

## The curate's egg revisited

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In my 2011 paper "Adjudications and the curate's egg" I asked the question, "If only part of an adjudicator's determination is bad, must the claimant lose the whole of the adjudicated amount?" I contrasted the approach of the Queensland Supreme Court and the NSW Supreme Court. I was critical of the approach of the NSW Supreme Court.

Subsequently, Basten JA in the NSW Court of Appeal in *Cardinal Project Services v Hanave* [2011] NSWCA 399 referred to the curate's egg at [52] where he said:

If the determination is indeed legally ineffective in all respects, it would be doubtful whether the Court could condition declaratory relief (or an order setting aside the decision) upon the applicant making such payment as would be required by the determination if validity could be determined part by part, like the curate's egg. Accordingly, the underlying assumption was inconsistent with the total invalidity for all purposes.

The issue arose again in *BM Alliance Coal Operations v BGC Contracting (No 2)* [2013] QSC 67 where Applegarth J in the Queensland Supreme Court found that the respondent had only established one of three jurisdictional errors by the adjudicator. Since the error related to approximately \$4 million [which the claimant agreed to repay to the respondent] of the approximately \$28 million assessed as the progress payment, Applegarth J refused to declare the adjudicator's decision void. The result was that the claimant was able to recover as a progress payment the balance of approximately \$24 million.

By contrast, in *Anderson Street Banksmeadow v Helcon Contracting Australia* [2013] NSWSC 657 Stevenson J in the NSW Supreme Court considered the decision of Applegarth J and came to the opposite conclusion. At [17] Stevenson J said that he was initially attracted to the approach of Applegarth J in *BM Alliance Coal Operations* but at [18]–[19] he said:

However, on reflection, I have come to the conclusion that in light of what fell from the Court of Appeal in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394 I cannot accept that submission.

In *Brodyn*, Hodgson JA (with whom Mason P and Giles JA agreed) held that a determination made in breach of the rules of natural justice is void, and not merely voidable.

At [22] Stevenson J said that he could not see any basis upon which would not accede to the respondent's application that he should make a declaration that the determination is void even assuming that he has a discretion.

Stevenson J does not cite what it is in *Brodyn* that precluded him from accepting the submission. I can't see anything in *Brodyn* to support Stevenson J's conclusion. Hodgson JA referred to 'void and voidable'. Hodgson JA did not say that the fact that

an adjudication determination is void means that the court must make necessarily make a declaration to that effect.

*Anderson Street* was decided on 30 May 2013 before *State of NSW v Kable* [2013] HCA 26 was decided by the High Court on 5 June 2013. The High Court took a quite different view to that of the NSW Court of Appeal on “void and voidable”. Had Stevenson J had the benefit of reading the judgment in *Kable*, he might have come to a quite different conclusion.

Briefly, in *Kable*, Levine J in the NSW Supreme Court, purporting to act under an Act that was subsequently held to be invalid, ordered the detention of Mr Kable. The question for the High Court was what effect, if any, the decision of Levine J had in the period before the Act was held to be invalid. The NSW Court of Appeal held that the order of Levine J was void and Mr Kable was entitled to damages for false imprisonment.

In *Kable* at [22] the majority in the High Court said:

The difficulties associated with using words like “void” and “voidable” in connection with administrative actions have long been recognized. Writing in 1967, H W R Wade said that:

[T]here is no such thing as voidness in an absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy. If and when that remedy is taken away, what was void must be treated as valid, being now by law unchallengeable. It is fallacious to suppose that an act can be effective in law only if it has always had some element of validity from the beginning. However destitute of legitimacy at its birth, it is legitimated when the law refuses to assist anyone who wants to bastardise it. What cannot be disputed has to be accepted.

The point is that Applegarth J in *BM Alliance* recognised that if he refused to make the declaration of invalidity of the adjudicator’s decision, the claimant could enforce it. Once the respondent has no remedy, the adjudication decision is in law unchallengeable. That is consistent with the High Court’s approach. Stevenson J erred in finding that he had no alternative but to make the declaration of invalidity.

At [48] Applegarth said:

In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33] and in later cases the High Court has recognised that a Court may exercise judicially its discretion to decline to grant relief where the circumstances make it just that the remedy should be withheld. This is such a case. The order which I propose to make takes account of both the policy underlying the granting of relief in the exercise of the Court’s supervisory jurisdiction to correct jurisdictional error and the statutory context in which the application for such relief was made. The

orders proposed by BGC are appropriate to remedy the jurisdictional error, whilst permitting BGC to retain the amount which would have been awarded to it if the second respondent had made his adjudication decision free of jurisdictional error. Such a course advances the policy of the Act. The particular circumstances of the case make it just that I decline to declare the decision void, subject to the condition that BGC pay BMA that part of the award which was affected by jurisdictional error, together with interest and GST.

A declaration is an equitable remedy. The very reason why the Court has a discretion as to whether it will make a declaration is so that the Court can do what is just. Perhaps, following *Kable*, the NSW Supreme Court will see its way to decline to make the declaration where the circumstances make it just that the declaration should be withheld even though the adjudication determination is void.