ARKIN V. MARSHALL – SOME DICEY IMPLICATIONS

by

ANTHONY TANNEY

Before I came to the Bar, I enjoyed a brief career – some would say not brief enough – as a university lecturer. Among my responsibilities was teaching the undergraduate course on constitutional law. My reading list for students on the course included the magisterial "Introduction to the Study of the Law of the Constitution", by Professor A V Dicey ("the Introduction"). Even then, the book was decades old. The first edition was published in 1885, when Lord Salisbury was Prime Minister. The 8th Edition (the last to be edited by Dicey himself, and the one included on my reading list) was prepared in 1914. Inevitably parts of it were wildly out of date. But I thought then, and still think now, that no work has ever captured the animating spirit behind our constitution better than Dicey's book. (The fact that it is written in a matchless prose style – direct, elegant and a pleasure to read – only adds to its virtues).

I thought about Dicey recently, when reading about an interview given to BBC Radio 4 by Lord Sumption, the former Supreme Court Justice. In the interview, Lord Sumption was critical of the actions of Derbyshire police, for using drones to conduct observations upon people out walking in the peak district during lockdown. What brought Dicey to mind was Lord Sumption's description of the tradition of policing in the UK, to which such actions were in his view contrary. That tradition, he said, viewed police as "citizens in uniform".

This struck me as pure Dicey. One of the most often quoted parts of the Introduction is this:

> "In England, the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister *down to a constable…, is under the same responsibility for every act done without legal justification as any other citizen*".

It appears, then, that Lord Sumption's vivid description of our policing tradition is one of which Dicey would have approved.

It seems that reminders about Dicey are like London Buses. Because last week, the Court of Appeal prompted another one, in the course of its decision in Arkin v. Marshall [2020] EWCA 620 (Civ).

The decision itself concerned a claim by receivers against mortgagors for possession of the mortgaged property. The issue for the Court of Appeal concerned the effect on those proceedings of the stay imposed by the emergency coronavirus practice direction, PD51Z. One of the arguments advanced by the receivers in opposition to the stay concerned the validity of PD51Z. The receivers argued that the Master of the Rolls, who issued the practice direction, did so in excess of his statutory rule making authority, and that PD51Z was accordingly *ultra vires* and void.

The mortgagors disagreed with the receivers' contention, maintaining that PD51Z was *intra vires* and valid. But they also raised a preliminary contention of their own: that any challenge to the *vires* of PD51Z had in any event to be brought by application for judicial review in the High Court, rather than on an appeal in county court possession proceedings.

This preliminary point was based on the well-known decision in O'Reilly v. Mackman [1983] 2 AC 237. In that case, inmates of Hull prison commenced proceedings by writ and originating summons, seeking declarations that certain disciplinary penalties imposed on them by the prison Board of Visitors were void. The House of Lords struck out their claims as an abuse of process. The reason was that the prisoners were seeking to vindicate what the House of Lords called their "public law rights". That was something they could do only by making an application for judicial review, seeking one of the so-called "prerogative orders", and not by using procedures applicable to private law claims.

The decision in O'Reilly raised eyebrows at the time. By using private law procedures the prisoners were merely adopting a practice that had been allowed by the courts over many years, as a result of perceived deficiencies with the prerogative remedies (certiorari, to quash an official decision; prohibition, to prevent action on an unlawful decision; and mandamus, to

compel performance of a statutory duty). But the O'Reilly decision was no more than simple logic. Judicial review procedure had been comprehensively reformed in 1977. Those reforms included features designed to protect public authorities from late or officious challenges to their acts and decisions: most notably a requirement to seek leave of the court to bring a claim within a maximum period of 3 months of the act or decision under challenge. Those protections would have been rendered useless if litigants could instead make use of procedures applicable to private law claims. O'Reilly therefore made judicial review the exclusive means for claimants to vindicate their public law rights.

So what exactly are "public law rights"?

Go back to Dicey's quotation about Prime Ministers and constables. As Dicey hints in the first sentence, in our constitution, public authorities answer not only to the special principles of judicial review, but also to the ordinary law of the land. In general, this means that public authorities are liable in private law and even in criminal law in circumstances where a private actor would also be liable.

This has positive and negative aspects. Thus, in general, if a public authority commits an act for which a private actor would be liable in civil or criminal law, then the authority will be liable in just the same way - unless it can point to a specific legal power, authorising it to act in that way. On the other hand, the mere fact that a public authority exceeds its legal powers, or fails to perform its legal duties, will not of itself generate liability in private law (or, as it is sometimes put, there is no tort in English law of causing loss by unlawful means). For example, public authorities enjoy all manner of powers to grant or withhold licences in various guises to persons wishing to undertake some form of publicly regulated activity. If an authority refuses a licence unlawfully for a bad reason, the disappointed applicant will usually have no remedy in damages against the authority in private law – his only right (apart from cases of malice) is a public law right to challenge the lawfulness of the refusal.

Damages are not available on an application for judicial review. Therefore a claimant seeking damages against a public authority has no option but to proceed by ordinary Part 7 claim. Case law subsequent to O'Reilly also

establishes that a claimant is entitled to raise a public law issue in private law proceedings, where the public law issue is collateral to a claim based on a cause of action in private law. For example, in one 19th Century case, a local authority demolished the claimant's building, under a closing order. The plaintiff successfully sued the authority for damages in trespass, alleging that the closing order was *ultra vires*. Such a claim could still be made today by private law proceedings, even though it involves a public law challenge as part of the damages claim. But in cases involving *only* public law rights – cases of "pure public law" – O'Reilly means that judicial review is the only available means of challenge.

It must be said that lawyers in other jurisdictions – notably some European jurisdictions – would puzzle at the idea of a "pure public law" case involving a public authority. They might instead regard *any* case involving a public authority as a "pure public law" case.

This is because in many other jurisdictions, public authorities enjoy a special legal status simply by virtue of being public authorities. This special status may extend to the right to be tried in special courts, as well as to substantive and procedural safeguards and immunities not applicable in claims against private actors. Invariably, such advantages are balanced by a constitutional declaration of rights, which public bodies must observe in their dealings with citizens – with a constitutional court to step in, sometimes controversially, where public power and private right conflict.

All of which happens to bring us back, once again, to Professor Dicey. To Dicey, the fact that public authorities answered to the same law, in the same courts, as private actors, was a great strength of our constitution. Indeed, Dicey went so far as to say our constitution itself was actually a product of the ordinary law of the land.

In this latter point, Dicey went too far – at least in literal terms. For example, the primary rule of our constitution – which Dicey discussed at length in the Introduction - is that legislative sovereignty resides in the Queen in Parliament. However one looks at it, this primary rule is not a rule of ordinary law.

But Dicey's real point was a more subtle one. His concern was to draw a contrast between two different types of constitutional models: that favoured

in continental Europe, conferring special advantages on public bodies, balanced by a declaration of the rights of citizens; and our own rather singular model, which, by denying any special legal advantages to public power, meant that no such balancing measure was needed.

Nor was it Dicey's concern merely to contrast these models. His concern was to emphasise the superiority, in his view, of our own. He wrote:

> "The matter to be noted is, that where the right to individual freedom is a result deduced from [a declaration] of the constitution, the idea readily occurs that the right is capable of being suspended or taken away. Where, on the other hand, the right to individual freedom is part of the constitution because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation".

In light of these remarks, it is perhaps not difficult to speculate about what Dicey would have made of the Human Rights Act 1998. He would have been, at best, nonplussed by it, for at least three reasons.

First, the Act does not enlarge the catalogue of private law causes of action against public authorities. In that sense, the Act observes the essential distinction between the public and private law lives of public authorities. But the rights conferred by the Act must nevertheless be respected by public authorities across the entire range of their activities whether in private law, or in public law.

A second point, related to the first, is that the Act applies to public authorities simply by reason of their status as such. As a result, it has become necessary to define what a public authority is – in effect, to describe what counts as "the State" - for the Act's purposes. Dicey would have found this exercise to be a strange one. In his view of our constitution, there was no state, at least in legal terms. Those exercising public power were merely individual citizens and corporations, answerable to the law in the same way as anyone else.

Third, in addition to the Act, public authorities continue to answer to the ordinary law of the land, without any special status or immunity. The Act is therefore not, in that sense, the balancing measure that such a provision might

represent in other jurisdictions. It is not therefore hard to imagine Dicey questioning what the Act is for. It is not much harder to imagine him viewing it with suspicion, in view of his comments about declarations of rights, quoted earlier.

Of course, Dicey was writing in a very different age. "Until August 1914" wrote the historian A J P Taylor (the time when Dicey was preparing the 8th Edition of the Introduction) "a sensible law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman". That is no longer true – mostly for good, but occasionally for ill. Is Dicey's vision of our constitution still relevant in the modern world? Many commentators think not. Maybe they are right. But one matter ought to be above controversy: that Dicey's book – which he himself said was the best thing he ever wrote – is among the few legal texts truly deserving the label *magnum opus*.

And so, finally, back to Arkin. In the result, the Court of Appeal did not accept the mortgagor's preliminary point, based on O'Reilly v. Mackman. It therefore heard argument on the *vires* challenge and, having done so, decided that PD51Z was in fact *intra vires* and, ultimately, that the stay of proceedings should be upheld.

On the O'Reilly point, in my view, with respect, the Court of Appeal erred. Had the Master of the Rolls exceeded his rule-making power, the result would have given rise to no private law cause of action for either of the parties to the claim. The matter would have sounded purely in public law, and the Court should have applied the O'Reilly rule.

In the event, it turned out that the practice direction was actually *intra vires* - so no matter. But it does all go to show that the business of judging, even in an apparently unexceptional mortgage possession claim, can still be a very Dicey one.

ANTHONY TANNEY