

Judicial Remedies
in
Public Law

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Lewis

Sweet & Maxwell

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Lord Diplock, giving the unanimous judgment of the House, held that it would:

"... as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority of infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Ord.53 for the protection of such authorities."

3-004

Consequently, the claim for a declaration would be struck out under Ord.18 r.19. Lord Diplock accepted that this was a general rule and that there would be exceptions. He gave two examples: namely where the invalidity of a decision arises as a collateral issue in a claim for an infringement of a right under private law, and where none of the parties objects to the use of the ordinary action. He expressly left open the possibility of other exceptions being developed by the courts on a case-by-case basis.

Rationale for the rule

3-005

There were two strands of thought underlying the exclusivity rule. First, prior to the 1977 reforms, there were certain defects inherent in the procedure for seeking the prerogative remedies, which made it necessary and reasonable to use the alternative procedure of seeking a declaration by ordinary action. In particular, there was no power to grant disclosure. Evidence was provided by affidavit and cross-examination on such evidence was virtually unknown. The 1977 reforms removed these and other disadvantages. Provision is made for disclosure⁶ and for cross-examination,⁷ which although not automatic as in ordinary proceedings, is governed by similar principles.⁸ In addition, it is now possible for a claim for a prerogative remedy to be coupled with a claim for a declaration or injunction,⁹ and, if appropriate, damages or restitution,¹⁰ in the same application. Thus, all the remedies that might prove necessary could be sought within one and the same procedure.

3-006

Secondly, there are specific protections incorporated into the judicial review procedure for the benefit of public authorities; these include the need to obtain permission which is intended to filter out unmeritorious or frivolous claims.¹¹ There is a short time-limit for applying for judicial review,¹² and the procedure itself is speedy. This protects the public interest in ensuring that public bodies and third parties are not kept in suspense as to the validity of a decision and the extent to which it could be implemented or relied upon. The fact that disclosure and cross-examination is not automatic, but requires permission, also ensures greater control over the conduct of proceedings by the court to ensure that these are not used to prolong proceedings unnecessarily.¹³ These protections do not exist in the ordinary claim procedure. Permission is not required. The ordinary limitation period applies and the process of establishing invalidity may be lengthy. Now that there are no procedural disadvantages for the applicant in proceedings by judicial review, it is no longer justifiable to allow an individual to bring an ordinary claim and thereby

to evade the protections afforded to public bodies by the judicial review provisions. To these reasons might be added the fact that judicial review applications are heard by judges on the Crown Office List who have experience and expertise in dealing with public law issues. A specialised procedure also emphasises the uniqueness of public law, in that it is quite unlike private litigation between parties. The courts have a more limited role in judicial review and need to ensure that the wider public interest, frequently present in such cases, is not overlooked.¹⁴

3-007

One of the results of the rule in *O'Reilly v Mackman*, however, is that there has been a large amount of litigation dealing solely with the question of whether proceedings are to be characterised as public law proceedings and whether the claims have been brought in the right forum rather than focussing on the legal merits of the claims. This litigation has been described as "unprofitable"¹⁵ and has attracted judicial criticism.¹⁶ As a consequence, the courts have recently indicated that the advantages of the judicial review procedure should not be overstated. The desire to have matters of public law determined by specialised Administrative Court judges, for example, needs to be counterbalanced by an awareness of the need not to overburden the Administrative Court and cause delays in the period before cases are heard. Furthermore, there may be instances where it is more appropriate for an issue of public law to be considered by a specialised appeal tribunal than by an application for judicial review.¹⁷ In the past, it was considered that where questions of fact arose in public law matters, the ordinary claim procedure may be more appropriate than judicial review in dealing with these matters.¹⁸ Now, it is recognised that while claims for judicial review do not generally involve determining questions of fact, the procedures can be adopted to deal with such questions when they arise. This consideration is, therefore, less likely to be a significant consideration.¹⁹ In addition, other values also have to be weighed in the balance in deciding the desirability of a rule of procedural exclusivity. In criminal matters, for example, the courts have emphasised the desirability of individuals being able to raise public law issues as a defence in magistrates' courts and Crown Courts as it may be physically easier and cheaper for them to do so than to institute separate judicial review proceedings.²⁰

3-008

For these reasons, the courts are in general less willing at present to allow claims to be struck out on the purely procedural ground that they should not have been brought by an ordinary claim and should have been brought by way of judicial review. They are more prone to emphasise as a minimum that the rule in *O'Reilly*

¹⁴ See dicta of Lord Bridge in *Cocks v Thanet DC* [1983] 2 A.C. 286 at 291. See Woolf, "Public Law and Private Law: Why the Divide?" [1986] P.L. 220 at 225-227.

¹⁵ per Lord Woolf M.R. in *Trustees of the Denis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840, at 848A-B.

¹⁶ See, e.g. the criticisms of Saville LJ in *British Steel plc v Commissioners of Customs and Excise* [1997] 2 All E.R. 366 and of Henry J. in *Doyle v Northumbria Probation Committee* [1991] 1 W.L.R. 1340 at 1348A-C.

¹⁷ See, e.g. dicta of Lord Bridge in *Chief Adjudication Officer v Foster* [1993] A.C. 754 at 766H-767B.

¹⁸ A consideration referred to in *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 A.C. 624 and by the Court of Appeal in *Trustees of Denis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840. The judicial review procedure can accommodate disputes of facts, particularly where this is necessary to ensure a fair hearing before an independent and impartial tribunal: see, e.g. *R. (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 W.L.R. 419. In general, however, judicial review is generally not used as a means of determining disputed facts but rather determining whether actions of public bodies are lawful. See generally para.9-121.

¹⁹ *Trim v North Dorset DC* [2011] 1 W.L.R. 1901 at [24]. Although this is a consideration that is still referred to on occasions: see *Hertfordshire County Council v Davies* [2018] 1 W.L.R. 4609 at [28].

²⁰ See, e.g. *Boddington v British Transport Police* [1999] 2 A.C. 143.

⁴ [1983] 2 A.C. 237 at 285.

⁵ The corresponding power now is in CPR r.3.4.

⁶ CPR Sch.1 Ord.53 r.8. formerly, discovery. See now CPR Pt 31.

⁷ CPR Sch.1 Ord.53 r.8. See now CPR Pt 31.

⁸ *O'Reilly v Mackman* [1983] 2 A.C. 237, at 285. But see paras 9-109-9-115.

⁹ Senior Courts Act 1981 s.31(1) and CPR r.54.3.

¹⁰ Senior Courts Act 1981 s.31(4) and CPR r.54.3.

¹¹ Senior Courts Act 1981 s.31(3) and CPR r.54.4.

¹² Senior Courts Act 1981 s.31(6) and CPR r.54.5.

¹³ See, per Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237 at 284.

v Mackman is subject to exceptions and there is a need to retain flexibility in applying the rule²¹ or to suggest that the scope of the rule still needs to be clarified.²² Furthermore, where both public law and private law issues arise, the courts at present tend to consider whether in all the circumstances the bringing of a claim by the ordinary claim procedure involves an abuse of process, rather than assuming that the by-passing of the judicial review procedure is an abuse.²³

Effect of the rule

It is an abuse of the process of the court to seek a declaration or injunction by ordinary claim in a public law case where the claim should proceed by judicial review. The court may therefore exercise its powers under CPR r.3.4, or its inherent jurisdiction, to strike out the claim.

There is power to transfer a claim to the Administrative Court instead of striking out the claim.²⁴ However, such a claim would still require permission to proceed as a claim for judicial review.²⁵ A judicial review claim must be brought promptly and no later than three months after the date when the grounds for bringing a claim first arose.²⁶ It is unlikely that permission to continue an ordinary claim transferred into the Administrative Court would be given unless the original claim, too, had been brought promptly or within three months of the date when the grounds for a claim arose. In many instances, an ordinary claim would not have been brought within that time-limit. There is power to extend the time for bringing a claim but that power is usually exercised only when there is good reason for the delay.²⁷ Delay resulting from the wrong choice of procedure is unlikely to be accepted as a good reason unless, possibly, the claimant was not at fault in believing that the ordinary claim procedure was available. In practice, there is a real risk that the ordinary claim will be struck out and either no transfer to the Administrative Court ordered or permission to continue the claim as a judicial review claim will be refused. There is, consequently, a real risk that the claimant will never be able to argue the merits of his case and will be denied relief solely on the grounds that he chose the wrong procedure initially and it is too late now to use the right procedure.

Given this risk, if there is any doubt as to the availability of the ordinary procedure, the wisest course of action is to bring a claim for judicial review first within the three-month time-limit.²⁸ If it transpires that the claim is not a public law one and cannot be brought by judicial review, the individual will normally still have time to commence his action by ordinary claim (as the usual, much longer time-limits will apply). A claimant may also apply for judicial review and pursue a paral-

²¹ See, e.g. the observations of Lord Slynn in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 at 57C-E and of Coulson L.J. in *Secretary of State for Transport v Arriva Rail East Midlands Ltd (Arriva)* [2020] 1 P. & C.R. 17 at [65].

²² See, e.g. the observations of Lord Lowry in *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 A.C. 624 at 653E and in *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 A.C. 1 at 34C.

²³ See *Clark v University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988 discussed at para. 3-027. See, also, as examples of this approach, *Phonographic Performances Ltd v Department of Trade and Industry* [2004] 1 W.L.R. 2893 at [29]-[52]; *Isle of Anglesey and others v Welsh Ministers and others* [2008] EWHC 921 (QB) (the point was not taken on appeal). In cases involving public law defences, see *Rhondda Cynon Taff BC v Watkins* [2003] 1 W.L.R. 1864 at [92]-[96].

²⁴ See CPR Pt 30.

²⁵ CPR r.54.4.

²⁶ See CPR r.54.5 and para.9-016 et seq.

²⁷ See CPR r.3.4 and para.9-034 et seq.

²⁸ As suggested by Lord Woolf M.R. in *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840 at 848E-F.

lel ordinary claim if there is any risk that the judicial review proceedings may not be determined until after the time-limit for bringing the ordinary claim has expired. The court may, in certain circumstances, direct that a claim begun by judicial review continue as if it had been begun as an ordinary claim.²⁹

Scope of the rule

The precise extent of the rule in *O'Reilly v Mackman*, and the exceptions, raise difficult issues in public law. The rule is said to apply to cases involving the infringement of rights protected by public law.³⁰ The notion of "public law rights" is a relative newcomer to English law. The difficulty lies in identifying what constitutes a public law matter for the purpose of the rule. The term "public law" has, in the past, been used in at least two senses. First, it may refer to the substantive principles of public law governing the exercise of public law powers, and which form the grounds for alleging that a public body is acting unlawfully. These are the familiar *Wednesbury* principles. A public law "right" in this sense could be described as a right to ensure that a public body acts lawfully in exercising its public law powers. The rights could be described in relation to the individual heads of challenge, for example, the right to ensure that natural justice is observed, or to ensure that the decision is based on relevant not irrelevant considerations, or is taken for a purpose authorised by statute, or is not *Wednesbury* unreasonable. Secondly, "public law" may refer to the remedies that an individual may obtain to negative an unlawful exercise of power. These are essentially remedies used to set aside unlawful decisions, or prevent the doing of unlawful acts, or compel the performance of public duties. These remedies now include the prerogative remedies of certiorari (now called a quashing order), mandamus (now called a mandatory order) and prohibition (now called a prohibiting order), and the ordinary remedies of declarations and injunctions when used for a public law purpose involving the supervisory jurisdiction of the courts over public bodies.

It must also be remembered that certain private law principles, such as tort and contract, apply to public bodies as well as private individuals. There may, therefore, be occasions when a public body is both subject to the special rules of public law designed to ensure that they use their public law powers lawfully and must also observe private law principles in the exercise of such powers. An individual may be claiming that action is unlawful and should be set aside, and also that the acts of the public body give rise to a private law right to damages as compensation for any loss incurred. A claim may principally involve private law principles such as negligence or breach of contract, but the application of those principles may be influenced by the statutory framework within which a public body operates or may involve questions such as the vires of acts of the public body.

There are therefore at least four possible questions that can arise in a case involving a public body:

- Is the public body violating a principle of public law?
- Is the individual seeking a remedy intended to set aside or nullify the unlawful actions of a public body?
- Is the public body violating a principle of private law?
- Is the individual seeking a private law remedy, principally damages, to compensate for the interference with his private law rights, or a declara-

²⁹ CPR r.54.20.

³⁰ per Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237 at 285.

tion of those rights or an injunction to prevent further unlawful interference with those rights?

3-015 A claim by an individual may involve answering only the first two questions (which are regarded as public law questions) or the last two (which are regarded as private law questions). As there is no clear divide between private and public law, it may be that all four questions arise out of the same facts. It may be that the effect of granting a declaration or an injunction to protect a private law right will have the practical effect of nullifying a public law action.

3-016 There is also the further problem of the relationship between public law and criminal law. An individual may be charged with an offence of contravening subordinate legislation or a decision of a public body, or acting without a relevant licence. He may wish to raise as his defence in those criminal proceedings the invalidity of the measure or decision that he is charged with contravening.

3-017 There is, as yet, no absolute clarity on the basic scope of the rule in *O'Reilly v Mackman*. In one case, the House of Lords discerned two possible interpretations. On one approach, the rule applies to proceedings where only public law issues arise, and does not apply if private law rights are also at stake. On the alternative approach, the rule applies to all proceedings where some public law act or decision is challenged.³¹ The general tenor of the decision in *O'Reilly v Mackman* is that the rule is to be understood in accordance with the second interpretation, namely that the rule applied whenever a public law issue arose for determination and that issue had to be determined by way of judicial review unless the situation fell within one of the exceptions to the rule. The issue of the precise scope of the rule did not, however, arise in *O'Reilly*. There, the claimants, who were prisoners, were challenging a decision to remove remission. The only basis of their claim and their only "rights" were public law rights; there was no possible claim in private law and no question of any private law remedy being available.³² It was not necessary, therefore, to determine the precise ambit of the rule. The House of Lords has left open the question of the proper scope of the rule.³³ For the reasons set out below, the better approach would be to view the rule as applying where the questions that can be raised are solely public law ones, i.e. to view the rule as requiring an individual to proceed by way of judicial review when he is seeking a public law remedy because a public body has violated a principle of public law (and even then there may be exceptions justifying use of the ordinary claim procedure). An individual who therefore sought to establish that there had been a breach of a principle of public law but was also seeking to vindicate any private law right would be free either to bring a claim for judicial review (and attach a claim for damages) or to proceed by making an ordinary claim.³⁴ Similarly, an individual could raise the invalidity of an administrative act as a defence to an ordinary claim or a criminal charge or could, if he so wished, bring a claim for judicial review of that act.

Cases raising only public law issues

3-018 Cases where the claim is based solely on substantive principles of public law, and where the only remedy which could be sought is one to quash or set aside the

³¹ See per Lord Lowry in *Roy v Kensington and Chelsea Family Health Practitioner Committee* [1992] 1 A.C. 624 at 653E-H.

³² As was pointed out by Lord Hoffmann in *O'Rourke v Camden LBC* [1998] A.C. 188 at 195G-H.

³³ See *Roy v Kensington and Chelsea Family Health Practitioner Committee* [1992] 1 A.C. 624.

³⁴ As happened in *D. v Home Office (Bail for Immigration Detainees intervening)* [2006] 1 W.L.R. 1003.

consequences of the decision (and in this sense constitutes a public law remedy) are clearly within the rule. Such cases can only be brought by judicial review and not ordinary claim. *O'Reilly v Mackman*³⁵ is itself a clear example of such a case. The claimant prisoners were alleging breach of the rules of natural justice, which are part of the body of principles developed by the courts specifically to control the exercise of power by a public body. The remedy they sought was a declaration that the decision of the Board of Visitors to remove their remission was a nullity, and that therefore no remission had ever been removed. In other words, the only issues of law raised and the only relief sought were within the realm of public law. The decision of the Board of Visitors did not affect any private law rights of the prisoners. They had no statutory or other common law rights to remission which could have founded the basis of a claim to be entitled to a private law right. It was accepted that they had no claim in damages arising from the decision so no private law rights were affected and consequently no claim could be made for a remedy in damages (or alternatively for a declaration of such rights or an injunction to prevent interference with such rights).

Cases where the only issues raised in the pleadings involve the substantive principles of public law, and where the remedy sought is intended to ensure that a public body exercises its public law powers (as defined in the previous chapter) in accordance with those principles must also be brought by judicial review. This is so even if it might have been possible to have raised some issue of private law. Thus, the Court of Appeal struck out an ordinary claim that a police officer had failed to comply with his statutory obligations to allow copies of documents to be made.³⁶ The claim was intended to ensure the proper exercise of public law powers by a public body. As such it could only be brought by judicial review. It was uncertain whether damages were available at private law for unlawful interference with goods. However, even if such a claim could be made, it had not been made in this case. The only claim made and the only relief sought related to the supervisory jurisdiction of the court over the exercise of public law powers, and that was a matter for judicial review not ordinary claim. Similarly, a challenge to a notice alleging a breach of a condition attached to a planning permission was a challenge to a public law act on public law grounds. As such, it had to be brought by way of judicial review and an ordinary claim, brought 18 months after service of the notice, was struck out as an abuse of process.³⁷

Cases involving only private law issues

Public bodies, just like individuals, can make contracts, commit torts and own land. The public nature of the body may be entirely incidental to claims arising out of such matters. Cases which raise only issues of private law and where the remedies sought are private law remedies such as damages are clearly outside the scope of judicial review. Thus, an individual cannot enforce a purely contractual right by way of judicial review.³⁸ Similarly, a tortious claim such as negligence,

³⁵ [1983] 2 A.C. 237. See also, *Wessex Water Authority v Farris (V.O.)* [1990] R.V.R. 78.

³⁶ *Allen v Chief Constable of Cheshire, The Times*, 7 July 1988.

³⁷ *Trim v North Dorset DC* [2011] 1 W.L.R. 1901. Conversely, decisions which do not raise purely public law issues, but involve questions of private law rights to damages, would not be within the scope of the rule: see *Secretary of State for Transport v Arriva Rail East Midlands Ltd (Arriva)* [2020] 1 P & C.R. 17 at [97].

³⁸ *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152; *R. v British Broadcasting Corp Ex p. Lavelle* [1983] 1 W.L.R. 23.

which raises no issue of public law, should be brought by ordinary claim.³⁹ The distinction between private law rights and public law issues is clear in principle. As Chapter 2 demonstrated, it is often very difficult in practice to determine in advance whether a particular matter will be classed as private or public.⁴⁰ Furthermore, there are numerous situations where questions of public law and private law are closely interwoven. The same set of facts may give rise to claims both in public law and private law. These cases are considered in the following sections.

Cases involving both private and public law

Decisions affecting private law rights

3-021 The same set of facts may give rise to issues of both public and private law. This may occur in a number of ways. A public body may have power to take a decision which will in some way affect or vary a private law right of an individual. Local authorities, for example, have statutory powers to vary the rents payable by their tenants or Family Practitioner Committees have power to vary the fees payable to a doctor for services provided. The source of the power is statutory and is likely to be sufficiently "public" to be susceptible to judicial review. The substance of a challenge may well be a public law issue, namely whether the power was exercised unlawfully in the public law sense, that is whether the decision or act of the public body was within the powers of the public body concerned. It is equally correct, however, that the individual's private law rights are at stake, i.e. his contractual right to a tenancy at a particular rent or a right to the payment of fees, and the effect of a successful challenge would be to vindicate those rights. Thus the issue inevitably arises as to whether such challenges fall within the scope of the rule in *O'Reilly v Mackman* and, if they do, whether such challenges may be brought by way of the ordinary claim procedure as well as by judicial review.

3-022 It is relatively clear that the courts are at present unlikely to strike out private law proceedings as an abuse of process where a private law right is at stake, particularly where it dominates the proceedings, whether or not the actual challenge focuses on an act or decision of a public body which is said to be ultra vires. Thus, it will be possible to raise the public law issues concerning the validity of the act in the ordinary private law claim intended to vindicate the private law right.⁴¹ This will either be because the rule in *O'Reilly v Mackman*, properly understood, does not apply when questions of private law right as well as public law rights are in issue. Alternatively, even if the rule applies, it may be appropriate to recognise an exception to that rule where private law rights are also at issue or where they dominate the proceedings.

3-023 A number of cases demonstrate the current attitude of the courts in these cases. In *Wandsworth LBC v Winder*,⁴² a local authority exercised statutory powers to increase the contractual rent payable by its tenants, including Mr Winder. Rather than challenge the decision by way of judicial review, Mr Winder refused to pay. The local authority eventually brought proceedings for possession of the property and arrears of rent. Mr Winder defended the proceedings on the ground that the rent

³⁹ See, e.g. *Hotson v East Berkshire Health Authority, sub nom. Hotson v Fitzgerald* [1987] A.C. 750.

⁴⁰ See paras 2-132-2-133.

⁴¹ *D. v Home Office (Bail for Immigration Detainees Intervening)* [2006] 1 W.L.R. 1003.

⁴² [1985] A.C. 461. See also *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] A.C. 112 (parent able to proceed by way of ordinary claim when seeking to enforce a private law parental right, notwithstanding that the subject matter of the claim was in essence a public law challenge).

increase was unreasonable in the public law sense of "so unreasonable that no reasonable local authority could have reached such a decision" and counter-claimed for a declaration that the decision was ultra vires. The essence of Mr Winder's claim was, then, a public law issue related to the validity of the decision to exercise the statutory power to increase the rents. The authority applied to have the defence and counter-claim struck out as an abuse of process as they raised issues of public law which should have been brought by way of judicial review. The House of Lords refused to strike out the defence and counter-claim and allowed the public law issues to be raised in the private law proceedings. Lord Fraser, giving the unanimous judgment, held that there was no abuse of process. He distinguished *O'Reilly v Mackman* on two grounds; first the decision here infringed the tenants' private law rights whereas in *O'Reilly* no private law rights were in issue and secondly the public law issues in *O'Reilly* were raised by the plaintiffs who initiated the proceedings whereas here they were raised by way of defence and counter-claim. Lord Fraser did not consider that any of the exceptions specifically identified in *O'Reilly* applied in the present case but, nonetheless, the proceedings were allowed to proceed. It is not clear whether he considered that the rule in *O'Reilly* did not apply because both private and public law rights arose or whether he considered that a further exception should be made to the rule, namely that an individual should not be prevented from raising public law issues, at least by way of defence to a civil law claim. In any event, it is clear that it was not an abuse of process to raise a defence or make a counter-claim involving a challenge to a public law decision where the proceedings also involved the vindication of an existing private law right.

The House of Lords adopted a similar approach to *Winder* in *Roy v Kensington and Chelsea Family Health Practitioner Committee*.⁴³ There, regulations⁴⁴ provided that a doctor ought to be paid a full basic practice allowance if he provided general medical services and "he is in the opinion of the responsible committee devoting a substantial amount of time to general practice under the National Health Service...". The defendant committee were of the opinion that Dr Roy did not devote a substantial amount of time to general practice and reduced the allowance payable by 20 per cent. Dr Roy issued ordinary private law proceedings claiming the full basic allowance. The committee applied to have the claim struck out as it involved a public law challenge to a public law decision (the decision to reduce the basic payment) which should have been brought by way of judicial review. Their Lordships analysed the regulations as giving rise to a private law right, derived from the statute and regulations, to be paid for the work that he had done. The amount of the payment may be affected by a discretionary decision on the part of the committee but that fact did not remove the doctor's private law right nor did it mean that any challenge to such a discretionary decision had to be brought by judicial review.⁴⁵ Lord Bridge held that where a person asserts a private law right, whether by way of a claim or defence, he could proceed by an ordinary private law proceedings notwithstanding that the proceeding might also involve the examination of a public

⁴³ [1992] 1 A.C. 624.

⁴⁴ In practice, a statement of fees and allowances made under reg.24 of the National Health Service (General Medical and Pharmaceutical Services) Regulations 1974 (SI 1974/160).

⁴⁵ This conclusion may be right but dicta in the case suggest that an order for payment of money due could not be sought on judicial review. That is true if the right is a private law right. If, however, the duty had been a public law duty only, there is nothing to prevent the court granting an order of mandamus requiring the public body to comply with its statutory duty by paying the money (see, e.g. *R. v Liverpool City Council Ex p. Coade, The Times*, 10 October 1986 discussed at para.6-051) or a declaration that the public body was under a duty to pay the money (see, e.g. *R. v Birmingham City Council Ex p. Mohammed* [1999] 1 W.L.R. 33).

law issue. Consequently, as Dr Roy was seeking to enforce a private law right to remuneration, albeit one where the quantum was affected by a discretionary decision, he could proceed by ordinary private law proceedings.⁴⁶ Lord Lowry considered that the arguments for excluding the case from the ambit in *O'Reilly v Mackman* or for treating it as an exception to the rule were conclusive and Dr Roy could proceed by ordinary private law proceedings. Lord Lowry was influenced by eight factors which can conveniently be divided into three groups, first, the nature of the rights in issue: here, the case involved the enforcement of private law rights (derived from statute) and those private law rights dominated the proceedings; secondly, procedural considerations such as the likelihood of factual disputes occurring which could be better dealt with in the ordinary claim procedure; and thirdly, considerations of policy or principle such as the belief that a person asserting rights should not be subjected to the need to obtain permission to institute proceedings or the special time constraints applicable in judicial review.⁴⁷

A similar approach is evidenced by the decision of the Court of Appeal in *British Steel Plc v Commissioners of Customs & Excise*.⁴⁸ There, the plaintiffs sought to recover duty paid on the basis that the Commissioners had unlawfully refused to recognise that British Steel were entitled to relief from payment of the duty. The Court of Appeal held that British Steel had a common law or private law right to recover duty unlawfully demanded and that they were entitled to challenge the lawfulness of the refusal to grant relief (which was a matter of public law) in the context of ordinary private law proceedings for recovery of the duty. Similarly, the Court of Appeal had held that where a person is seeking to enforce a private law right, conferred by statute, to payment of a grant, he may proceed by way of an ordinary claim notwithstanding that public law issues surrounding the question of whether he has fulfilled the conditions governing entitlement to payment also arise.⁴⁹ Similarly, a claim for restitution to recover money paid for services which, if there had not been a public law error by a public body, would not have been paid by that public body can be brought by way of judicial review.⁵⁰

In *Steed v Secretary of State for the Home Department*,⁵¹ a person complained about the delay in processing a claim for compensation under a statutory scheme whereby a person was obliged to surrender a hand gun to the authorities and then received a payment equivalent to the value of the hand gun. The claimant issued an ordinary claim for the unpaid amount, together with interest. The House of Lords held that the claimant had a right to compensation once the conditions for payment were met and that it was plainly arguable that when a person was obliged to surrender property there was an obligation to process the claim for compensation within a reasonable time. As such a claim was, in effect, a claim for money due to him and not paid when it was due and could be brought by way of ordinary claim. The claimant was not limited to challenging the reasonableness of the delay by bringing a claim for judicial review.

⁴⁶ [1992] 1 A.C. 624 at 630D-G; in that case a writ, now by way of a claim under Pt 8 of the CPR.

⁴⁷ [1992] 1 A.C. 624 at 654A-D.

⁴⁸ [1997] 2 All E.R. 366 (reversing Laws J. in [1996] 1 All E.R. 1002 at first instance on this point). See also *Hutchings v Islington LBC* [1998] 1 W.L.R. 1629.

⁴⁹ *Trustees of Denis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840 and see *Doyle v Northumbria Probation Committee* [1991] 1 W.L.R. 1340.

⁵⁰ *Surrey CC v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550 (QB); [2021] Q.B. 896. See also *Richards v Worcestershire CC* [2017] EWCA Civ 1998; [2018] P.T.S.R. 1563 (court refused to strike out a claim for recovery of monies paid for services which allegedly should have been paid by the local authority).

⁵¹ [2000] 1 W.L.R. 1169.

The issue arose again in *Clark v University of Lincolnshire and Humberside*⁵² where the Court of Appeal refused to strike out a claim based on alleged breach of a contractual relationship between a student and a university notwithstanding that the issues were ones which could also have been litigated by way of judicial review. The University in that case was a statutory body created under the Education Reform Act 1988. As a body performing public functions, claims that the University had failed to act in accordance with its own regulations would be amenable to judicial review. As a fee-paying student, the claimant also had a contract with the University which was capable, in principle, of being the subject of an ordinary claim for breach of contract.⁵³ In the present case, the claimant brought a claim for breach of contract, alleging, in effect, that the University was obliged to act in accordance with its own regulations but had failed to do so when awarding her a third-class degree only. The University contended that the claimant should have brought that claim by way of judicial review and that it was an abuse of process to bring the claim by contract long after the expiry of the three-month time-limit that would normally apply in judicial review challenges. The Court of Appeal declined to strike out the claim. As the claimant had a claim in contract, it would not be appropriate to strike out the claim simply because it could have been more appropriately brought by way of judicial review.⁵⁴ Rather, the court could use its powers under the CPR to ensure that such claims did not involve an abuse of process. The emphasis in such cases would not therefore be on whether the right procedure had been used but whether the use of the ordinary claim proceedings involved an improper attempt to circumvent the protections included in the judicial review procedure. This approach has been followed in subsequent cases where the courts have considered whether, in all the circumstances of the case, including questions of delay, it would be an abuse of process to allow a claim to proceed.⁵⁵

The primary protection for public bodies is the requirement that claims for judicial review be lodged promptly and in any event within three months. The difficulty is that, if a claim raises both private and public law rights, then allowing the use of the ordinary procedure would enable the claim to be brought long after the expiry of the time-limit for judicial review. The Court of Appeal in *Clark* gave some illustrations of methods of resolving that difficulty. First, if the court were being asked to review the actions of the public body and the remedies sought were discretionary remedies, such as a declaration or an injunction, intended to have the decision of the public set aside or to prevent it giving effect to its decision, then it may be appropriate to refuse those remedies or even to grant summary judgment for the defendant on that aspect of the claim.⁵⁶ In this way, the time-limits in judicial review, and the discretion in relation to remedies in ordinary proceedings, could be used to ensure that the decisions of public bodies were not left open to challenge for unreasonable periods of time. If, however, a claimant also had a money claim, for example, breach of contract, that claim could proceed in the ordinary claim. Secondly, the court could strike out a claim, in appropriate circumstances, if it were

⁵² [2000] 1 W.L.R. 1988.

⁵³ See para.2-116.

⁵⁴ [2000] 1 W.L.R. 1988 at [38].

⁵⁵ *Isle of Anglesey and others v Welsh Ministers and others* [2008] EWHC 921 (QB) (claim for a declaration that an order granting a right of sea fishery was invalid brought 45 years after the order made; in the circumstances, there was no abuse of process. The point had not become live until recently and the fishermen involved would not have been relying on the fact that the validity of the order would not be challenged. The point in relation to abuse was not taken on appeal). See also *Phonographic Performances Ltd v Department of Trade and Industry* [2004] 1 W.L.R. 2893 at [29]-[52].

⁵⁶ [2000] 1 W.L.R. 1988 at [36].

satisfied that proceeding by way of ordinary claim, rather than judicial review, involved an abuse of process. The mere use of the ordinary proceedings, however, would not be abusive. Nor would the commencement of such proceedings within the ordinary time-limit for bringing such claims be an abuse, although delay in instituting proceedings is a factor which can be taken into account in deciding if proceedings are abusive.⁵⁷ In practice, it is likely that the courts would only find that the institution of ordinary proceedings, rather than judicial review, was an abuse if the purpose of using the ordinary procedure was to circumvent or flout the protection given to public bodies in judicial review.

3-029 Concentration on the refusal of particular remedies is likely to be the more successful way of reconciling the interests of the public body defendant in not having its decisions left subject to challenge for an unreasonable period with the interests of the individual who wishes to vindicate his private law rights. If the real purpose of the proceedings is to seek a remedy setting aside a decision of that body, that is, in truth, an attempt to seek a public law remedy. It is in those situations that the time-limit in judicial review proceedings is regarded as important as decisions of public bodies are expected to be acted upon and, if they are to be challenged, they should be challenged relatively promptly. It is not in the wider public interest that the validity of decisions of public bodies should be left in a state of uncertainty. If ordinary proceedings are possible, either because issues of public law and private law arise out of the same facts or, as in *Clark*, both private law and public law rights arise, but if an essentially public law remedy is being sought, it may be appropriate to refuse such a remedy if there were unreasonable delay in instituting the proceedings. Any private law claim giving rise to a claim in damages, such as the contract claim in *Clark* or a claim in tort, could still be pursued. This approach is reflected in the decision of the Court of Appeal in *Secretary of State for Transport v Arriva Rail East Midlands Ltd (Arriva)*.⁵⁸ The Court recognise that a claim for damages for breach of the statutory duties governing the procurement process but that it would not be appropriate to grant an injunction or other remedy intended to undo the tendering process.

Public and private law claims arising

3-030 Cases raising both public law and private law issues may also arise in other, more complex ways. An individual may be claiming that certain decisions or actions are invalid and should be set aside because the public body has violated one of the substantive principles governing the exercise of public law power, and also that the public body has violated his private law rights and is liable in damages. A claim that an exercise of statutory powers is unlawful, and of no effect, may, for example, be coupled with a claim that the public body owes a common law duty of care in the exercise of those statutory powers which has been breached, and so damages are payable. An individual may be seeking to enforce a statutory duty and also claiming that it is one of those duties that gives rise to a right to compensation in damages for certain categories of persons. The tort of misfeasance in a public office, which gives rise to a right to damages classed as a private law right, requires an act by a public body which is ultra vires (a public law issue) together with malice or knowledge of the invalidity. Other torts may involve public law issues. The tort of false imprisonment, for example, may involve determining whether a public body

⁵⁷ [2000] 1 W.L.R. 1988 at [35]–[39]. Where a public law issue is raised as a defence, it would, however, not be appropriate to strike out the defence on the grounds of delay in raising the issue: *Rhondda Cynon Taff BC v Watkins* [2003] 1 W.L.R. 1864 at [42] and [80]–[96].

⁵⁸ [2020] 1 P. & C.R. 17 at [105].

exercising statutory powers of detention has acted lawfully or whether the detention is invalid.

An individual may seek judicial review where the issue raised is a public law one in the sense defined in Chapter 2. The judicial review proceedings will determine whether a decision or an action involves a violation of one of the principles governing the exercise of public law power, and whether the decision should be set aside or the consequences of the action nullified. The individual may also include a claim for damages. Thus, a claim for judicial review to enforce a public law duty may include a claim for damages⁵⁹ (or an injunction in appropriate circumstances⁶⁰) or a request for a quashing order to quash a decision of a Board of Visitors removing remission may be coupled with a claim for damages for false imprisonment.⁶¹

3-032 The second question that arises is the extent to which an individual may alternatively chose to pursue such claims by the ordinary claim procedure rather than seeking judicial review and claiming damages in the course of those proceedings. The Court of Appeal has held that where claims in private law and public law arise out of the same set of facts, the individual is entitled to pursue the private law claims by ordinary claim.⁶² Thus, an individual was entitled to proceed by an ordinary claim for damages in tort for breach of (a claim which is characterised in English law as akin to the private law tort of breach of statutory duty⁶³), notwithstanding that other issues involving the failure to meet obligations, which were classed as public law obligations, also arose.

3-033 More difficult, is the question of whether public law claims which also arise out of the same facts can be allowed to proceed in the same ordinary action, or whether they must be struck out as an abuse of the process of the court.

3-034 In *An Bord Bainne Co-operative (Irish Dairy Board) v Milk Marketing Board*,⁶⁴ in addition to claiming damages for breach of what is now art.102 TFEU, the plaintiff alleged that the defendant had acted in breach of an EU regulation. Breach of this regulation did not give rise to any private law right to damages, but operated in public law by giving rise to an entitlement to have action inconsistent with the regulation rights quashed or declared invalid.⁶⁵ The Court of Appeal held that the public law claims could proceed in the same ordinary action as the private law issues since they arose from the same facts and “were inextricably linked” with the private law issues. The Court of Appeal considered again the position where private law and public law claims arose out of the same set of facts in *Secretary of State for Transport v Arriva Rail East Midlands Ltd (Arriva)*.⁶⁶ There, the public body took a number of decisions relating to a tendering exercise and disqualified certain bidders. The bidders brought a private law claim for damages contending that the decisions taken resulted in breaches of the relevant statutory duties. The Court of Appeal held that the claim for damages was inextricably mixed with the public law

⁵⁹ *R. v Inner London Education Authority Ex p. Ali and Murshid* [1990] 2 Admin. L.R. 822.

⁶⁰ *R. v Kensington and Chelsea RBC Ex p. Hammell* [1989] Q.B. 518.

⁶¹ *R. v Board of Visitors of Gartree Prison Ex p. Sears*, *The Times*, 20 March 1985. The claim for damages would be unlikely to succeed in the light of the decision of the House of Lords in *R. v Deputy Governor of Parkhurst Prison Ex p. Hague: Weldon v Home Office* [1991] 3 W.L.R. 340.

⁶² *An Bord Bainne Co-operative (Irish Dairy Board) v Milk Marketing Board* [1984] 2 C.M.L.R. 584 and see *Phonographic Performances Ltd v Department of Trade and Industry* [2004] 1 W.L.R. 2893. The High Court decision in *Guevara v Hounslow LBC*, *The Times*, 17 April 1987 (which held that an individual must proceed by judicial review if substantial element of public law involved, even if claiming damages) probably no longer represents good law.

⁶³ *Garden Cottage Foods v Milk Marketing Board* [1984] A.C. 130. See Ch.17.

⁶⁴ [1984] 2 C.M.L.R. 584.

⁶⁵ *An Bord Bainne Co-operative (Irish Dairy Board) v Milk Marketing Board* [1984] 2 C.M.L.R. 584.

⁶⁶ [2020] 1 P. & C.R. 17.

issues relating to the validity of the decisions. A claim for damages was not an abuse of process in those circumstances and could be brought by ordinary claim within the six-year time limit applicable to claims for breach of statutory duty. A claim for an injunction, or possibly a declaration, intended to undo the effect of the decision (as opposed to seeking damages but leaving the decisions in place) may be an abuse of process if brought outside the three-month time limit provided for in relation to judicial review. There, the Court considered that the issue of whether the claim for an injunction amounted to an abuse of process was better dealt with at the trial rather than on an application to strike out.

3-035

The Court of Appeal in *Davy v Spelthorne BC*⁶⁷ took a different approach. There, the substance of the case was considered to involve private law rights arising from the agreement between the parties that Davy would not challenge the enforcement notice, and the allegedly negligent advice of the authority. The Court of Appeal allowed the claim for damages to proceed since this was based on private law rights and sought private law relief in the form of damages. The plaintiff also sought an injunction to prevent the implementation of the enforcement notice and an order setting aside the notice. The Court of Appeal held that these remedies would essentially be public law remedies since they would achieve the same effect as a quashing order or a declaration in judicial review. The public authority were entitled to claim the protections granted by the judicial review procedure when relief of this nature was sought. Consequently, these claims would be struck out. This aspect of the decision was not appealed to the House of Lords.

3-036

One potential practical drawback of the approach in *Davy* is that it contemplates two sets of proceedings dealing with issues arising out of one set of facts. An individual wishing to make alternative claims would have to pursue parallel proceedings. Alternatively, *Davy* could have applied for judicial review in respect of the notice and attached a claim for damages, thus enabling both issues to be dealt with together. Therefore, in order to avoid two sets of proceedings, the individual is pressurised into using the judicial review procedure to protect his private law rights, even though that procedure is not primarily designed for resolving such issues and requires him to accept the considerable procedural restraints and differences of the judicial review as compared with the ordinary claim procedure.

3-037

The better view is that the approach of the Court of Appeal in *An Bord Bainne and Arriva* is preferable and that both the issues of public and private law may be considered in the ordinary claim procedure. The House of Lords has referred to *An Bord Bainne* with approval.⁶⁸ Furthermore, the approach in that case fits more naturally with the case law in this area which accepts that the fact that private law rights are raised in a particular matter is a reason for allowing related public law issues to be examined in the ordinary proceedings as well. Furthermore, if there were undue delay in instituting the proceedings, that could be a reason for refusing injunctive relief. The mere fact that the relief was sought in ordinary proceedings rather than by way of judicial review would not, of itself, justify a refusal to entertain the claim.⁶⁹

⁶⁷ (1983) 81 L.G.R. 580.

⁶⁸ See, e.g. *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 at 57C.

⁶⁹ See the approach in *Clark v University of Lincolnshire and Humberside* [2001] 1 W.L.R. 1988 discussed at para.3-027 and *Secretary of State for Transport v Arriva Rail East Midlands Ltd (Arriva)* [2020] 1 P. & C.R. 17 at [105]–[113].

Public law decision a precondition to creation of a private law right

One approach suggested by the courts in earlier cases to the problem of statutory duties and powers creating both public and private law rights, is to analyse the duty or decision-making powers as creating a two-tier structure. First, there is the decision as to whether a duty is owed to, or a benefit is to be conferred on, the individual. Primary responsibility for making the determination lies with the public body. The courts only exercise residual supervision to ensure that the public body observes the substantive principles of administrative law intended to prevent the abuse of power. The courts may quash unlawful decisions and require the public body to reconsider the matter according to law, but cannot substitute their view on entitlement for that of the public body. Challenges to a decision that a duty is not owed, or that a discretionary benefit should not be paid, raise issues that are classed as public law issues, and can only be raised by way of judicial review. The grounds of challenge, the role of the courts in exercising residual supervision, and the nature of the remedy are all public law issues falling within the scope of the judicial review jurisdiction. Adopting this analysis, no private law right is regarded as existing at this first stage and a favourable decision by the public body is regarded as a necessary precondition to the creation of a private law right.

3-038

The second tier arises when the public body accepts that a duty is owed or a grant should be paid. At that stage, the courts may construe the statutory scheme as giving rise to a private law right, once the public body has reached a decision that the duty is owed. If the public body fails for some reason to fulfil the duty, the individual may bring an ordinary action seeking damages or an injunction to enforce the private law right.

3-039

Thus, in *Cocks v Thanet DC*,⁷⁰ the House of Lords analysed the duties imposed by the Housing (Homeless Persons) Act 1977 in this way. The decision as to whether a person qualified for permanent or temporary accommodation lay with the local authority, who thus had to determine whether the duty to accommodate was owed. That decision could only be challenged in the courts on the usual principles of administrative law and the court could only set aside the authority's decision; it could not substitute its opinion on whether the duty was owed for that of the authority. The validity of the decision of the public authority on eligibility was a public law matter to be resolved by judicial review. Once the authority accepted that a duty to house was owed to the individual, private law rights were created. These private law rights could be enforced by way of an ordinary action, seeking damages or an injunction. As the individual was seeking to challenge a decision refusing to recognise that the duty was owed, he was raising a public law matter that had to be raised by judicial review, and the ordinary action seeking an injunction to enforce the duty was struck out as an abuse of process.

3-040

That analysis has now been rejected by the House of Lords in *O'Rourke v Camden LBC*.⁷¹ There, the House held that the duties that were created by the Housing Acts did not create any private law rights at any stage. In particular, the House were critical of the suggestion that a private law duty which had not previously existed could arise once a public body had taken a decision in favour of the applicant. The result of the ruling in *O'Rourke* is that there will be very few⁷² if any situations where statute creates a private law right in this way. As no private law

3-041

⁷⁰ [1983] 2 A.C. 286. See also *Cato v Minister of Agriculture, Fisheries and Food* [1989] 3 C.M.L.R. 513.

⁷¹ [1998] A.C. 188.

⁷² They will be "a rare animal indeed" per Lord Woolf M.R. in *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840 at 848A.

right arises, the situation will be one where the only rights, and the only remedies, are public law ones. As such, they may normally be claimed only by way of judicial review as this is one category of cases where the rule in *O'Reilly v Mackman* applies.⁷³

3-042 There have been other attempts to analyse such situations as one where there is an antecedent public law decision which, if favourable, then gives rise to private law rights and to suggest that challenges to the antecedent decision must be brought by judicial review. The courts have, rightly, refused to encourage this kind of analysis. Rather than seeing the relationship between public and private law as a series of chronological hurdles to be dealt with in the appropriate sequence, they have largely accepted that a single factual relationship may involve interwoven elements of public and private law. Thus in *Roy*,⁷⁴ the House of Lords were not prepared to analyse the situation as one where the private law right to remuneration arose only if there was an antecedent public law decision in the doctor's favour. Similarly, the Court of Appeal has rejected the suggestion that a right to recover the payment of duty on the grounds that the payer was entitled to relief depended first on challenging the public law decision to refuse relief.⁷⁵ The Court of Appeal has also rejected the argument that a claim for damages for breach of a statutory duty in the public procurement was dependent on establishing that the decisions concerning the tender process was unlawful.⁷⁶

3-043 There is a possibility, however, that there may be very rare situations in which this two-tier approach to rights will be adopted. That situation arguably might arise where a public law decision is taken which then gives rise to a right to payment of a particular sum, as is the case with home improvement grants. The Court of Appeal has accepted that an action to obtain payment of a grant where the authority had decided to pay it gave rise to a private law right.⁷⁷ The Court considered, however, that the decision as to whether or not to make the grant involved purely public law rights not private law rights.⁷⁸ If that is correct, the implication is that the rule in *O'Reilly v Mackman* would apply and a challenge to the refusal of a grant would have to be made by way of judicial review (unless one of the exceptions apply). This situation is unlikely to arise frequently and is likely to be confined to situations involving decisions to pay money.

Cases involving enforcement of a private law right where a collateral issue of public law arises

3-044 In *O'Reilly v Mackman*, Lord Diplock stated that one possible exception to the general rule might be: "...where the invalidity of a decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private

⁷³ Cases striking out claims on the grounds that they involved challenges to the public law aspect of the duty to house should now be decided on the basis that no private law right arises at all: see the earlier decisions in *Mohram Ali v Tower Hamlets LBC* [1993] Q.B. 407 and *Tower Hamlets LBC v Abdi* (1992) 91 L.G.R. 300.

⁷⁴ [1992] 1 A.C. 624 at 653B-C.

⁷⁵ *British Steel Plc v Commissioners of Customs & Excise* [1997] 2 All E.R. 366.

⁷⁶ *Secretary of State for Transport v Arriva Rail East Midlands Ltd (Arriva)* [2020] 1 P. & C.R. 17 at [76]-[79].

⁷⁷ *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840.

⁷⁸ *Trustees of the Denis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840 per Lord Woolf M.R. at 846B-C. See also *Cato v Minister of Agriculture Fisheries and Food* [1989] 3 C.M.L.R. 513.

law".⁷⁹ The meaning of this exception was not discussed, and it has not featured significantly in subsequent case law. The House of Lords in *Winder*⁸⁰ held that the exception did not apply where the public law issue was the central issue in the case. Other cases have been classified as raising only private law issues and so outside the scope of the rule altogether.⁸¹ Lord Scarman in *Gillick*,⁸² for example, held that Mrs Gillick's claim that a circular was unlawful interfered with her common law parental rights. As the claim involved the enforcement of private law rights it fell outside the rule in *O'Reilly v Mackman* which only dealt with the enforcement of public law rights. Alternatively, he was prepared to accept that, if the rule did apply, then the exception was applicable as the "...private law content of her claim was so great". A similar approach was adopted in *Roy*.⁸³

Consent

The second exception suggested in *O'Reilly v Mackman* arises where neither party objects to the use of the ordinary claim procedure.⁸⁴ There has been criticism of this exception, on the ground that the courts ought not to overlook an abuse of process simply because the parties agree.⁸⁵ Yet, the rule is a judge-made rule designed to ensure that a claimant does not evade the safeguards afforded the public body: if the public body considers that those safeguards are not applicable in the instant case, or that the issue raised is so significant that it outweighs other considerations, there seems no reason for the courts to refuse to entertain the claim. The rule is not a jurisdictional limitation on the courts' power to hear public law claims by ordinary claim, and the parties are not conferring a jurisdiction on the courts that they do not have: they are simply agreeing that the reasons that normally lead to a court refusing to hear such claims by ordinary claim are not present in the instant case. The exception has not featured greatly in the case law although on one occasion it was expressly relied upon by a court.⁸⁶ In *Gillick*,⁸⁷ Lord Scarman indicated that the consent exception was an alternative reason for allowing the case to proceed. There are other cases which should have proceeded by judicial review but where ordinary claims have been allowed, and these may be explicable on the basis of implied consent by the public body as the rule in *O'Reilly v Mackman* was not invoked.⁸⁸

⁷⁹ [1983] 2 A.C. 237 at 285.

⁸⁰ *Wandsworth LBC v Winder* [1985] A.C. 461 and see para.3-023.

⁸¹ See, e.g. *Davy v Spelthorne BC* [1984] A.C. 262.

⁸² *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] A.C. 112.

⁸³ [1992] 1 A.C. 624.

⁸⁴ [1983] 2 A.C. 237 at 285.

⁸⁵ See Grubb, "Two Steps Towards a Unified Administrative Law Procedure" [1983] P.L. 190 and Harlow, "Gillick: A Comedy of Errors?" (1986) 49 M.L.R. 768 at 771-772. See also the dictum of Lord Scarman in *Gillick* [1986] A.C. 112 at 178, although he subsequently accepted that the exception does apply.

⁸⁶ *Securities and Investment Board v FIMBRA* [1992] Ch. 268 at 275H-276A.

⁸⁷ [1986] A.C. 112.

⁸⁸ See, e.g. *Bostock v Kay* (1989) 133 S.J. 749. The issue of bias is a public law one which has been dealt with by judicial review in other cases; see *R. v Governors of Small Heath School Ex p. Birmingham City Council* [1990] C.O.D. 23.