COLLATERAL CHALLENGE AND ENFORCEMENT NOTICES (1)

Cet animal est tres mechant-quand on l'attaque, il se defend (2)

Notorious were the fruitless labours of the poet Samuel Taylor Coleridge in steadfastly advocating a distinction between fancy and the imagination - an endeavour in semantics which was always unconvincing (3) Echoes of this kind of sophistry resonate in the very recent decision of the Court of Appeal (Criminal Division) in *R v. Wicks* (4) which seeks to resurrect, (5) a supposed dichotomy between the nullity and invalidity of an enforcement notice. Unlike Coleridge's metaphysics, such esoteric and outmoded analysis has significant practical consequences in the planning context which may prove injurious to the interests of developers who find themselves the victims of enforcement proceedings, and who wish to challenge them collaterally. (6) This is so because *R v. Wicks* limits the circumstances in which the invalidity of an enforcement notice can be raised as a defence in a criminal trial. Developers seeking to challenge the *vires* of the notice will often be forced to undertake expensive High Court litigation if a conviction is to be avoided. (7) Strict limitations on the availability of this procedure may mean that such recourse is not always possible.

In *R v. Wicks* a developer had unsuccessfully appealed against the issue of an enforcement notice, and no further appeal was instituted before the High Court. Subsequently, when prosecuted, he elected for trial at the Crown court. His defence sought to challenge the notice on *vires* grounds by asserting that it was unreasonable and , further, that it had been issued in bad faith. The learned judge ruled that unless the notice was bad on its face, the matters alleged could not be pleaded by way of defence at the trial since, as a matter of public law, the exclusive procedure for making that challenge was by way of judicial review. The defendant then pleaded guilty.

The learned judge granted a certificate of fitness for appeal of which the principal ground was whether it was appropriate to challenge the decision to issue an enforcement notice on *Wednesbury* grounds (8) (irrelevant considerations, perversity, bad faith) by way of a defence to an indictment. In its judgment, the Court of Appeal, following the earlier decision in *Bugg v. DPP* (9) decided that this defence was an abuse of the process of court. It held that in a defence to a prosecution for breach of an enforcement notice a

defendant can only plead that the enforcement notice is *ex facie* a nullity . In other cases, where what is alleged is that the defect is other than an *ex facie* defect, for example that the decision to issue an enforcement notice was unreasonable in the *Wednesbury* sense, the allegation can only be made by way of an application for judicial review in separate proceedings. The Court labelled these "invalidity" (as opposed to "nullity") cases.

The distinction between nullity and invalidity was held to be important because in the latter type of case (that is, one of "invalidity"- a *Wednesbury* type challenge) evidence would be required to establish the defect, and the criminal courts would not be suited to these issues. Lay justices in particular might find difficulties in applying the principles of an area of law which has been regarded as "complex". (10) For example, it was held that an assertion that the enforcement notice was unreasonable would involve a consideration of planning policy and other evidence not suited to a criminal trial.

In sum, the controlling principle enshrined in this judgment is thus that there is a distinction between nullity and invalidity. An *ex facie* defect is capable of rendering the enforcement notice a nullity. This is a matter which can be pleaded in criminal proceedings. A matter going merely to invalidity is a matter which must be raised by way of judicial review. The defendant must then apply for a stay of the criminal proceedings and seek leave for judicial review. This clearly necessitates the cost of separate High Court proceedings (within the strict three months time limit).

More fundamentally, the decision in *R v. Wicks* prevents the recipient of an enforcement notice from making a challenge to its *vires* as a matter of right: judicial review proceedings are subject to the discretionary leave stage, and any remedies available are themselves a matter of discretion. This is not normally so in the case of a defence in a criminal trial which can be advanced as a matter of right.

R v. Wicks is open to challenge on two grounds: (i) it is an unwarranted extension of the *O' Reilly v. Mackman* principle; (11) and (ii) it ignores well-establish decisions which hold that where a decision is perverse or tainted by irrelevancy or otherwise challengeable on *Wednesbury* grounds the error goes to jurisdiction and decision in question which is a nullity. It is void *ab initio* and not merely voidable (i.e. "invalid" in the sense meant by the Court of

Appeal). There are no degrees of nullity. This, as will be discussed below, is a fundamental orthodoxy.

O' Reilly v. Mackman

It will be recalled that in *O' Reilly v. Mackman* it was Lord Diplock who, in an *ex cathedra* judgment in which the whole House concurred, established the presumptive exclusivity of judicial review proceedings in matters of public law. Where a public law issue is at stake the matter must normally be raised by way of an application for judicial review in the High Court. (12)

The rationale for this ruling is stated to be that in an application for judicial review leave is required, and this procedural device affords important protection to public administration. Since, at the leave stage, the application is made *ex parte* by the applicant, the local planning authority is not required to bear the expense and inconvenience of raising a defence until the applicant has shown that an arguable case exists. Further, the performance of public duties is a matter in which the public has an interest and this interest must be considered amongst other matters before the administration is subject to the delays and uncertainties of litigation. This procedural device is thus seen as an important protection for public bodies in filtering out vexatious and unwarranted claims.

In addition to the leave stage there is also the further protection afforded by the strict time limit for judicial review which is also intended to provide certainty in public administration. (13) It is considered important that this protection should not be circumvented by selecting alternative means of asserting public law matters. This is the *sub silentio* reasoning underlying the Court of Appeal's decision in *R v. Wicks*.

Whilst the general rule enunciated in *O' Reilly* is relatively straightforward, the aftermath of the decision has been confounded by uncertainty since Lord Diplock's ventured to establish exceptions to the rule. These exceptions permit certain public law matters to be asserted outside the judicial review procedure. Falling within this exceptional category are cases where "the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties object to the

adoption of the procedure by writ or originating summons". (14) Presently we are concerned with the first of these exceptions.

Collateral Pleas (15)

It is important to be clear that even in *O' Reilly* itself the possibility of collateral challenge was not seen to be abrogated by the general rule . The problem has been to understand the sense in which Lord Diplock used the term "collateral". According to one view, he used the term in the sense in which it is used in this paper. A public law issue would arise collaterally in proceedings not specifically designed to resolve such issues, such as where magistrates are asked to convict a developer for breach of an enforcement notice. The applicant would only then have to proced by way of judicial review where no private rights was at stake. This intepretation, if correct, still creatres uncertainty about the challenge to enforcement notices because the planning legislation has removed private legal rights to develop land. A counter argument might be that such collateral challenge is permitted because a developer prosecuted under an invalid enforcement notice is affected in his private rights in so far as he risks the imposition of a fine.

But there is another, narrower, interpretation of Lord Diplock's judgment which descibes a public law issue as arising collaterally where it is not the central issue in the case. (16) Only cases in which private law issues dominate would the case be heard outside the judicial review procedure. If this interpetation is correct the question is whether in the present context private law issues can be said to dominate?

The first issue, of course is: which of these intepretationsof Lord Diplock's exception is is correct? According to one view, the former, wider interpretation is correct and, indeed, necessary interpretation of the reformed RSC Ord 53 which sought only to effect procedural changes to the *application* for judicial review. Since collateral challenges are not themselves *applications* for review they cannot have been affected by the introduction of the new RSC Ord. 53. (17) The opportunity to consider the matter came before the House of Lords in *Roy v. Kensington & Chelsea & Westminster Family Practitioners' Committee* (18) but unfortunately, their lordships declined to resolve the confusion. However, Lord Lowry expressed a clear preference for the former, broad approach. This is not enough to remove the uncertainty as to whether

Lord Diplock's exception permits the raising of a public law defence outside the application for judicial review.

However, the existence and value of the wider interpretation of collateral challenge exception seemed to have been recognised and applied in the important case of *Wandsworth LBC v. Winder*. (19) Here the facts were that a local authority tenant did not succeed in obtaining leave to challenge the *vires* of a rent increase. Subsequently, in county court proceedings, the local authority sought to recover possession and arrears of rent from the tenant who had maintained his refusal to pay the increase.

Notwithstanding the general rule established in *O' Reilly*, the tenant's defence was not struck out. This was so because the public law issue (the validity of the resolution increasing the rent) was capable of affording the tenant a defence to the claim against him and it was unjust to deprive the tenant of that defence. No objection was taken either to the suitability of the county court as a forum for the determination of public law issues, nor to the possible evidential difficulties in resolving such issues despite the significance attached to these issues in *Wicks.*

However the importance of the decision in the present context is somewhat diminished because Lord Fraser did not regard it as falling within the collateral exception at all. He preferred insead to distinguish *O' Reilly* on the grounds that (i) the respondent was claiming a breach of a contractual right ; and (ii) he was not to be penalised where he had not been responsible for the choice of forum.

A further difficulty arose when the Divisional Court in *Quietlynn v. Plymouth City Council* (20) refused to allow a collateral challenge in criminal proceedings partly on thee grounds that the criminal courts lack competence to deal with complex issues of public law. Conflict in the authorities was then established when the Divisional Court in *R v. Reading Crown Court ex p Hutchinson* (21) rejected the reasoning in *Quietlynn.* It recognised the fundamental importance of not forcing upon members of the public the invidious decision when confronted by *ultra vires* administrative action either to take expensive High Court proceedings (*in addition to* the costs incurred in mounting a defence to a civil or criminal matter) or to abandon their

civil/criminal defence entirely because it would not be a matter arguable outside judicial review proceedings.

In *Reading* the defendants were permitted to argue that the bye-laws were *ultra vires* the enabling statute in prosecutions for their alleged violation. They persuasively argued that it should be open to them to challenge a bye-law in the magistrates' court since bye-laws, like local justices, are part of a system of local administration. Furthermore, it was unjust to require them to incur the significant expense of separate judicial review proceedings where all that was intended was an "appeal" against a small fine.

However, decisions like *Winder* (regardless of its scope) have not found support with some senior members of the judiciary and in particular Lord Woolf who, writing extra -judicially has stated that the *Winder* decision in effect erodes the safeguards of the *O' Reilly* principle. (22) Given his forthright views it is hardly surprising that Lord Woolf should seek to narrow its scope as well as that of exceptions to the *O' Reilly* principle. The opportunity to do so arose in *Bugg v. DPP* (23) which was later cited with approval by the Court of Appeal (Criminal Division) in *R v. Bovis Construction Ltd.* (24) It was the decision in *Bugg v. DPP* upon which so much reliance was placed in *R v. Wicks*. Here (in *Bugg*) Woolf L.J. (as he then was) criticised the reasoning in cases like *Hutchinson* for overlooking different types of invalidity case, only some of which were suited to resolution in the criminal process. (25)

The proper distinction to be drawn, it was held, was between "substantive" and "procedural" defects. "Substantive" defects amounting to defects on the face of the notice *could* be the subject of collateral challenge, but not "procedural" defects. The former (a "substantive" defect) would arise where the bye-law were outwith the power pursuant to which it was made, or if it were patently unreasonable, and the latter (a "procedural" defect) would arise if the enforcement notice was successfully impugned on the grounds that the enacting authority had failed to comply with a procedural requirement governing its enactment. (26) This analysis leaves many questions affecting these definitions unresolved, but for present purposes it suffices to note that postulated the dichotomy operates at two levels: doctrinal and evidential.

First, at the doctrinal level, the purported distinction between "substantive" and "procedural" error ignored the orthodoxy that both types of error are errors going to jurisdiction resulting in the nullity of the decision impugned. The recognition that this was so was precisely the significant advance made by the House of Lords in the landmark decision in *Ridge v. Baldwin* (27) Lord Woolf flatly contradicted this by asserting that procedural error is *not* now to be regarded as a matter of excess or abuse of power. (28) With respect to his lordship this is simply untenable.

At a more practical level, the Court in *Bugg* stressed that "procedural" defects required to be established, as a matter of evidence, by a different means than "substantive" defects. The court held that since the authority responsible for enacting the by-law would not be a party to a criminal prosecution it would be denied the opportunity of defending the procedure leading to the enactment of the notice. The court would therefore be unable to decide the issue for lack of sufficient evidence. No such problem would arise in the case of "substantive" *ultra vires* because the question could be resolved by an examination of the bye-law and the enabling enactment.

The Court of Appeal in *R v. Wicks* attempted to adopt this doctrinal heresy and extend its effects. It adopted the practical distinction forged in *Bugg* between different kinds of issue in which invalidity is raised (some requiring to be proved by extrinsic evidence, and others where the error could be established by a straightforward examination of documents) but re-defined the doctrinal distinction by disapproving Lord Woolf's dichotomy between "substantive" and "procedural" defects. The true distinction to be drawn, it held, was between invalidity and nullity. A defect resulting in "nullity" can be pleaded as a defence in a criminal matter *as of right*. The court will then declare the decision *ultra vires* and void. "Nullity" cases are broadly those which Lord Woolf labelled "substantive" but excluded bad faith. In all other cases wherer it is alleged that instrument is *ultra vires* the result is mere "invalidity" Here the matter cannot be raised outside judicial review, and judicial review is not available to any applicant as a matter of right.

As a result of this ruling, where leave is refused (for example, on the grounds of delay), the impugned administrative action will not be quashed; it will remain effective in law and the accused will have no choice but to plead guilty.

This is so notwithstanding that an essential element in the offence charged (the enforcement notice) is *ultra vires*.

This analysis is, of course, to resurrect the pre- *Ridge v. Baldwin* (29) reliance upon a supposed distinction between void and voidable administrative action. (30) It utters the same heresy as was heard in *Bugg* because it assumes that an administrative authority can commit an errors of law and remain within its jurisdiction. It is now accepted that the effect of the House of Lords decision in the *Anisminic* case was that all errors of law go to jurisdiction. (31)

However, it is also a matter of some concern that *R v. Wicks* is not a loyal application of *Bugg* but an extension of it. Under *Bugg* a bye-law tainted by *mala fides* (32) was held to be capable of collateral challenge, that is, by way of a defence in criminal proceedings. The recipient could thus wait until prosecuted and plead the invalidity by way of a defence either in the Crown court or before local justices. This is so because under Lord Woolf's analysis the defect was apparently deemed to be "substantive" and not merely "procedural". Paradoxically, the obvious need for the defence to adduce evidence to prove bad faith was not thought to be a problem even though this was precisely the reason why "procedural" defects could not be pleaded.

The reservation of the possibility of a challenge on the grounds of bad faith was dismissed as an *obiter dictum* in *R v. Wicks* where it was held that all defences raising *Wednesbury* type issues, relevancy, and bad faith must be established by way of proceedings for judicial review.

This draconian application of the post RSC Ord 53 principle procedural exclusivity is not without serious pitfalls for both developers and legal advisers. The strictly applied time limit of three months (33) means that in a judicial review would probably not be available to a developer who waited until the criminal trial only then to discover the effect of the ruling in *R v. Wicks* and the consequent need to apply for judicial review. In such a case it is likely that it would be too late to comply with the time limit, which would not normally be extended.

The arguments raised in *R v. Wicks*, *Bugg* and *Quitlynn* to defend this grave position in which public interest considerations trump the right to make a defence in a criminal trial focus on two central issues.

1. That raising a public law matter by way of defence in a criminal matter would be beyond the reasonable capacity of the criminal process. This raises three subordinate objections none of which is convincing.

(a) *The expertise of the criminal court.* It has been stated that confronted with "complex" questions of public law are not equiped to deal with them. (34) Moreover, the protection available to public bodies in judicial review includes the expertise of specialist public law judges only available on judicial review.

The problem with these arguments is that they are applied selectively. Lay justices are required to confront difficult and complex issues of law as a part of their jurisdiction. One only has to recall the possible impact of EC law on s.47 of the Shops Act 1950. (35) This was also an issue about which different courts might reach different conclusions, but it was never suggested that this matter should be removed from the magistrates' jurisdiction.

(b) *The need for evidence*. In *Wicks* and *Bugg* it will be recalled that a dichomtomy was to be forged according to whether evidence was needed to prove the invalidity alleged. Merely because evidence is required does not make it a matter suitable for judicial review. Indeed, the reverse could apply. If, for example, there were a factual dispute, the ordinary civil and criminal courts would be more equipped to deal with such matters than judicial review with its limited scope for discovery and cross examination. (36) The argument on suitability of the criminal process is also weakened by Lord Justice Woolf's admission that cases of *mala fides* would be suited to collateral attack even though evidence would be required to establish liability.

(c) *Parties.*

It has also been objected that the defendant local authority reponsible for the enforcement notice would not be before the court to defend it when its validity was in question. (37) The answer to this is that the local planning authority can be required to give evidence before the justices in support of the notice. In civil proceedings it is possible to make a public authority a party. An analogy is provided by *Hazell v. Hammersmith & Fulham* (38) where banks were joined as parties their right to enforce the impugned transactions might be at issue.

2. *Certainty*.

This argument suggests that if a bye-law could be challenged in criminal proceedings different courts might reach different decisions about its validity at different times. As Feldman argues (39) a similar risk exists in relation to substantive challenge (or "nullity" cases) even if they are considered on judicial review because of the indeterminacy of the very principles of judicial review.

However, if there is force in this argument, it cannot apply in the case of an enforcement notice which takes effect *in personam.* Consistency is not an issue.

Collateral Challenge Before and After RSC Ord. 53.

The most fundamental objection to *R v. Wickes* and *Bugg* is that no practical or procedural objection was ever raised to the questioning of the validity of bye-laws (or enfporcement notices) on the grounds of unreasonableness; indeed, this possibility has been admitted at least since *R v. Rose ex p Wood* (40) where the decision of the stipendiary magistrate to inquire into the validity of a bye-law on the grounds that it had been confirmed by the Secretary of State was quashed by the Divisional Court on the grounds that there is no jurisdiction to enforce a bad bye-law. This ruling was confirmed in the classical decision in *Kruse v. Johnson.* (41) and interpreted by Lloyd L.J. in *R v. Reading Crown Court ex p Hutchinson* (42) as imposing a *duty* on the justices to inquire whether an order under which a conviction is sought is valid.

The argument that the jurisdiction (or possibly duty) to entertain collateral challenge has been curtailed by the decision in *O' Reilly v. Mackman* and the procedural changes to Ord 53 are unconvincing. It is difficult to understand that a procedural reform of civil law could have swept away the right of an accused person to mount a defence in a criminal trial. If the enforcement notice (or bye-law) is bad (e.g., for perversity) the prosecution case is fundamentally flawed, and the justices have no jurisdiction to convict under it. Justices do not

lack sufficient powers to overcome evidential problems, nor is their jurisdiction normally lifted in "complex matters". (43)

Legitimate Expectation and Fairness?

A shift in emphasis away from the *ultra vires* doctrine as the constitutional justification for judicial control of administrative action towards a broader theory based upon considerations of administrative fairness seems to have found some support amongst the academics and judiciary. (44) This approach seems, for example, more satisfactorily to explain decisions in which the propriety of judicial review of (some) powers rooted in the royal prerogative is accepted. (45) The traditonal *ultra vires* doctrine which is predicated upon obedience to Parliament could not have been developed to produce such results.

This new reasoning might permit cases like *R v. Wicks* and *Bugg* to be questioned on the alternative grounds of a breach of a legitimate expectation. (46) According to this argument, a developer could be regarded as having a legitimate expectation of not being convicted under an invalid enforcement notice. Since that expectation only comes into existence by virtue of the criminal process (the prosecution) the duty to respect it should be regarded as binding upon the criminal court (as opposed to the Divisional Court). Failure to do so might breach the duty to act fairly.

The difficulty with this argument is what is meant by the duty to act fairly in this context? It might require simply that the accused is treated according to existing legal principles. This would mean that the duty would be properly discharged when the developer was told by the criminal court to seek redress by way of judicial review. This would, however, be unconvincing if judicial review were unavailable, for example, because the time limit for an application had expired. Thus fairness must relate as much to the *outcome* as to the procedure by which the case is administered. If this argument is accepted, it is not unreasonable to assert that this criminal court should discharge its duty to act fairly by hearing submissions on the validity of the enforcement notice. (47)

Conclusion

The decision in *R v. Wicks* seeks to abrogate the right of an individual charged with the offence of breaching an enforcement notice to raise the defence that the enforcement notice is *ultra vires.* It is a serious matter that such a defence is only possible (unless reliance is placed upon a patent defect) if the accused is willing and able to bear the considerable expense of applying for judicial review. This procedure is subject to strictly applied procedural devices (such as the leave requirement and time limit), and it is not available as of right. It is very much open to question whether these constraints on the availability of judicial review (which were imposed for the protection of public bodies from vexatious litigants) were intended to be applied to curtail the rights of the accused to make a defence in a criminal trial.

It is also a questionable expression of legal policy that the right to raise a defence (and thus avoid the imposition of a criminal sanction) should be a matter for the discretion of the courts. Such a defence should be recognised as a matter of right since it challenges an essential element in the offence charged: the *vires* of the notice under which the penalty is to be imposed. The possibility that an accused can be convicted under an invalid enforcement notice also raises concerns based on the Rule of Law. It must be objectionable that an accused can be subjected to a penalty under the terms of an invalid enforcement notice which, but virtue of its *ultra vires* nature creates no offence. For this reason *R v. Wicks* may not be entirely consistent with Article 7 of the European Convention of Human Rights which provides that "No-one shall be held guilty of a criminal offence on account of any act or omission which did not constitute a crimninal offence under national law...at the time when it was committed."

FOOTNOTES.

(1) Although, as will be seen below, collateral issues can be used to describe different kinds of proceedings, unless the context otherwise requires it, the term is used here to describe proceedings the main point of which is not to challenge the validity of the enforcement notice. This is so where, for example a developer accused of an offence of breaching an enforcement notice might wish to raise the invalidity of the notice at the criminal trial. This is a

collateral attack. Such challenges are of great antiquity: see, e.g., the *Case of the Marshalsea* (1612) 10 Co Rep 68b. Collateral attack is, however, only available where the error is jurisdictional; non-jurisdictional errors can only be quashed by *certiorari*. This is because a court in a collateral action might not have a jurisdiction to quash invalid administrative action (a point misunderstood in *R v. Wicks* [1996] JPL 743 at p. 751 where the court incorrectly reasoned that this lack of competence made the collateral attack of an enforcement notice inappropriate. This is erroneous because if the notiice is vitiated by jurisdictional error, it is a nullity and the criminal court merely declares that this is so. As a nullity it does not need to be quashed. For a discussion of these matters see Craig, "*Administrative Law*" 3rd edit. Sweet & Maxwell (1994). The current and widely accepted view is that the distinction between jurisdictional and non jurisdictional error is unimportant because all errors of law go to jurisdiction. However, as will be discussed below, *R v. Wicks* and *Bugg* (*infra.)* reject this orthodoxy.

(2) *Per* Lloyd L.J. in *R v. Reading Crown Court ex p Hutchinson* [1988] 1 QB 384 at p. 392.

(3) *Biographia Literaria,* J & M Dent & Sons Ltd (1975) at pp 50-52.

(4) [1996] JPL 743.

(5) *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 QB 196, especially at p. 226.

(6) The normal procedure by which an enforcement notice is challenged is by way of an appeal to the Secretary of State under s.174(1) of the Town & Country Planning Act 1990 instituted before the notice comes into effect. The possible grounds of appeal, which are those listed in s. 174 (2), do not expressly include the *vires* of the notice.

A further appeal lies to the High Court on a point of law under s. 289 (7). At this stage, because the appellant is permitted to take points not raised before the Secretary of State, it is permissible to question the *vires* of the notice in these appeal proceedings: *John Pearcy Transport Ltd v. Secretary of State and Hounslow LBC* (1987) 53 P&CR 91. See further Heap "*An Introduction to Planning Law*" 10th edit. (1991) Sweet & Maxwell pp 264 *et seq.*) However,

it has been a fundamental principle that a citizen confronted with *ultra vires* administrative action is not required to take positive steps to challenge it; instead he may ignore it until prosecuted and raise the invalidity as a defence. The importance of this principle was most recently recognised by Woolf L.J. in *Bugg v. DPP* [1993] QB 473, at p. 500 notwithstanding the decision in that case.

(7) Either before the High Court in proceedings under s. 289 (7), or by way of judicial review. See generally Wade & Forsyth, "*Administrative Law*" 7th edition, Oxford (1994), Ch .10; Craig, "*Administrative Law*" 3rd edit. Sweet & Maxwell (1994) Ch. 12; Feldman, "*Collateral Challenge & Judicial Review: the Boundary Dispute Continues*", [1993] PL 37.

(8) *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

(9) [1993] QB 473.

(10) *Per* Webster J., *Quietlynn v. Plymouth City Council* [1988] QB 114, 131.

(11) *O' Reilly v. Mackman* [1983] 2 AC 237.

(12) The effect of the decision in *O' Reilly v. Mackman* has been widely discussed. See for example: Tanney: "*Procedural Exclusivity in Administrative Law"* [1994] PL 51; Fredman & Morris, *"The Costs of Exclusivity: Public and Private Re-examined"* [1994] PL 69; Alder *"Hunting the Chimaera- the end of O' Reilly v. Mackman"* [1993] Legal Studies 183.

(13) RSC Ord 53 r 4 (1) provides that an application for leave must be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application can be made.

(14) Per Lord Diplock in *O' Reilly v. Mackman* [1983] 2 AC 237 at p. 285.

(15) See generally Emery, *"The Vires Defence"* [1992] CLJ 308 and *"Collateral Attack"* (1993) 56 MLR 643. The Law Commission in its Report "*Administrative Law: Judicial Review and Statutory Appeals*" Law Comm No. 226 did not directly address the present issue concerning collateral defences outside the application for judicial review.

(16) See Emery *loc cit.* The diffculty arises because in an earlier passage Lord Diplock stated that judicial review applies to a claim for damages for breach of a right in private law resulting from the invalid decision of a public body thereby suggesting that all "mixed cases" involving both public law and other matters are cases where judicial review must be sought. [1983] 2 AC 237 at p. 285. (But see now *Roy* on this point [1992] 1 All ER 705)

(17) This reasoning was supported by Lord Fraser of Tullybelton in *Wandsworth LBC v. Winder*. [1985] AC 461, at p. 510.

(18) [1992] 1 All ER 705. Note the emarks of Lord Lowry at p.. 728-729.

(19) [1985] AC 461

(20) *Quietlynn v. Plymouth City Council* [1988] QB 114, 131.

(21) [1988] 1 QB 384. The reasoning of the Divisional Court was in effect subsequently upheld by the House of Lords in *DPP v. Hutchinson* [1990] 2 All ER 836.

(22) [1986] PL 220 esp. pp 233 *et seq.*

(23) *Supra.* n. (9).

(24) [1994] Crim. L. R. 938.

(25) [1993] QB 473 at p. 498.

(26) *Id.* at p. 494.

(27) [1964] AC 40. See also *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147, esp Lord Reid at 170 the effect of which was confirmed in *R v. Hull University Visitor ex p Page* [1993] AC 682. It is, of course, the case that a breach of natural justice will rarely appear on the record and so a decision taken in breach of those principles can only be quashed if a breach of natural justice is jurisdictional error.

(28) [1993] QB 473 at p.500.

(29) And pre -*Anisminic*, supra. n. (27).

(30) This void/voidable distinction has been powerfully criticised, for example, by Lord Diplock in *Hoffman-La Roche & Co. AG v. Secretary of State for Trade and Industry* [1975] AC 295, 366;Lord Hailsham in *London & Clydesdale Estates Ltd v. Aberdeen DC* [1980] 1 WLR 182, 189; and Mustill L.J. described the distinction as "obsolescent" in *R v. Home Secretary ex p Malhi* [1991] 1 QB 194, 208. See also S Sedley [1989] PL 32.

(31) *R v. Hull University Visitor ex p Page* [1993] AC 682.

(32) One of the problems with *Bugg* is the definitional one: which defects fall into each nominated category? *Mala fides* provides a good example because in law bad faith exists independently dishonesty. It can arise merely where power is used for an improper purpose: see Lord Sumner in *Roberts v. Hopwood* [1925] Ac 578, 603. The difficulty is that the pursuit of an improper purpose, as a matter requiring evidential proof, might be something which Lord Woolf would have considered more appropriate for judicial review than collateral proceedings.

(33) *Supra,* n. (13).

(34) Webster J. in the *Quietlynn* case was particularly concerned at the increasing sophistication of the principles of judicial review which made it unsuited to the jurisdiction of lay justices. [1988] 1 QB 114, 131.

(35) For a useful survey see Catherine Barnard, "*Sunday Trading: A Drama in Five Acts*" (1994) 57 MLR 449.

(36) A point made with some force by Feldman, "*Collateral Challenge & Judicial Review: the Boundary Dispute Continues*", [1993] PL 37.

(37) A point which much vexed Woolf L.J. in *Bugg*.

(38) [1991] 2 WLR 377.

(39) *Loc. c.it.*

(40) (1855) 19 JP 676.

(41) [1898] 2 QB 91.

(42) *R v. Reading Crown Court ex p Hutchinson* [1988] 1 QB 384

(43) [1988] 1 QB 384, at p.391.

(44) E.G., Harlow, "*Is the Ultra Vires Rule the Basis for Judicial Review?"* [1987] PL 543; *Council for Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374; *R v. Secretary of State for Transport ex p Richmond -upon-Thames* [1994] 1 All ER 577, at p. 595; *R v. Secretary of State for the Home Department ex p Ruddock* [1987] 1 WLR 1482, 1487 *per* Taylor J.; *R v. Panel on Take-overs and Mergers ex p. Datafin plc* [1987] 2 WLR 699

(45) *Council for Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 at least where the prerogative power in question is justiciable.

(46) It might be possible to found this argument on existing authority, see generally Forsyth, *The Provenance and Protection of Legitimate Expectations* (1988) 47 Cambridge Law Journal 238; Craig, "*Legitimate Expectations: A Conceptual Analysis"* [1992] 108 LQR 7, and see also Craig *"Administrative Law" loc. cit.* An important recent decision in this area is *R v. Ministry of Agriculture, Fisheries and Food ex p Hamble (Offshore Fisheries)* [1995] 2

All ER 714, Sedley J. If existing authority does not extend so far it may be necessary for the idea of administrative fairness to become more deeply rooted before such an argument can be sustained.

(47) Emery offers an alternative suggestion that the criminal court should be able to apply to the High Court for a "preliminary ruling" on the validity of the enforcement notice, *supra* n. (15).

5976 words

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