a contract of guarantee the consequences in private law are those which flow where one of the parties to a contract lacks capacity. I see no escape from this conclusion … if, as I believe there to be, there is only one category of ultra vires decisions where a local authority is concerned I see no room for a judicial discretion.

However, Hobhouse LJ (in Credit Suisse at 357) took a different approach:

... [Counsel’s] arguments make the error ... of using administrative law language and concepts without making the necessary adjustments. It remains necessary to ask what amounts to a defence to a private law cause of action. Want of capacity is a defence to a contractual claim; breach of duty, fiduciary or otherwise, may be a defence depending on the circumstances. To say that administrative law categorises all grounds for judicial review as 'ultra vires' does not assist. In civil proceedings the question is whether, after taking into account the relevant public law, there is on the facts a private law defence. By a parity of reasoning, how a Divisional Court would have decided an application for judicial review and what remedy, if any, it would have granted in the exercise of its discretion is not material.

In the present case, Maurice Kay LJ preferred the approach adopted by Hobhouse LJ in Credit Suisse. Maurice LJ said (at [37]):

I do not think that the assimilation of the various types of public law error in Anisminic had the effect of imposing a rule which extends inexorably to public law error as a defence to a private law claim. There is no logical reason why it should and this case demonstrates why it should not. It would be highly undesirable if, years after time expired for the making of a prompt public law challenge by a person with a sufficient interest, the fact of an historic breach of fiduciary duty should inevitably lead to the defeat of a private law claim brought by a party who acted throughout in good faith.

Credit Suisse, said Maurice Kay LJ, had been a case of "pure" ultra vires. In contrast, the local authority in the present case had been doing something it was authorised to do but would (had a breach of fiduciary duty been found) have been doing so in an authorised way. Maurice Kay LJ concluded that this would not have 'go[ne] to legal capacity'.

Maurice Kay LJ’s approach—like that of Etherton LJ in his concurring judgment—appears to rest on the supposition that the status of an administrative act may differ in public and private law. As Etherton LJ put it (at [49]): ‘The existence of public law remedies for breach of public law duties should make no difference to the private law consequences of ultra vires (want of capacity), on the one hand, and breach of duty in respect of a transaction within the capacity of the corporation, on the other hand.’