IN THE PRIVY COUNCIL No. 5 of 1978

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

EQUITY DIVISION

IN PROCEEDINGS NO. 762 OF 1977

B E T W E E N :

FERD DAWSON CALVIN (Plaintiff) Appellant

- and -

JOHN HENRY BROWNLOW CARR (First-named Defendant)

JOHN HENRY BROWNLOW CARR
BLAKE RAYMOND PELLY
DENIS PATRICK ROWE
SIR JOHN WORROKER AUSTIN
ROBERT ANDREW HOWELL
WILLIAM FRASER GORDON
JOHN HORACE INGHAM
THOMAS RENDELL STREET
REX JAMES WHITE (Second-named Defendants)

JAMES JOSEPH MEEHAN
HECTOR JOHN MAHONEY
DOUGLAS GEORGE McKAY
JACK BARRY HICKMAN
THOMAS JOSEPH CARLTON
NORMAN SWAIN
BRIAN HILTON KILLIAN (Third-named Defendants)

Respondents

CASE FOR THE RESPONDENTS

1. This is an appeal by the Plaintiff ("Calvin") Record

pursuant to the grant of discretionary leave under Clause 2(b) of the Order in Council of 1909, from a reserved judgment of Mr. Justice Rath sitting in the Equity Division of the Supreme Court. This judgment was delivered on 23rd June 1977 after a hearing that lasted for eleven days. His Honour dismissed with costs Calvin's statement of claim.

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2. Calvin sued for injunctive and declaratory relief: primarily, he sought an order restraining the Defendants from giving effect to a disqualification of one year's duration imposed upon him under the Rules of Racing of the Australian Jockey Club ("the Rules of Racing")

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3. On 26th March 1976, the Stipendiary Stewards of the Australian Jockey Club ("the Stewards") awarded this disqualification following an inquiry by them into the performance of a three-year old colt, "Count Mayo", in a race called the Eastlakes Handicap, Second Division, held at Randwick Racecourse on 13th March 1976. The Stewards charged Calvin, who was a part-owner of the horse, with having been a party to a breach by Count Mayo's jockey, Peter William Cuddihy, of Rule 135(a) of the Rules of Racing.

4. Rule 135 is in the following terms:

(a) Every horse shall be run on its merits.

(b) The rider of every horse shall take all reasonable and permissible measures throughout the race to ensure that his horse is given full opportunity to win or to obtain the best possible place in the field.

(c) Any person who in the opinion of the Stewards has breached, or was a party to breaching, any portion of this Rule may be punished, and the horse concerned may be disqualified.

5. Calvin appealed to the Committee of the Australian Jockey Club ("the Committee") against his disqualification which, according to the Stewards' decision, ran for one year from 26th March 1976.

6. This basis upon which Calvin was entitled to appeal to the Committee will be explained later:
see Paragraphs 19 and 20 (infra).

7. On 9th April 1976, the Committee commenced the hearing of the appeal. It was heard together with the appeals of jockey Cuddihy and of Ronald Thomas Dawson, the stable foreman who had been in charge of "Count Mayo" on the day of the race. They also had been charged with breaching Rule 135 in connection with the running of the horse; the Stewards had found each of them guilty and imposed a period of disqualification equal to that imposed upon Calvin. Vol.II p.207

8. The hearing of the appeal concluded on 13th April 1976. After a retirement to consider their decision, the Committee dismissed the appeals of both Calvin and Cuddihy and confirmed the disqualification of each of them. Dawson's appeal was allowed. Vol.II p.351

9. Calvin was at all relevant times the owner or part-owner or lessee of a number of racehorses and also had a substantial interest in the ownership of a bloodstock stud in the management of which he was actively concerned. The principal effect of his disqualification so long as it subsisted was to preclude any racehorse in which he had any interest from being entered in any race run under the Rules of Racing. A further consequence of the disqualification was that his membership of the Australian Jockey Club ("The Club") was forfeited by virtue of the operation of rule 11 of the Club's rules. This rule is as follows:-

"11 Any member who shall be disqualified the Rules of Racing by the Committee of the Club, or whose disqualification by the stewards or Committee of any registered meeting, or of any registered or other Club, shall have been adopted by the Committee of the Club, shall upon such disqualification or adoption, ipso facto cease to be a member of the Club, provided that in the case of a member disqualified pursuant to any of the following Rules of Racing of the Club, Nos. 22, 23, 24 or 25,

such member shall not ipso facto cease to be a member of the Club, but the Committee may request him to give an explanation of his conduct, or to resign, and if the member so requested shall not within fourteen days of his receiving such request either offer an explanation of his conduct satisfactory to the Committee or resign, the Committee may cancel his membership, and thereafter such member shall cease to be a member of the Club."

10. Shortly after the Committee had dismissed his appeal, Calvin commenced proceedings against the Defendants (Respondents) to challenge the validity of the disqualification. He sought and obtained an interlocutory injunction to restrain the Defendants from giving effect to it pending the hearing of the suit. As it happened, that hearing did not commence until 17th April 1977, by which time the period of disqualification had expired.

11. The A.J.C. is a "principal Club" within the meaning of the Rules of Racing. As such, it exercises close and detailed control over horseracing within its territorial area, namely, New South Wales and the Australian Capital Territory. In each of the other States of the Commonwealth there is a principal Club with corresponding functions.

12. The several principal Clubs have formulated, and administer, a set of rules known as the Australian Rules of Racing ("A.R.R."). These constitute one of the two elements in the Rules of Racing; the other of such elements consists of the Local Rules ("L.R."), formulated by the principal Club, which apply in that Club's territory.

A.R.R. 2

13. Anyone who wishes to take part in horse-racing in New South Wales may do so only upon condition of being contractually bound by the Rules of Racing. Furthermore, a disqualification imposed or recognized by a principal Club will be enforced by other principal Clubs. Thus, if Calvin had not obtained interlocutory relief, the disqualification would have been effective throughout Australia.

14. The Australian Jockey Club is a voluntary,

unincorporated association. It functions and powers are derived from two sources: firstly, the Rules of Racing; secondly, a statute known as the Australian Jockey Club Act 1873-1948 ("the Act").

15. Section 4 of the Act provides that for the purposes of any legal proceedings against the Club, the Chairman for the time being shall be sued as nominal defendant for and on behalf of the Club. The first defendant, as Chairman of the Club at all relevant times, was joined as the nominal defendant in the proceedings.

16. The group of persons collectively described as the second defendants were sued in their capacity as the members of the Committee of the Club who heard and determined Calvin's appeal.

17. The persons described as the third defendants were sued in their capacity as the stipendiary stewards employed by the Club. Except for the defendant Killian, all of them took part in the inquiry into the running of "Count Mayo" in the race and in the decisions to disqualify Calvin, Cuddihy and Dawson.

18. The Stewards have wide-ranging powers and functions under the Rules of Racing. The provisions of Rule 4 are relevant to the issues that arose in the proceedings and call for special consideration in this appeal:

"4 Any act done or decision made by a Committee of a Club or by Stewards in the exercise or intended exercise of any right power or authority conferred by or under any of the Rules shall except where otherwise provided in the Rules be final and conclusive."

"It may be necessary to refer in argument to the following rules, which are to be found in the yellow booklet at the back of Volume 2 of the Record: Rules 8, 175, 182, 196."

19. The Committee is invested with statutory powers under section 32 of the Act to hear and determine an appeal by any person considering himself aggrieved by a decision of the stewards, in the exercise of their disciplinary powers, to disqualify a person. Section 32 is as follows:-

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"32(1) In any of the following cases, that is to say:

(a) where the stewards of the Australian Jockey Club or of any other club or race meeting registered by the Australian Jockey Club under the Rules of Racing of the Australian Jockey Club have:

(i) disqualified or warned off any person,

(ii) disqualified any horse

(iii) revoked the license of any trainer, jockey or rider or suspended any such license for a period exceeding one month, or

(iv) fined any person a sum of not less than ten dollars; or

(b) where any body, empowered by the Club, in accordance with the Rules of Racing of the Australian Jockey Club, to hear and determine appeals from any decision of the Committee or stewards of any club registered as aforesaid which is within the jurisdiction of such body, has dismissed any appeal in respect of any matter referred to in paragraph (a) of this subsection or neglected or refused to hear and determine any such appeal,

any person considering himself aggrieved thereby may appeal to the Committee of the Australian Jockey Club:

Provided that no appeal under this subsection shall lie to the Committee of the Australian Jockey Club unless the appellant has first exercised any other right of appeal which may be conferred on him by the Rules of Racing of the Australian Jockey Club.

(2) (a) Any appeal to the Committee of the Australian Jockey Club under subsection one of this section shall be in the nature of a re-hearing. Such Committee in hearing any such appeal shall sit as in open court.

(b) The decision of such Committee on any such appeal shall be final and shall be given

effect to by the stewards of the Australian Jockey Club or the committee or stewards of any other club or race meeting to whose jurisdiction the appellant is subject.

(3) (a) For the purpose of hearing and determining any such appeal the Committee of the Australian Jockey Club and the chairman or other person presiding at the hearing of any such appeal shall have the powers, authorities, protections and immunities conferred by the Royal Commissions Act, 1923, as amended by subsequent Acts, on a commissioner and the chairman of a commission respectively appointed under Division 1 or Part II of that Act, as so amended, and the said Act, as so amended, section thirteen and Division 2 of Part II excepted, shall mutatis mutandis, apply to any witness summoned by the appearing before such Committee.

(b) An appellant shall be entitled to be represented before such Committee and may be so represented by a barrister, solicitor or agent.

(4) The decision of such Committee or any such appeal shall be upon the real merits and justice of the case and it shall not be bound

(5) (a) **Expressions used in this section shall have the meanings respectively ascribed thereto in the Rules of Racing of the Australian Jockey Club.** ~~respectively racing of~~

(b) This section shall be construed as supplemental to and not in derogation of or limited by the Rules of Racing of the Australian Jockey Club."

20. Local Rules 71, 72 and 73 make provision in relation to the exercise by the Committee of their appellate powers. These rules are as follows:-

"71 Subject to the provisions of the Australian Jockey Club Act, the Committee of the Australian Jockey Club may on the hearing of the appeal:

(a) Remit the matter in dispute to be reopened or reheard by the Committee of the Club or Association or Stewards from whose decision the

appeal is brought; or

(b) Upon the evidence already taken and any additional evidence, which in their opinion it was desirable to admit or obtain, make such order as in their opinion ought to have been made by such Committee or Stewards, or as in their opinion may be necessary to ensure the determination on the merits of the real question at issue; and

(c) Make such order as they may think proper for payment of the costs and expenses of the appeal and with reference to the disposal of the said sum of £50."

"72 Subject as aforesaid the Committee may at its discretion allow the appellant to be represented by counsel on the hearing of any appeal and in any case may have counsel present to assist the Committee."

"73 Subject as aforesaid no fresh evidence shall be adduced on the hearing of any appeal to the said Committee except by leave of the Committee."

21. Section 6 of the Royal Commissions Act 1923-1934, which is referred to in section 32 of the Act, is as follows:

"6 Every commissioner shall in the exercise of his duty as a commissioner have the same protection and immunity as a judge of the Supreme Court."

Vol.II, pp.4-6

22. Calvin's claim for relief against the Stewards was based on allegations, firstly, that in the course of their inquiry and reaching their decision they infringed the principles of natural justice in several respects; and, secondly, that there was either no evidence, or no evidence upon which they could reasonably conclude, that Calvin had been guilty of the offence charged.

Vol.I, pp.66-70

23. Rath J. held that the stewards were bound to observe the rules of natural justice in the conduct of their inquiry and in coming to any decision to impose a punishment under the Rules of Racing. The Respondent's submissions on this

point are to be found at paragraphs 49 to 51 (infra).

24. His Honour rejected, correctly it is submitted, several of the grounds upon which it was alleged on Calvin's behalf that the Stewards had departed from the principles of natural justice. But he came to the conclusion that their proceedings and their decision were vitiated by a denial of natural justice in other respects. The principal matters upon which His Honour relied in this connection were that Calvin was neither present while the Stewards questioned Cuddihy nor afterwards informed of statements made by Cuddihy in the course of giving his evidence, in particular, statements that were capable of implicating Calvin in the alleged offence. His Honour regarded these matters "as a serious defect in the proceedings". His Honour also founded upon the circumstances that Calvin was not present in the Stewards' room while evidence was taken from other persons called before the Stewards for the purposes of their inquiry and that he was not advised of what they had told the Stewards.

Vol.I, p.76
Vol.I, pp.83-85

25. It is submitted that His Honour was wrong in those conclusions and that the Stewards did not infringe any rule of natural justice relevant to their proceedings. This argument will be developed later in this case.

26. Consequentially upon his finding that there had been a departure from natural justice in the conduct of the steward's inquiry so as to vitiate the disqualification imposed by them. His Honour next dealt with the question whether the disqualification was nevertheless valid and effective because of its confirmation by the Committee upon the hearing of Calvin's appeal.

Vol.I, p.85.30
p.95.20
pp.127.15-128

27. At this point it should be mentioned that on Calvin's behalf it was contended that the decision of the Committee was itself invalid by reason of a number of alleged defects in their proceedings. It was further contended that even if those grounds of challenge were not made out, a decision of the Commmittee adverse to Calvin could not cure the defect found by His Honour to have invalidated the Stewards' decision.

Vol.I, pp.7-8

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28. The grounds upon which it was contended that the proceedings before the Committee and its decision were defective and invalid may be sumarized as follows. It is to be noted, however, that the trial judge expressly rejected each of those grounds after carefully weighing the evidence adduced to support them.

Vol.I, pp.109-116.5

29. The first allegation raised by Calvin on this part of the case was that the Committee denied natural justice because in the conduct of the appeal and in its dismissal "the Committee, notwithstanding protest made, conducted the hearing on one day (9th April 1976) for an inordinate period approximating 13 hours". This allegation was amplified in particulars in which it was asserted that having regard to the nature of the charge and the complexity to the issues involved, the length of time over which the hearing extended (i) was per se inordinate; or (ii) created an appearance of such inordinate length as to give rise to a reasonable suspicion on the part of a fair-minded bystander that Calvin would not obtain a fair trial; or (iii) imposed excessively on the capacities of counsel representing the parties and assisting the Committee and of members of the Committee and witnesses; or (iv) gave rise to a reasonable suspicion by fair-minded observers that the capacities of members of the Committee were being imposed upon excessively and that thereby Calvin and the other appellants might not obtain a fair hearing; or (v) was not a bona fide exercise of the power to hear and determine appeals under section 32 of the Act.

Vol.I, p.112.3

30. In rejecting all those allegations His Honour pertinently observed that neither Calvin nor those who appeared as his legal representatives before the Committee were called to give evidence in support of them.

Vol.I, p.116.8

31. Another alleged defect in the Committee's proceedings was that certain members of the Committee has admittedly placed bets on horses running in the race. His Honour rejected this point quite summarily by saying:

> "The full circumstances of these bets are known. None of them gave rise to any interest in a member of the Committee that would or could be affected by the outcome of the appeal

> There was no suggestion that any member of the Committee had, or could reasonably be suspected of having, any feeling of hostility to the plaintiff by reason of the failure of Count Mayo to do better than it did. I see no support for the plaintiff's case on this ground."

32. His Honour dismissed in short order another alleged ground of complaint concerning the validity of the Committee's proceedings. It had been alleged in the statement of claim that members of the Committee took into account things observed by them during the running of the race without informing Calvin what they were, thereby depriving him of a proper opportunity to make an answer with respect to them. As to this, His Honour said: Vol.I, p.116.18

> "There is no evidence that any member of the Committee had any personal knowledge relating to any of the matters in issue in the appeal, and grounds in the statement of claim to this effect are not supportable in any way."

33. This left for consideration by His Honour an allegation of misconduct, namely, a charge that one member of the Committee, Mr. R. A. Howell, Q.C., adopted a partisan attitude against Calvin during the hearing of the appeal. Calvin did not condescend to support this serious allegation from the witness-box; he was content to rely on evidence from two racing journalists, who were his friends. They made an unfavourable impact upon His Honour, as appears from the following passage in the judgment: Vol.I, pp.116. 23-124.19

> "The impression I formed of these witnesses was that they were (to adopt an expression from the statement of claim) manifestly partisan. Evidence was also given by members of the Committee, Mr. Comans (solicitor and counsel for Dawson) and His Honour Judge Falkingham. This evidence establishes clearly that the observations of the plaintiff's witnesses were erroneous and that Mr. Howell conducted himself throughout the hearing of the appeal calmly, courteously and properly."

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Vol.I, p.8.29
Vol.I, p.124.

33A. Calvin further alleged in his statement of claim that the decision of the Committee was unsupported by evidence, or by evidence upon which reasonable men could act. The trial judge found adversely to Calvin on these issues.

34. It is understood that on the hearing of this appeal to Your Lordships' Board, the decision of the trial judge on the several points mentioned in paragraphs 29-33 (inclusive) will not be challenged. Nevertheless, it may be of assistance to the Board to have in summary form a description, as given in those paragraphs, of the context in which the only appeal points relied upon by Calvin arise.

35. These points may be stated as follows:

(a) By reason of the Stewards' failure to apply the principles of natural justice in the course of their inquiry and in imposing the disqualification, their decision was void, as opposed to voidable.

(b) Therefore the Committee had no jurisdiction to hear Calvin's appeal: there was no disqualification to appeal against. In consequence, so it is said, the purported confirmation of the "disqualification" was ineffectual in law.

36. Each of these propositions is challenged.

37. As to the first of them, it will be noticed that His Honour found it unnecessary to examine the question in any great detail. He regarded the decision of the Privy Council in Durayappah v. Fernando ((1967) 2 A.C. 337 at pp.354-5) as concluding the point in favour of the defendants. (See also R. v. Aston University Senate (1969) 2 W.L.R. 1418). It is submitted that this view was correct. The decision of the Stewards was valid unless and until it was challenged; and despite any denial of natural justice that may have vitiated their proceedings, their decision was a springboard from which an appeal to the Committee could be validly undertaken and determined. It would be incongruous in the extreme if Calvin, having voluntarily invoked the appellate jurisdiction of the Committee, could be heard to say that it had no jurisdiction to hear and determine his appeal. It is submitted

that his election so to appeal precludes him from denying the jurisdiction of the Committee to deal with and decide the case.

VOID OR VOIDABLE? Paragraphs 38 - 40

38. (a) Reported cases differ on the question whether a decision given in defiance of the rules of natural justice is "void" or merely "Voidable". This difference is vividly illustrated in the speeches in Ridge v. Baldwin ((1964) A.C. 40), even though this was a case in which that particular issue did not fall for decision

(b) In any attempt to reach a final resolution of this question, there should be put to one side those authorities which characterise a decision made in defiance of one of the rules of natural justice as a "nullity" when successfuly challenged. When successfully challenged it must be a "nullity", but from this no conclusion follows as to its status before challenge.

(c) Those who take the view that the denial of natural justice produces "voidness" adopt that concept in a very limited sense: they have never suggested that a party entitled to impugn the decision may, without mounting a successful challenge, allege its voidness in subsequent proceedings. And it has never been asserted that third parties are not bound by an unchallenged decision.

39. Reported cases provide many examples of decisions made in defiance of the rules of natural justice being treated as "voidable" either for all purposes or, at least, for some purposes. The following illustrations will serve to demonstrate the proposition:

(a) There is high authority in quite explicit terms for the view that a decision tainted by breach of one of the principles of natural justice - the rule that no one may be a judge in his own cause - is merely voidable and not void: Dimes v. Grand Junction Canal Co. ((1852) 3 H.L.C. 759); Phillips v. Eyre ((1870) L.R. 6 Q.B.1 at p.22). It would be contrary to reason and quite capricious if a breach of this particular rule produces mere "voidability"

and a breach of the other rule (audi alteram partem) were to produce "voidness".

(b) None of the authorities gainsay the proposition that where the decision of an inferior domestic tribunal constituted by an organisation is vitiated by a denial of natural justice, and the rules of that organization provide for an appeal to a superior domestic tribunal, a right of appeal is validly available. This principle is clearly recognized in White v. Kuzych ((1951) A.C. 585) and in Annamunthodo v. Oilfield Workers Union ((1961) A.C. 945). Now, if the initial decision - that of the inferior tribunal - were void in the sense of being a nullity for all purposes, an appeal to the superior domestic tribunal would not be available: for there would be nothing to appeal against. The proper conclusion is therefore that the initial decision has at least enough validity to ground an appeal: in other words, it is at worst voidable.

(c) The rules of waiver illustrate the same point. The cases state that whilst defects of justice apparent on the face of the record cannot be waived, all other defects (including defects arising out of a denial of natural justice) can be waived: R. v. Comptroller General of Patents, ex Parte Parke Davis & Co. ((1953) 2 W.L.R. 760 at 764), R. v. Essex Justices ((1927) 2 K.B. 475 at 489). If decisions given in defiance of the rules of natural justice were void for all purposes, waiver would never be possible. One can no more waive a complete nullity than one can ratify a complete nullity: Creswick Grand Truck Gold Mining Co. v. Hassall ((1868) 5 W.W. & A.B.(E) 49); Ashbury Railway Carriage & Iron Co. v. Richie ((1875) L.R. 7 H.L. 653); Danish Mercantile Co. v. Beaumont ((1951) Ch. 680).

(d) The ancient prerogative writs (or their modern counterparts) together with the remedies of injunction and declaration are the procedural vehicles for challenging a decision given in denial of natural justice. All these forms of remedy have been held to

be discretionary: see R. Williams ((1914) 1 K.B. 608); R. v. The General Commissioners for the Purposes of the Income Tax; Ex Parte Princess Edmonde de Polignac ((1917) 1 K.B. 486): R. v. Aston University (supra). No decision in respect of which relief may be refused in the exercise of judicial discretion can be a nullity.

(e) There is authority, never overruled, that mandamus will not lie to compel an official to perform a statutory duty unless his purported performance of that duty in defiance of the rules of natural justice has been previously quashed by certiorari: R. v. Kent Justices ((1880) 44 J.P. 298). The principle underlying this decision must be that departure from those rules does not produce a nullity.

(f) Bias against a prosecutor does not prevent a plea of autrefois acquit: see R. v. Simpson ((1914) 1 K.B. 66). Such a result would be impossible if the accused's conviction were in truth a nullity.

40. It is submitted therefore that Rath J. was correct in following the decision of the Privy Council in Durayappah's case as authority for the proposition that a decision arrived at in breach of natural justice is voidable rather than void. Considerations of principle and the weight of prior authority point in the same direction. Vol. I, pp.127.16-128.5

41. (a) Turning specifically to the proposition outlined in paragraph 35(b) (supra) it is submitted on behalf of the defendants that the Committee had jurisdiction, upon the true interpretation of section 32 of the Act, to hear and determine an appeal against a purported disqualification in fact imposed by the Stewards. Further, provided that (as was correctly held to be the case) the Committee embarked on a hearing of the whole matter de novo and that (as was also correctly held to be the case) its proceedings were not vitiated by any denial of natural justice, the effect of the appeal is that the decision thereon cures any defect in the decision of the Stewards.

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(b) The authorities on this aspect of the case are as follows:

(i) Privy Council:

Pillai v. Singapore City Council ((1968) 1 W.L.R. 1278) decides the law in the manner contended for above. But it does not stand alone. De Verteuil v. Knaggs ((1918) A.C. 557 especially at p.562) is authority for the same proposition: for if an appeal from one tribunal to the same tribunal can cure an initial defect, an appeal to a different tribunal must have the same effect. The reasoning in White v. Kuzych ((1951) A.C. 585) is in the same line.

(ii) House of Lords:

The issue has never been dealt with. The point was specifically left open in Ridge v. Baldwin.

(iii) High Court of Australia:

The question has been decided favourably to the Respondent's contention no less than three times. See Meyers v. Casey ((1913) 17 C.L.R. 90, per Barton A.C.J. at p.101); per Isaacs J. at pp.114 et seq; Australian Workers Union v. Bowen (No.2) ((1948) 77 C.L.R. 601, per Latham C.J. at p.618, per Rich J. at p.619, per Starke J. at 619 and per Dixon J. at pp.631-2; and Twist v. Randwick Council ((1976) 12 A.L.R. 379, especially per Mason J. at pp.387-8.

(iv) Canada:

The same view has been taken by the Canadian courts. See Clark

and Ontario Securities Commission ((1966) 46 D.L.R. (2d) 585); King v. University of Saskatchewan ((1969) 6 D.L.R. (3d) 120).

42. It appears from the reasons for judgment that His Honour was concerned about an apparent or possible conflict between two decisions of the Privy Council already alluded to, namely, Annamunthodo v. Oilfield Workers Trade Union and Pillai v. Singapore City Council (supra). The former case has been interpreted in the Supreme Court of New South Wales as laying down a principle that an unsuccessful appeal to a higher domestic tribunal will not "cure" a denial of natural justice in the lower domestic tribunal, notwithstanding that no such defect vitiates the proceedings on appeal. But the Privy Council in Pillai treated Annamunthodo as laying down no such proposition. The New South Wales cases are Hall v. New South Wales Trotting Club ((1976) 1 N.S.W. L.R. 323 per Holland J. at p.341) and Ethell v. Whalan ((1971) 1 N.S.W.L.R. 416 per Hope J. at pp. 431-432). In each of those cases the decision in Annamunthodo (supra) was treated as being directly contrary to that in Australian Workers Union v. Bowen (supra) and the Privy Council was followed. No reliance should be placed on either Hall or Ethell. Relevant authorities, namely, Meyers v. Casey (supra) and Pillai were not cited. Vol.I, pp.95.22-103.15

43. If Annamunthodo's case stands as authority for the proposition that no domestic appellate hearing, however fairly conducted, and even though conducted by way of hearing de novo, can cure denial of natural justice by the primary domestic tribunal, it should be put aside, for the following reasons:

(a) it is against the weight of authority;

(b) it would produce multiplicity of litigation;

(c) its reasoning, in distinguishing White v. Kusych, is unsatisfactory;

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(d) it is based on the fallacy that an initially wrongful decision is void for all purposes; and

(e) it involves acceptance of two wholly inconsistent propositions, viz:

(i) the appellate tribunal has jurisdiction to hear an appeal, but

(ii) has no jurisdiction to decide the appeal it hears.

Vol.I, p.96.16-98.3

44. There is, however, a further point concerning the supposed conflict between the Privy Council and the High Court of Australia upon this particular aspect of the law. The point was raised before Rath J. but not decided. It is submitted that the decisions of the High Court referred to in paragraph 41(b)(iii) (supra) establish for all purposes of Australian law that an unsuccessful appeal, if conducted regularly and in conformity with the principles of natural justice, will cure any defect by way of departure from those principles by the lower tribunal. Consistently with the principle ennunciated by the Privy Council in Australian Consolidated Press Limited v. Uren ((1967) 117 C.L.R. 221 at 238, 241) the law for Australia in this respect ought to be regarded as settled and ought not to be disturbed because of a seemingly inconsistent decision of the Privy Council in a non-Australian case. See also in this connection the decision of the Privy Council in Geelong Harbour Trust Commissioners v. Gibbs Bright & Co. ((1975) 48 A.L.J.R. 1 at p.4.).

Vol.I, pp.70.7-73.16

45. Before Rath J., it was submitted on behalf of the defendants that Rule 4 of the Rules in its application to the facts of this case, precluded any challenge to the decision of the Stewards on the basis that it was tainted by a denial of natural justice. This submission was rejected. The Respondents will rely upon it on the hearing of this appeal. Shortly stated, the argument to be presented is that if the Stewards made a bona fide attempt to exercise their authority relating to a matter within their jurisdiction under the Rules and if what they did is reasonably capable of being referred to

a power so vested in them, their acts are not to be invalidated. Lack of bona fides on their part was neither alleged nor proved. To give Rule 4 such an interpretation is not to oust the jurisdiction of the courts, because cases of mala fides are not excluded from legal challenge. So construed, therefore, the rule is not contrary to public policy.

46. Another aspect of the operation of Rule 4 is relevant to this case. The rule protects from challenge decisions of the Committee of a Club in the exercise or intended exercise of any authority conferred by the Rules. In hearing the appeal, the Committee's jurisdiction was partly derived from the Rules: See A.R. 199. Thus the decision of the Committee is "final and conclusive" even if (which is disputed) the decision of the stewards was a nullity (void).

47. The trial judge rejected submissions made on behalf of the first and second defendants to the effect that section 6 of the Royal Commissions Act operated to protect the Committee's decision from judicial review by the Supreme Court. It is submitted that in so doing His Honour erred in law. These defendants relied and will rely before Your Lordships' Board on the principle that a judge of a superior court of record—such as the Supreme Court of New South Wales - is and always has been immune from the supervisory jurisdiction of that Court exercisable by prerogative writs or by proceedings analogous thereto. The present proceedings fell into the latter category. And if - as is submitted - the effect of section 32(3)(a) of the Act is to confer this particular immunity on members of the Committee "for the purposes of hearing and determining" an appeal, it follows that they cannot be restrained from putting their decision into effect. Further, the Stewards are under a statutory obligation (see section 32(2)(b)) to give effect to the Committee's decision.

Vol.I, pp.92.12-94.27

48. It is further submitted that the Appellant, having approbated the appellate jurisdiction of the Committee by lodging and prosecuting his appeal was not entitled

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to reprobate that jurisdiction by asserting that there was no decision of the Stewards from which an appeal could lie. An alternative approach of an analgous kind is that in the exercise of judicial discretion whether to grant or refuse injunctive or declaratory relief in this case, the circumstances that:

(i) the Appellant's invoked the jurisdiction of the Committee;

(ii) that he received a fair hearing de novo there;

Vol.II, pp.318-319 (iii) that he submitted to the Committee through his leading counsel, that the Stewards' alleged departure from natural justice was a ground for allowing the appeal.

require that any such relief should be refused.

49. (a) The respondents now turn to the question of whether the stewards denied natural justice. It is submitted that, on the evidence, and the facts found by His Honour, they did not.

(b) At the outset, however, it is necessary to examine the extent to which the rules of natural justice bound the stewards. It will be seen that these rules applied only in the most attenuated and penumbral sense.

Vol.I, p.75.20-76.4 (c) In the first place, as His Honour made plain, the Rules of Racing (which have both contractual and statutory force) leave little, if any, scope for the application of the maxim "no one can be a judge in his own cause". Stewards are, by the nature of their functions, compelled to act as policemen, witnesses, prosecutors and judges. They could not fulfil their functions if they did not. This has always been recognised in Australia: see, for example, the judgment of Adam J. in R. v. Brewer, ex parte Renzella ((1973) V.R. 375).

(d) In the second place, the applicability of the other rule of natural justice, viz. that a person is entitled to be heard in his own defence, must be considered in the context of how horseracing is in fact conducted.

Depending on the precise facts and circumstances of each case, the detailed obligations imposed on a tribunal by the rule will vary.

(e) As Tucker L.J. said in Russell v. Duke of Norfolk ((1949) 1 All E.R. 109 at 118):

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Lord Atkin spoke to similar effect in General Medical Council v. Spackman ((1943) A.C. 627 and 638). Both pronouncements were approved by the Privy Council in University of Ceylon v. Fernando ((1960) 1 All E.R. 631.)

(f) Applying these principles to the present case, it will be seen that one vital factor in measuring the applicability of the rules is the urgency of the task embarked on by the stewards, and the need to complete any inquiry speedily. Speed is essential both because of the necessarily fugitive nature of the evidence given on such occasions and because a decision must sometimes be arrived at almost instantly, e.g. to determine whether a jockey whose conduct is in question can ride in the next race, or whether an owner whose conduct is in question should be permitted to start a horse in the next race.

(g) In these circumstances, it is difficult to see what duties the stewards had to discharge other than the elementary ones alluded to by Harman J. in Byrne v. Kinematograph Renters Society Limited ((1958) 2 All E.R. 579 at 599):

> "What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that really there is anything more."

This test was also approved by the Privy Council in Durayappah's Case.

50. (a) Did, then, the stewards comply with each of Harman J's three requirements? The respondents submit that this question must be answered in the affirmative. These requirements will be considered in turn.

(b) It cannot be suggested that the appellant did not know the nature of the accusation made against him. Indeed, the pleadings do not seem so to allege. Despite the appellant's presence in court during the whole of the proceedings he did not elect to give evidence - which is surely inconsistent with an assertion that he was ignorant of the charge made against him. Moreover, His Honour made an explicit finding of fact:

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> "I am satisfied that the plaintiff was aware of the nature of the charge against him, and of the nature and significance of the stewards' observations of the race."

(c) The appellant was given a full opportunity to state his case. Indeed, so much appears from the transcript of the proceedings before the stewards. In this regard, it is worth noting that there has been no suggestion that he made any request of the stewards - either for information, for access to records or documents, for an opportunity to cross-examine such person, or for further particulars - which was refused by the

stewards. He was allowed to put to the stewards precisely the case he wanted to put.

(d) Thirdly, His Honour's findings negative any suggestion of lack of good faith in the stewards.

This being so, how can it be suggested that the proceedings before the stewards were other than "right and just and fair"? This is the ultimate test: see per Lord Morris of Borth-y-Gest in Wiseman v. Borneman ((1971) A.C. 297).

51. On what matters, then, did His Honour rely on his conclusion that the stewards denied natural justice? They were three in number: (a) That the stewards did not show the appellant Cuddihy's evidence, or invite him to be present when such evidence was given, or give him the opportunity of being present; (b) that he was not privy to the evidence given by Compbell, Mason, Galea and Todd; and (c) that he was denied an opportunity to address on penalty. These do not amount to a denial of natural justice. As to (a), there is no objection to the taking of Cuddihy's evidence in the absence of the appellant: see Durayappah's Case. At most, the stewards' obligation was to acquaint the appellant with such of Cuddihy's evidence as the appellant could rebut if he wished. Cuddihy's evidence conerned two points: (i) whether Cuddihy rode the horse otherwise than on its merits, and (ii) if so, did he do so on the appellant's instructions. There was no point in acquainting the appellant with the minutiae of the evidence as to how in fact Cuddihy managed the horse: since the appellant did not ride the horse, he could not have given any evidence on that topic. The stewards clearly did inform the appellant that they were concerned that, the horse not having been raced on its merits, Cuddihy might have ridden the horse to the appellants' instructions, and the appellant frankly admitted that it had been ridden to his instructions. Therefore, the only relevant

evidence given by Cuddihy was disclosed to the appellant. If the appellant had asked to see or to be apprised of Cuddihy's evidence and it had been withheld from him, different considerations might apply - but that was not the case. It is also of some relevance to note that at no stage did the appellant complain that he was ignorant about the nature of the evidence given by his own jockey.

As to (b): the evidence as to what bets were placed on the horse and in what circumstances did not have to be disclosed to the appellant, as the evidence was either favourable to the appellant or neutral in character. It did not require an answer by the appellant, and hence did not have to be disclosed to him.

As to (c): the appellant had no right to address as to penalty - see per Lord Atkinson in Weinberger v. Inglis ((1919) A.C. 606 at 631-632). Moreover, when putting his case there was nothing to prevent him from addressing as to penalty. Furthermore, after having been found guilty, there was nothing to stop him putting any submissions as to penalty which he wished to put.

For these reasons, it is submitted that, on the primary facts as found by His Honour, no conclusion that the stewards denied natural justice can be sustained.

52. Finally, it is submitted that this appeal should be dismissed with costs for the following (among other)

R E A S O N S :

1. His Honour ought not to have held that the Stewards in their inquiry infringed any relevant rule of natural justice: (paragraphs 49-51).

2. That any departure by the Stewards from any rule of natural justice relevant to the conduct of their inquiry rendered their decision not void, but voidable only; so that any such defect was cured by the

properly conducted re-hearing of the case undertaken by the Committee on the appeal: (paragraphs 37-42).

3. That the law in Australia on the question whether a denial of natural justice renders a decision void for all purposes or merely voidable has been settled favourably to the Respondent by a consistent course of decisions in the High Court of Australia and ought not to be altered: (paragraphs 43-44).

4. That Rule 4 operated to preclude any challenge to the decision of the Stewards on the ground that it was tainted by a departure from natural justice: (paragraph 45); and operated to protect the Committee's decision from any such challenge (paragraphs 45 and 46).

5. That section 6 of the Royal Commissions Act, made applicable to the Committee by section 32(3)(a) of the Act, protected the Committee's decision from legal challenge: (paragraph 48).

6. That the Appellant, having invoked the jurisdiction of the Committee by appealing to it, cannot be heard to deny such jurisdiction on the ground that there was nothing to appeal against: (paragraph 48).

7. That relief should be refused on discretionary grounds: (paragraph 48).

8. That His Honour was correct in dismissing the Appellant's statement of claim.

T.E.F. HUGHES

R.P. MEAGHER

CATHERINE F. WEIGALL

No. 5 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

EQUITY DIVISION

B E T W E E N

FERD DAWSON CALVIN — Appellant (Plaintiff)

- and -

JOHN HENRY BROWNLOW CARR and OTHERS — Respondents (Defendants)

CASE FOR THE RESPONDENTS

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