Case No: C1/2012/1824

Neutral Citation Number: [2013] EWCA Civ 555
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MRS JUSTICE LANG DBE
[2012] EWHC 1731 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2013

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE BEATSON
and
THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL

- -

Between :

THE QUEEN ON THE APPLICATION OF HILL	**Appellant**
- and -	
INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Kenneth Hamer (instructed by **Cope's Solicitors**) for the **Appellant**
Ms Catherine Callaghan (instructed by **Bates Wells & Braithwaite London LLP**) for the **Respondent**

Hearing dates: 15th & 16th April 2013

- -

Judgment

Lord Justice Longmore:

1. Mr Nicholas Albert Hill is a chartered accountant who had the misfortune to become the defendant in disciplinary proceedings brought by his professional body the Institute of Chartered Accountants in England and Wales, ("the Institute"). The charge was that he had committed an act or default likely to bring discredit on himself, the Institute or the profession of accountancy. The particulars were (broadly) that, as the Finance Director of a company subsequently re-named as KPSS (UK) Ltd ("KPSS") and trustee of the KPSS pension scheme, he together with the managing director of KPSS, Mr Heal, incorporated a company of their own subsequently re-named as Park View Asset Management ("PVAM") of which Mr Hill was a director and shareholder. He then between November 2001 and November 2004 caused over £100,000 to be transferred from KPSS to PVAM. He also caused PVAM to buy premises at Faraday Close in Eastbourne which were occupied by KPSS and which were later sold for a profit of £145,000. He later caused PVAM to buy another property and office furniture which were leased to KPSS for well above the market rent. None of these transactions were disclosed in KPSS's accounts or to Deloitte's, the auditors of both KPSS and its pension scheme. The facts were largely undisputed and civil proceedings by KPSS were later settled for an undisclosed sum. Mr Hill's defence in the disciplinary proceedings brought in April 2009 was that he did not appreciate that there was anything wrong or unprofessional about these transactions.

2. In due course a hearing which was, in the end, to take 6 days began before a disciplinary tribunal consisting of Mr Harris FCA as Chairman, Mr Brooks FCA as the second professional member and Mr Mander as the requisite lay member. Mr Underhill acted as Legal Assessor; the Institute's advocate was Mr O'Fathaigh and Mr Hill's advocate was an experienced solicitor Mr Cope. No doubt the tribunal members had many professional commitments and it was impossible to sit for 6 consecutive days. They sat on 10th and 11th November 2009 and then adjourned to resume on 17th and 18th December 2009. By this time Mr Hill was being cross-examined. His evidence resumed on the next available date for hearing 27th January 2010 and the final day was 8th April 2010. The tribunal decided that Mr Hill was guilty of unprofessional conduct and that he was to be excluded from membership of the Institute. He was also fined £25,000 and required to pay costs of £32,000. An appeal to the relevant Appeal Committee was dismissed on 4th February 2011 although the costs bill was reduced.

3. The reason why the case has now come to the Administrative Court and this court is that on Day 4 (18th December 2009) Mr Mander had an appointment which meant that he could not sit longer than 5.00 p.m. on that day. At the beginning of the day the Chairman said that the hearing would have to conclude for the day at 5.00 p.m. and he explained at about 3.00 p.m. that the reason was that Mr Mander would have to leave at 5.00 p.m. It had been hoped that Mr Hill's cross-examination would have been finished by then but, as a result of a submission of no case to answer taking its time, Mr Hill was still giving evidence in chief at 3.00 p.m. when the following exchange occurred:-

> "THE CHAIRMAN: I am sorry Mr Cope, could I just mention something; it is possible under the rules if everyone agrees that we could continue in Mr Mander's absence with just two members of the tribunal after he left at five.

MR COPE: Yes. I do not think you would need agreement to do that, you have a discretion to do that.

THE CHAIRMAN: Well I would like your agreement because if he got the transcript he would get the flavour of what has gone on.

MR COPE: Do I take it you will be ordering the transcript of the last two days?

THE CHAIRMAN: Yes, I can do.

MR COPE: I think on that basis if there is to be a transcript I would certainly have no objection to Mr Mander leaving at five.

THE CHAIRMAN: Yes, we will have a transcript. Do you have any objection Mr O'Fathaigh.

MR O'FATHAIGH: No. I think what you are suggesting is that you continue after five and Mr Mander has the benefit of a transcript and you will then meet again and confer and then give your decision?

THE CHAIRMAN: Well we will try and see how far we get.

MR O'FATHAIGH: Are we going to try and finish Mr Hill today so when we meet next time it will just be legal submissions and decision time?

THE CHAIRMAN: If that is possible."

4. By the time 5.00 p.m. arrived evidence in chief had finished and cross-examination had begun. After Mr Hill had explained that, while he realised with hindsight and his lately acquired knowledge of the law that he had acted wrongly, he did not realise he was acting wrongly at the time, Mr Mander prepared to leave and this exchange took place:-

"MR O'FATHAIGH: If the transcript could be marked that Mr Mander is leaving and the Committee Administrator is leaving and I will wait and then begin again.

THE CHAIRMAN: Shall we just take a short adjournment.

MR COPE: Do I take it that Mr Mander does not have any further questions of Mr Hill.

MR MANDER: Not at this stage, no.

MR COPE: It may be on the next occasion his evidence will have been completed and there might not be a further

> opportunity. If Mr Mander does have other questions then we could recall Mr Hill
>
> THE CHAIRMAN: Indeed. We will just have a brief adjournment.
>
> (Adjournment for a short time)
>
> (The hearing continued without Mr Mander)"

At about 6.30 p.m. the cross-examination concluded and the legal assessor asked a few questions after which the Chairman said:-

> "THE CHAIRMAN: Well we are going to have to adjourn now. We have got some questions. On the next occasion there will be re-examination and then we will put our questions and I think Mr Mander may have some other questions and then we will hear closing arguments."

The hearing was then adjourned to a date which was later fixed to be 27th January 2010.

5. On that date the hearing resumed. Mr Hill gave further evidence in chief and was further cross-examined on new documents which had emerged during the adjournment some of which were, rather reluctantly, admitted by the Tribunal. The tribunal members then asked various questions. Another witness was recalled to deal with the new documents. The tribunal then adjourned for lunch and resumed at 1.30 p.m. Mr O'Fathaigh then made oral closing submissions. Mr Cope made his closing submissions by way of a written document. The tribunal then retired from 2.13 p.m. to 4.45 p.m. but were unable to announce a decision that day. The hearing was therefore adjourned until 12th February 2010. On that day the Tribunal announced their decision that the charge was proved. They heard submissions on costs, and a formal record of their decision resulting in Mr Hill's exclusion from the Institute together with the reasons was signed by the Chairman on 28th May 2010.

6. It is now said that, despite Mr Cope's agreement to the way matters proceeded, there was in fact no power on the part of the disciplinary tribunal to permit one of its members to depart during the hearing and then take part in the remainder of the hearing. It is also said that there was a breach of the rule of natural justice that "he who decides must hear" and that that breach was not waived. All proceedings after 5.00 p.m. on 18th December 2009 were therefore a nullity including the decision of the tribunal that the charge was proved. Lang J held that there was power for the tribunal to allow Mr Mander to leave and later return after he had read a transcript of the part of the hearing which he did not attend. She held, however, that there had been a breach of the rules of natural justice; but she concluded that the breach had been waived by Mr Cope's agreement to the procedure which was voluntary, informed and unequivocal. There is now an appeal to this court.

Powers of the Tribunal

7. The Institute was constituted by Royal Charter granted on 11th May 1880 and by Supplemental Charter granted on 21st December 1948. Its stated objects include the maintenance of "high standards of practice and professional conduct by all its members" (Article 1(a)(iv)). The Institute is empowered under the Charter to make bye-laws and regulations, including in relation to discipline provided always that "no such regulations shall" be in any way inconsistent with the express provisions of the Charter or the bye-laws (para 16 of the Supplemental Charter). The Institute is managed by its Council. The Council has made Disciplinary Bye-laws ("the Bye-laws") which govern the exercise of the Institute's disciplinary functions in relation to its members. The Bye-laws provide for the appointment and constitution of an Investigation Committee, a Disciplinary Committee and an Appeal Committee.

8. Bye-law 19 makes provision for the appointment and constitution of a Tribunal of the Disciplinary Committee. Bye-law 1(2) defines a tribunal as "a tribunal appointed under bye-law 19(1) to hear a formal complaint": Bye-law 19 provides:-

> "(1) On receipt by the Disciplinary Committee of a formal complaint, the Chairman of that Committee or, failing him, any Vice-Chairman of that Committee
>
> (a) shall appoint three of its members, two of them being members of the Institute and the third not being an accountant, as a tribunal to hear that complaint;
>
> (b) and shall appoint one of the three as chairman of the tribunal.
>
> (2) If, in the case of a tribunal so appointed, any member of the tribunal –
>
> (a) is for any reason unable to attend the hearing or any adjourned hearing of the formal complaint; or
>
> (b) is in the course of the hearing unable to continue so to attend.
>
> the remaining members, if not less than two in number, may at their discretion proceed or continue with the hearing; but if the defendant is present or represented at the hearing, they shall do so only if he or his representative consents.
>
> (3) If in a case falling within paragraph 2, the remaining members of the tribunal
>
> (a) do not proceed or continue with the hearing; or
>
> (b) complete the hearing but are unable to agree on a finding,
>
> the complaint shall be heard or re-heard by a new tribunal under paragraph 1."

9. There are also Disciplinary Committee Regulations which regulate the procedure before a tribunal. Regulation 28 provides:-

> "The hearing shall be informal and the strict rules of evidence shall not apply. Subject to these regulations the tribunal may adopt any method of procedure which it may consider fair and which gives each party an opportunity to have his case presented. The tribunal may at its discretion consider evidence which has not been provided in accordance with regulations 14 and 17 above. Subject to regulation 7, the hearing will be in public. Evidence will not be taken on oath."

Regulation 46 provides:-

> "No objection shall be upheld to any technical fault in the complaint or in the procedure adopted by a tribunal provided that the proceedings are fair and the relevant Bye-laws and Regulations have been complied with."

10. Mr Kenneth Hamer for Mr Hill submitted that Bye-law 19 was the only provision in the charter, the bye-laws or the regulations which dealt with the departure of a member of the tribunal. It provided that if a member departed, the remaining members (if not less than two in number) could proceed with the hearing if the defendant or his representation agreed but not otherwise. Since that was the only provision dealing with departure, it must follow that departure and return of a member was not allowed, even if the parties agreed. To the extent that Regulation 28 allowed the Tribunal to adopt any procedure which it considered fair, the adoption of any procedure permitting temporary departure and return would be inconsistent with the Bye-laws and impermissible pursuant to paragraph 16 of the Supplementary Charter. If it was beyond the powers given to the Tribunal to allow Mr Mander to depart, read the transcript and return, they would have acted outside their powers and that excess of jurisdiction could not be cured by any agreement.

11. I cannot accept this argument. In the first place it would be surprising if there were no power at all for a disciplinary tribunal (with its relatively informal procedures) to permit one member to depart and return if all parties agreed. That would introduce a degree of rigidity into the proceedings which would be undesirable.

12. Secondly, the fact that express power is given to a tribunal to carry on as a tribunal of a lesser number if one member is "unable to continue… to attend" does not to my mind preclude a member absenting himself and returning. The power is given so that, if a member cannot continue at all, the tribunal itself can continue rather than reconstitute itself and start all over again. That is an example of a lack of rigidity in the proceedings, not its opposite. Mr Hamer relied on the principle that an express provision in a bye-law implies the opposite of its alternative (more pithily expressed in the Latin phrase expressio unius exclusio alterius). But I do not see temporary absence and return as a true alternative to an "inability to continue to attend". "Inability" implies a permanent state the alternative to which is a continuing attendance. Mr Mander was unable to attend for a comparatively short time in the six day hearing. The Bye-laws just do not provide for that situation. Of course any

procedure designed to cope with the problem must be fair but if it were not there would anyway be a breach of regulation 48.

13. Thirdly I agree with Stanley Burnton LJ in Virdi v Law Society [2010] 1 WLR 2840 paras 28-31 that when one is dealing with bye-laws and regulations of professional disciplinary bodies one cannot expect every contingency to be foreseen and provided for. The right question to ask of any procedure adopted should therefore be not whether it is permitted but whether it is prohibited. If one asks that question in this case after rejecting any application of the expressio unius principle, the answer is that the procedure adopted is not prohibited. It must, of course, still be fair and that to my mind is the critical issue in this appeal.

Breach of the rules of natural justice?

14. The first rule of natural justice that no judge should be a judge in his own cause or, as it is now more popularly known, the rule against bias is an elementary but highly important component of any developed system of justice. So is the second rule that each party must be heard, sometimes expressed in Latin as "audi alteram partem". It is sometimes also expressed in the form "he who decides must hear".

15. The word "hear" cannot be taken completely literally since a tribunal will necessarily read a good deal of evidence as well as, literally, hear it. But if it is decided that a defendant or a witness will give oral evidence then that evidence will be "heard" and it is important that each member of the tribunal should, if at all possible, "hear" all that evidence. Reading a transcript is normally no substitute for hearing evidence from a live witness given orally. For a tribunal member or juror or judge to absent himself (without consent) while oral evidence is given and later take part in the ensuing decision will, therefore, usually be a breach of the second rule of natural justice. Authorities for this proposition begin with cases about magistrates' courts but include at least one case about disciplinary tribunals.

16. In Bolton v Bolton [1949] 1 All E R 908 there were matrimonial proceedings which were initially heard by one magistrate and then concluded by another magistrate. It seems that the parties consented to this procedure but on appeal to the Divisional Court Lord Merriman P said that this was "wholly irregular" and added:-

> "To put the matter at its very lowest, it is a very grave disadvantage to anybody who has to give a decision in such a case not to have been able to judge the demeanour of the complainant's wife while she was giving her own story."

Lord Merriman thought however, that it would be a "grave wrong" to require the case to be re-heard and he therefore dismissed the appeal. He could not therefore have thought that the undoubted irregularity affected the jurisdiction of the magistrates' court.

17. It is not impossible that it was as a result of this case that s. 98(6) of the Magistrates Court Act 1952 (now s.121(6) of the MCA 1980) was enacted requiring that the justices which composed a court should be present throughout the proceedings but if any absence did occur the absent justice should cease to act. In Munday v Munday [1954] 1 WLR 1078 this section was held to have been infringed when three justices

were present on the first day, were joined on the second day by two more justices, and were absent on the third day with the result that the case was decided by the second two justices and a third who had not previously been present at all.

18. In Ng v The Queen [1987] 1 WLR 1356, the Privy Council quashed a conviction of the Mauritius Intermediate Court where the composition of the justices trying the defendant changed over the course of a hearing lasting several days. Lord Griffiths said at 1358H:-

> "In a criminal trial, whether before a jury or before magistrates, it is a fundamental requirement of justice that those called upon to deliver the verdict must have heard all the evidence. The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend. If they have not had the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict and any verdict they purport to return must be quashed."

Lord Griffiths added, at 1360B:-

> "Whether or not justice was done in the present case it was certainly not seen to be done."

19. Jeffs v New Zealand Dairy Production and Marketing Board [1967] AC 551 dealt with a decision of the Respondent Board, which had set up a committee to investigate questions of dairy supply and hear evidence in relation to that supply. The Board reached a decision based only on the written report of the committee, without having any knowledge of the evidence, whether by themselves hearing it being given or by themselves reading the witness statements. The decision was quashed as procedurally unfair, on the basis that it was reached without consideration of and in ignorance of the evidence. But Viscount Dilhorne (giving the advice of the Privy Council) said at 568F-569B:-

> "Subject to the provisions of the Act and of any regulations thereunder, the board can regulate its procedure in such manner as it thinks fit. … Whether the board heard the interested parties orally or by receiving written statements from them is, as Hamilton LJ said in Rex v Local Government Board, ex parte Arlidge [1914] 1 KB 160, a matter of procedure. Equally it would have been a matter of procedure if the board had appointed a person or persons to hear and receive evidence and submissions from interested parties for the purpose of informing the board of the evidence and submissions (see Osgood v Nelson and Rex v Local Government Board, ex parte Arlidge). This procedure [i.e. the delegation to another person

> of the task of hearing evidence] may be convenient when the credibility of witnesses is not involved, and if it had been followed in this case and as a result the board, before it reached a decision, was fully informed of the evidence given and the submissions made and had considered them, then it could not have been said that the board had not heard the interested parties and had acted contrary to the principles of natural justice. In some circumstances it may suffice for the board to have before it and to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the board."

This shows not merely that the way evidence is received is essentially a procedural matter but also that reading witness statements or receiving their evidence in some other accurate manner may be a permissible procedure.

20. In R (Michalak) v General Medical Council [2011] EWHC 2307 (Admin) a new member of a GMC Fitness to Practise Panel had been substituted part way through a hearing, after the witnesses had given evidence. The Panel considered that the new member needed to hear the witnesses live, and so decided to hear all the witnesses again, which meant that two members of the Panel would hear the witnesses twice while the substituted member would hear them only once. Kenneth Parker J quashed the decision and ordered a fresh panel to be constituted to hear the case again. In giving reasons, he said at [17]-[18] that it would in principle have been acceptable for the new member to have simply read into the transcripts to get up to speed with the remaining members:-

> "A situation arose where a member was to be substituted who would not have the same information and background as the other two members. That is a situation that occurs in practice with some regularity and the way in which it is solved is often to allow that particular new substituted member to have access and to read into the transcripts carefully so as to have the same kind of information as the originally constituted members. It is generally acknowledged that that is not a perfect solution because in some cases the way in which the evidence was given can be significant and therefore a person who has not heard the witness may be at a disadvantage to those who have. …
>
> However, in some cases it is concluded that, having regard to the nature of the case and the evidence that has been given, the potential for injustice is relatively slight and that the advantages for the administration of justice in general countervail such slight disadvantage that has been perceived. The general advantages of course lie in the fact that it is then unnecessary for the hearing to be duplicated with all the additional cost, use of resources and anxiety to one or both parties of having to go through yet again a full hearing, when that is not strictly necessary because other measures can be taken."

21. This last case is an illustration of the problems that can arise for professional disciplinary tribunals in this area and the difficulties that exist in resolving the problems in accordance with the strict rules of natural justice. Some might think that for two members to hear the evidence twice was less of an evil than for one member to read the evidence rather than hear it. But for Kenneth Parker J (who has great experience of these matters) it was the former course that caused the Panel's decision to be quashed, while he appeared to regard the latter course with comparative equanimity.

22. The judge (para 72) did not find it easy to draw any general conclusion from these authorities; she thought that the principle that "he who decides must hear" had been strictly applied in criminal cases and in cases with juries but had been more flexibly applied in civil cases without a jury. I agree with that and would myself add that in professional disciplinary cases the tribunal is, subject to the relevant bye-laws or other rules, master of its own procedure. If there is a hearing with live witnesses giving their evidence orally, it will normally be a breach of rules of natural justice for a member of the tribunal (in the absence of agreement) to absent himself while a witness is giving evidence and later return to participate in the decision. This will not normally be cured by the absent member reading a transcript of the evidence given in his absence, unless the evidence is comparatively uncontroversial for the reasons given by Lord Griffiths in Ng v The Queen. Such absence will be difficult (if not impossible) to justify if the evidence being given is that of the defendant or respondent to the disciplinary proceedings.

Consent

23. But is it still a breach of the rules of natural justice, if a defendant or his duly authorised advocate agrees that a member of a tribunal can be absent for a part of the hearing but read a transcript of the evidence given in his absence and, having read it, return, continue the hearing and contribute to the decision? For my part I see no reason to think that that is a breach of the rules of natural justice. Of course, the agreement must (see para 31 below) be voluntary, informed and unequivocal but, if it is, there is something peculiarly unattractive in a litigant agreeing to this course, continuing to participate in the hearing and then, on finding that the decision is adverse, alleging that the decision has been reached in breach of the rules of natural justice and must therefore be treated as a nullity and quashed.

24. The judge held that there had been a breach of the rules of natural justice but that it had been waived and therefore dismissed the claim. Mr Hamer submitted that the breach of natural justice was so grave that the tribunal had acted without jurisdiction and that acting without jurisdiction in this way could not be consented to. Miss Callaghan for the Institute supported the judge's conclusion but submitted that it would be more consistent with principle if the judge had decided that there was no breach of natural justice because Mr Hill had consented to the course adopted rather than holding that there had been a breach of natural justice which was later waived.

Jurisdiction

25. Although it is often said that a decision reached in breach of the rules of natural justice is a nullity, I cannot accept that it would be a decision reached without "jurisdiction" in any relevant sense. In his dissenting judgment in Carter v Ahsan

[2005] ICR 1817, later approved by the House of Lords sub nom. Watt (Carter) v Ahsan [2008] 1 AC 696, Sedley LJ drew a distinction between what he called "constitutive jurisdiction" and "adjudicative jurisdiction" saying at para 16:-

> "By constitutive jurisdiction I mean the power given to a judicial body to decide certain classes of issue. By adjudicative jurisdiction I mean the entitlement of such a body to reach a decision within its constitutive jurisdiction."

The importance of the distinction for present purposes is that an act outside the constitutive jurisdiction of a tribunal is an act which cannot be agreed to by the parties and cannot, therefore, be waived by them. If Mr Hamer's first argument in relation to the Bye-laws were correct and there was no power for the tribunal to permit a temporary absence by a tribunal member on the basis that he would read the transcript of evidence given in his absence and then return, the procedure adopted would no doubt be outside the constitutive jurisdiction of the tribunal and could not be agreed to or waived.

26. But Mr Hamer's argument is wrong for the reasons given above and the most that any breach of the rules of natural justice could amount to would be a breach of the tribunal's adjudicative jurisdiction; there is no reason why such breach cannot be agreed to or waived in proper circumstances.

27. The most apposite authority which Mr Hamer was able to cite was Doyle v Canada (Restrictive Trade Practices Commission) [1985] 21 DLR (4th) 366. In that case the hearing lasted for 32 days between April 1982 and June 1983 and two out of the three commissioners were absent from all or part of the hearings up to 6 days. They read the transcripts of the evidence given on the occasions they did not attend. The complainant did not attend most of the hearings and it was argued that that failure on his part constituted a waiver of his right to insist that every commissioner should attend every hearing. By a majority the Federal Court of Appeal of Canada held that the report of the Commissioner should be set aside. Pratte J gave the only reasoned decision of the majority and said this (page 368):-

> "I do not think it is necessary for the purpose of deciding this case to determine whether the rule that two members of the Commission constitute a quorum was complied with. The important issue is whether the maxim "he who decides must hear" invoked by the applicant should be applied here.
>
> This maxim expresses a well-known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the *audi alteram partem* rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case. In my view, however, the rule expresses more than that; it is a rule which actually affects the judge's jurisdiction. For that reason its violation may be invoked even by a litigant who waived his right to be heard by the court which passed judgment on him.

> Thus, a defendant who voluntarily declines to attend the hearing thereby waives the right to be heard; he does not, however, waive the right to be judged by a judge who has heard the evidence. This having been said, it must be realized that the rule "he who decides must hear", important though it may be, is based on the legislator's supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representations of the parties in the manner which the law requires that they be heard. It can therefore not be argued that the requirements of the law have been met merely because the members of the tribunal who rendered a decision heard the evidence and arguments; the rule requires that they hear them in the manner prescribed by law."

28. This authority deserves respect but the reference to the rule that "he who decides must hear" as a rule which affects the judge's jurisdiction does not address the question of what kind of jurisdiction a breach of the rule will affect. It may well affect a judge's adjudicative jurisdiction but, if it does, that will not bar any waiver or consent. If Pratte J was intending to indicate that no breach of the rules of natural justice can ever be waived, I would respectfully disagree.

29. Doyle is moreover distinguishable because there was no agreement from the complainant that the Commission could adopt the course it did. The argument was that by not himself attending the hearings Mr Doyle had waived any right to rely on the rule that he who decided must hear. That argument was understandably dismissed. If he had actually agreed that the commissioners could absent themselves, read the transcripts and return, the judgment might well have been very differently expressed. It was on this ground that Doyle was itself distinguished in the later case of Montreuil v Human Rights Commission [2008] CHRT32 in which the defendant's agreement to the course adopted was regarded as highly relevant.

30. I would therefore reject Mr Hamer's argument that, if any breach of natural justice occurred, it could not be waived. I would go further and say that a breach of the rule of natural justice of the kind that is said to have occurred in the present case is at most an irregularity that could be waived. Indeed if there was an agreement to the procedure adopted, I would prefer to say that there has been no breach of the relevant rule of natural justice at all. One must look at the position as it was at about 5.00 p.m. on Day 4 when Mr Mander left; if one does that, it is odd to say that the tribunal acted in breach of the rule of natural justice when all parties agreed to the course that was to be taken. "Waiver" is more naturally used in respect of something that was definitely a breach when it occurred but is later agreed not to matter.

31. In relation to a true case of waiver in respect of the imputed bias of the tribunal in Millar v Dickson [2002] 1 WLR 1615 (the case about temporary recorders) Lord Bingham of Cornhill CJ said at para 31 that an effective waiver had to be voluntary, informed and unequivocal. If agreement is to prevent what would otherwise be a

breach of the rules of natural justice it cannot be anything less than a voluntary, informed and unequivocal agreement. The question is thus whether there was such an agreement on the facts of the present case. It may well be that the distinction between saying that there was no breach of the rules of natural justice by virtue of the parties' agreement and saying that there was a breach of the rules of natural justice but that it was waived is a mere matter of words. Nevertheless I prefer the earlier formulation if it is appropriate on the facts.

Agreement/Waiver

32. The first question is whether agreement given and communicated by a defendant's advocate is sufficient or whether the Tribunal must satisfy themselves by asking the defendant directly whether he agrees personally to the procedure to be adopted. Ms Callaghan argued for the former, Mr Hamer for the latter.

33. I agree with Ms Callaghan. A professional (or indeed any other) tribunal must usually be entitled to rely on the agreement of a properly qualified advocate to any proposed procedural course without having to go behind the advocate and check that his client personally agrees with what the advocate has said.

34. I say "usually" because the first requirement of any agreement or waiver is that it must be voluntary and the voluntariness must be that of the client. If there is any evidence that the advocate put pressure on the client (as in Smith v Kvaerner Cementation Ltd [2007] 1WLR 370) or concealed any material facts, then the client must be able to show that his apparent agreement was involuntary (or, indeed, uninformed). But until that has happened the tribunal must be able to proceed on the basis that a qualified advocate has appropriate authority.

35. Mr Hamer submitted that Mr Hill's agreement was not voluntary because there had apparently been no consultation between Mr Hill and Mr Cope before Mr Cope indicated his agreement to Mr Mander's departure. Certainly the transcript does not show that there was such consultation at 3.00 p.m. on Day 4 when Mr Cope said there was no objection to Mr Mander leaving at 5.00 p.m. Nevertheless the tribunal did take a "short adjournment" when Mr Mander did leave at 5.00 p.m. If Mr Hill had felt any genuine unease about Mr Cope's departure, he could have raised that concern with Mr Cope at that time. More importantly perhaps there was a gap of almost 6 weeks before the tribunal resumed on 27th January. Mr Hill could easily have raised any concerns during that time since it was not too late to submit that the tribunal could continue as a tribunal of two without Mr Mander's continuing participation or even to submit that the proper course would be to begin all over again. No such submission was ever made. To the extent therefore that Mr Hamer suggested that Mr Hill had been "hustled into" a decision in the manner that concerned this court in Jones v DAS Legal Expenses Insurance Co Ltd [2003] EWCA Civ 1071, any such submission is without foundation.

36. Mr Hamer then submitted that the agreement was not an informed agreement because it was based on Mr Cope's mis-understanding that agreement from Mr Hill to the proposed way of dealing with Mr Mander's absence was unnecessary. That was certainly what Mr Cope gave the tribunal (and no doubt his client) to understand in his first reaction to the Chairman's proposal at 3.00 p.m. Mr Cope was wrong about that because, whether the Chairman was to proceed under Bye-law 19(2)(b) or

Regulation 46, the agreement of Mr Hill was, in my view, required. But the Chairman wisely made it clear that, whatever Mr Cope thought of the matter, he would not be happy to proceed as suggested without agreement and that agreement was forthcoming. In those circumstances and in the light of the six week subsequent period which gave every opportunity for second thoughts, I cannot accept that Mr Hill's consent to the proposed course was uninformed.

37. Even Mr Hamer could not suggest that Mr Hill's agreement was unequivocal. In these circumstances I am satisfied that both the question whether there was an agreement which means that there was no breach of the rules of natural justice and the question whether, granted there was a breach of the rules of natural justice, that breach was waived, must be answered in the affirmative.

Respondent's Notice

38. It is worthy of mention that Mr Hill has already been able to ventilate his dissatisfaction both with the merits of the decision of the Disciplinary Committee and its breach of natural justice (as he would say) by exercising his right of appeal to an Appeal Committee. That Appeal Committee said this in paragraph 76 of its determination:-

> "This case was not dependent upon a judgment as to disputed evidence or the veracity or demeanour of witnesses. The common theme in Mr Hill's defence put forward in his witness statement, defence, skeleton argument and final submissions was reflected in his answers in cross-examination as is clear from our reading of the transcript. In no way in this case do we feel disadvantaged in forming our judgment by not having heard Mr Hill give evidence. Mr Mander was in fact present for Mr Hill's fairly lengthy examination in chief and part of the cross-examination. There was no actual prejudice to Mr Hill by reason of Mr Mander's absence during the major part of the cross-examination."

39. Although the judge disagreed and said that it was impossible to evaluate what difference it might have made if Mr Mander had been present , Ms Callaghan sought to build on this conclusion and submitted that, even if there had been a breach of the rules of natural justice which was not waived, the court should make no order, because any freshly constituted committee would inevitably come to the same conclusion.

40. In the light of the conclusions already reached it is unnecessary to express any view about the Respondent's Notice and I do not do so. But Mr Hill can at least have the satisfaction of knowing that his professional peers were satisfied that allowing Mr Mander to leave, read the transcript and return to participate in the decision caused him no prejudice at all.

41. I would dismiss this appeal.

Lord Justice Beatson:

42. I am grateful to Longmore LJ for his comprehensive description of the facts and legal issues in this appeal. I agree with both his conclusion that the appeal should be dismissed and with his reasoning. In particular I too consider that in the circumstances of this case the effect of Mr Hill's consent to the course adopted was that there was no breach of the relevant rule of natural justice rather than that there was a breach which was waived. Since, on this point we are differing from the judge, I would like to add a judgment of my own.

43. My starting point is that two types of case should be distinguished. The first (and perhaps the more common) is where there has been a breach of one of the requirements of procedural fairness and the question is whether it has subsequently been waived by the person affected. Locabail (UK) Ltd v Bayfield Properties Ltd. [2000] QB 431 is such a case. In that case, the court was concerned with the disclosure by the deputy judge on the seventh day of a sixteen day trial of what was a disqualifying interest by him. There was a clear breach of the rule automatically disqualifying a person on the grounds of pecuniary interest. No objection was, however, made at the time to the judge continuing. The trial continued for a further nine days, and the point was only taken after an adverse judgment was given. It was held that the right to object had been waived: see [2000] QB 451 at [26], [35], [40], [68] – [69].

44. The second type of case is where, at a stage in the process before there has been any breach of express procedural requirements or the requirements of natural justice, the decision maker and the others involved have discussed a proposed procedure and have freely and in full knowledge of the facts consented to that procedure which is then followed. In such a case in my view the correct analysis is (for the reason given by Longmore LJ at [30]) to not regard the situation as a breach of natural justice which has been waived.

45. In most situations this follows from the inherent qualities of the relevant principle of natural justice. For example, the *audi alteram partem* principle requires only that a person be given an opportunity to be heard. Where a person is offered the opportunity to be heard by a procedure which is fair but declines the offer, it is a distortion of language to regard the making of the decision without hearing him as a breach of natural justice which has been waived. The position is in principle similar where, as in this case, the individual has agreed to a particular procedure, here the agreement of 18th December that Mr Mander would depart at 5 p.m. and would read the remainder of Mr Hill's evidence from the transcript.

46. The underlying reason of principle for not analysing the second type of case as a waived breach, primarily flows from another inherent quality of the principle entitling a person to a fair hearing. It is the recognition that denying a person a fair hearing is a wrong that is personal to that person so that, although the principles of natural justice are part of our public law and although those not directly affected or not affected at all are generally accorded standing to challenge a decision that is flawed in public law terms, this is not the case where the breach is of the *audi alteram partem* principle. Moreover, although there have been statements that waiver is not always possible in natural justice cases (see e.g. Mayes v Mayes [1971] 1 WLR 679 at 684 Sir Jocelyn Simon P), that is a minority view. Even after a serious breach, including the rule automatically disqualifying a person on the grounds of pecuniary interest to which I have referred (see Locabail (UK) Ltd v Bayfield Properties Ltd. [2000] QB 431 at

[15]) waiver is possible provided it is done so freely and in full knowledge of the facts by the person affected, and there is no other interested party affected who (as in R v Hnedon R.D.C. ex parte Chorley [1933] 2 K.B. 696) objects.

47. More broadly, the requirements of natural justice have often been described as "fair play in action": see, for example, Lord Morris of Borth-y-gest in Wiseman v Borneman [1971] 1 AC 297 at 309. Particularly since the re-invigoration of the principles almost 50 years ago in Ridge v Baldwin [1964] AC 40, the concept of fairness embodied in the different strands of natural justice has been seen as flexible and as not requiring the courts to lay down over rigid rules: see R v Monopolies and Mergers Commission, ex p. Matthew Brown Plc [1987] 1 WLR 1235 and Lloyd v McMahon [1987] 1 AC 625 at 702. One example of that flexibility is as to what precisely is required for a procedure to be fair: see, for example, McInnes v Onslow-Fane [1978] 1 WLR 1520 at 1530. Regarding a procedure which has been freely accepted in advance and with full knowledge of the facts as a breach of natural justice which has been waived is in my judgment both contrived and inconsistent with the flexibility in the concept and with the idea that a procedure which breaches the rules is "unfair" and that the rules reflect the idea of "fair play in action". It in effect would create a category which might be characterised as a technical breach of natural justice, but, as Bingham LJ stated in R v Chief Constable of the Thames Valley Police, ex p Cotton [1990] IRLR 344, there can be no such thing "because … a procedure must in all the circumstances of a given case be either fair or unfair".

48. In my judgment, Thomas v University of Bradford (No 2) [1992] 1 All ER 964 should probably be seen as an example of the second type of case but to do so is not straight-forward. Before explaining the difficulty, I summarise the facts of that case. Miss Thomas, a university lecturer was being subjected to a disciplinary procedure and possible removal from office as a member of the university's permanent academic staff. She and her then legal advisers knew from the outset of the first meeting on 19th October 1982 of a committee established under one of its statutes that the university proposed to proceed under the statute, and not under the procedure pursuant to one of its ordinances which would have provided her with substantial additional protection. She raised no objection to the proposed procedure either at that stage or at later hearings in November or at any stage before the relevant committee completed its deliberations and recommended her removal.

49. The reason why it is not entirely straight-forward to analyse Thomas's case as one involving no breach of natural justice rather than a waived breach is because Lord Browne-Wilkinson, on behalf of the university's Visitor, used (see [1992] 1 All ER at 979) the language of waiver as well as that of acquiescence. Moreover, his judgment also uses the language of a refusal of relief in the exercise of the court's discretion for what he regarded as breach of a procedural requirement. He stated that, although the Visitor could not confer a jurisdiction which the university did not otherwise possess, he had discretion whether or not to strike down an *intra vires* decision for procedural irregularity. Lord Browne-Wilkinson's analysis probably reflects his rejection of the university's interpretation of the scope of the ordinance and thus his view that the university had followed the incorrect procedure. But, since the consent was given at the very outset, and since Lord Browne-Wilkinson appears to have accepted that, though incorrect, the procedure complied with the rules of natural justice, I find it difficult to characterise the case as one of a waived breach. For the reasons I have

given about the principles of natural justice being "fair play in action", the flexibility of their requirements, and the personal nature of the wrong committed by denying a person a fair hearing, I consider that the better analysis is to regard the advance consent to what was otherwise a fair procedure in that case as precluding there being a breach of the requirements of natural justice.

50. There is a further advantage in not analysing circumstances where the person affected has consented in advance to a particular procedure as a breach of natural justice. It is that, in a case such as this, it avoids arid discussion as to the status of a decision that is tainted by such a breach pending the decision of the court, a question which has, in the past, vexed public lawyers in particular in the context of the requirements of procedural fairness: see the summary in Wade and Forysth, A*dministrative Law,* (10th ed.) at 417 – 418. In so far as the submissions on behalf of Mr Hill relied on the principle that no waiver of rights "can give a public authority more power than it legitimately possesses", they invited exploration of this question. It was, perhaps, to address such arguments that, in his judgment in Carter v Ahsan [2005] ICR 1817, Sedley LJ drew the distinction between what he characterised as "constitutive jurisdiction" and "adjudicative jurisdiction" to which Longmore LJ has referred at [25] of his judgment. The distinction appears similar to that identified in 1968 by Lord Reid in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 between the narrower classical sense of jurisdiction denoting entitlement to enter on the inquiry in question, and a wider one denoting entitlement to make a valid decision.

51. Categorising different types of jurisdiction and ways of losing jurisdiction may in very general terms be helpful. But it is important not to forget that, in his speech in the Anisminic case Lord Wilberforce sought (see [1969] 2 AC at 207) to analyse the position "avoiding…such words as 'jurisdiction', 'error' and 'nullity'" which he stated "create many problems". He considered that the task of the court was to identify whether the administrative body had stepped outside the authority it derived from statute and (207F-G) that it followed from the decision in Ridge v Baldwin that failure to comply with the principles of natural justice is equivalent to a departure from the remitted area. Sedley LJ's judgment was a dissenting judgment. Although the House of Lords approved of his conclusion, Lord Hoffmann, who delivered the only considered speech, did not refer to the distinction between "constitutive" and "adjudicative" jurisdiction. Buxton LJ ([2005] ICR 1817 at [81]) stated that he agreed with the distinction, but also stated that the expression "adjudicative jurisdiction" "often, indeed perhaps always, involves a misnomer, since as Sedley LJ points out it is plainly erroneous to say that a court acts without *jurisdiction* when it makes a mistake of law in deciding an issue that is properly before it".

52. What is clear, as Buxton LJ also stated in Carter v Ahsan at [82], is that whether one calls it "constitutive jurisdiction" or not, an objection can only be taken at any stage of the proceedings in respect of the entitlement of the decision-maker to enter on the inquiry in question. In other cases, as Erle J stated in Jones v James (1850) 19 LJ QB 257, jurisdiction may be "contingent; in such a case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards". That, in my judgment, is the appropriate analysis in the first of the two categories of case which I have discussed, although the requirement that waiver be free and given with full knowledge of the facts may mean that it is not always possible to infer it from conduct.

53. Finally, I should refer to a concern I had at the outset of the hearing about one aspect of what occurred in this case. Despite the five week adjournment at the end of the proceedings on 18th December, only the members of the panel were provided with a transcript. It appears (see Day five, 27 January 2010, pp 227 – 8) that the Chairman indicated that he had instructed that the transcript had been prepared for the Institute only because of the cost. Mr Mander and the other members of the tribunal asked Mr Hill questions based on the transcript of the earlier hearing when he had not been given sight of it. Understandably, his responses relied on his memory of what had happened five weeks earlier. My concern was that it might have been unfair after that time to put points to him based on what he had said on the earlier occasion without letting him see the transcript. Had the questions come on the same or the next day, he would have had his previous evidence well in mind, but five weeks later his memory might have faded. I have, however, concluded that since Mr Cope did not take this point or press a request for a transcript to be provided to enable Mr Hill to refresh his memory, the point cannot now be taken.

Lord Justice Underhill:

54. I agree that this appeal should be dismissed for the reasons given by Longmore LJ. I also agree, for the reasons given by both him and Beatson LJ, that the better analysis is that there was in the circumstances of the present case no breach of the rules of natural justice, rather than that there was such a breach but that it was waived.