Grounds for setting aside a judgment -Void or voidable?

The legal term '***there are not varying degrees of nullity***" outlines a long-established public justice principle in which grounds for setting aside are based.

An act or provision is either entirely valid, or it's entirely null and void from the outset, there's no in between.

Intelligence UK Investigations provides this helpful analysis to assist in identifying and properly dealing with acts by public bodies and their officers (including courts and judges) or acts by others, that are in law, void from the outset.

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1. Grounds for setting aside a judgment or order that is a nullity is a right 'ex debito justitiae'

The Latin term '***ex debito justitiae***' means 'as a debt by way of justice', or put directly, "***as a matter of right*** ", encompassing a remedy that a court is obligated to grant, as principles of justice require it, not as a matter of discretion.

A remedy granted ex debito justitiae is a non-negotiable entitlement, which the public authority (Court or public decision-making body) has no discretion to refuse.

2. Not varying degrees of nullity means 'void from the outset' or 'void ab initio'

There isn't varying "levels" of invalidity, that is a fact. An act by a public body, a person, or a contractual or statutory condition is simply either valid or invalid, and if it's the latter, it's 'void from the outset', which translates in Latin to 'void ab initio'.

The distinction between 'void' and 'voidable' has consistently been drawn in many final judgments of the senior courts over the last century.

In ***MacFoy v United Africa Ltd [1962] AC 152***, 'the people's judge', Lord Denning looked at an appeal to the Privy Council from the West African Court of Appeal. The point at issue was whether a statement of claim, delivered in the long vacation (which in those days was not permitted under the procedural rules), was a nullity. The Appellant contended that it was, and that all subsequent proceedings were void.

The appeal failed, as the act was voidable, and not void. Lord Denning, delivering the judgment of their Lordships, said this:

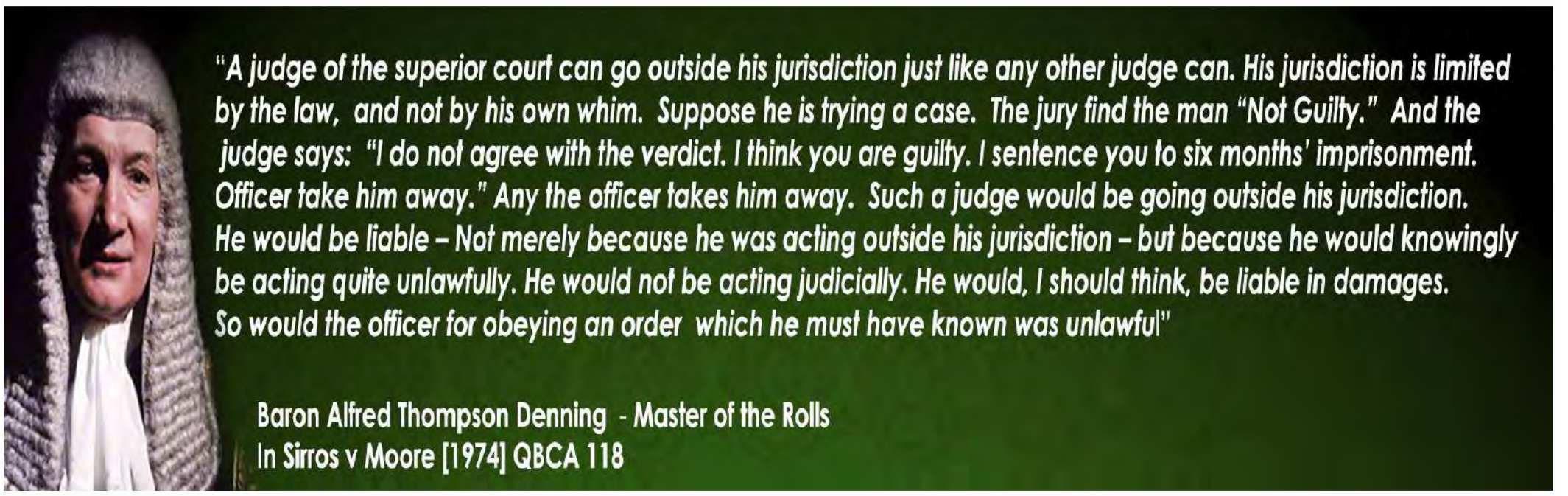
> ***"The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

3. 'Fraud unravels all, even post judgment' – The Supreme Court reaffirmed that it does

The principle that fraud vitiates a judgment extends back to the decision of **Lazarus Estates Ltd v Beasley [1956] 1 Q.B. 702**:

> "***No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court… can be allowed to stand if it has been obtained by fraud. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."***

More recently in 2019, the Supreme Court in ***Takhar v Gracefield Developments Ltd and others [2019] UKSC 13*** the Supreme Court held that where it can be shown that a judgment has been obtained by fraud, a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment.



As Lord Denning, then Master of the Rolls said in *Sirros v Moore*, a judge's jurisdiction is '***limited by the law, and not by his own whim***'

An act by a judicial officer without jurisdiction is automatically void.

4. Misconstruction of a statutory provision or failure to comply with a statutory requirement

A classic example of judicial acts being void through fundamental defect failure to comply with a mandatory statutory requirement, is the evasion of the engaged rule on set off within corporate insolvency proceedings. Any agreement to evade the primary insolvency legislation engages the anti-deprivation rule, automatically voiding the infringing act.

A further obvious example is failure to serve process where process is required, such as a judicial officer making a directions order in a claim that was not served on the Defendant. The claim form is irredeemably defective, and the order founded by it is automatically void.

5. Statutory provisions restricting jurisdiction of certain levels of judiciary or office holder

An act is unquestionably without jurisdiction and is therefore void in circumstances where a statutory or contractual provision limits jurisdiction of an officer from doing certain acts, when the rule is trespassed on.

A classic example of such conduct is where a Master of the High Court has determined a claim that seeks remedy for an alleged violation of the Human Rights Act 1998, or where a case involves 'criminal matters' such as fraud by failing to disclose information during financial injunction proceedings.

In such circumstances detailed above, a Master is precluded by statute at Practice Direction 2B 'Allocation of cases to levels of judiciary' Rule 3.1(b) and Rule 7A(1).

If a Master goes on to make an order, or grant an interim remedy in a case involving 'criminal matters' or he determines a claim seeking remedy for a human rights violation by a judicial act, his order is without question, automatically void.

6. The doctrine of witness immunity from suit

If a party gives evidence as a witness in a police investigation or in court, that party is automatically afforded witness protection by way of absolute witness immunity from suit in relation to the words he has spoke as a witness, or the evidence he (or she) has given.

In our article exposing the affront to justice by Mr Justice Eyre of the King's Bench Division, we set out how the Court under Mr Justice Eyre sought to evade this Firm's application for standalone declaratory relief.

We are alleging that the corrupt English judiciary illegally trespassed on Mr Millinder's absolute witness immunity from suit.

In coming to the conclusion we did in our fact find, we recited from our Managing Director's 2008 Court of Appeal case in ***Sprecher Grier Halberstam LLP v Walsh***.

In granting the appeal by Sprecher Grier Halberstam, Paul Staines (AKA Guido Fawkes) the controversial political blogger, the Court recited leading judgments by the House of Lords on the doctrine of witness immunity from suit, which automatically bars any civil action against such a party under that privilege.

In SGH v Walsh the Court of Appeal relied on the House of Lords final judgment, Watson v M'Ewan [1905] AC 480, the Earl of Halsbury LC said this:

*"By complete authority, including the authority of this House, it has been decided that the privilege of a witness, **the immunity from responsibility in an action when evidence has been given by him in a court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable – it is settled law and cannot be doubted**. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. **So far the matter, I think, is too plain for argument**."*

In Marrinan v Vibart [1963] 1 Q.B. 234, 238 Salmon J. held:

***"**It is true that in nearly all the reported cases in which the principles to which I have alluded were laid down, the form of action was for damages for libel or slander, but **in my judgment these principles in no way depend upon the form of action**. In Hargreaves v Bretherton [1959] 1 Q.B. 45, an unsuccessful attempt was made to evade the immunity to which I have referred by suing for damages for perjury. Counsel for the plaintiff attempted to distinguish that case on the ground that an action for damages for perjury is unknown to the law, whereas an action for damages for conspiracy is of respectable lineage. As far as it goes, the distinction is a sound one. It does not, however, affect the point that Hargreaves v Bretherton demonstrates that the immunity to which I have referred is not only an immunity to be sued for damages in libel or slander. **The immunity, in my judgment, is an immunity from any form of civil action**."*

Any civil action, including adverse costs or damages, civil contempt or any other form of civil action is automatically void in circumstances where that action arose in connection with the evidence a witness, litigator, private prosecutor or investigator had first given in court or to an official investigatory body.

Any act or order trespassing on one's privilege of absolute immunity from suit is automatically void for the protection of the public justice common law principle that witnesses should be able to freely give evidence without fear of civil ramifications.

7. Case law: A person' affected by a void act, judgment or order has a right ex debito justitiae to have the act declared to be so and set aside

Craig v Kanssen [1943] KB 256 reaffirmed that the courts have Inherent power of court to declare a nullity to be so and set aside, and that it is a person's right in those circumstances for the court to do so ex debito justitiae,

"***A person who is affected by an order of the court which can properly be described as a nullity is entitled ex debito justitiae to have it set aside***"

"***Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction and it is not necessary to appeal from it.***"

***Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147** – The famous constitutional law judgment by the House of Lords wherein at p.171(B) – (E) Lord Reid said this (highlighted for emphasis distinguishing acts that are considered nullities):

"I have come without hesitation to the conclusion that in this case we are not prevented from inquiring whether the order of the commission was a nullity.

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

8. Errors of law or misconstruction of statutory provisions

To summarise the important errors of law that are finally determined by the House of Lords to constitute nullities / automatically void acts we list those in order from the Anisminic judgment for easy reference:

1. **A decision given in bad faith (meaning with favour or ill-will):** The test for bias based on the opinion of the ordinary informed lay observer has effect.

2. **A decision which the public authority or entity had no power to make**:

3. **Failure to comply with the requirements of natural justice:**

4. **Mis-construal or misconstruction of the provisions giving the public authority a power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it:**

5. **Refusal or failure to take into account something which it was required to take into account:**

6. **Basing a decision on some matter which, under the provisions setting it up, it had no right to take into account.**

9. Grounds for setting aside a judgment / court order – concluding remarks

Judges and courts are not infallible, and as Lord Denning said in ***Sirros v Moore*****,** 'jurisdiction is limited by the law, and not by a judge's own whim'. Judges do get it wrong, and sometimes when they do, their act is void, rather then being merely voidable.

The distinction is material, and we repeat, if an act is void, it is automatically void from the outset, whereas a voidable act requires an application to set aside, judicial review or an appeal to correct it.

10. Judicial acts and acts by public authorities that are void

Failure to comply with a statutory requirement resulting in a fundamental defect (meaning a defect that cannot be made right), such as failing to administer a due process such as service of proceedings, or the administration of set off within an insolvency when the creditor with a corresponding claim sought to prove against the insolvent with a greater claim against the creditor, prior to making an insolvency order when the rule (14.25 Insolvency Rules 2016) required it to be done.

A 'purported determination' with acts such as dismissing a claim or application without taking into account material evidence or facts that would otherwise have resulted in a substantially different order being made had a properly conducted judicial process been carried out. In Anisminic v Foreign Compensation Commission, at p.170 Lord Reid explained why law will always hold a purported determination to be a nullity, by putting it this way:

"They say that " determination " means a real determination and does not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity. Or, putting it in another way, if you seek to show that a determination is a nullity you are not questioning the purported determination-you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist: it is quite another thing to say that there is nothing to be questioned. Let me illustrate the matter by supposing a simple case. A statute provides that a certain order may be made by a person who holds a specified qualification or appointment, and it contains a provision, similar to section 4 (4), that such an order made by such a person shall not be called in question in any court of law. A person aggrieved by an order alleges that it is a forgery or that the person who made the order did not hold that qualification or appointment. Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly-meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court. Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity."

There are dozens of authorities on the issue of nullity, but the cruciality is in ensuring that the right cause of action is taken, and that one is not drawn into the trap of seeking to declare void what is voidable, or vice versa.

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