NOTES OF CASES

JURISDICTIONAL THEORY IN THE MELTING POT

South East Asia Fire Bricks Sdn. Bhd. v. *Non-Metallic Mineral Products Manufacturing Employees Union and Others*[1]

The recent decision of the Judicial Committee of the Privy Council on appeal from the Federal Court of Malaysia in *South-East Asia Fire Bricks* is the latest in a confusing series of cases concerning a fundamental problem of administrative law, namely the effect of ouster clauses on judicial review of the decisions of inferior tribunals. The litigation arose out of a decision of the Industrial Court, but the decision is of little immediate importance in the area of labour law in Malaysia because the relevant statutory provisions have recently been amended so as to provide an avenue of appeal from the Industrial Court to the High Court on a point of law.[2] Thus the Board's decision that section 29(3)(a) of the Industrial Relations Act 1967 was effective to exclude the jurisdiction of the High Court to quash a decision of the Industrial Court by certiorari on the ground of an error of law, except where the error goes to jurisdiction, was in effect abrogated in advance by the recent amendment. That the decision has wider implications — in the writer's opinion unfortunate ones — is the burden of this note.

The case came before the Board in the following manner. On 4th February 1974 the respondent union called out on strike its members who were employees of the appellant company.[3] The company issued notices to the employees on 5th February informing them that unless they returned to work within 48 hours their services would be deemed to be terminated. On 12th February the Minister for Labour and Manpower referred the dispute to the Industrial Court. On 16th February the strikers attempted to return to work but were locked out. They argued before the Industrial Court that the lockout was illegal because the dispute had been referred to the Industrial Court. On 8th August the Industrial Court made an award in their favour, and ordered the company to take them back, as from 16th February, on the same terms and conditions as before. The appellants applied to the High Court for certiorari to quash the Industrial Court's decision for an error of law on the face of the record. The High Court granted the application and quashed the award of the Industrial Court.[4] The union appealed to the Federal Court, which held that

1 [1980] 2 All E.R. 689.

2 See now the new s. 33A of the Act. Also in view of the Board's decision the important question whether there was an error of law by the Industrial Court did not fall for consideration.

3 The other respondents were employees who went on strike but were not members of the union.

4 [1975] 2 M.L.J. 250.

there was no error of law and restored the award.[5] The company appealed to the Judicial Committee with the leave of the Federal Court. Their counsel opened the case on the merits, but counsel for the respondents replied that the High Court had no jurisdiction to quash the award on the ground of error of law. The point had not been raised in the lower courts, but the Board allowed the respondents to rely on it after a lengthy adjournment had been granted to enable the parties to lodge a supplemental case on the question.[6] In the result the respondents' argument was upheld, so that the Board advised His Majesty the Yang di-Pertuan Agong that the decision of the Federal Court should stand, albeit on different grounds, and with it the Industrial Court's award. Thus the question whether the Industrial Court had in fact made an error of law did not fall for consideration by the Board, but the Federal Court's *ratio,* insofar as it is of any relevance after the Board's decision, presumably still remains good law.

The relevant provision, section 29(3)(a) of the Act, was in the following terms:

> "Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any Court of law."

Lord Fraser, delivering the Board's opinion, considered first of all whether the section referred to certiorari at all, or merely prohibited appeals. His Lordship considered that it did refer to certiorari since the word "quash" was ordinarily used to describe the result of an order of certiorari, and in any event the words "quashed or called into question in any court of law" were clearly directed to certiorari.

Secondly his Lordship considered whether nonetheless certiorari was still available to correct an error of law on the face of the record. In relation to this question the argument revolved around both English and Malaysian decisions.

It will be convenient to take the English decisions first. His Lordship dealt very briefly with two important decisions, *Anisminic Ltd.* v. *Foreign Compensation Commission,*[7] and *Pearlman* v. *Keepers and Governors of Harrow School.*[8] With regard to the former, his Lordship said that the case

> "... shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by way of certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 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'.... But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as a breach of natural justice, then the ouster will be effective."[9]

5 [1976] 2 M.L.J. 67.

6 The appellants appear not to have resisted the raising of a new issue. The procedure is unusual, but no doubt is justified by the importance of the question raised, the fact that the issue was one of jurisdiction, and the feasibility of granting a suitable adjournment.

7 [1969] 2 A.C. 147.

8 [1979] 1 All E.R. 365.

9 [1980] 2 All E.R. 689, 692.

With regard to *Pearlman's* case, his Lordship relied on a passage in the dissenting opinion of Geoffrey Lane L.J. as follows:

> "..., the only circumstances in which this court can correct what is to my mind the error of the county court judge is if he was acting in excess of his jurisdiction as opposed to merely making an error of law...."[10]

Thus, having interpreted English law to provide for a distinction between jurisdictional and non-jurisdictional errors, such that the former but not the latter survive a "no certiorari" clause, his Lordship dealt with the appellants' contention that it was settled law in Malaysia that the High Court could quash an award of the Industrial Court for an error of law on the face of the record.

The appellant relied first of all on *Selangor Omnibus Co. Ltd. v. Transport Workers Union, Malaya.*[11] His Lordship pointed out that *dicta* in that case which supported the appellants' contention were *obiter* only, because the decision was that the Industrial Court had jurisdiction to hear the dispute and certiorari was refused. Their Lordships considered those *dicta* erroneous.

Secondly the appellants relied on a passage from Syed Othman J.'s judgment in *Kannan* v. *Menteri Bum Dan Tenaga Rakyat,*[12] in which it was said:

> "... I am inclined to think that the better view of the law is that a plea that the court cannot interfere with a decision by reason of an ouster clause will only be accepted if the decision was reached according to the law. If the decision is not according to law, the court would invariably interfere with it. To my mind, a decision not according to law is no decision at all. In the present case, I would say that the decision of the minister can be questioned if it can be shown that it was reached as a result of no proper enquiry, or if it can be shown that the decision was a nullity for lack of jurisdiction or for failure to comply with the law."[13]

His Lordship pointed out that the passage is ambiguous: if "not according to law" meant "containing an error of law", then their Lordships would be unable to agree with it; however, having regard to an earlier passage in that judgment, his Lordship considered that was not the meaning intended.

Thirdly the appellants relied on *Lian Yit Engineering Works Sdn. Bhd.* v. *Loh Ah Fon and others,*[14] in which Abdul Hamid J. had relied on the previous Malaysian decisions cited above, concluding that it was "well established law" that the High Court could issue certiorari to quash an Industrial Court decision which on the face of it was wrong in law. Their Lordships were unable to agree with this decision unless it could be supported on the ground that the Industrial Court had acted in excess of its jurisdiction.

Fourthly the appellants cited *obiter dicta* in two judgments of Abdoolcader J., in *Sungei Wangi Estate* v. *Uni s/o Narayan Nambiar*[15]

10 [1979] 2 All E.R. 365, 375.
11 [1967] 1 M.L.J. 280.
12 [1974] 1 M.L.J. 90.
13 *Ibid.,* p. 92.
14 [1974] 2 M.L.J. 41.
15 [1975] 1 M.L.J. 136.

and in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. I),*[16] which contain *dicta* to the same effect. In the latter case Abdoolcader J. said:

> "I do not think that there can be any doubt now that it is settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue certiorari to quash for jurisdictional defect, error of law on the face of the record or manifest fraud."[17]

Their Lordships considered this passage to be erroneous, but commented that the same learned judge had distinguished, correctly as they thought, in *Mak Sik Kwong* v. *Minister of the Interior, Malaysia (No. 2),*[18] between those errors of law that give rise to an excess of jurisdiction and those that do not. Their Lordships referred also to another decision of Abdoolcader J. in *Chan Siew Kin* v. *Woi Fung Sheng Tin Medical Store and Another,*[19] in which he held that a provision in the Control of Rent Act 1966 which he construed as an ouster clause was effective to exclude certiorari except for "manifest defect of jurisdiction in the authority that made the decision or manifest fraud in the party procuring it"[20] and referred to his decision in *Mak Sik Kwong (No. 2).*[21]

Their Lordships did not comment on this latter dictum, but having dealt with the authorities in the manner indicated, they referred to Section 53A of the Act, which provided that the Industrial Court may, and shall, if so directed by the Attorney-General, refer any question of law to the Attorney-General for his opinion and make an award not inconsistent with the opinion. This section, in their Lordships view, had the effect that the Attorney-General's opinion was effectively binding on the Industrial Court and thus reinforced the view that it was intended to keep questions remitted to the Industrial Court away from the ordinary courts, so that awards of the Industrial Court were not subject to review by certiorari merely on the ground of error of law.

To consider the implications of this decision it is necessary to consider briefly the history which lies behind it but which was, unfortunately, barely touched on by their Lordships. The all-important decision in the *Anisminic* case is the inevitable starting point. The facts and decision in that case are too well known to bear repetition here, but the point which is of importance is that that case gave rise, by its broad conception of an error of law, to the suggestion that the House of Lords had effectively obliterated the distinction between jurisdictional and non-jurisdictional errors of law. This suggestion was no mere fanciful projection, but a serious view, propounded both by eminent jurists and by eminent judges, of the effect of the decision, looked at realistically.[22] This view has been put forward not only as the practical result of the *Anisminic* case, but indeed as a generally desirable result, because it entails that whenever a tribunal or ad-

16 [1975] 2 M.L.J. 168.
17 *Ibid., p.* 170.
18 [1975] 2 M.LJ. 175.
19 [1978] 1 M.L.J. 144.
20 *Ibid.,* p. 146.
21 See *supra.,* p. 18.
22 See, for example Lord Diplock, *Administrative Law: Judicial Review Reviewed* [1974] C.L.J. 237; Gould, *Anisminic and Jurisdictional Review* [1970] P.L. 358. The literature on this point is notoriously voluminous.

ministrative authority makes an error of law in reaching its decision, the decision is a nullity and can be quashed by certiorari, and therefore that this is so regardless of the existence of a provision which purports to remove the jurisdiction of the courts to review the decision, because, on the view being considered, all errors of law go to jurisdiction. It will be seen that on this view the concept of an error of law on the face of the record is immaterial — if all errors of law are jurisdictional it matters not whether the error appears on the face of the record or not.

This position has in particular received support from Lord Diplock and Lord Denning. Speaking in Kuala Lumpur in June 1979 Lord Diplock made it clear he still adheres to this view:[23]

> "I will not pause to revive the barren analyses that there used to be undertaken by myself among others of what facts found by the tribunal went to jurisdiction and what did not, for the concept of what does go to jurisdiction has since become so broad as to make them obsolete.
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> ... The jurisdiction to set aside decisions of inferior tribunals for error of law upon their face is regarded by Professor Wade as an anomaly; but the nullity of such decisions is capable of rational explanation on the basis that any jurisdiction which the statute conferred on them to determine the matter in dispute is limited to deciding cases in accordance with the law. The effect of the famous case of *Anisminic* in the House of Lords is, I believe, no less than this.
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> ... To ask oneself the wrong question in the course of reaching a decision was held in the *Anisminic* case to go to jurisdiction and so to render the decision void. That case concerned the decision of an administrative tribunal, but the same principle has since been extended to the exercise by administrative authorities, which are not tribunals, of a power to make decisions in individual cases that affect legal rights. Since any error of law on matters relevant to the decision will cause the decision-maker to ask himself the wrong question, want of jurisdiction has now merged with error of law on the part of administrative authority made in the course of reaching a decision whether it appears on the face of the record or not, to constitute the principal ground on which administrative acts may be held by the courts to be null and void.
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> ... In reducing English administrative law to the application of two broad principles, the observance of the rules of natural justice and the avoidance of error in the interpretation and application of the law, I am exercising the privilege of a lecturer to anticipate what I believe my colleagues or my successors in a judicial capacity may declare authoritatively to be the law. I do not claim that they have done so yet."

In fact the last sentence was not quite true, because in *Pearlman* v. *Harrow School,*[24] decided in July 1978, Lord Denning M.R. delivered himself of a clear expression, and in fact so far the only frank admission from the bench, of the view held by Lord Diplock:

> "The High Court has, and should have, jurisdiction to control the proceedings of inferior courts and tribunals by way of judicial review. When they go wrong in law, the High Court should have power to put them right. Not only in the instant case to do justice to the complainant, but also so as to secure that all courts and tribunals, when faced with the same point of law, should decide it in the same way. It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in what court it is heard. The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an

[23] See Lord Diplock, *Judicial Control of Government* (Second Tun Razak Memorial Lecture) [1979] 2 M.L.J, cxl, cxliii.
[24] [1979] 1 All E.R. 365, 372.

> error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it."

Lord Denning was in a majority because Eveleigh L.J. concurred with his decision in the case, though without committing himself to principles enunciated by Lord Denning. However Geoffrey Lane L.J., dissenting, while agreeing that there was an error of law involved in the case, did not consider it to be a jurisdictional error.[25] It will be recalled that it was this dissenting opinion which found favour with the Privy Council in *South East Asia Firebricks.*

In *Re Racal Communications Ltd.*[26] Lord Denning expressed views similar to those he expressed in *Pearlman's* case. His brethren in the Court of Appeal agreed with his decision, but again without committing themselves to his broad view of jurisdictional error. In the House of Lords[27] Lord Diplock, delivering the leading judgment, disapproved both decisions. However his *ratio,* with which the other members of the House agreed, was that the Court of Appeal in each case had ignored the fact that it was considering the decision of an inferior court from whose decision an appeal to the Court of Appeal was governed by statute, which is not the same situation as when the High Court reviews the decision of a tribunal with a statutorily circumscribed jurisdiction. Lord Diplock went on however to express views simiar to those expressed in the lecture quoted above, reiterating that the "old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished" by the *Anisminic* case.[28]

The decision in *Re Racal Communications Ltd.* came a matter of a few days after *South East Asia Firebricks.* Yet clearly the two cases cannot stand together. If, as Lord Diplock and Lord Denning would have it, the distinction between jurisdictional and non-jurisdictional errors no longer exists (in Lord Diplock's case one might have to add "for practical purposes") then the decision in *South East Asia Firebricks* must be wrong, because all errors of law are jurisdictional and therefore the ouster clause is ineffective to exclude the jurisdiction of the High Court. In the presence of this deep division among the English judges on an important question which touches the continued development of administrative law, what solution can be offered?

Formally, there is sufficient authority for the Diplock/Denning view for it to prevail; conversely there is ample authority for the traditional view. In England the courts will presumably follow *Re Racal,* which is a House of Lords decision, in preference to *South-East Asia Firebricks,* a Privy Council decision, notwithstanding the fact that four leading judges have thrown their weight behind the

[25] *Ibid.,* p. 376.
[26] [1980] 2 W.L.R. 241, sub nom. *In re a Company.*
[27] [1980] 2 All E.R. 634.
[28] Lord Edmund Davies, *ibid.,* p. 644, disagreed with both Lord Diplock and Lord Denning. Interestingly enough his Lordship was also a party to the decision in *South East Asia Firebricks,* to which his Lordship alone made reference. It is perhaps unfortunate that Lord Diplock, presumably unaware of that decision, expressed no opinion on it.

traditional view.[29] One factor which will weigh in favour of the Diplock/Denning view is the complete absence of any discussion of the complex theoretical arguments relating to jurisdictional errors in the opinion of the Privy Council in *South-East Asia Firebricks.* In Malaysia the courts will presumably regard themselves as bound by the traditional view, which is part of the *ratio* in *South-East Asia Firebricks;* the alternative view put forward by Abdoolcader J. in *Mak Sik Kwong No. 1,* although not specifically disapproved by the Privy Council is clearly no longer tenable in view of the Privy Council's decision, if indeed it was tenable before.[30] The courts in other jurisdictions in which the Privy Council is the final court of appeal are free to choose, but would be best advised to adopt the Diplock/Denning view, since the continued allegiance of the Privy Council to the traditional view would appear to depend, at best, upon the composition of the bench. The courts should not regard themselves as formally bound by the Privy Council decision in preference to the House of Lords decision because there can be no case where they will have to consider a statute which is in *pari materia* to the Malaysian Industrial Relations Act as it stood at the relevant time. It should be stressed that *South East Asia Firebricks* should not be regarded as a binding authority whenever the courts have to consider an ouster clause in the same terms as that considered in *South East Asia Firebricks;* the statutory context is a most important aspect of the decision and clearly each statute should be considered in the light of all its provisions.

As has been suggested, what is curiously lacking in the decisions referred to, Lord Denning's judgment in *Pearlman's* case excepted, is any but the most superficial discussion of the deep problems of policy and legal theory which are involved in the issue of jurisdictional error. An analysis of these problems will not be undertaken in this brief note, but it is suggested that the points now to be mentioned deserve some ventilation in a superior tribunal, ventilation which is conspicuously lacking in both *South East Asia Firebricks* and, to a lesser extent, in *Re Racal Communications.*

It would seem that the burden of justification now lies with the adherents of the traditional view. To anyone but a lawyer, the idea of a jurisdiction to make errors of law is one which almost defies understanding, and one might be forgiven for wondering whether the idea would have made any sense even to lawyers if the law prior to *Anisminic* had not developed in such a curiously patchwork fashion. The traditional view is lacking in logic because it allows an inferior tribunal or authority to misinterpret the law, whether accidentally or by design, so as to affect the width of its powers and the rights of individuals; as Lord Denning has pointed out it also allows two tribunals of the same type to reach opposite results in similar instances, a circumstance which is hardly designed to bring credit to legal institutions. The distinction between jurisdictional and non-jurisdictional errors has always been a semantic distinction which, unlike some semantic distinctions, is not capable of any rational explanation. The

[29] Lord Fraser, Lord Edmund Davies, Lord Russell and Lord Keith. The last named, somewhat curiously, concurred with the majority in *Re Racal,* but did not deliver an opinion.

[30] See Jain, *Administrative Law of Malaysia and Singapore,* p. 404 ff.

best one can say is that some errors go to jurisdiction and some do not — the rest depends, of course, on the facts of the case, which is much as to say that it is a question of policy. It is hard to see how any error of law which affects the decision of a particular case can truly be such that it does not involve the tribunal or authority asking itself the wrong question, or determining the case by a procedure which is forbidden by the law.

Once these arguments are accepted the traditionalists are flushed out into the open as adherents of a view which depends ultimately entirely on policy considerations. The policy consideration which is most persuasive is that the legislature should be allowed, if it expresses itself sufficiently clearly, to give tribunals and authorities the power to determine certain questions of law in cases of a relatively trivial nature speedily, efficiently, and without recourse by aggrieved parties to lengthy litigation in the courts designed to obtain reversal of the decision under the guise of judicial review. Adoption of the Diplock/ Denning view closes the door on non-interference. This position is superficially attractive but gives too much weight to efficiency and too little to justice. More injustice is caused in the pursuit of efficiency than in the pursuit of evil; to allow the legislature to cut off the individual's ultimate recourse to law in any instance is to deny the rule of law. Even looking at the matter from the point of view of practical politics, if the draftsman finds a formula that works he will use it again, but if he cannot he will probably abandon the chase and spend his energies in pursuit of worthier goals. This has been the British experience, but the draftsman has proved more pertinacious elsewhere. The fundamental point which appears not to have been sufficiently appreciated is that in preserving judicial review despite an ouster clause one is not ignoring the intention of the legislature, but rather giving effect to the only logically possible intention of the legislature, because to give powers to an authority coupled with powers to determine exclusively what in law those powers are is to give unlimited powers to that authority, a situation which can never be intended and which indeed can never, according to any familiar notions of law, occur.

Accordingly it is suggested that *South East Asia Firebricks* represents the last flicker of a dying ember, and that the guiding principle should henceforth be taken to be that put forward in *Re Racal Communications,* in whatever jurisdiction the question arises.

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