

# CHAPTER 1

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## Actions against Public Officials: Introduction

### A. INTRODUCTION

This book is concerned with the circumstances in which a public official's statements, representations or promises may give rise to liability. The law reports are replete with cases concerning statements, representations and promises. This is unsurprising since a single statement has the capacity to mislead, offend or insult many dozens of individuals. The morass of case law is partly attributable to what Lord Blackburn described as the inherent "imperfection of language",<sup>1</sup> but it is also due in no small part to the imperfections of those who use it. Language becomes a dangerous tool in the hands of the malicious, the careless or the plain foolish, and so it is important that the law should provide protection against harmful statements and representations. All the more so when the statements in question emanate from public bodies because we repose trust and confidence in public officials and expect them to deal straightforwardly and consistently with us. 1-001

But not all inaccurate or harmful statements and representations should give rise to liability; a delicate balance needs to be struck. Public officials are not infallible and they should not be discouraged from carrying out their tasks by the spectre of legal liability. Nor should large sums of taxpayers' money, destined for doing public good, instead have to be diverted and used to resist or to meet damages liability. As Lord Steyn observed in the context of the negligence liability of public bodies: 1-002

"On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for

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<sup>1</sup> *River Wear Commissioners v Adamson* (1877) L.R. 2 App. Cas. 743, at 763.

every misfortune there is a remedy. On the other hand, there are cases where the courts recognise on principled grounds the compelling demands of corrective justice".<sup>2</sup>

1-003 Balancing these competing policy concerns is only part of the problem facing those attempting to devise a satisfactory scheme for administrative redress in England. There are deeper difficulties which must be confronted if English law is to respond adequately to administrative failings. The first difficulty concerns the distinction between public and private law. Attempts to create a separate public law, whether at a procedural or substantive level, have been hindered by the inability of English law to draw a clear distinction between the public and the private sphere. The second difficulty concerns the institutional capacity of the Administrative Court to resolve difficult factual questions and evidential disputes. It is doubtful whether the Court's adversarial and largely written procedure is always best suited to rooting out the cause of administrative failure, or to enabling the judges to foresee the impact of their decisions on the administration. Thirdly, not every claimant desires large sums of money by way of compensation. The courts adopt a narrow definition of recoverable loss and they offer a choice from a relatively limited selection of remedies. An adequate system of administrative redress therefore has to confront whether less serious forms of harm might be cured by a more flexible array of remedies. Finally, the cost, formality and delay of civil litigation may not always be an appropriate or proportionate means of resolving a citizen's grievances. More informal, expeditious and economical forms of redress are required to complement the courts' jurisdiction. This chapter highlights these difficulties as it examines Crown immunity, procedural exclusivity, the distinction between public and private law, the availability of money remedies in public law, access to information and evidence in public law proceedings, and finally, the Law Commission's proposals for reform of remedies in public law.

1-004 At the outset it should be made clear that there is no single definition of a statement, promise or representation and that the various causes of action examined in this book all take slightly different approaches. Accordingly, no technical definition of a statement, promise or representation will be formulated. It is clear, however, that statements and representations may be made not only by words, but also by conduct. There is also a difference in the role played by statements and representations as part of a cause of action; sometimes the fault lies in the inaccuracy of the statement, sometimes liability arises because the content of the statement is offensive or otherwise harmful, and sometimes liability is imposed because a public official has resiled from a representation. Despite these differences,

<sup>2</sup> *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057, at [2].

a public official has resiled from a representation. Despite these differences, these causes of action are united by the fact that the communication of information, or an idea, to another person forms a key element in the claim. There are good reasons for examining these causes of action together: first, the subject of statements and representations made by public officials is of great practical importance. Secondly, because causes of action in both public and private law as well as extra curial modes of address are engaged, analysing these topics together provides a valuable opportunity to consider the general state of administrative justice and to address the problematic features identified in the previous paragraph.

## B. CROWN IMMUNITY

### The position at common law

The Crown was immune from civil suit at common law. This immunity 1-005 applied not only to actions brought against the Crown individually, but also to actions which sought to make the Crown vicariously liable.<sup>3</sup> Despite this immunity, the Crown could be petitioned to grant a remedy by way of petition of right. This is perhaps one of the earliest examples of what Bell has identified as "a strong tradition of administrative non-law" supplementing a restrictive approach towards administrative liability before the courts.<sup>4</sup>

By the start of the 20th century the Crown's immunity at common law 1-006 had become anomalous. The Crown was a major employer and there was no principled justification for the immunity which the Crown enjoyed when it was acting in its capacity as an ordinary employer, as opposed to when it was exercising its prerogative powers. Since an action could be brought against the individual tortfeasor, a practice developed whereby if injury was caused by a Crown servant, the Crown would nominate an individual as responsible and would indemnify that individual against any award made against him or her. The practice relied on a fiction: the individual defendant was in truth a nominal defendant behind whom stood the Crown. In *Adams v Naylor*,<sup>5</sup> the practice was strongly criticised by the House of Lords, and shortly afterwards in *Royster v Cavey*,<sup>6</sup> the Court of Appeal refused jurisdiction in a case where it was clear that the nominated

<sup>3</sup> Workers in the service of the Crown were treated as servants of the Crown, rather than their superior officers: see *Bainbridge v Postmaster General* [1906] 1 K.B. 178, at 187, per Collins M.R.

<sup>4</sup> J. Bell, "Mechanisms for Cross-Fertilisation of Administrative Law in Europe" in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* (OUP, 1998), p.150.

<sup>5</sup> [1946] A.C. 543, at 500, per Lord Simon; at 551, per Lord Thankerton; at 552-553, per Lord Simonds; and at 556, per Lord Uthwatt.

<sup>6</sup> [1947] K.B. 204.

individual defendant had no connection whatsoever with the accident that caused the claimant's injury. Parliament responded to this unsatisfactory state of affairs by passing the Crown Proceedings Act 1947.

### The Crown Proceedings Act 1947

1-007 The CPA 1947 lifted the Crown's general immunity in respect of tort claims. Section 2(1) provides:

"Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:—

- (a) in respect of torts committed by its servants or agents;
- (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
- (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."

The 1947 Act does not define the expression the "Crown", but plainly it includes central government. However, the Act does not permit a tort action to be brought against the monarch in a private capacity.<sup>7</sup>

1-008 Section 2(1) of the CPA 1947 lifts the common law immunity of the Crown and makes it liable in three ways. First, the Crown is liable to third parties for the acts of its servants and agents. For these purposes, an independent contractor is treated as being an agent.<sup>8</sup> However, the Crown is only liable for the acts of its independent contractors to the extent that a private person would be liable in those circumstances.<sup>9</sup> The second form of liability created by s.2(1) is the Crown's liability to its own servants and agents for its own negligence as an employer. Thirdly, the Crown is made liable in connection with its ownership and occupation of property—the Occupiers' Liability Acts 1957 and 1984 only bind the Crown to the extent provided for in the CPA 1947.<sup>10</sup>

<sup>7</sup> Crown Proceedings Act 1947 s.40(1).

<sup>8</sup> Crown Proceedings Act 1947 s.38(2).

<sup>9</sup> Crown Proceedings Act 1947 s.40(2)(d).

<sup>10</sup> Occupiers' Liability Act 1957 s.6; and Occupiers' Liability Act 1984 s.3.

Where the Crown is liable in any of the above respects, it is subject to the ordinary rules relating to contribution, and joint and several liability.<sup>11</sup> It is questionable whether this should be the case; very often the Crown's liability will be secondary, for example it might be at fault for failing properly to regulate or control a third party who caused loss to the claimant. The Crown is often the target for litigation because it is the "last man standing" and it incurs a liability out of all proportion to its responsibility for the loss. Thus the Law Commission has proposed that the courts should be able to abandon the principle of joint and several liability and instead determine liability proportionately, based on the extent of a public body's responsibility for the claimant's loss.<sup>12</sup>

#### *Limitations on the liability of the Crown under the CPA 1947*

The Crown will only be liable for a failure to comply with a statutory duty if the duty is binding upon persons other than the Crown who have been directly or indirectly appointed by the Crown and whose salaries are paid out of the Consolidated Fund of the United Kingdom, monies provided by Parliament, or any other funds certified by the treasury for the purpose of the CPA 1947.<sup>13</sup> Since the police are paid from other sources the Crown is not liable in respect of their failures to comply with statutory duties. Another key immunity is provided by s.11 of the CPA 1947 which establishes that the Crown is not liable in tort for the exercise of prerogative powers or for the exercise of any powers conferred by statute.<sup>14</sup>

The CPA 1947 only applies in respect of alleged liability of the Crown in respect of Her Majesty's government in the United Kingdom or the Scottish Administration.<sup>15</sup> The limitations on the liability of the Crown cannot be circumvented by attempting to make the Crown vicariously liable.<sup>16</sup>

Section 10 of the CPA 1947 excluded the liability in tort of the Crown or any member of the armed forces to other members of the armed forces.<sup>17</sup> Where the potential liability was based on an act or omission of a

<sup>11</sup> Crown Proceedings Act 1947 s.4.

<sup>12</sup> Law Com Consultation Paper No.187, *Administrative Redress: Public Bodies and the Citizen*, (2008), para.4.190.

<sup>13</sup> Crown Proceedings Act 1947 s.2(2).

<sup>14</sup> S.11 does not prevent a claim in negligence in relation to the exercise of statutory powers where a common law duty of care is owed: *Home Office v Dorset Yacht Co. Ltd* [1970] A.C. 1004; *Phelps v Hillingdon LBC* [2001] 2 A.C. 619.

<sup>15</sup> Crown Proceedings Act 1947 s.40(2)(b).

<sup>16</sup> Crown Proceedings Act 1947 s.2(4).

<sup>17</sup> In *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 A.C. 1163, the House of Lords held that s.10 CPA 1947 did not breach a serviceman's right of access to court under Art.6 ECHR. The section constituted a substantive bar which fell outside the scope of Art.6 ECHR because it did not block an existing cause of action, but rather created one where previously there had been none. See also *Roche v United Kingdom* (2006) 42 E.H.R.R. 30.

member of the armed forces, and the “thing suffered” by the other member of the armed forces was suffered when he was either on duty as a member of the armed forces or on any land, premises, ship, aircraft or vehicle of the armed forces, and the act or omission was connected with the execution of duties of the armed forces, the Secretary of State was required to certify that the “thing suffered” was to be treated as service for the purposes of entitlement to an award relating to the disablement or death of members of the armed forces. The Secretary of State’s certificate was conclusive of the facts contained within it. Section 10 was repealed by the Crown Proceedings (Armed Forces) Act 1987, although s.2 of the 1987 Act provides that it may be revived by order of the Secretary of State for Defence in the event of an imminent national danger, great emergency, or for the purposes of any warlike operation in any part of the world outside the United Kingdom.

#### Judicial acts

- 1-013 The 1947 Act excludes Crown liability for any acts done in the discharge or purported discharge of responsibilities of a judicial nature or in the execution of judicial process.<sup>18</sup> This provision is only of limited applicability because, by virtue of s.2(1), Crown liability only arises if the servant or agent would themselves be liable to the claimant. Since most judicial offices have immunity from civil suit for acts done in good faith in the exercise of their jurisdiction,<sup>19</sup> Crown liability would not in any event arise. Consequently, the 1947 Act immunity is only of importance in cases concerning judicial acts done in bad faith, or those situations where judicial officers may be sued when acting outside their jurisdiction. The courts have given a wide interpretation to this immunity. In *Quinland v Governor of Swaleside Prison*,<sup>20</sup> the Court of Appeal held that the 1947 Act judicial immunity extended to certain administrative functions as well as judicial functions.<sup>21</sup> The case concerned the Registrar of Criminal Appeals who had failed to refer a case to the full Court of Appeal to correct an error. The Registrar was a member of the Court Service—an executive agency established to facilitate and implement the functions of the judiciary. The Court of Appeal held that the Registrar’s omission fell within the “execution of judicial process” limb of the 1947 Act immunity.

#### Postal services

- 1-014 Immunity in tort is provided by s.90 of the Postal Services Act 2000 in relation to proceedings against a universal service provider (or its officers, servants, employees, agents or sub-contractors) in connection with the

<sup>18</sup> Crown Proceedings Act 1947 s.2(5).

<sup>19</sup> See para.1-015.

<sup>20</sup> [2002] EWCA Civ 174; [2003] Q.B. 306.

<sup>21</sup> Doubting the view of Tudor Evans J. in *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All E.R. 692.

provision of a universal postal service because of anything done or omitted to be done in relation to any postal packet in the course of transmission by post, or any omission to carry out arrangements for the collection of anything to be conveyed by post.

#### Judicial officers

In England, judges of superior courts of record enjoy immunity from suit 1-015 with respect to anything done in connection with their judicial role. They have complete immunity from liability in damages for any act that is either within jurisdiction or honestly believed to be within jurisdiction.<sup>22</sup> The immunity even extends to situations where the judge is motivated by malice,<sup>23</sup> but there is no immunity for a judge who knowingly acts outside jurisdiction with malice.<sup>24</sup> The judiciary also enjoys immunity in respect of human rights claims. Section 9 of the Human Rights Act 1998 precludes actions for damages in relation to judicial acts done in good faith, but there is an exception relating to Art.5 of the Convention. This is because Art.5 requires that the victim of a breach of the Article should have an enforceable right to compensation. Notwithstanding these immunities, it is clearly established in any event that “the judge owes no duty of care to either of the parties”.<sup>25</sup> The judges’ wide immunity from suit rests on three compelling considerations of public policy: the need to ensure freedom of speech in court; the need to retain confidence in the integrity of the judicial process; and the need to guard against collateral attacks upon judicial decisions.

A justice of the peace or a justice’s clerk or assistant clerk exercising the 1-016 functions of a single justice enjoys a statutory immunity from any action for damages where he or she has acted in the execution of his or her duty with respect to any matter within jurisdiction.<sup>26</sup> The similarity of the role of an arbitrator to that of a judge means that arbitrators also have immunity from suit, even though they are not usually acting pursuant to the power of the state.<sup>27</sup>

### C. PROCEDURAL EXCLUSIVITY

#### Introduction

An important procedural question in any action against a public official is 1-017 whether the claimant is required to proceed by way of a claim for judicial review, or whether he or she can make an ordinary Part 7 or Part 8 claim,

<sup>22</sup> *Sirros v Moore* [1975] Q.B. 118.

<sup>23</sup> *Anderson v Gorrie* [1895] 1 Q.B. 668.

<sup>24</sup> *Re McC* [1985] A.C. 528, at 540, per Lord Bridge.

<sup>25</sup> *Arthur J.S. Hall & Co v Simons* [2002] 1 A.C. 615, at 698, per Lord Hoffmann.

<sup>26</sup> Courts Act 2003 s.31. An action will lie if, in bad faith, the defendant acted outside his or her jurisdiction: s.32.

<sup>27</sup> *Arenson v Casson Beckman Rutley & Co* [1977] A.C. 405; *Sutcliffe v Thackrah* [1974] A.C. 727, at 744, per Lord Morris, at 754, per Viscount Dilhorne, and at 758, per Lord Salmon.

thereby escaping the short judicial review time limit.<sup>28</sup> In 1983 the House of Lords held that public law issues should almost always be litigated in a claim for judicial review. As will be seen below, a sharp distinction between public and private law could not be drawn at a procedural level and the modern position is much more flexible.

### O'Reilly v Mackman

1-018 In *O'Reilly v Mackman* the House of Lords limited the circumstances in which a declaration or injunction could be sought in a public law case outside the newly created judicial review procedure in RSC Order 53.<sup>29</sup> Lord Diplock held that prior to the 1977 reforms, the procedural limitations affecting the prerogative orders had justified the use of the declaration in public law disputes. However, the reformed Order 53 removed these defects by making provision for disclosure, allowing damages to be claimed in the same action and permitting cross-examination. The reformed procedure also provided safeguards for public bodies, in particular the requirement of permission and the short three-month time limit. Lord Diplock said that it would be an abuse of process to try to circumvent these safeguards by seeking a declaration outside the judicial review procedure. He held that in public law matters, claimants must proceed by way of an application for judicial review; they could not sue by writ action<sup>30</sup>:

“Now that those disadvantages to applicants have been removed and all the remedies for the infringement of rights protected by public law can be obtained upon an application for judicial review, as can also infringements of rights under private law if such infringements should also be involved, it would in my view 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 infringed rights to which he was entitled to protection under

<sup>28</sup> Under CPR r.54.5(3) claims for judicial review must be filed promptly and in any event not later than three months after the grounds to make the claim first arose. In addition, s.31(6) of the Supreme Court Act 1981 provides: “Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of the application or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.” In *R. v Dairy Produce Quota Tribunal England and Wales, Ex p. Caswell* [1990] 2 A.C. 738, the House of Lords considered the relationship between s.31(6) and RSC Order 53 r.4 which was the predecessor to CPR r.54.5 and held that if a claim has not been brought promptly or within three months there will have been “undue delay” for the purposes of s.31(6).

<sup>29</sup> [1983] 2 A.C. 237.

<sup>30</sup> [1983] 2 A.C. 237, at 285, per Lord Diplock.

public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.”

Lord Diplock stated that there were exceptions to procedural exclusivity “particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law”.<sup>31</sup> In the wake of *O'Reilly*, the courts struggled with this exception; first, because of the difficulty of deciding whether a particular interest should be characterised as a private right or not.<sup>32</sup> Secondly, because it was unclear whether the presence of a private right automatically exempted the claimant from using RSC Order 53, or whether the presence of a private right was merely one factor which could lead the court to make a discretionary exception to the exclusivity principle.

The difficulties presented by claims involving mixed public and private law issues are exemplified by *Roy v Kensington & Chelsea & Westminster Family Practitioners Committee*.<sup>33</sup> The defendant health authority reduced the applicant doctor's salary by 20 per cent because it maintained that he had not devoted sufficient time to NHS patients as opposed to private ones. The power to do so was contained in NHS regulations. The applicant sued by writ arguing that this was a breach of contract but the defendant contended that he should have proceeded by an application for judicial review (his application would then have failed as he was outside the time limit). The House of Lords allowed his private action to proceed. Lord Lowry suggested two possible interpretations of the private rights exception in *O'Reilly*<sup>34</sup>:

“The ‘broad approach’ was that the ‘rule in *O'Reilly v Mackman*’ did not apply generally against bringing actions to vindicate private rights in all circumstances in which those actions involved a challenge to a public law act or decision, but that it merely required the aggrieved person to proceed by judicial review only when private rights were not at stake. ‘The narrow approach’ assumed that the rule applied generally to *all* proceedings in which public law acts or decisions were challenged, subject to some exceptions when private law rights were involved. There was no need in *O'Reilly v Mackman* to choose between these approaches, but it seems clear that Lord Diplock considered himself to be stating a general rule with exceptions. For my part, I much prefer the broad approach, which is both traditionally

<sup>31</sup> [1983] 2 A.C. 237, at 285.

<sup>32</sup> See e.g. *Cocks v Thanet DC* [1983] 2 A.C. 286; *O'Rourke v Camden LBC* [1988] A.C. 188; *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840.

<sup>33</sup> [1992] 1 A.C. 624.

<sup>34</sup> [1992] 1 A.C. 624, at 653.

orthodox and consistent with the *Pyx Granite* principle. . . It would also, if adopted, have the practical merit of getting rid of a procedural minefield. I shall, however, be content for the purpose of this appeal to adopt the narrow approach, which avoids the need to discuss the proper scope of the rule, a point which has not been argued before your Lordships and has hitherto been seriously discussed only by the academic writers.”

The “broad view” has been preferred in subsequent cases, so the rule *O’Reilly v Mackman* is inapplicable in cases involving private rights.<sup>35</sup>

1-020 The principle of procedural exclusivity is inconsistent with the modern procedural trend against setting threshold traps for the unwary litigant. It is unjust that what is in essence a procedural formality should frustrate claimants’ legitimate substantive grievances. Leading commentators contended 25 years ago that procedural exclusivity was a step backwards to the old system of forms of action whereby the claimant may fail solely as a result of adopting the wrong form of initiating process.<sup>36</sup>

1-021 Shortly before CPR Part 54 came into force, the Court of Appeal had an opportunity to revisit the rule in *O’Reilly v Mackman* and to examine how it ought to apply in the context of the CPR. In *Clark v University of Lincolnshire and Humberside*,<sup>37</sup> the Court of Appeal suggested that the CPR 1998 give the courts powers which are functionally equivalent to, but which avoid, the rigid formalism of *O’Reilly v Mackman*. The claimant was a student who had been awarded a mark of zero for coursework which she had plagiarised. Her claim was framed in contract and it was eventually stayed because the parties agreed to mediate, nevertheless, the court’s remarks concerning the effect of the CPR on procedural exclusivity are illuminating. The Court of Appeal held that a claim against a public body for breach of contract should not be struck out merely because an application for judicial review might have been a more appropriate procedural route. The Court highlighted the fact that the CPR enables judges to prevent unfair exploitation of the longer limitation periods in ordinary civil suits because claims can be struck out notwithstanding the currency of the limitation period<sup>38</sup>:

“While in the past, it would not be appropriate to look at delay of a party commencing proceedings other than by judicial review within

<sup>35</sup> See e.g. *British Steel v Customs & Excise Commissioners* [1996] 1 All E.R. 1002.

<sup>36</sup> H.W.R. Wade, “Public Law, Private Law and Judicial Review” (1983) 99 L.Q.R. 166; J.A. Jolowicz, “The Forms of Action Disinterred” [1983] C.L.J. 15.

<sup>37</sup> [2000] 1 W.L.R. 1988.

<sup>38</sup> [2000] 1 W.L.R. 1988, at 1997, per Lord Woolf M.R. At p.1993 Sedley L.J. described the differing limitation periods as “the single important difference between judicial review and civil suit”. It was largely this difference which gave birth to the principle of exclusivity because of Lord Diplock’s concern that actions begun by writ could be commenced at the very end of the limitation period, conferring a significant tactical advantage on the applicant and causing considerable disruption to the public administration and third parties: *O’Reilly v Mackman* [1985] 2 A.C. 237, 284).

the limitation period in deciding whether the proceedings are abusive this is no longer the position. If proceedings of a type which would normally be brought by judicial review are instead brought by bringing an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process can take into account whether there has been unjustified delay in initiating proceedings.”

Delay is now also a relevant factor in applications for summary judgment. Under Part 24, the court grants summary judgment to the defendant in an ordinary civil suit if in all the circumstances, including the availability of judicial review, the proceedings amount to an abuse of process, or because of lapse of time or other circumstances no worthwhile relief could be expected.<sup>39</sup> Lord Woolf M.R. remarked that the advent of Part 24 means “a markedly different position from that which existed when *O’Reilly v Mackman* was decided” because Part 24 relieves public bodies of the burden of defending the sort of hopeless claims which Lord Diplock was concerned about in *O’Reilly*.<sup>40</sup>

Lord Woolf M.R. also noted that CPR Part 1 applies to ordinary actions involving issues of public law. That provision obliges both parties to assist the court in furthering the overriding objectives of the CPR, including dealing with cases fairly and expediently.<sup>41</sup> *Clark* was decided prior to the entry into force of CPR Part 54; nevertheless the judgment provides a valuable insight into the operation of the rule in *O’Reilly v Mackman* in the context of the CPR. Sedley L.J. described the new approach thus<sup>42</sup>:

“the Civil Procedure Rules 1998 have given substance to [the suggestion] that the mode of commencement of proceedings should not matter, and that what should matter is whether the choice of procedure (which is now represented by the identification of the issues) is critical to the outcome.”

In *Clark*, the Court of Appeal couched abuse of process in terms of whether the

“protection provided by Order 53 has been flouted in circumstances which are inconsistent with Part 1 [of the CPR]. Those principles are now central to determining what is due process”.<sup>43</sup>

<sup>39</sup> [2000] 1 W.L.R. 1988, at 1997, per Lord Woolf M.R. Prior to the CPR the court would not intervene during the currency of the limitation period: see *Birkett v James* [1977] A.C. 297.

<sup>40</sup> [2000] 1 W.L.R. 1988, at 1996.

<sup>41</sup> CPR rr1.3 and 1.1(2)(d). In addition, Lord Woolf M.R. gave the example of a stay being ordered in accordance with CPR r1.4(2)(e) if it would be desirable for the claimant to use an internal disciplinary procedure before coming to court: [2000] 1 W.L.R. 1988, at 1996.

<sup>42</sup> [2000] 1 W.L.R. 1988, at 1993.

<sup>43</sup> [2000] 1 W.L.R. 1988, at 1998, per Lord Woolf M.R.

The difficulty with *Clark* is that the doctrine of abuse of process is employed here for the protection of public authorities. However, the touchstone of procedural abuse, viz Part 1 (“the overriding objective”) of the CPR, makes no mention of the circumstances in which public authorities might need protection. As such, *Clark* has been criticised for giving “very uncertain guidance” to claimants, encouraging those who lack a recognisable private law right to believe that they may nevertheless seek a declaration by way of ordinary procedure since the court’s powers to strike out and give summary judgment afford public authorities sufficient protection.<sup>44</sup>

1-023 There are many examples of the new, flexible approach which *Clark* created.<sup>45</sup> However, exclusivity is not dead. In *Carter Commercial Development Ltd v Bedford Borough Council*, a developer’s planning appeal was rejected by the Planning Inspectorate as it was out of time.<sup>46</sup> The developer disputed this, but waited eight months before challenging the decision by means of a Part 8 claim for a declaration. In a robust judgment, Jackson J. held that the claim ought to have been made using the Part 54 judicial review procedure. The developer had chosen to proceed under Part 8 in order to circumvent the three-month time limit for judicial review and accordingly its claim was an abuse of process.<sup>47</sup>

## D. PUBLIC/PRIVATE

### *Jurisdictional equality*

1-024 Historically, largely as a result of Dicey’s influence, the fundamental principle governing administrative liability in English law has been the principle of jurisdictional equality.<sup>48</sup> This principle requires that public officials be treated in the same way and in accordance with the same rules as private persons. According to this approach a claimant may only recover compensation from a public body if he or she can bring a claim within a private law course of action. The jurisdictional equality principle is, however, problematic. Dicey formulated it as part of his rule of law and

<sup>44</sup> T. Cornford, “The New Rules of Procedure for Judicial Review” [2005] 5 Web. J.C.L.I.

<sup>45</sup> See e.g. *R. (on the application of Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 W.L.R. 419, at [62]; *R. (on the application of P) v Secretary of State for the Home Department* [2001] 1 W.L.R. 2002, at [120]; *D. v Home Office* [2006] 1 W.L.R. 1003, at [104]; *Rhondda Cynon Taff CBC v Watkins* [2003] 1 W.L.R. 1864; *Bunney v Burns Anderson Plc* [2007] EWHC 1240, at [25].

<sup>46</sup> [2001] EWHC 669 (Admin).

<sup>47</sup> [2001] EWHC 669 (Admin), at [29]–[34].

<sup>48</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (Macmillan, 1915) pp.198–199; see also P. Cane, “Damages in Public Law” (1999) 9 Otago L.R. 489, at 490; and J. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP, 2004).

“the principal appeal of the ideal of equality has not to do with the allocation of losses, but with the control of government. It is a political idea, reflected in the proposition that ‘government is under law’.”<sup>49</sup>

Although it can be argued that the legitimacy of a public official’s actions depends on the official observing the same legal principles which also apply between private parties, there is no justification for determining all questions of public liability by reference to private law principles because public officials perform many functions for which there is no clear analogue in the private sphere.<sup>50</sup> As will be seen in Section G below, the Law Commission has recently accepted the force of this argument and proposed a separate regime of public law liability in respect of “truly public” activities.

### *Public and private*

The distinction between public and private law gives rise to a paradox<sup>51</sup>: 1-025 the distinction appears to be alive and well—it is visible in judicial review procedure, the creation of an Administrative Court, in EC law concerning the direct effect of directives, and in s.6 of the Human Rights Act 1998. But on the other hand, the distinction has been the target of considerable judicial and academic criticism to the effect that it is outmoded, descriptively inaccurate or normatively undesirable. The case law on the distinction between public and private for the purposes of judicial review, human rights and European law is voluminous and no attempt will be made to summarise it here.<sup>52</sup> Instead, this section considers what implications the difficulty of demarcating public and private might have for the future development of the law.

As Allison has argued, a distinction between public and private law is a 1-026 relatively recent innovation in England.<sup>53</sup> The prerogative remedies for reviewing administrative action were administered by the ordinary courts under an undifferentiated ordinary common law, not under a public law distinct from private law, and it was only in 1981 that the Crown Office list of judges was created to ensure that judges with public law expertise dealt with judicial review cases. The creation of a public/private distinction

<sup>49</sup> Hogg and Monahan, *Liability of the Crown*, 3rd edn (Carswell, 2000), p.4.

<sup>50</sup> Cf. T. Cornford, *Towards a Public Law of Tort* (Ashgate, 2008), ch.2.

<sup>51</sup> P. Cane, “Accountability and the Public/Private Distinction” in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, 2003), ch.10, p.247–248.

<sup>52</sup> For detailed coverage of this topic see C. Lewis, *Judicial Remedies in Public Law*, 4th edn (Sweet & Maxwell, 2008); and J. Beatson, S. Grosz, T. Hickman, and R. Singh, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008), ch.4.

<sup>53</sup> J. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP, 2004); J. Allison, “Variation of view on English legal distinctions between public and private” [2007] C.L.J. 698.

in English law has not been without its difficulties. As was explained in the previous section, the attempt to create a sharp distinction between public and private at a procedural level failed and in recent years the rule *O'Reilly v Mackman* has given way to a more flexible and pragmatic approach. There has also been considerable criticism of distinguishing public and private at a substantive level. First, the public/private is said to be inapplicable to the corporatisation of modern government and that it is little more than a "formalist façade" behind which the judiciary has attempted to "shield from public criticism some highly executive minded decisions".<sup>54</sup> Secondly, the dichotomy is said to be inaccurate, or at least unhelpful, as a way of explaining legal and social structures and institutions. It is not possible to classify some functions, such as the provision of housing, as being either public or private in nature because housing may be provided by a local authority pursuant to statutory obligation, by a private person for profit, or by a charitable organisation.<sup>55</sup>

1-027 Thirdly, English law lacks a clear conception of the state. As Allison has argued,<sup>56</sup> traditionally when a conception of the state would have been used by a French lawyer, English lawyers have used various vague conceptions, such as the Crown, officials, or officers of the Crown. These conceptions do not approximate to a conception of the state administration; rather they obscured the extent to which government had become centralised. Allison presents a powerful argument that the French model of the distinction between public and private law only makes sense in its particular constitutional and political setting. In particular, he argues that a legal system must possess four characteristics if the French model is to operate successfully: (i) a well-developed theory of the "state" as a separate administrative entity subject to public law and with characteristics justifying it being subjected to special legal control; (ii) a "categorical approach" to law according to which public and private are mutually exclusive; (iii) a doctrine of the separation of powers which ensures that those who decide administrative disputes are independent from the administration but also experts in understanding its processes and needs<sup>57</sup>; and (iv) inquisitorial procedures for the resolution of disputes between the citizen and the state which enable the public ramifications of such disputes to be properly investigated. The Administrative Court's adversarial, paper-based pro-

<sup>54</sup> C. Harlow, "Public and Private' Law: Definition Without Distinction" (1980) 43 M.L.R. 241.

<sup>55</sup> C. Harlow, "Public and Private' Law: Definition Without Distinction" (1980) 43 M.L.R. 241; and D. Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 Univ. Penn. L.Rev. 1349-1357.

<sup>56</sup> J. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (2004, OUP); and J. Allison, "Variation of view on English legal distinctions between public and private" [2007] C.L.J. 698.

<sup>57</sup> See further, J. Allison, "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" [1994] C.L.J. 367; and J. Allison, "The Procedural Reason for Judicial Restraint" [1994] P.L. 452.

cedures are examined in Section F below and in Chapter 10 they are compared to the inquisitorial investigations carried out by the public sector ombudsmen.

The fourth criticism is that the distinction has precipitated endless 1-028 satellite litigation. The rule in *O'Reilly v Mackman* gave rise to a considerable number of fruitless procedural wrangles and the courts are currently struggling to determine the application of s.6 of the Human Rights Act 1998 in situations where a public body contracts out its public functions to a private entity.<sup>58</sup>

1-029 Against this background it can be seen that, although the late development of an English public law has negated the traditional Diceyan view, these criticisms of the public/private dichotomy and the manifest problems encountered in trying to implant the dichotomy into English law demonstrate Dicey's enduring significance.<sup>59</sup> The idea of entrenching the divide more deeply and creating a system of administrative courts on the French model, staffed by the judges expert in administrative matters with inquisitorial powers attracted some writers in the middle of the 20th century,<sup>60</sup> but in the light of the problems outlined above it now seems a remote possibility. The continuing appeal of Dicey's normative view suggests that any developments of the English approach to administrative liability will result in only minimal revision; the first step being to create special rules of public liability in relation to those activities for which there is no private law analogue without undermining the traditional principle of jurisdictional equality in other areas. Another traditional feature of English administrative justice which is likely to shape future developments is that of relatively restrictive legal liability supplemented by more liberal and flexible administrative "non-law". This is particularly so in the case of public sector ombudsmen because of their inquisitorial procedures.

<sup>58</sup> See e.g. *R. (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; [2002] 2 All E.R. 936; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546; *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95; *R. (on the application of Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377; [2009] 1 All E.R. 17; D. Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act 1998" [2000] P.L. 476; P.P. Craig, "Contracting out, the Human Rights Act and the Scope of Judicial Review" (2002) 118 L.Q.R. 551; Joint Committee on Human Rights, Ninth Report, *The Meaning of Public Authority under the Human Rights Act* (HL 77, HC 410, 2006-7); C. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (OUP, 2007), ch.6.

<sup>59</sup> J. Allison, "Variation of view on English legal distinctions between public and private" [2007] C.L.J. 698, at 711.

<sup>60</sup> See e.g. H. Street, *Governmental Liability* (CUP, 1953); and J. Mitchell, "The Causes and Effects of the Absence of a System of Public Law in the United Kingdom" [1965] P.L. 95.

## E. MONEY REMEDIES IN PUBLIC LAW

## Introduction

1-030 Claimants who are disappointed or aggrieved by a public body's statements or representations often desire financial compensation. However, "English law does not provide a remedy in damages for a breach of a public law right".<sup>61</sup> The absence of a right to public law damages at common law has been the subject of sustained criticism and the deficiency of the current position is most obvious in the case of an individual who is unlawfully denied or deprived of a licence and who suffers loss. English law provides no compensation in such a scenario.<sup>62</sup> The position in English law appears anomalous given that damages can be recovered for breach of public law obligations as a matter of European Community law and the law of the European Convention on Human Rights. This section considers the availability of damages under those European systems because any development of English law is likely to be strongly influenced by Europe.

## Judicial Review

1-031 In English law there is no general right to damages for ultra vires conduct by public bodies—claimants must establish a private law cause of action if they are to recover compensation. As Lord Goff observed in *R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.2)*,<sup>63</sup> "in this country there is no general right to indemnity by reason of damage suffered through invalid administrative action". In another case, Lord Wilberforce considered that English law's unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action was a sign of the immaturity of English public law<sup>64</sup>:

"In more developed legal systems this particular difficulty does not arise. Such systems give indemnity to persons injured by illegal acts of

<sup>61</sup> *R. (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743 (Admin), at [14].

<sup>62</sup> See e.g. *R. v Knowsley MBC, Ex p. Maguire* (1992) 90 L.G.R. 653; *R. (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWHC 1743, at [20]. For cases in which the absence of public law damages is open to criticism see: *Banks v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 416, at [117] (procedurally unfair imposition of restrictions on moving cattle causing irrecoverable financial loss); and *Chagos Islanders v Attorney General, Her Majesty's British Indian Ocean Territory Commissioner* [2004] EWCA Civ 997, at [20] (removal of islanders from their homeland under an ultra vires ordinance).

<sup>63</sup> [1991] 1 A.C. 603, at 672.

<sup>64</sup> *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] A.C. 295, at 359.

the administration. Consequently, where the prospective loss which may be caused by an order is pecuniary, there is no need to suspend the impugned administrative act: it can take effect (in our language an injunction can be given) and at the end of the day the subject can, if necessary, be compensated."

As a matter of procedure, damages can be sought together with public law remedies. Section 31(4) of the Supreme Court Act 1981 provides that on an application for judicial review the court may award "damages, restitution or the recovery of any sum due" to an applicant satisfying the following conditions: (i) he has joined with his main application "a claim for such award arising from any matter to which his application relates"; and (ii) the court is satisfied that, if the claim had been made in an ordinary action begun by the applicant at the time of making his application, he would have been awarded damages. Accordingly, the courts cannot hear a claim for judicial review which simply seeks damages. In *R. (Kurdistan Workers Party) v Secretary of State for the Home Department*, Richards J. explained the courts' approach to damages claims in judicial review<sup>65</sup>:

"A claim for damages can properly be made as part of an otherwise appropriate claim for judicial review, but is not in itself a good reason for permitting judicial review. In practice, where there is a claim for damages as part of an otherwise appropriate claim for judicial review, the claim for damages would normally be left over to be dealt with as a discrete issue, if still relevant, after the main issues of public law had been determined. Even if still dealt with under Civil Procedure Rules Pt 54, rather than transferred out of the Administrative Court, it would still generally be subject to directions bringing it broadly into line with a damages claim commenced in the normal way."

The English position contrasts sharply with the French law of administrative torts which was developed by reference to three principles<sup>66</sup>:

"The first was that of liability of the state for the fault of its servants. The second was...the principle that this administrative liability should be subject to rules which were separate and distinct from those of the *droit civil*; and the third was the principle that such questions should fall within the jurisdiction of the administrative courts."

<sup>65</sup> [2002] EWHC 64, at [87].

<sup>66</sup> L. Brown and J. Bell, *French Administrative Law*, 5th edn (OUP, 1998), p.185.

standards and values shared by citizens and officially approved by the administration.

*Is substantive unfairness a separate ground for judicial review?*

2-122 The notion of equal citizenship does not per se require substantive unfairness to be a separate ground for judicial review; the overriding requirement is simply that administrative decisions not unjustifiably burden particular individuals. *Wednesbury* reasonableness could be remodelled so as to become an umbrella principle encompassing all of the instances of substantively unfair decisions, including disproportionate ones. In other words, substantive fairness determined according to the ideal of equal citizenship could become the touchstone of reasonableness. It would, however, better enable substantive equality to develop incrementally as a basis for judicial review if it broke free from the embrace of *Wednesbury*. True to the pragmatic development of the common law, the courts could recognise that administrative decisions must be substantively fair and that at the moment, substantive unfairness will generally involve either: (i) breach of a representation or promise i.e. the doctrine of legitimate expectations; (ii) unfairness flowing from misunderstanding of a relevant fact; (iii) an unjustified failure to apply a policy to a particular case; or (iv) an unjustified departure from the principles contained in a ratified, but unincorporated treaty. Exceptionally, there may also be other cases such as *Unilever* which strictly fall outside these heads of unfairness, but which are sufficiently analogous that on their own particular facts they too should be regarded as instances of substantive unfairness. In the future, as the tug of liberal principles of dignity and substantive equality and the economy of the common law combine, other paradigms of substantive unfairness might also develop. But for the time being, development of a full blown set of standards of substantive unfairness would go against the grain of the central constitutional mode of change which respects continuity.

## CHAPTER 3

### Legitimate Expectations in EU Law

#### A. INTRODUCTION

This chapter outlines the main principles of the doctrine of legitimate expectation in European Union law.<sup>1</sup> The doctrine of legitimate expectations binds both EU institutions and national authorities applying EC law.<sup>2</sup> Whereas the doctrine of legitimate expectations in domestic law is principally based on fairness, the EC principle of legitimate expectations is closely related to the principle of legal certainty. The European doctrine of legitimate expectations protected substantive legitimate expectations long before domestic law accepted this possibility. However, comparatively few claims succeed in community law because of the considerable weight accorded to the public interest in maintaining discretionary freedom in areas such as the common agricultural policy and state aids.

#### B. THE MAIN PRINCIPLES

As in English law, an expectation will only be enforced if it is legitimate. 3-002 The ECJ has taken a relatively restrictive approach to the question of when an expectation will be legitimate. In particular the notion of the prudent, discriminating and well-informed trader has been used to limit the circumstances in which an expectation will be recognised as being legitimate. It is doubtful whether such a restrictive approach is necessary given

<sup>1</sup> For a detailed coverage of this topic see J. Schwarze, *European Administrative Law*, revised first edn, (Sweet & Maxwell, 2006); P.P. Craig, *EU Administrative Law* (OUP, 2006) ch.16; and T. Tridimas, *The General Principles of EU Law*, 2nd edn (OUP, 2006) ch.6.

<sup>2</sup> Joined Cases C-31-44/91 *Alois Lageder SpA v Amministrazione delle Finanze* [1993] E.C.R. I-1761, at [33].

the considerable opportunities for the EC institutions and Member States to justify frustrating a legitimate expectation.

### Expectation must be reasonable

#### *Prudent, discriminating and well-informed trader test*

- 3-003 An expectation will not be held to be legitimate if the conduct complained of could have been foreseen by the prudent, discriminating and well-informed trader. In *Van den Bergh en Jurgens and Vin Dijk Food Products v Commission*,<sup>3</sup> the applicants claimed that they had suffered loss as a result of the implementation of a scheme designed to reduce excess stocks of butter in the Community by reducing prices. They contended that the Commission had stated publicly on several occasions that such price reduction schemes were not successful in leading to a lasting reduction in stocks. In the light of these statements they claimed that they had no reason to suspect that the Commission would introduce such a scheme again. The ECJ held for the Commission had not given an undertaking never to use such schemes again and that a prudent and discriminating trader ought to have considered the possibility that further schemes would be introduced.<sup>4</sup> The claim therefore failed. Similarly, in *Delacre v Commission*,<sup>5</sup> the applicants who manufactured pastries had applied for aid for butter following an invitation to tender. After they had made the application the Commission fixed the maximum amount for a grant of aid at an amount which was lower than that which the applicants had applied for. They contended that they had a legitimate expectation that the aid scheme in force at the time of their application would be applied but this argument was rejected on the basis that a prudent and well-informed trader ought to have foreseen a fall in the level of aid as a result of an increase in the selling price of butter.
- 3-004 As Craig has identified, the notion of the prudent, discriminating and well-informed trader has led to the failure of many claims based on legitimate expectations in areas where common policies operate, such as agriculture, fisheries and transport.<sup>6</sup> These areas are subject to frequent changes and both the ECJ and CFI expect the prudent trader to factor the possibility of change into his or her decision-making.<sup>7</sup> Even in other areas

<sup>3</sup> [1987] E.C.R. 1155.

<sup>4</sup> [1987] E.C.R. 1155, at [45].

<sup>5</sup> Case C-350/88 *Delacre v Commission* [1990] E.C.R. I-395.

<sup>6</sup> P.P. Craig, *EU Administrative Law* (OUP, 2006), p.632.

<sup>7</sup> Case 78/77 *Lubrs v Hauptzollamt Hamburg-Jonas* [1978] E.C.R. 169; Case 127/78 *Spitta & Co v Hauptzollamt Frankfurt/Main-Ost* [1979] E.C.R. 171; Case T-489/93 *Unifruit Hellas EPE v Commission* [1994] E.C.R. II-1201; Case T-336/94 *Efisol SA v Commission* [1996] E.C.R. II-1343; Cases T-466, 469, 473 and 477/93 *O'Dwyer v Council* [1996] E.C.R. II-2071; Cases T-142 and 283/01 *Organización de Productores de Túnidos Congelados (OPTUC) v Commission* [2004] E.C.R. II-329; Case C-342/03 *Spain v Council* [2005] E.C.R. I-1975.

of community law a relatively strict approach is taken. For example, in *Alpharma Inc v Council*,<sup>8</sup> the CFI held that a prudent and discriminating operator in the pharmaceutical sector ought to have known that authorisation of a product for use as an additive under a Directive could be withdrawn where there was a risk to human health.

The prudent, discriminating and well-informed trader is not only aware 3-005 of the factual position in relation to the relevant Community market, but also has a degree of legal knowledge. The applicant in *Behn Verpackungsbedarf GmbH v Hauptzollamt Itzehoe*,<sup>9</sup> had imported paper from non-member states and paid custom duties at rates prescribed in a tariff manual published by the German Finance Ministry. The rates in the manual were incorrect and the German customs office sought repayment of the difference. The ECJ did not consider that the applicant had a legitimate expectation. It felt that the prudent trader ought to read the Official Journal and acquaint himself with the relevant rules: "the applicable Community tariff provisions constituted the sole relevant positive law as from the date of the publication in the Official Journal of the European Communities, and everyone was deemed to know that law".<sup>10</sup>

It is questionable whether the prudent, discriminating and well-informed 3-006 trader ought to be imbued with such a detailed factual and legal knowledge. As was argued in the previous chapter, the question of legitimacy should simply be a question of fact and an objective assessment of reasonableness. Like the normative approach to legitimate expectations in English law, the prudent trader test means that legitimacy becomes less an ascertainable product of the interaction between the promisor and the promisee and more the consequence of circumstances entirely extraneous to the relationship between the parties. Apart from leading to unpredictability due to uncertainty as to quite how much knowledge to imbue the prudent trader with, this approach also prejudices individuals and small businesses. As Schönberg has observed<sup>11</sup>:

"While this view may be suitable for the largest and most well-informed economic operators, many smaller and less experienced operators are, as a result of increasing European integration, involved in cross-border trade. There is arguably room for a more flexible and liberal approach towards such operators and private individuals who rely upon statements from the Community administration."

#### *Applicant's motives*

The Community courts will look at the motive of the applicant in order to 3-007 determine whether a legitimate expectation arises—in particular, whether the applicant is seeking to make a speculative profit, or take advantage in

<sup>8</sup> Case T-70/99 [2002] E.C.R. II-3495.

<sup>9</sup> Case C-80/89 [1990] E.C.R. I-2659.

<sup>10</sup> Case C-80/89 [1990] E.C.R. I-2659, at [13].

<sup>11</sup> S. Schönberg, *Legitimate Expectations in Administrative Law* (OUP, 2000), p.128.

some other way. The ECJ takes the view that a prudent and discriminating trader would appreciate that the Community institutions or the relevant national authorities would take immediate action to prevent any loophole from being exploited and therefore no legitimate expectation will arise. For example in *EVGF Mackprang*,<sup>12</sup> a German grain dealer challenged a Commission decision under the Common Agricultural Policy which prevented it from taking advantage of low grain prices in France in order to sell on to the intervention agency in Germany. The decision was introduced after the applicant had already purchased grain in France but before the applicant had sold it to the German agency. The ECJ denied that the applicant had a legitimate expectation of being able to sell on to the German agency and that the decision, which applied to grain in transit, was a justified precaution against purely speculative activities. Advocate General Warner's Opinion also emphasised this point:

"No trader who was exploiting the situation in order to make out of the system profits that the system was never designed to bestow on him could legitimately rely on the persistence of the situation. On the contrary, the only reasonable expectation that such a trader could have was that the competent authorities would act swiftly as possible to bring the situation to an end."

- 3-008 No legitimate expectation will arise from wrongdoing on the part of the applicant, especially where the alleged expectation is based on fraud or deception. In *Kol v Land Berlin*, the applicant had obtained a residence permit by fraud and the ECJ held that employment under such a fraudulent permit did not give rise to a legitimate expectation on the part of the fraudulent Turkish worker.<sup>13</sup> The ECJ has rejected a number of other legitimate expectation claims on the ground that the expectation was created by fraud.<sup>14</sup>

#### *Breach of Community law*

- 3-009 A legitimate expectation is unlikely to arise in situations where a Community or national institution has created or permitted a violation of Community law. For example in *Commission v Belgium*,<sup>15</sup> the grant of unlawful state aid by a national authority to an undertaking did not prevent the Commission from ordering the national authority to recover the unlawfully paid aid. No legitimate expectation was created by the

<sup>12</sup> Case 2/75 [1975] E.C.R. 607.

<sup>13</sup> Case 2/75 [1975] E.C.R. 607, at [28].

<sup>14</sup> See e.g. Case 67/84 *Sideradria SpA v Commission* [1985] E.C.R. 3983, at [21]; Case T-73/95 *Estabelecimentos Isidore M. Oliveira SA v Commission* [1997] E.C.R. II-381; and Case T-199/99 *Sgaravatti Mediterranea Srl v Commission* [2002] E.C.R. II-3731.

<sup>15</sup> Case 52/84 *Commission v Belgium* [1986] 1 E.C.R. 89.

payment even though the aid was paid in relation to a product not included in prohibitory state aid guidelines issued by the Commission. Similarly, given the mandatory nature of the review of state aid under Art.88 EC, no legitimate expectation can arise that aid has been granted lawfully unless it has been granted in accordance with the correct procedure under Art.88 EC.<sup>16</sup>

There can generally be no legitimate expectation based on a promise not to enforce community law,<sup>17</sup> although in extreme cases a legitimate expectation may arise. For example in *RSV v Commission*, the commission's delay of 26 months in requiring the Netherlands to recover unlawfully paid state aid was held to have created a legitimate expectation that the claimant could retain the aid.<sup>18</sup> It has also been held that it is unreasonable for an individual or undertaking to seek to rely on assurances from EC institutions or Member States in respect of practices that are in breach of Community law.<sup>19</sup>

#### **Inducement**

In addition to being reasonable an expectation must also have been induced by an assurance, practice, or legislation. As Craig identifies,<sup>20</sup> legitimate expectations may be induced by all manner of administrative communications for example letters,<sup>21</sup> faxes,<sup>22</sup> reports,<sup>23</sup> communications,<sup>24</sup> and codes of conduct.<sup>25</sup> Previous legislation may also give rise to a legitimate expectation. In *Sofrimport v Commission*,<sup>26</sup> the Commission suspended the import of dessert apples originating in Chile by passing two regulations on April 14, 1988. The claimant had shipped a cargo of apples from Chile for import into the Community on March 31, 1988 and it was denied an import licence while the goods were in transit. Article 3(3) of Regulation No. 2702/72 required the Commission to take account of the special position of products in transit to the Community when taking

<sup>16</sup> Joined Cases C-183/02P and C-187/02P *Daewoo Electronics Manufacturing Espana SA v Commission* [2004] E.C.R. I-10609. The ECJ considered that a diligent businessman ought normally to be able to determine whether the correct procedure had been followed.

<sup>17</sup> Case T-2/93 *Air France v Commission* [1994] E.C.R. II-323, at [102].

<sup>18</sup> Case 223/85 [1987] E.C.R. 4617.

<sup>19</sup> Case T-123/89 *Chomel v Commission* [1990] E.C.R. II-131, at [26]; Case 188/92 *Thyssen AG v Commission* [1983] E.C.R. 3721, at [11].

<sup>20</sup> P.P. Craig, *EU Administrative Law* (OUP, 2006), p.627.

<sup>21</sup> Case 144/82 *Detti v ECJ* [1983] E.C.R. 2421.

<sup>22</sup> Cases T-46 and 151/98 *CEMR v Commission* [2000] E.C.R. II-167.

<sup>23</sup> Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products v Commission* [1987] E.C.R. 1155.

<sup>24</sup> Case T-7/89 *Hercules v Commission* [1991] E.C.R. II-1711, at [53]-[55].

<sup>25</sup> Case T-107/02 *GE Betz, Inc, formerly BetzDearborn Inc v OHIM* [2004] E.C.R. II-1845, at [87].

<sup>26</sup> Case C-152/88 [1990] E.C.R. I-2477.

protective measures. It was held for this provision enabled an importer whose goods were in transit to rely on a legitimate expectation that no suspensory measure would be applied against his goods unless an overriding public interest requires otherwise.<sup>27</sup>

3-012 It is essential that the relevant representation is sufficiently clear and precise. In *Lefebvre v Commission*, the CFI held that:

“there is an important difference between a statement made by the commission in general terms which cannot engender any valid expectations, and an assurance in precise terms, on which expectations may legitimately be based.”

Many claims have failed to establish a clear specific representation. For example, in *Alpharma v Council*,<sup>28</sup> the applicant challenged the withdrawal of an authorisation for certain additives in feeding stuffs and contended that this breached the applicant's legitimate expectations. A Directive had established a surveillance programme to assess possible problems about resistance to antibiotics induced by additives in animal feed and it was contended that this meant that the applicant could reasonably expect that no decision banning its additive would be taken before the results of the programme were known. The CFI disagreed and held that the surveillance programme did not give any indication that a decision to withdraw the authorisation for the additives would be conditional on completion of the research. Furthermore, letters from the Commission and statements by the Commissioner for Agriculture did not contain a precise and specific assurance.

3-013 It has been said that there is usually something in the nature of a contract characterising the relationship between the community or state institution and the applicant before an inducement will be recognised.<sup>29</sup> An excellent illustration of this is the milk marketing litigation. In order to limit surplus milk production in the Community, Council Regulation No.1078/77 offered incentives to producers to leave the market temporarily and a payment was offered to producers who undertook not to engage in milk production for five years. A subsequent Regulation (No.857/84) created a levy on quantities of milk that were produced over and above a specified amount or quota. The Regulation did not allocate a specified amount to producers who had discontinued milk production in

<sup>27</sup> However, Art.3(3) only allows traders to rely on a legitimate expectation that products already in transit will not be refused entry on arrival in the Community. It does not require the Commission to exempt goods in transit from other protective measures, such as countervailing charges which affect traders less severely: Case C-51/95 [1997] E.C.R. I-727.

<sup>28</sup> Case T-70/99 [2002] E.C.R. II-3495.

<sup>29</sup> Case C-331/88 *R. v Ministry of Agriculture, Fisheries and Food, Ex p. FEDESA* [1990] E.C.R. I-4023, at 4048, per Advocate General Mischo.

the year preceding the application for a quota. In *Mulder v Minister van Landbouw en Visserij*,<sup>30</sup> the claimant was a returning milk producer who had previously undertaken not to engage in production for five years. He was unable to take up milk production following the expiration of his undertaking because he was unable to obtain a quota. The ECJ held that this violated his legitimate expectations:

“Where such a producer, as in the present case, has been encouraged by a Community measure to suspend marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions.”

The second regulation was therefore invalid insofar as it did not provide for the allocation of a quota to returning producers.

The council amended the regulation in order to comply with this judgment and added a provision to the effect that where producers had not delivered milk during the reference year for quotas by reason of their undertaking, a special quota equal to 60 per cent of their milk production during the 12 months preceding the month in which they had made their applications for the non-marketing payments would apply. This was also held to breach the applicant's legitimate expectations. In *Spagl*,<sup>31</sup> the ECJ held that:

“the principle of the protection of legitimate expectations precludes the rate of production from being fixed at such a high level, by comparison with those applicable to [continuing producers], that its application amounts to a restriction which specifically affects them by very reason of the undertaking given by under Regulation No.1078/77”.

On the facts, the amended Regulation was unlawful because a reduction of 40 per cent in respect of returning producers was disproportionate by comparison to the maximum 17.5 per cent reduction in respect of continuing producers. These cases illustrate that it is possible for the respondent to have a sufficiently close relationship to engender a specific legitimate expectation with a class of persons (in this case milk producers) and not merely with an individual.

### When is the breach of an expectation unlawful?

A legitimate expectation may be frustrated where there is an overriding public interest justifying such a course of action. As Craig has noted the Community courts have been reluctant to assign a discrete legal label to

<sup>30</sup> Case 120/86 [1988] E.C.R. 2321.

<sup>31</sup> [1990] E.C.R. I-4539, at [22].

this balancing test.<sup>32</sup> The reasoning in cases such as *Spagl*<sup>33</sup> suggests that the test is one of significant imbalance, manifest unfairness, or clear disproportionality between the interests of the person affected and the policy considerations in favour of departure from an expectation. The court found that the amended regulation imposed a significant burden on the applicant and had examined the public-interest justification for differential reductions in quota. It concluded that the differential impact was not necessary to achieve the purposes of the scheme and it is clear that the court considered the burden on the applicant was disproportionate.

<sup>32</sup> P.P. Craig, *EU Administrative Law* (OUP, 2006), p.650.

<sup>33</sup> [1990] E.C.R. I-4539, at [22].

## CHAPTER 4

### Local Government Code of Conduct

#### A. INTRODUCTION

The law regulating the conduct of members of local authorities has been 4-001 revolutionised by Part 3 of the Local Government Act 2000 ("LGA 2000"), which contains a requirement that members and co-opted members must comply with a statutory code of conduct. This new ethical framework provides a very important means of controlling members' statements and representations.<sup>1</sup> Part 3 of the LGA 2000 has its roots in the publication by Lord Nolan of the third report of the Committee of Standards in Public Life which called for a new ethical framework for local government and observed that "scarcely anyone had a good word to say" about the previous arrangements.<sup>2</sup> Under those previous arrangements, the national code governing councillors was described as a complicated document on which the advice of an experienced officer was usually necessary; the regime for handling conflicts of interest was said to be "impenetrable"; and the penalties were inconsistent.<sup>3</sup> The Nolan Committee attributed the failings of the previous system to the fact that responsibility for maintaining standards had shifted from local government to central government.<sup>4</sup> The new ethical framework contained in Part 3 of the LGA 2000 seeks to remedy this problem by returning responsibility for maintaining standards of conduct to the local authorities themselves, but within a framework set by Parliament.

<sup>1</sup> This chapter focuses on those parts of the Code that apply in relation to statements and representations. For a detailed analysis of all of the Code's provisions see *Cross on Local Government* (London: Sweet & Maxwell), paras 4-73ff.

<sup>2</sup> Cm.3701-1, (July 1999), para.54. See also the 1986 report of a Committee chaired by David Widdicombe Q.C. (Cmnd. 9797).

<sup>3</sup> Cm.3701-1, (July 1999), para.56.

<sup>4</sup> Cm.3701-1, (July 1999), para.11.

## Overview of the statutory scheme

### *Principles governing members of relevant authorities*

- 4-002 The Secretary of State may by order specify the principles which are to govern the conduct of members<sup>5</sup> and co-opted members<sup>6</sup> of relevant authorities<sup>7</sup> in England and police authorities in Wales.<sup>8</sup> Such an order must provide as respects each specified principle: (a) that it applies to a person only when acting in an official capacity; or (b) that it applies to a person only when not acting in an official capacity.<sup>9</sup> However, the latter formulation may only apply to a principle that prohibits particular conduct (or conduct of a particular description) where that conduct would constitute a criminal offence.<sup>10</sup> These provisions are designed to address the problems experienced in determining when precisely members were under an obligation to comply with the new ethical framework and when they were not.<sup>11</sup>
- 4-003 For England, the Secretary of State has specified the following general principles<sup>12</sup>:

#### *"Selflessness"*

1. Members should serve only the public interest and should never improperly confer an advantage or disadvantage on any person.

#### *Honesty and Integrity*

2. Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.

<sup>5</sup> By virtue of s.83(3),(4), LGA 2000, where Part 2 of the LGA applies to a relevant authority, any reference to a member includes a reference to an elected mayor or executive member, and in the case of the Greater London Authority, the Mayor of London or a London Assembly member.

<sup>6</sup> Defined in s.49(7) of the LGA 2000 as a person who is not a member of the authority but who—(a) is a member of any committee or sub-committee of the authority; or (b) is a member of, and represents the authority on, any joint committee or joint sub-committee of the authority, and who is entitled to vote on any question which falls to be decided at any meeting of that committee or sub-committee.

<sup>7</sup> See para.4-005 below.

<sup>8</sup> LGA 2000 s.49(1). In Wales, the National Assembly may by order specify the principles which are to govern the conduct of members and co-opted members of relevant authorities in Wales (other than police authorities): s.49(1),(2).

<sup>9</sup> LGA 2000 s.49(2A), inserted by the Local Government and Public Involvement in Health Act 2007, s.183(1).

<sup>10</sup> LGA 2000 s.49(2B), inserted by the Local Government and Public Involvement in Health Act 2007, s.183(1).

<sup>11</sup> See further paras 4-064ff.

<sup>12</sup> Relevant Authorities (General Principles) Order 2001 (SI 2001/1401).

#### *Objectivity*

3. Members should make decisions on merit, including when making appointments, awarding contracts, or recommending individuals for rewards or benefits.

#### *Accountability*

4. Members should be accountable to the public for their actions and the manner in which they carry out their responsibilities, and should co-operate fully and honestly with any scrutiny appropriate to their particular office.

#### *Openness*

5. Members should be as open as possible about their actions and those of their authority, and should be prepared to give reasons for those actions.

#### *Personal Judgement*

6. Members may take account of the views of others, including their political groups, but should reach their own conclusions on the issues before them and act in accordance with those conclusions.

#### *Respect for Others*

7. Members should promote equality by not discriminating unlawfully against any person, and by treating people with respect, regardless of their race, age, religion, gender, sexual orientation or disability. They should respect the impartiality and integrity of the authority's statutory officers, and its other employees.

#### *Duty to Uphold the Law*

8. Members should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them.

#### *Stewardship*

9. Members should do whatever they are able to do to ensure that their authorities use their resources prudently and in accordance with the law.

#### *Leadership*

10. Members should promote and support these principles by leadership, and by example, and should act in a way that secures or preserves public confidence."

The second and eighth principles ("honesty and integrity" and "duty to uphold the law") apply on all occasions, whereas the other principles only

apply to the conduct of members or co-opted members in an official capacity.<sup>13</sup>

### *Model Codes of Conduct*

- 4-004 The Secretary of State may by order issue a model code as regards the conduct which is expected of members and co-opted members of relevant authorities<sup>14</sup> in England and police authorities in Wales (known as the Model Code of Conduct).<sup>15</sup> A Model Code of Conduct must be consistent with the principles specified by the Secretary of State pursuant to s.49 of the LGA 2000.<sup>16</sup> It may include provisions which are mandatory, and it may include provisions which are optional.<sup>17</sup> A Model Code of Conduct must provide for each provision to apply to a person only when acting, or not acting, in an official capacity. However, the latter formulation can only apply to particular conduct where it would constitute a criminal offence.<sup>18</sup>
- 4-005 The Model Code of Conduct applies to the following bodies in England<sup>19</sup>:

- (a) police authorities;
- (b) a county council;
- (c) a district council;
- (d) a London borough council;
- (e) a parish council;
- (f) the Greater London Authority;
- (g) the Metropolitan Police Authority;
- (h) the London Fire and Emergency Planning Authority;
- (i) the Common Council of the City of London;
- (j) the Council of the Isles of Scilly;
- (k) a fire and rescue authority;
- (l) a joint authority;
- (m) the Broads Authority; and
- (n) a National Park authority.

<sup>13</sup> Relevant Authorities (General Principles) Order 2001 (SI 2001/1401), para.3. Different principles apply in Wales, see: Conduct of Members (Principles) (Wales) Order 2001 (SI 2001/2276), as amended by SI 2005/2929 (W.214), Art.55.

<sup>14</sup> As defined in s.49(6) of the LGA 2000.

<sup>15</sup> LGA 2000 s.50(1). The National Assembly for Wales may by order issue a model code as regards the conduct which is expected of members and co-opted members of relevant authorities in Wales other than police authorities: s.50(2).

<sup>16</sup> LGA 2000 s.50(4)(a).

<sup>17</sup> LGA 2000 s.50(4)(b), (c).

<sup>18</sup> LGA 2000 s.50(4A), (4B).

<sup>19</sup> Local Authorities (Model Code of Conduct) Order 2007, (SI 2007/1159), Art.1. The Model Code of Conduct also applies to police authorities in Wales: Art.1(2)(a).

Previously, various codes were applicable to the different relevant authorities in England and police forces in Wales,<sup>20</sup> but since May 3, 2007, a single revised Model Code of Conduct has applied to all relevant authorities.<sup>21</sup>

### *Scope of the English Model Code of Conduct*

The Code emphasises that it is the individual member's responsibility to comply with the provisions of the Code.<sup>22</sup> Paragraph 2(1) instructs members that they are obliged to comply with the Code:

“whenever you—

- (a) conduct the business of your authority (which in this Code, includes the business of the office to which you are elected or appointed); or
- (b) act in a way that might give the impression you are acting as a representative of your authority,

and references to your official capacity are construed accordingly.”

The Code does not apply in relation to a member's conduct other than where it is in his or her official capacity, subject to two exceptions.<sup>23</sup> First, paras 3(2)(c) (intimidation), 5 (bringing one's office into disrepute) and 6(a) (using one's position to gain improper advantage) also apply at any other time “where that conduct constitutes a criminal offence for which [the member has] been convicted”.<sup>24</sup> Secondly, where a member acts as a representative of his or her authority on another relevant authority, he or she must, when acting for that other authority, comply with that other authority's code. And where a member acts as a representative of his or her authority on any other body, he or she must, when acting for that other body, comply with his or her authority's code, except and in so far as it conflicts with any other lawful obligations to which that other body may be subject.<sup>25</sup>

<sup>20</sup> See Local Authorities (Model Code of Conduct) (England) Order 2001 (SI 2001/3575); Parish Councils (Model Code of Conduct) (England) Order 2001 (SI 2001/3576); National Parks and Broads Authorities (Model Code of Conduct) (England) Order 2001 (SI 2001/3577); Police Authorities (Model Code of Conduct) Order 2001 (SI 2001/3578).

<sup>21</sup> Local Authorities (Model Code of Conduct) Order 2007 (SI 2007/1159). A revised code also now applies in Wales: Local Authorities (Model Code of Conduct) (Wales) Order 2008 (SI 2008/788 W.82).

<sup>22</sup> Local Authorities (Model Code of Conduct) Order 2007 (SI 2007/1159), para.1(3).

<sup>23</sup> Local Authorities (Model Code of Conduct) Order 2007 (SI 2007/1159), para.2(1).

<sup>24</sup> Local Authorities (Model Code of Conduct) Order 2007 (SI 2007/1159), para.2(3). Furthermore, para.2(4) provides that: “Conduct to which this Code applies (whether that is conduct in your official capacity or conduct mentioned in sub-paragraph (3)) includes a criminal offence for which you are convicted (including an offence you committed before the date you took office, but for which you are convicted after that date).”

<sup>25</sup> Local Authorities (Model Code of Conduct) Order 2007 (SI 2007/1159), para.2(5)(a), (b).

*Adoption of a code of conduct by relevant authorities*

4-008 Within six months of a Model Code of Conduct, or a revised Model Code of Conduct, being issued under s.50 of the LGA 2000, relevant authorities to which the Code applies must pass a resolution adopting a code of conduct for its members and co-opted members.<sup>26</sup> Such a code must incorporate the mandatory provisions of the Model Code of Conduct and it may also incorporate any optional provisions of the Model Code, as well as any other provisions provided that they are consistent with the Model Code.<sup>27</sup> If a relevant authority fails to comply with its duty within the relevant six-month period it must do so as soon as reasonably practicable,<sup>28</sup> and any mandatory provisions of the Model Code of Conduct which for the time being applies to the authority will automatically apply in relation to the members and co-opted members of the authority for so long as the authority fails to comply with its duty.<sup>29</sup>

4-009 As soon as reasonably practicable after adopting or revising a code of conduct under s.51, a relevant authority must<sup>30</sup>:

“(a) ensure that copies of the code or revised code are available at an office of the authority for inspection by members of the public at all reasonable hours,

(b) publish in one or more newspapers circulating in their area a notice which—

(i) states that they have adopted or revised a code of conduct,

(ii) states that copies of the code or revised code are available at an office of the authority for inspection by members of the public at such times as may be specified in the notice, and

(iii) specifies the address of that office, and

(c) send a copy of the code or revised code—

(i) in the case of a relevant authority in England or a police authority in Wales, to the Standards Board for England,

(ii) in the case of a relevant authority in Wales, to the [Public Services Ombudsman for Wales].”

<sup>26</sup> LGA 2000 s.51.

<sup>27</sup> LGA 2000 s.51(4). Where the authority includes any other provision consistent with the Model Code, it must state whether the provision applies to a person only when acting, or not acting in, an official capacity. The latter formulation may only be used in relation to a provision that prohibits particular conduct (or conduct of a particular description) where it would constitute a criminal offence within the meaning of the code: s.51(4A), (4B). By contrast, a relevant authority in Wales (except a police authority) may include provisions which are to apply to a person at all times, or otherwise than at all times: s.51(4C).

<sup>28</sup> LGA 2000 s.51(5)(a).

<sup>29</sup> LGA 2000 s.51(5)(b).

<sup>30</sup> LGA 2000 s.51(6). Where a relevant authority themselves publish a newspaper, the duty to publish a notice under subsection (6)(b) is to be construed as a duty to publish that notice in their newspaper and at least one other newspaper circulating in their area: s.51(7).

*Members' duty to comply with their authority's code*

Section 52(1)(a) of the LGA 2000 provides that a person who is a member 4-010 or co-opted member of a relevant authority at a time when the authority adopts a code of conduct under s.51 for the first time, must:

“before the end of the period of two months beginning with the date on which the code of conduct is adopted, give to the authority a written undertaking that in performing his functions he will observe the authority's code of conduct for the time being under section 51”.

In relation to that obligation, s.52(1)(b) provides that “if he fails to do so, is to cease to be a member or co-opted member at the end of that period”. This would seem to mean that upon the expiry of the prescribed two month period, any member who had not given a written undertaking would automatically cease to be a member. However, in *R. (on the application of Meredith) v Merthyr Tydfil County BC*,<sup>31</sup> Elias J. gave a more benevolent interpretation to s.52(1)(b). All 33 of the council's members had failed to give the required written undertaking because they had been misadvised as to the date by which they must do so. Elias J. held that the purpose of s.52(1)(b) was limited to disqualifying those members who refused to accept the standards required by the Model Code. Accordingly, a member had to be aware of his or her obligation to give a written undertaking by a particular date before it could be said that he or she was unwilling to accept the Code's standards.

## B. REQUIREMENTS OF THE MODEL CODE OF CONDUCT

### Introduction

The Model Code of Conduct contains a number of provisions which are 4-011 capable of being breached by a public official's statements or representations. The Code's broad range of application is illustrated by the following examples from the Standards Board and Adjudication Panel case reports<sup>32</sup>:

- (i) A councillor who sent an email to members of his political group giving a false account of a telephone call from another councillor in an attempt to discredit her<sup>33</sup>;

<sup>31</sup> [2002] EWHC 634 (Admin).

<sup>32</sup> Reports of cases before the Standards Board can be viewed at: <http://www.standardsboard.gov.uk/CaseInformation/Advancedsearch/> and reports of cases before the Adjudication Panel can be viewed at: <http://www.adjudicationpanel.co.uk/index.php?page=Decisions>.

<sup>33</sup> SBE 17587.07.

- (ii) a case in which a councillor was disqualified for four years after he brought his office into disrepute by a series of verbal attacks on various members of the public<sup>34</sup>;
- (iii) an implied threat to a landlord that his business with the council would suffer if he did not serve his tenant with an eviction notice<sup>35</sup>;
- (iv) an angry confrontation at a council social event during which one councillor threatened to kill another councillor<sup>36</sup>;
- (v) humiliating and intimidating remarks and emails addressed from a councillor to a senior council officer<sup>37</sup>;
- (vi) a councillor who had forged his child-minder's signature and falsely claimed reimbursement of child care expenses under a council scheme to reimburse costs incurred as a result of members attending council meetings<sup>38</sup>;
- (vii) a councillor who used his position to gain entry and demand information from staff at a branch of the Open College Network<sup>39</sup>;
- (viii) verbal and written attacks on the character and integrity of a former clerk, leading to the councillor being disqualified for one year<sup>40</sup>;
- (ix) questions addressed by the Mayor of London to a Jewish Evening Standard journalist, likening him to a Nazi concentration camp guard<sup>41</sup>; and
- (x) intemperate statements by the Leader of Peterborough City Council refusing to support calls for an inquiry into the death of a British soldier in Northern Ireland and accusing the dead man's family of wasting his time.<sup>42</sup>

## The Code's provisions

### *Bullying and intimidation*

4-012 Paragraph 3 of the Model Code of Conduct prohibits inter alia bullying and intimidation. It states that:

<sup>34</sup> SBE 6558.04. N.B. this case predates the decision in *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin); [2006] H.R.L.R. 45, which held that the Model Code of Conduct does not apply to a member's private life. See further para.4-064 below.

<sup>35</sup> SBE 16839.06.

<sup>36</sup> SBE 13747.06.

<sup>37</sup> SBE 21653.08.

<sup>38</sup> APE 0388.

<sup>39</sup> APE 0401.

<sup>40</sup> APE 0402.

<sup>41</sup> *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin); [2006] H.R.L.R. 45.

<sup>42</sup> *Sanders v Kingston (No.1)* [2005] EWHC 1145 (Admin); [2005] B.L.G.R. 719.

"(1) You must treat others with respect.

(2) You must not—

- (a) do anything which may cause your authority to breach any of the equality enactments (as defined in section 33 of the Equality Act 2006);
- (b) bully any person;
- (c) intimidate or attempt to intimidate any person who is or is likely to be—

(i) a complainant,

(ii) a witness, or

(iii) involved in the administration of any investigation or proceedings,

in relation to an allegation that a member (including yourself) has failed to comply with his or her authority's code of conduct; or

(d) do anything which compromises or is likely to compromise the impartiality of those who work for, or on behalf of, your authority.

(3) In relation to police authorities and the Metropolitan Police Authority, for the purposes of sub-paragraph (2)(d) those who work for, or on behalf of, an authority are deemed to include a police officer."

The concept of bullying is more fully explained in guidance issued by the 4-013 Standards Board for England.<sup>43</sup> The guidance states that:

"Bullying can be described as offensive, intimidating, malicious, insulting or humiliating behaviour, towards someone weaker than you or someone you have, or believe to have, influence over. . . Bullying is any insulting or offensive behaviour towards an individual or group of individuals. This includes using physical force or making abusive personal remarks about or to the victim not only face-to-face, but by email, letter, through the press, at council meetings or by other means."

Bullying can be contrasted with the sort of legitimate challenges that a member can make when questioning policy or scrutinising performance (as long as it is done appropriately and is not offensive or disrespectful). The

<sup>43</sup> The Standards Board for England, *Fact Sheet on Bullying* (<http://www.standardsboard.gov.uk/TheCodeofConduct/Guidance/CodeofConduct/Factsheets/filedownload,16138,en.pdf>).

guidance also places emphasis on the context in which disrespectful language is used:

“Disrespectful, intimidating or demeaning behaviour which is not carried out from a position of power or authority may not be bullying. But it may still be a breach of the Code of Conduct, e.g. by failing to treat others with respect. For example, if a member uses inappropriate language or is disrespectful to another member during a debate, it may not be classed as bullying because a platform is present for the other member to defend themselves. On the other hand, a member making abusive and disrespectful comments about an officer during a debate may be seen as bullying because the officer is not able to defend themselves.”

Clear evidence of bullying is required so objective assessments can be made more easily as to whether there may be a breach of the Code of Conduct. This is because it is more difficult to judge bullying from general remarks, such as “the councillor is always undermining me through her comments” and in “some circumstances, the claims are cases of oversensitivity to criticism, or a breakdown in a relationship between officers and members without an indication of any bullying.”

#### *Disrepute*

4-014 Paragraph 5 of the Model Code of Conduct covers a multitude of sins and provides that:

“You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.”

This provision has been held to have been breached in a number of cases concerning members’ statements.<sup>44</sup>

#### *Using position to gain improper advantage*

4-015 Paragraph 6 of the Model Code of Conduct prohibits public officials from using their positions improperly to gain an advantage or to confer a disadvantage. It also provides that when using, or authorising the use, of the authority’s resources, public officials must act in accordance with the authority’s reasonable requirements:

“You—

- (a) must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage; and

<sup>44</sup> See para.4-011.

- (b) must, when using or authorising the use by others of the resources of your authority—
  - (i) act in accordance with your authority’s reasonable requirements;
  - (ii) ensure that such resources are not used improperly for political purposes (including party political purposes); and
- (c) must have regard to any applicable Local Authority Code of Publicity made under the Local Government Act 1986.”

This provision would, for example, be breached by the submission of false expense claims by a councillor.

## C. STANDARDS COMMITTEES AND THE STANDARDS BOARD FOR ENGLAND

### Introduction

Important changes to Part 3 of the LGA 2000 have been made by Part 10 4-016 of the Local Government and Public Involvement in Health Act 2007, in particular provision has been made for local determination of complaints of breaches of the Code.

### Standards Committees

Every relevant authority, except parish councils and community councils, 4-017 must establish a standards committee.<sup>45</sup> Standards committees must comprise at least two members of the authority and at least one person, including the chair person of the committee, who is not a member, or officer, of that or of any other relevant authority.<sup>46</sup> A standards committee is not to be treated as a body to which the duty to allocate seats to political groups pursuant to s.15 of the Local Government Act 1989 applies.<sup>47</sup>

#### *Composition and appointment of standards committees*

The rules governing the constitution and proceedings of Standards Com- 4-018 mittees and sub-committees are contained in the Standards Committee (England) Regulations 2008. An authority must ensure that at least 25 per

<sup>45</sup> LGA 2000 s.53(1),(2).

<sup>46</sup> LGA 2000 s.54(4).

<sup>47</sup> LGA 2000 s.54(10).

cent of the members of its standards committee are independent members.<sup>48</sup> Where it is operating executive arrangements under Part 2 of the LGA 2000 an authority must ensure that only one member of its standards committee is a member of the executive.<sup>49</sup> Where an authority is a responsible authority,<sup>50</sup> it must ensure that at least two members of the standards committee are members of parish councils for which it is responsible, who are not also members of the responsible authority.<sup>51</sup>

4-019 A person may only be appointed as an independent member of a standards committee if the appointment is approved by a majority of the members of the authority<sup>52</sup>; if the appointment is advertised in one or more newspapers circulating in the area of the authority and in such other publications or websites as the authority considers appropriate<sup>53</sup>; and if the appointment is of a person who submitted an application to the authority.<sup>54</sup> However, a person may not be appointed as an independent member of a standards committee if that person has within the period of five years immediately preceding the date of the appointment been a member or officer of the authority,<sup>55</sup> or is a relative or close friend of a member or officer of the authority.<sup>56</sup> Any person appointed as an independent member of a standards committee who becomes a member or officer, or a relative of a member or officer, of the relevant authority shall cease to be a member of the standards committee.<sup>57</sup> A standards committee shall not be quorate unless there are three members present for its duration.<sup>58</sup>

#### *Functions of standards committees*

4-020 The general functions of a standards committee are: (a) promoting and maintaining high standards of conduct by the members and co-opted members of the authority; and (b) assisting members of the authority to observe the authority's code of conduct.<sup>59</sup> Standards committees also have the following specific functions: (a) advising the authority on the adoption

<sup>48</sup> The Standards Committee (England) Regulations 2008 (SI 2008/1085) reg.4(1)(a). An independent member is defined in reg.2 as "a person appointed to a standards committee, or sub-committee of the standards committee, of an authority, who is not a member, or an officer, of that or any other relevant authority".

<sup>49</sup> The Standards Committee (England) Regulations 2008 reg.4(1)(b).

<sup>50</sup> Defined in reg.1 of the Standards Committee (England) Regulations 2008 to mean "a district council or unitary county council which has functions in relation to parish councils for which it is responsible under s.55(12) of the [Local Government Act 2000]". For the definition of "unitary county council" see s.55(13) of the LGA 2000.

<sup>51</sup> The Standards Committee (England) Regulations 2008 reg.4(2).

<sup>52</sup> The Standards Committee (England) Regulations 2008 reg.5(1)(a).

<sup>53</sup> The Standards Committee (England) Regulations 2008 reg.5(1)(b).

<sup>54</sup> The Standards Committee (England) Regulations 2008 reg.5(1)(c).

<sup>55</sup> The Standards Committee (England) Regulations 2008 reg.5(2)(a).

<sup>56</sup> The Standards Committee (England) Regulations 2008 reg.5(2)(b).

<sup>57</sup> The Standards Committee (England) Regulations 2008 reg.5(6).

<sup>58</sup> The Standards Committee (England) Regulations 2008 reg.7(1).

<sup>59</sup> LGA 2000 s.54(1).

or revision of a code of conduct; (b) monitoring the operation of the authority's code of conduct; and (c) advising, training or arranging to train members and co-opted members of the authority on matters relating to the authority's code of conduct.<sup>60</sup> A standards committee of a district council has the same functions in relation to the parish councils, and the members of parish councils, for which the district council is the responsible authority.<sup>61</sup> A standards committee of a unitary county council has the same functions in relation to the parish councils, and the members of parish councils, for which the unitary county council is the responsible authority.<sup>62</sup>

### The Standards Board for England

The Standards Board for England is a body corporate which consists of at least three members appointed by the Secretary of State.<sup>63</sup> The Standards Board has the following functions<sup>64</sup>:

- (i) it must appoint employees known as ethical standards officers;
- (ii) it may issue guidance to ethical standards officers in relation to the exercise of their functions;
- (iii) it may issue guidance to relevant authorities in England and police authorities in Wales on matters relating to the conduct of members and co-opted members;
- (iv) it may issue guidance to relevant authorities in England and police authorities in Wales in relation to the qualifications or experience which monitoring officers should possess; and
- (v) it may arrange for any such guidance to be made public.

In exercising its functions, the Standards Board for England must have regard to the need to promote and maintain high standards of conduct by members and co-opted members of relevant authorities in England.<sup>65</sup>

<sup>60</sup> LGA 2000 s.54(2).

<sup>61</sup> LGA 2000 s.55(1). A district council or unitary county council is the responsible authority in relation to a parish council which is not a common parish council, if the parish is situated within the area of the district council or county council. In relation to a parish council which is a common parish council, a district council or unitary county council is the responsible authority if the parishes in the group are wholly situated within that area or if the greatest number of local government electors for the parishes in the group is situated in that area: s.55(12).

<sup>62</sup> LGA 2000 s.55(2).

<sup>63</sup> LGA 2000 s.57(1),(2).

<sup>64</sup> LGA 2000 s.57(5).

<sup>65</sup> LGA 2000 s.57(4).

## CHAPTER 8

### Restitution

#### A. INTRODUCTION

##### The nature of restitution

8-001 The law of restitution is concerned with the award of remedies based on the measure of the defendant's *gain*, rather than the claimant's loss. These gain-based remedies will be awarded in three situations<sup>1</sup>:

- (i) where the defendant has profited from the commission of a wrong;
- (ii) where the defendant has received property in which the claimant has a proprietary interest and the claimant seeks to vindicate his property rights; and
- (iii) where the defendant has been unjustly enriched at the claimant's expense. This is the principle most frequently engaged in restitutionary claims involving public bodies. In such claims, four matters must be considered: whether the defendant was *enriched*; whether the enrichment was *at the expense of the claimant*; whether the enrichment was *unjust*; and whether any defences are available.<sup>2</sup>

##### Examples of restitution claims involving public bodies

8-002 The law reports contain many examples of restitutionary claims involving public bodies. The many diverse situations in which a right to restitution might arise for, or against, a public body can be seen from the following examples:

<sup>1</sup> See G. Virgo, *The Principles of the Law of Restitution*, 2nd edn (OUP, 2006).

<sup>2</sup> See paras 8-004, 8-005, 8-006ff, and Section I respectively.

- *Woolwich v Inland Revenue Commissioners*<sup>3</sup>: a claim for the recovery of tax paid following a demand which was ultra vires because the statutory instrument upon which it was based was also ultra vires;
- *Kleinwort Benson v Lincoln City Council*<sup>4</sup>: a claim by a bank to recover money paid to a local authority under an interest rate swap transaction that was ultra vires and thus void;
- *British Steel plc v Commissioners of Customs & Excise*<sup>5</sup>: a claim to recover duty which was paid when the Revenue incorrectly denied that the claimant was entitled to relief;
- *Norwich City Council v Stringer*<sup>6</sup>: a claim by a local authority to recover overpaid housing benefit;
- *Deutsche Morgan Grenfell v Inland Revenue Commissioners*<sup>7</sup>: a claim to obtain a restitutionary remedy in the form of interest in respect of taxes that had been demanded early in breach of EC law; and
- *Hickley and Bosworth B.C. v Shaw*<sup>8</sup>: a claim by a local authority to recover money paid to a former employee under a void redundancy agreement.

##### Policy considerations in cases involving public authorities

In claims for restitution involving public authorities there are two conflicting policy considerations. On the one hand there is the constitutional imperative that where a public authority is not entitled to money which it has received, that money should be repaid to the citizen from whom it was unlawfully taken. Ever since the enactment of Art.4 of the Bill of Rights 1689,<sup>9</sup> English law has recognised that a public authority may only demand money from citizens if it has a legal power to do so.<sup>10</sup> Reciprocity demands no less, given that where the Crown pays money out of the consolidated fund without statutory power, it is able to recover that money on the basis of its incapacity.<sup>11</sup> However, on the other hand, public policy suggests that

<sup>3</sup> [1993] A.C. 70.

<sup>4</sup> [1999] 2 A.C. 349.

<sup>5</sup> [1997] 2 All E.R. 366.

<sup>6</sup> (2001) 33 H.L.R. 158. See C. Baker and A. Baker, "Ultra vires demands and the limits of restitution" [2000] J.L.G.L. 81.

<sup>7</sup> [2006] UKHL 49; [2007] 1 A.C. 558.

<sup>8</sup> [2000] L.G.R. 1.

<sup>9</sup> Art.4 provides: "That levying money for or to the use of the Crowne by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal".

<sup>10</sup> See *Attorney-General v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884.

<sup>11</sup> *Auckland Harbour Board v R* [1924] A.C. 318, at 327, per Viscount Haldane ". . . it has been a principle of the British Constitution now for more than two centuries . . . that no money can be taken out of the Consolidated Fund into which revenues of the State have been paid, excepting under a distinct authorisation of Parliament itself. . . Any payment out of the Consolidated Fund made without Parliamentary authority is simply illegal and *ultra vires* and may be recovered by the Government if it can . . . be traced".

restitutionary claims should be deterred if they would cause serious adverse effects to public finances. For example, in *Glasgow Corporation v Lord Advocate*,<sup>12</sup> in denying restitution of money paid due to an erroneous interpretation of a statute Lord Clyde said<sup>13</sup>:

“But it does not therefore follow that, when the error is established, the money must automatically be paid back by the taxing authority. For a repayment in such circumstances has wider repercussions, and affects far more interests than those of the one taxpayer. It would, in my opinion, introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be a wholesale opening up of transactions between them whenever any Court put a new interpretation upon an existing statutory provision imposing a tax”.

English law seeks to balance these competing considerations by affording a right to restitution, subject to a number of defences to protect public bodies' security of receipt.

### Enrichment

8-004 A defendant will be considered to have been enriched if he received money. The mere receipt for money will enrich the defendant because money is a universal medium of exchange.<sup>14</sup> The position is more complicated in relation to the provision of services. Once rendered a service, unlike money, cannot be returned; restitution must instead take the form of payment for the service. But the defendant may never have wished to receive the service, or, at least not if he had to pay for it. When faced with such an argument, Goff and Jones suggest that the court should treat the defendant as having benefited by a service if he freely accepted it, i.e. “if, as a reasonable man, he should have known that the claimant who rendered the service expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services”.<sup>15</sup> In *R. (on the application of Charles Rowe) v Vale of White Horse DC*,<sup>16</sup> due to an administrative oversight, the council had for 19 years failed to bill the claimant and others for the provision of sewerage services. Lightman J. held that the services were necessary and their provision had saved the

<sup>12</sup> 1959 S.C. 203.

<sup>13</sup> 1959 S.C. 203, at 230.

<sup>14</sup> See Goff & Jones, *The Law of Restitution*, 7th edn (London: Sweet & Maxwell, 2007), para.1-018.

<sup>15</sup> Goff & Jones, *The Law of Restitution*, 7th edn (London: Sweet & Maxwell, 2007), para.1-019.

<sup>16</sup> [2003] 1 Lloyd's Rep. 418.

claimant expenditure, but there was no free acceptance on the facts because the council had engendered the reasonable belief that the claimant would not have to pay for the services.<sup>17</sup>

### At the expense of the claimant

Enrichment will be “at the expense of the claimant” if it is obtained 8-005 directly from the claimant. On several occasions it has been argued that the defendant's enrichment was not at the expense of the claimant because the claimant had already passed the loss on to its customers, or had offset its loss by means of hedging contracts with third parties. Such an argument was rejected in *Kleinwort Benson Ltd v South Tyneside MBC*,<sup>18</sup> and in *Kleinwort Benson Ltd v Birmingham City Council*.<sup>19</sup> In both cases the claimant bank had made parallel hedging contracts with third parties when it entered into the void interest rate swap agreement with the defendant.<sup>20</sup> The defence of passing on was rejected because the hedging contracts were too remote to be taken into account; and because the law of restitution is concerned with the defendant's gain, not the claimant's loss.<sup>21</sup>

### “Unjust” enrichment

Enrichment of a public authority will be considered to be “unjust” if 8-006 receipt of the payment was ultra vires the authority. There are four main reasons why receipt of a payment may be regarded as ultra vires a public authority.

#### *Invalid delegated legislation*

If money is paid pursuant to delegated legislation which is unlawful, the 8-007 receipt of that money by the public authority will also be ultra vires. This is illustrated by *Woolwich Equitable Building Society v Inland Revenue Commissioners*,<sup>22</sup> where the Revenue's receipt of tax was held to be ultra vires because the Income Tax (Building Societies) Regulations 1986 (SI

<sup>17</sup> [2003] 1 Lloyd's Rep. 418, at [14], citing *Bridgewater v Griffiths* [2000] 1 W.L.R. 524, at 532; *Bookmakers' Afternoon Greyhound Services v Wilf Gilbert (Staffordshire) Ltd* [1994] F.S.R. 723; and *Gilbert v Knight* [1968] 2 All E.R. 248.

<sup>18</sup> [1994] 4 All E.R. 972.

<sup>19</sup> [1996] 4 All E.R. 733.

<sup>20</sup> On the “swaps” litigation see paras 8-015ff.

<sup>21</sup> In *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70, at 177-178, Lord Goff left open the possibility that the defence of passing on might be applicable where a taxpayer has passed on an ultra vires tax demand to his customers. Passing on is a statutory defence in relation to restitution of overpaid VAT: s.80(3) of the Value Added Tax Act 1994. See further para.8-042 below.

<sup>22</sup> [1993] A.C. 70.

1986/482), pursuant to which the tax was paid, had been found to be ultra vires the Finance Act 1985.<sup>23</sup>

#### *Breach of EC law*

- 8-008 A statute, statutory instrument or exercise of administrative discretion will be unlawful if it is contrary to EC law. A benefit received in breach of EC law will be ultra vires the authority and the ECJ has repeatedly held that EC law confers a right to recover benefits obtained by public bodies in breach of EC law.<sup>24</sup>

#### *Unauthorised transactions*

- 8-009 If a public body lacks capacity to enter into a particular transaction the transaction will be void and any receipt of money pursuant to the void transaction will be ultra vires. This form of ultra vires receipt is illustrated by the interest swaps litigation in which the House of Lords held that s.111 of the Local Government Act 1972 did not authorise local authorities to enter into interest rate swap transactions and that accordingly all receipts under such transactions were ultra vires.<sup>25</sup>

#### *Mistaken payments*

- 8-010 Receipt of a payment will be ultra vires the public body if the money was demanded or paid by mistake. This could be a factual mistake whereby the sum due was miscalculated, or it could be a mistake of law—for example where a valid regulation on which the demand was based is misconstrued and the claimant is erroneously thought to be liable to pay, or to pay more than is due on proper construction of the regulation.

### B. EXTORTION BY COLOUR OF OFFICE (*colore officii*)

- 8-011 An ultra vires demand by a public authority was not recognised as a ground for restitution until the House of Lords' decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners*.<sup>26</sup> Prior to the *Woolwich*

<sup>23</sup> *R. v Inland Revenue Commissioners, Ex p. Woolwich Equitable Building Society* [1990] 1 W.L.R. 140.

<sup>24</sup> See e.g. Case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] E.C.R. 3595; Cases C-192-218/95 *Société Comateb v Directeur Général des Douanes et Droits Indirects* [1997] E.C.R. I-165; Case C-242/95 *GT Link A/S v De Danske Statsbaner (DSB)* [1997] E.C.R. I-4349; Case C-188/95 *Fantask A/S v Industriministeriet* [1997] E.C.R. I-6783; Case C-397/98 and C-410/98 *Metallgesellschaft Ltd v Inland Revenue Commissioners* [2001] Ch. 620; Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2003] Q.B. 866; and Case C-324/00 *Lankhorst-Hoborst GmbH v Finanzamt Steinfurt* [2003] S.T.C. 607. See further, A. Jones, *Restitution and European Community Law* (Mansfield Press, 2000).

<sup>25</sup> *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1. See further paras 8-015ff.

<sup>26</sup> [1993] A.C. 70.

decision, the most common ground for restitution in cases involving public bodies was “demands made *colore officii*”. This ground of restitution was based on the wider principle of restitution of benefits conferred under compulsion. A right to restitution would arise if money was obtained by “colour of office” or *colore officii*.<sup>27</sup> Willes J. stated the rule as follows<sup>28</sup>:

“when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received”.

The claimant had not only to prove that money was demanded by a public official, but also that the demand was coercive. As Windeyer J. explained, in *Mason v The State of New South Wales*,<sup>29</sup> “extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty”. Importantly, not all money unlawfully demanded by a public official is recoverable on this basis—the money must have been paid by the claimant to secure performance of the official’s duty which he wrongfully refused to perform.<sup>30</sup> The rationale for permitting restitution in cases of *colore officii* is that public officials occupy especially powerful positions and thus their demands in themselves carry more force than similar demands by private individuals and organisations. As Isaacs J. explained in *Sargood Bros v The Commonwealth*:

“The right to recovery after a demand *colore officii* rests upon the assumption that the position occupied by the defendant creates virtual compulsion, where it conveys to the person paying the knowledge or belief that he has no means of escape from payment strictly so called if he wishes to avert injury to or deprivation of some right to which he is entitled without such payment”.

A good example of this ground of restitution is the decision in *Morgan v Palmer*.<sup>31</sup> The claimant publican paid four shillings to the mayor following an implied threat that unless he did so his licence would not be renewed.

<sup>27</sup> In the Court of Appeal in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70, at 80, Glidewell L.J. said that the expression *colore officii* was “an archaic phrase [which] is at best vague and at worst almost meaningless at the present day”.

<sup>28</sup> *Great Western Ry. v Sutton* (1868-1869) L.R. 4 H.L. 226, at 249, cited with approval in *South of Scotland Electricity Board v British Oxygen Co. Ltd* [1959] 1 W.L.R. 589, at 607.

<sup>29</sup> (1959) 102 C.L.R. 180, at 140. This statement was approved by Lord Keith and Lord Jauncey in *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] A.C. 70, at 162 and 189-190, respectively.

<sup>30</sup> *Morgan v Palmer* (1842) 2 B. & C. 729, at 737, per Littledale J.

<sup>31</sup> (1824) 2 B. & C. 729. See also, *Hooper v Exeter Corpn* (1887) 56 L.J. Q.B. 457; *Queens of the River Steamship Co Ltd v River Thames Conservators* (1899) 15 T.L.R. 474; *South of Scotland Electricity Board v British Oxygen Co Ltd* (No.2) [1959] 2 All E.R. 225.

The mayor had no power to make such a demand and the claim succeeded. Similarly, in *Steele v Williams*,<sup>32</sup> a threat was made that the claimant's clerk would not be allowed to copy extracts from the Parish Register of Burials and Baptisms unless a fee was paid. The defendant had no power to charge the claimant who succeeded in obtaining restitution. Importantly, a threat to sue was normally held to be a legitimate threat and so did not give rise to liability under the *colore officii* principle. For this reason, restitution was denied on the basis of duress in *William Whitely Ltd v R*,<sup>33</sup> and Walton J. said<sup>34</sup>:

"The plaintiffs must have known that if proceedings were taken for penalties it would be open for them in such proceedings to raise the question as to whether the duties were payable or not, as they did, in fact, in 1906. . . They knew that the Commissioners of the Inland Revenue could not determine whether the duties were payable or not. They could take no action if the duties were not paid except by legal proceedings. . . In the circumstances I have come to the conclusion that there was nothing in this case which amounted to compulsion".

8-013 It is open to question whether extortion by colour of office still exists as a separate ground for restitution or whether it has been absorbed by the *Woolwich* principle that money paid pursuant to an ultra vires demand is recoverable.<sup>35</sup> This is an important point because, as Goff & Jones observe, there are important differences between the colour of office cases and the *Woolwich* principle<sup>36</sup>:

- (i) the colour of office cases are based on the fact that, for his own benefit, a public official used illegitimate pressure to demand money in return for a duty which he was bound to perform for free or for less than the sum paid;

<sup>32</sup> (1853) 8 Ex. 625. But for the Indemnity Act 1920, restitution would also have been awarded in *T and J Brocklebank Ltd v R* [1925] 1 K.B. 52, where a shipping controller threatened to withhold a licence authorising the sale of a ship to a foreign firm, unless a percentage of the purchase price was paid to the Ministry of Defence.

<sup>33</sup> (1909) 101 L.T. 741.

<sup>34</sup> (1909) 101 L.T. 741, at 745.

<sup>35</sup> *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] A.C. 70. See Section E. In Goff & Jones, *The Law of Restitution*, 6th edn (London: Sweet & Maxwell, 2007), para.10-018 the editors state that "it is not at all clear what is the present authority of the *colore officii* line of cases". Professor Burrows takes the view that "although not expressly spelt out" the *colore officii* cases have been overruled: A. Burrows, *The Law of Restitution*, 2nd edn (OUP, 2002), p.438. See also, G. Virgo, *The Principles of the Law of Restitution*, 2nd edn (OUP, 2006), p. 407.

<sup>36</sup> Goff & Jones, *The Law of Restitution*, 6th edn (London: Sweet & Maxwell, 2007), para.10-018.

- (ii) a very wide definition of public official has been taken in the *colore officii* cases, so as to include arbitrators<sup>37</sup> and common carriers for example<sup>38</sup>; and
- (iii) in *Woolwich*, Lord Browne Wilkinson allowed the claim because the payment was "without consideration".<sup>39-40</sup> But in the *colore officii* cases, the claimant sometimes obtained part of the consideration which he had bargained for from the public official and yet still succeeded despite the payment not being without consideration.

## C. MISTAKE

### Introduction

Restitution is available in respect of money paid under a mistake of fact, 8-014 but for many years it was denied that restitution was available in respect of payments made under a mistake of law.<sup>41</sup> However, in *Kleinwort Benson v Lincoln City Council*,<sup>42</sup> the House of Lords removed the mistake of law bar. This was an extremely important breakthrough because many cases involving ultra vires payments arise because the claimant was mistaken as to the law and believed that he or she was liable to make the disputed payment to the public authority. The *Kleinwort Benson* case arose from the "swaps" transactions entered into by local authorities in the 1980s. It is necessary to outline the nature of these transactions and the history of the swaps litigation before examining the decision in *Kleinwort Benson*.

### The swaps cases

In the 1980s, central government imposed heavy restrictions on local 8-015 government finances in order to meet its targets for the control of governmental spending. Many local authorities circumvented these restrictions by taking part in "off-balance-sheet" transactions, such as interest

<sup>37</sup> Where an arbitrator or umpire fixes his fee in a case where he has no jurisdiction to do so, a party who pays the fee in order to take up the award is entitled to recover the money paid: *Re Coombs and Freshfield and Fernley* (1850) 4 Ex. 839. The same applies if the arbitrator is entitled to fix his fee, but charges an exorbitant one: *Re Coombs and Freshfield and Fernley* (1850) 4 Ex. 839; *Barnes v Hayward* (1857) 1 H. & N. 742, at 743, per Pollock C.B.

<sup>38</sup> See e.g. *Great Western Ry. v Sutton* (1868-1869) L.R. 4 H.L. 226, at 227, Blackburn J.

<sup>39-40</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70, at 197.

<sup>41</sup> See *Bilbie v Lumley* (1802) 2 East. 469; *Brisbane v Dacres* (1813) 5 Taunt. 143; *Wilson and M'Lellan v Sinclair* (1830) 4 W. & S. 398; and *Kelly v Solari* (1841) 9 M. & W. 54.

<sup>42</sup> [1999] 2 A.C. 349.

rate swap transactions in order to raise additional money. An interest rate swap can take many forms, but in essence one party, known as the fixed rate payer, agrees to pay to the other party over a certain period interest at a fixed rate on a notional capital sum; and the other party known as the floating rate payer, agrees to pay to the former over the same period interest on the same notional sum at a market rate determined in accordance with a certain formula. In practice, a balance is struck at each relevant date and the party who then owes the greater sum will pay the difference to the other party.<sup>43</sup> Banks commonly entered into hedging arrangements whereby they entered back-to-back swaps so that every payment under one swaps contract would be cancelled out by the payments under the "hedge" swap.

8-016 These interest swaps became very popular with local authorities, particularly a form of swap which involved an up front payment of a capital sum by one party that was subsequently balanced by an adjustment of the parties' respective liabilities. This type of arrangement enabled the rate-capped local authorities to achieve a form of borrowing. However, in *Hazell v Hammersmith & Fulham LBC*,<sup>44</sup> the House of Lords held that interest swaps were ultra vires because they were not authorised by s.111 of the Local Government Act 1972 which permitted authorities to enter into any transaction "which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions". Generally speaking, the banks had "lost" under the swaps transactions and had made balancing payments to the local authorities. Following the decision in *Hazell*, they therefore sought to recover that money. The cases raised four principal issues which are considered below: (i) whether the authorities were liable to refund the money they had received from the banks<sup>45</sup>; (ii) whether any defences were available<sup>46</sup>; (iii) whether interest was payable<sup>47</sup>; and (iv) jurisdictional issues.<sup>48</sup>

### Kleinwort Benson Ltd v Lincoln City Council

8-017 In *Kleinwort Benson Ltd v Lincoln City Council*,<sup>49</sup> the House of Lords held that money paid under a mistake of law was, in principle, recoverable. The claimant bank had paid £423,000 to the defendant local authority under

<sup>43</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, at 365, per Lord Goff.  
<sup>44</sup> [1992] 2 A.C. 1. The London Borough of Hammersmith and Fulham made a total of 592 swaps transactions, that is more than all of the other local authorities combined. The notional value of its swaps was £6 billion and they were responsible for 0.5 per cent of all swaps transactions world-wide.

<sup>45</sup> See paras 8-017ff.

<sup>46</sup> See Section I.

<sup>47</sup> See para.8-037.

<sup>48</sup> See para.8-023.

<sup>49</sup> [1999] 2 A.C. 349.

void swaps transactions. The money had been paid more than six years before the claim was issued. Therefore the claimant could only succeed if its action was for relief from the consequences of a mistake in which case the limitation period would run from the date when it discovered the mistake or "could with reasonable diligence have discovered it".<sup>50</sup> The majority of the House of Lords held that the rule precluding recovery of money paid under a mistake of law should be abolished and that a general right to restitution of money paid under mistake of law or fact should be recognised, subject to defences. The mistake of law bar suffered from three main defects<sup>51</sup>: first, the rule was unjust because it allowed the payee to retain a payment which would not have been made to him but for the payor's mistake; secondly, the distinction between mistakes of law and mistakes of fact produced results which appeared capricious; and finally the judges had manipulated the distinction between mistakes of fact and mistakes of law so as to make the rule unpredictable in its application. Against this background, Lord Goff recognised that the mistake of law bar had been rejected<sup>52</sup>:

"either by legislation or by judicial decision, in countries throughout the common law world. This is due not only to specific criticism of the mistake of law rule as such, but still more to the combined effect of two fundamental changes in the law: first, recognition that there exists a coherent law of restitution founded upon the principle of unjust enrichment, and second, within that body of law, recognition of the defence of change of position. . . The combined effect is not only that the mistake of law rule can no longer be allowed to survive, but also that the law must evolve appropriate defences which can, together with the defence of change of position, provide protection where appropriate for recipients of money paid under a mistake of law in those cases in which justice or policy does not require them to refund the money".

As Lord Goff held, the policy underlying the mistake of law bar can adequately be served by the recognition of a general right to recover mistaken payments subject to specified defences "to cater for the fears which formerly appeared to require a blanket exclusion of recovery".<sup>53</sup>

*What is a mistake law?—changes in the settled understanding of the law*

In *Kleinwort Benson v Lincoln City Council*, the question arose whether 8-018 the bank had actually been mistaken when it paid money under a swap transaction of the sort subsequently declared to be void in *Hazell v*

<sup>50</sup> Limitation Act 1980 s.32(1)(c).

<sup>51</sup> [1999] 2 A.C. 349, at 372, per Lord Goff.

<sup>52</sup> [1999] 2 A.C. 349, at 373.

<sup>53</sup> [1999] 2 A.C. 349, at 372.

*Hammersmith and Fulham LBC*. For Professor Birks the answer was plain: when established law is changed by a subsequent decision of the courts, money paid in accordance with the old established law is not recoverable as having been paid under a mistake of law—the payor has simply made a misprediction and is no more mistaken than a man who gets soaked because he mispredicted the weather.<sup>54</sup> Lord Browne-Wilkinson, with whom Lord Lloyd agreed, dissented and agreed with Birks' analysis. The declaratory theory of the common law, he said, dictates that once the higher court has stated the changed law, the law as so stated applies not only to that case, but also to all cases subsequently coming before the courts, even though the events in question may have occurred prior to the higher court's ruling.<sup>55</sup> Accordingly, the "precise question is whether the fact that the later overruling decision operates retrospectively so far as the substantive law is concerned also requires it to be assumed (contrary to the facts) that *at the date of each payment* the claimant made a mistake as to what the law then was".<sup>56</sup> Lord Browne-Wilkinson could see no justification for assuming that the claimant had made a mistake, especially because on such an approach payments could be reopened many years later when the law changed and this would be "subversive of the great public interest in the security of receipts and the closure of transactions".<sup>57</sup>

8-019 The majority of the House of Lords held, however, that a payor should be assumed to have been mistaken when the law is changed by judicial decision with retrospective effect. Lord Goff said that<sup>58</sup>:

"the money was indeed paid over under a mistake, the mistake being a mistake of law. The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law held to be applicable at the date of payment, he was not bound to pay it. Plainly, therefore, he paid under a mistake of law. . ."

And Lord Hope considered that<sup>59</sup>:

"[there is no] essential difference as between fact and law in regard to the payer's state of mind. This may vary from one of complete ignorance to a state of ample knowledge but a misapplication of what is known to the facts. . . [It] may have been due to a failure to predict correctly how the court would determine issues which were unre-

<sup>54</sup> P. Birks, *An Introduction to the Law of Restitution*, rev. edn (OUP, 1989), pp.147-148. See also Law Com No. 227, (1994), Cm 2731, *Restitution: Mistakes of Law and ultra vires public authority receipts and payments*.

<sup>55</sup> [1999] 2 A.C. 349, at 358-359, per Lord Browne-Wilkinson.

<sup>56</sup> [1999] 2 A.C. 349, at 359, per Lord Browne-Wilkinson.

<sup>57</sup> [1999] 2 A.C. 349, at 379.

<sup>58</sup> [1999] 2 A.C. 349, at 379.

<sup>59</sup> [1999] 2 A.C. 349, at 409-410.

solved at the time of the payment, or even to foresee that there was an issue which would have to be resolved by the Court. As Mason C.J. said in the *David Securities* case . . . the concept of mistake includes cases of sheer ignorance as well as of positive but incorrect belief".

Lord Hoffmann accepted that this approach might tilt the balance too far against the public interest in the security of transactions, particularly because the Limitation Act 1980 did not deal with the difficulties created by mistakes arising from retrospective changes in law by judicial decision. Nevertheless, he considered that "any measures to redress the balance must be a matter for the legislature".<sup>60</sup>

The difficulty of identifying the precise nature of the claimant's mistake is illustrated by the facts of *Deutsche Morgan Grenfell*. Lord Hope and Lord Scott held that DMG's mistake lay in its erroneous belief that it was not entitled to make a group income election. Lord Hope's reasoning was as follows<sup>61</sup>:

"I think, with respect, that Park J's analysis was the correct way of looking at what happened in this case. It was the mistaken belief that group relief could not be claimed that led inevitably to the liability to pay ACT which, absent a valid claim to group relief, DMG was not in a position to dispute. That was the mistake which was made, of which the payment of ACT was a secondary consequence. But, as Park J was right to recognise, if the mistake about the availability of group income relief had not existed, the ACT would not have been paid. There was an unbroken causative link between the mistake and the payment. It follows that the payments were made under a mistake".

By contrast, Lord Hoffmann held that this was a "rather sophisticated view of the nature of the mistake".<sup>62</sup> Instead, in his view, DMG's mistake was that it wrongly believed that advance corporation tax ("ACT") was payable because "the election provisions were purely machinery, which DMG would undoubtedly have used, by which it could enforce its right to exemption from liability".<sup>63</sup> The precise nature of the mistake was critical because it went to the issue of whether the tax was actually payable at the time DMG made the disputed payments. Lord Hoffmann did not consider that liability to pay ACT arose and so he had no difficulty in holding that DMG was entitled to restitution. But on Lord Hope and Lord Scott's view, DMG's mistake in failing to make a group income election meant that ACT was payable. Accordingly, Lord Scott held that DMG was not entitled to

<sup>60</sup> [1999] 2 A.C. 349, at 401.

<sup>61</sup> [2006] UKHL 49; [2007] 1 A.C. 558, at [62]. See also [89] per Lord Scott.

<sup>62</sup> [2006] UKHL 49; [2007] 1 A.C. 558, at [32].

<sup>63</sup> [2006] UKHL 49; [2007] 1 A.C. 558, at [32].