THE VOID ORDER
by

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If an 'ORDER' in court was made because the Judge or any party to the judgment had no jurisdiction, broke the law or ignored due process, that order is VOID.

Anything AFTER the point when the person acted ultra vires is void AB INITIO - ie IT DIDN"T HAPPEN.

You can apply to have that VOID ORDER nullified.

The interesting and important nature of a 'void' order of a Court is not fully understood and appreciated in England and this article is written to assist the understanding of a 'void' order and to assist legal professionals in any concerns they may have in submitting to a Court that its order is void, if indeed it is void.

In Anlaby v. Praetorius (1888) 20 Q.B.D. 764 at 769 Fry L.J. stated on the issue of void proceedings that:

"A plaintiff has no right to obtain any judgement at all".

A void order does not have to be obeyed because, for example, in Crane v Director of Public Prosecutions [1921] it was stated that if an order is void ab initio (from the beginning) then there is no real order of the Court.

In Fry v. Moore (1889), 23 Q.B.D. 395 Lindley, L.J. said of void and irregular proceedings that it may be difficult to draw the exact line between nullity and irregularity. If a procedure is irregular it can be waived by the defendant but if it is null it cannot be waived and all that is done afterwards is void; in general, one can easily see on which side of the line the particular case falls.

A void order results from a 'fundamental defect' in proceedings (Upjohn LJ in Re Pritchard (deceased) [1963] 1 Ch 502 and Lord Denning in Firman v Ellis [1978] 3 WLR 1) or from a 'without jurisdiction'/ultra vires act of a public body or judicial office holder (Lord Denning in Pearlman v Governors of Harrow School [1978] 3 WLR 736).

A 'fundamental defect' includes a failure to serve process where service of process is required (Lord Greene in Craig v Kanssen Craig v Kanssen [1943] 1 KB 256); or where service of proceedings never came to the notice of the defendant at all (e.g. he was abroad and was unaware of the service of

proceedings); or where there is a fundamental defect in the issuing of proceedings so that in effect the proceedings have never started; or where proceedings appear to be duly issued but fail to comply with a statutory requirement (Upjohn LJ in Re Pritchard [1963]). Failure to comply with a statutory requirement includes rules made pursuant to a statute (Smurthwaite v Hannay [1894] A.C. 494).

A 'without jurisdiction'/ultra vires act is any act which a Court did not have power to do (Lord Denning in Firman v Ellis [1978]).

In Peacock v Bell and Kendal [1667] 85 E.R. 81, pp.87:88 it was held that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly stated.

It is important to note therefore that in the case of orders of Courts with unlimited jurisdiction, an order can never be void unless the 'unlimited jurisdiction' is 'limited' in situations where it is expressly shown to be so. In the case of orders of the Courts of unlimited jurisdiction where the jurisdiction is not expressly shown to be limited, the orders are either irregular or regular. If irregular, it can be set aside by the Court that made it upon application to that Court and a person affected by the irregular order has a right –ex debito justitiae – to have it set aside. If it is regular, it can only be set aside by an appellate Court upon appeal if there is one to which an appeal lies (Lord Diplock in Isaacs v Robertson (1984) 43 W.I.R. PC at 128-130). However, where the Court's unlimited jurisdiction is shown to be limited (for example: a restriction on the Court's power by an Act of Parliament or Civil or Criminal Procedure Rule) (Peacock v Bell and Kendal [1667]; Halsbury's Laws of England) then the doctrine of nullity will apply.

Similarly, if the higher Court's order is founded on a lower Court's void act or invalid claim then the higher Court's decision will also be void (Lord Denning in MacFoy v United Africa Co. Ltd. [1961] 3 All ER).

The main differences between a 'void' and 'voidable' order or claim is that:

(i) a 'void' order or claim has no legal effect ab initio (from the beginning/outset) and therefore does not need to be appealed, although for convenience it may sometimes be necessary to have it set aside (Lord Denning in MacFoy v United Africa Co. Ltd. [1961] and Firman v Ellis [1978]) whereas a 'voidable' order or claim has legal effect unless and until it is set aside. Therefore, while a void order or claim does not have to be obeyed and can be ignored and its nullity can be relied on as a defence when necessary (Wandsworth London Borough Council v. Winder [1985] A.C. 461), a voidable order or claim has to be obeyed and cannot be ignored unless and until it is set aside; and

(ii) a 'void' order can be set aside by the Court which made the order because the Court has inherent jurisdiction to set aside its own void order (Lord Greene in Craig v Kanssen [1943]) whereas a 'voidable' order can only be set aside by appeal to an appellate Court.

A person affected by both a void or voidable order has the right – ex debito justitiae – to have the order set aside (which means that the Court does not have discretion to refuse to set aside the order or to go into the merits of the case) (Lord Greene in Craig v Kanssen [1943])

The procedure for setting aside a void order is by application to the Court which made the void order, although it can also be set aside by appeal although an appeal is not necessary (Lord Greene in Craig v Kanssen [1943]) or it can quashed or declared invalid by Judicial Review (where available) and where damages may also be claimed.

Although an appeal is not necessary to set aside a void order, if permission to appeal is requested and if out of time the Court should grant permission because time does not run because the order is void and the person affected by it has the right to have it set aside (Lord Greene in Craig v Kanssen [1943].

A void order is incurably void and all proceedings based on the invalid claim or void act are also void. Even a decision of the higher Courts (High Court, Court of Appeal and Supreme Court) will be void if the decision is founded on an invalid claim or void act, because something cannot be founded on nothing (Lord Denning in MacFoy v United Africa Co. Ltd. [1961])

A void order is void even if it results in a failure of natural justice or injustice to an innocent third party (Lord Denning in Wiseman v Wiseman [1953] 1 All ER 601).

It is never too late to raise the issue of nullity and a person can ignore the void order or claim and raise it as a defence when necessary (Wandsworth London Borough Council v. Winder [1985] A.C. 461; Smurthwaite v Hannay [1894] A.C. 494; Upjohn LJ in Re Pritchard (deceased) [1963]; Lord Denning in MacFoy v United Africa Co. Ltd. [1961]).

In R v. Clarke and McDaid [2008] UKHL8 the House of Lords confirmed that there is no valid trial if the bill/Indictment has not been signed by an appropriate officer of the Court because Parliament intended that the Indictment be signed by a proper officer of the Court.

In Bellinger v Bellinger [2003] UKHL 21 the House of Lords confirmed that a void act is void from the outset and no Court – not even the House of Lords (now the Supreme Court) – has jurisdiction to give legal effect to a void act no matter how unreasonable that may seem, because doing so would mean reforming the law which no Court has power to do because such power rests only with Parliament. The duty of the Court is to interpret and apply the law not reform or create it.

It is important to note that if a claim is invalid the plaintiff can start all over again unless he is prevented from doing so due to limitation as in the case of Re Pritchard (deceased) [1963] or estoppel – for example; where the Claimant applied to the Court for permission to correct/amend the claim and permission was refused; or the plaintiff or his solicitor had been negligent in ignoring a material fact when filing the invalid claim so that the plaintiff is estopped by the principle that he

should not be allowed a 'second bite at the cherry'; and in the case of a criminal trial if there has been a fundamental technical defect the Court can order a new trial (venire de novo – may you cause to come anew).

Chronology of some case laws relating to void orders:

1888:

In Anlaby v. Praetorius (1888) Fry L.J. stated on the issue of void proceedings that:

(i) a plaintiff has no right to obtain any judgement at all.

1889:

In Fry v. Moore (1889) Lindley, L.J. said that:

(i) it might be difficult to draw the exact line between nullity and irregularity. If an order is irregular it can be waived by the defendant but if it is null then it renders all that is done afterwards void. In general one can easily see on which side of the line the particular case falls.

1921:

Crane v Director of Public Prosecutions [1921]:

(i) if an order is void ab initio (from the beginning) then there is no real order of the Court.

1943:

In Craig v Kanssen [1943] Lord Greene confirmed that:

(i) an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside;

(ii) so far as procedure is concerned the Court in its 'inherent jurisdiction' can set aside its own order and an appeal from the order is not necessary; and

(iii) if permission to appeal is requested and if out of time the Court should grant permission because time does not run because the point is that the order is invalid and the person affected by it has the right to have it set aside.

1953:

In Wiseman v Wiseman [1953] 1 All ER 601 – Lord Denning confirmed that:

(i) The issue of natural justice does not arise in a void order because it is void whether it causes a failure of natural justice or not;

(ii) a claimant or defendant should not be allowed to abuse the process of Court by failing to comply with a statutory procedure and yet keep the benefit of it and for that reason also a void act is void even if it affects the rights of an innocent third party.

1961:

In MacFoy v United Africa Co Ltd. [1961] Lord Denning confirmed that:

(i) a void order is automatically void without more ado;

(ii) a void order does not have to be set aside by a Court to render it void although for convenience it may sometimes be necessary to have the Court set the void order aside;

(iii) a void order is incurably void and all proceedings based on the void order/invalid claim are also void

1963:

In Re Pritchard (deceased) [1963] Upjohn LJ confirmed that:

(i) a fundamental defect in proceedings will make the whole proceedings a nullity;

(ii) a nullity cannot be waived;

(iii) it is never too late to raise the issue of nullity; and

(iv) a person affected by a void order has the right – ex debito justitiae – to have it set aside.

1978:

In Firman v Ellis [1978] Lord Denning confirmed that:

(i) a void act is void ab initio

1979:

Lord Denning, in his book 'The Discipline of Law' – Butterworths 1979 – page 77, states:

(i) although a void order has no legal effect from the outset it may sometimes be necessary to have it set aside because as Lord Radcliffe once said: "It bears no brand of invalidity on its forehead".

1985:

Wandsworth London Borough Council v. Winder [1985] A.C. 461:

(i) a person may ignore a void claim and rely on it as a defence when necessary.

2003:

In Bellinger v Bellinger [2003] the House of Lords confirmed that:

(i) a void act is void from the outset; and

(ii) no Court – not even the House of Lords (now the Supreme Court) has jurisdiction to give legal effect to a void act no matter how unreasonable that may seem because doing so would mean reforming the laws which no Court has power to do because such power rests only with Parliament. The duty of the Court is to interpret and apply the law not reform it.

Conclusion based on the case laws referred to above:

(i) an application to have a void order set aside can be made to the Court which made the void order;

(ii) the setting aside must be done under the Court's inherent power to set aside its own void order;

(iii) the Court does not have discretion to refuse the application because the person affected by the void order has a right to have it set aside;

(iv) an appeal is not necessary because the order is already void;

(v) if permission to appeal is sought and if sought out of time permission should be given because as the order is void time does not run; it is never too late to raise the issue of nullity; and the person affected by the void order has a right to have it set aside;

(vi) a void order can be quashed or declared unlawful by Judicial Review where available and where damages may also be claimed;

(vii) the whole proceedings is void if it was based on a void act;

(viii) a void order does not have to be obeyed because it has no legal effect from the beginning;

(ix) as it is never too late to raise the issue of nullity a person can ignore the void order and rely on nullity as a defence when necessary;

(x) a void order is void even if the nullity is unjust or injustice occurs to an innocent third party;

(xi) an order of a Court of unlimited jurisdiction is only void if it can be expressly be shown that the unlimited jurisdiction is limited in that situation, or the order is founded on an invalid claim or void act;

(xii) no Court (not even the Supreme Court) has jurisdiction to give effect to a void act and the duty of the Court is only to interpret and apply the law not to reform or create it as such power rests only with Parliament.