

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 3 - Capacity of Parties
Chapter 11 - The Crown, Public Authorities and the European Union
Section 1. - Introduction

The influence of public law concepts

11-001

The position of government contracts in English law is somewhat ambiguous. In contrast to many Continental jurisdictions, government contracts in English law do not have their own special category as a part of public law.¹ But, although government contracts are dealt with under the general principles of private law, the private law principles are frequently supplemented, modified or disapplied in response to the peculiar circumstances of governmental transactions. Often these alterations to the private law principles are either inspired by, or involve the direct borrowing, of public and constitutional law concepts. The result is a body of law which, although part of private law, has been strongly influenced by ideas more familiar to public lawyers.²

The European Union

11-002

An express power to enter contracts is conferred on the European Union by art.335 of the Consolidated Version of the Treaty on the Functioning of the European Union, which provides³:

“In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable or immovable property and be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.”

The broad terms in which the Union is thus granted capacity effectively excludes the application of doctrines limiting the contractual capacity of English public authorities. The Treaty also provides that “The contractual liability of the Union shall be governed by the law applicable to the contract in question”.⁴

Alternative remedies

11-003

Although contracts made by government do not engage a special contractual regime, the involvement of government gives the potential for other bases of liability not normally open to private contracting parties. The three most obvious possibilities are judicial review, breach of human rights⁵ and breach of the procurement regulations.⁶ The possibilities of contractual issues being subjected to judicial review and the impact of the Human Rights Act 1998 were discussed in Ch.1.⁷ A detailed treatment

of the procurement regulations is beyond the scope of this chapter but Pt 6⁸ of the chapter contains an outline of the requirements and a discussion of the effect of a breach of the public procurement regulations on any contract that may have been made. It should be noted that each of these potential alternatives is independent of contractual liability, and does not require a contract to have been concluded. Thus, breach of human rights focuses on whether the claimant's protected right has been invaded unjustifiably. The public procurement regulations set out a highly detailed, prescriptive series of obligations relating to the entire contracting process, breach of which may incur liability to any potential contracting party. Judicial review focuses on the improper exercise of power by a public authority; where the authority has failed to make good a legitimate expectation it has created, the factual basis for judicial review may be very similar to the factual basis for a claim for breach of contract.⁹ But the remedies available for a successful application for judicial review are very different to those available in a successful action for breach of contract. Furthermore, the availability of judicial review in relation to commercial contracts is controversial.¹⁰

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1. Street, *Governmental Liability* (1953), p.81; Kahn-Freund and Wedderburn, foreword to Turpin, *Government Contracts* (1972), p.9, attributing the lack of a separate category to the “quirks of our legal history”; Auby [2007] P.L. 40. On public law see A Davies, *The Public Law of Government Contracts* (2008).
 2. J. Mitchell, *The Contracts of Public Authorities* (1954), particularly Ch.1. For an illustration of the limits of the public law influence see *Krebs v NHS Commissioning Board* [2014] EWCA Civ 1540 at [31].
 3. [2012] O.J. C326/01.
 4. [2012] O.J. C326/01, art.340. On identifying the applicable law, see below Ch.30.
 5. Human Rights Act 1998.
 6. See below, para.11-051.
 7. See above, paras 1-224 et seq. and 1-057 et seq.
 8. See below, paras 11-051—11-054.
 9. e.g. *R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213 (authority promising tetraplegic patient a home for life if she would move from existing hospital accommodation).
 10. *Hampshire CC v Supportways Community Services Ltd* [2006] EWCA Civ 1035; Arrowsmith (1990) 106 L.Q.R. 277; Freedland [1994] P.L. 86, 95–102; Bailey [2007] P.L. 444.

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Capacity

11-004

The Crown has an inherent, common law capacity to make contracts. ¹² No statutory authority is needed. Whilst this contracting power can be seen as part of the prerogatives of the Crown—largely because it requires no Parliamentary approval ¹³—it is probably more accurate to see it as part of the Crown's capacity to do whatever is not prohibited by law. ¹⁴ It follows that statutory provisions conferring contracting powers on Ministers are not strictly necessary; such statutory sections are best explained in terms of the constitutional convention that a programme of expenditure should have prior statutory authorisation. ¹⁵

^{11.} Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.

^{12.} Turpin, *Government Contracts* (1972), p.19; Daintith (1979) 32 C.L.P. 41, 42; Freedland [1994] P.L. 86, 91–92; Harris (1992) 108 L.Q.R. 626, 627, (2007) 123 L.Q.R. 225; Davies (2006) 122 L.Q.R. 98, 102.

^{13.} Daintith (1979) 32 C.L.P. 41, 42; Freedland [1994] P.L. 86, 91–92.

^{14.} Harris (1992) 108 L.Q.R. 626, (2007) 123 L.Q.R. 225, 226; see also Freedland's later view that, at least in relation to the Private Finance Initiative, government does not see itself as exercising a prerogative power when making contracts: [1998] P.L. 288, 292–294.

^{15.} Turpin, *Government Contracts* (1972), p.19; Daintith (1979) 32 C.L.P. 41, 44–45.

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Section 2. - Crown Contracts ¹¹

(a) - Parliamentary Control Over Crown Contracts

Express limitations

11-005

Where Parliament has limited the Crown's right to contract, any purported contract made outside those limits is void. ¹⁶ For instance, a statute might require specific legislative approval for contracts over a certain duration, ¹⁷ or prescribe a method for disposal of government property. ¹⁸ Failure to obtain approval, or to follow the prescribed method will be fatal to the validity of the contract.

Implied limitation

11-006

Whilst the Crown has an inherent capacity to make contracts, it has been settled, since the Revolutionary Settlement of 1688, that the Crown does not have control over public money. ¹⁹ Expenditure is controlled by Parliament; and Parliament exercises that control through the Appropriation Acts, which set out the amounts and purposes for which expenditure is authorised. ²⁰ This fundamental constitutional principle may affect a contracting party's ability to recover payment under a contract with the Crown: if no appropriation covers the payment, no money can be paid over to the claimant. Thus, in *R. v Churchward*, ²¹ where the relevant parliamentary appropriation expressly excluded any payment being made to the claimant, ²² no payment was recoverable. On the facts of the case payment had only been promised "out of moneys to be provided by parliament", but Shee J. went on to say that, if this condition had not been expressed, such a condition:

"... must on account of the notorious inability of the crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the crown." ²³

Two of the other three judges did not deal with the point, and Cockburn C.J. indicated that he would not have implied such a condition precedent to payment. *Churchward's* case is, therefore, in itself, ambiguous in relation to the implied condition advanced by Shee J. ²⁴ But, in a series of later judgments Viscount Haldane emphasised the importance of legislative control over expenditure, ²⁵ culminating in his speech in the House of Lords in *Att-Gen v Great Southern and Western Railway Co of Ireland*. ²⁶ There, in a speech with which Lords Dunedin and Carson agreed, he emphatically endorsed the analysis of Shee J. in *Churchward's* case, saying that:

"However clear it may be that before the Revolutionary Settlement the Crown could be taken to contract personally, it is equally clear that since that Settlement its ordinary contracts only mean that it will pay out of funds which Parliament may or may not supply."

It is, therefore, clear, that whilst the absence of a Parliamentary appropriation will not make a contract void, such an appropriation is a condition precedent of liability to pay.²⁸ The appropriation need not refer specifically to the particular contract—general terms suffice.²⁹

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- ^{11.} Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.
 - ^{16.} *New South Wales v Bardolph* (1934) 52 C.L.R. 455, 496, per Rich J.
 - ^{17.} *Commercial Cable Co v Government of Newfoundland* [1916] 2 A.C. 610.
 - ^{18.} *Cugden Rutile (No.2) Pty Ltd v Chalk* [1975] A.C. 520.
 - ^{19.} Bill of Rights 1688 art.4.
 - ^{20.} e.g. Supply and Appropriation (Main Estimates) Act 2015.
 - ^{21.} (1865) L.R. 1 Q.B. 173.
 - ^{22.} *R. v Churchward* (1865) L.R. 1 Q.B. 173, 183.
 - ^{23.} *R. v Churchward* (1865) L.R. 1 Q.B. 173, 209. The contractual provision seems not to have been unusual—cf. *Taylor v Brewer* (1813) 1 M. & S. 290, 291, where Lord Ellenborough C.J. drew attention to the practice of “several departments of Government” that promised to pay only what should be deemed right.
 - ^{24.} Sawyer (1946) 62 L.Q.R. 23, 24; Street (1948) 11 M.L.R. 129, 131; Williams, *Crown Proceedings* (1948), p.10; Street (1949–1950) 8 University of Toronto Law Journal 32, 33–34; Street, *Governmental Liability* (1953), pp.85–87.
 - ^{25.} *Commercial Cable Co v Government of Newfoundland* [1916] 2 A.C. 610; *Mackay v Att-Gen for British Columbia* [1922] 1 A.C. 457; *Auckland Harbour Board v The King* [1924] A.C. 318.
 - ^{26.} [1925] A.C. 754.
 - ^{27.} *Att-Gen v Great Southern and Western Railway Co of Ireland* [1925] A.C. 754, 773.
 - ^{28.} See also *New South Wales v Bardolph* (1934) 52 C.L.R. 455. The judgment of Dixon J. contains a particularly helpful exposition of Viscount Haldane’s views (see especially at 514). McTiernan J. described Shee J. in *Churchward* as stating: “the effect on the contract of [the Crown’s] incapacity ... the exigency of binding constitutional practice fashions the promise of the Crown into a promise to pay out of moneys lawfully available under parliamentary appropriation”.
 - ^{29.} *New South Wales v Bardolph* (1934) 52 C.L.R. 455, 467–474, per Evatt J.; Street, *Governmental Liability* (1953), p.90, commenting that the opposite rule would be “disastrous”; Harris (2007) 123 L.Q.R. 225, 229.

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Section 2. - Crown Contracts ¹¹

(b) - Fettering of Discretion

Construction of Crown's obligations so as to avoid fettering

11-007

Virtually every contractual promise restricts a promisor's future freedom of action. Under ordinary circumstances there is no policy objection to this, but where the promisor is the Crown, such restrictions have the potential to inhibit the Crown in its performance of duties or exercise of powers in the public interest. In order to avert this undesirable consequence, the courts avoid interpreting the Crown's contractual promises in a way that would constrain the performance of its functions. ³⁰ Thus, in *Commissioners of Crown Lands v Page* ³¹ a tenant of Crown premises sought to have a covenant for quiet enjoyment implied into the lease; this covenant was breached, the tenant alleged, when the premises were requisitioned by the Minister of Works, acting under statutory powers. The Court of Appeal unanimously held that any implied term would not extend "to prevent the future exercise by the Crown of powers and duties imposed upon it in its executive capacity by statute". ³² Devlin L.J. held that, even if the covenant for quiet enjoyment had been express, he would have read it as, by necessary implication, excluding "those measures affecting the nation as a whole which the Crown takes for the public good". ³³ The importance of Devlin L.J.'s approach is illustrated by *Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd* ³⁴ where the covenant for quiet enjoyment was indeed express. The covenant was contained in a lease originally entered in 1931 between the predecessors of the claimants as leaseholders, and the predecessors of the Trust as landlords in respect of a property in Hampstead Garden Suburb. Later, pursuant to a scheme of management introduced under the Leasehold Reform Act 1967, the Trust's predecessors acquired a right to control proposed developments of enfranchised properties in the Suburb, which included the property of the claimant's immediate neighbour. The neighbour proposed to build a basement extension, for which, under the terms of the 1967 scheme, the Trust's approval was required. The claimant objected, and, once it became evident that the defendant intended to grant the permission, argued that if the Trust granted permission, it would be in breach of the obligation of quiet enjoyment contained in the 1931 lease. The Court of Appeal upheld the decision of Henderson J., who had rejected this argument. Although the case did not concern the Crown, the Court of Appeal relied on the approach of Devlin L.J. in *Page v Commissioners of Crown Lands* (which it quoted at length ³⁵) in holding that since the Trust was acting as a custodian of the public interest in the amenities of Hampstead Garden Suburb, and was exercising statutory powers in deciding whether to grant permission, its activities fell outside the scope of the covenant for quiet enjoyment. ³⁶ The Court of Appeal presented its conclusion as an application of "ordinary contractual principles of interpretation", ³⁷ but it also acknowledged that the parties to the 1931 lease could hardly have imagined the radically changed circumstances in which the covenant for quiet enjoyment fell to be interpreted. It held, however, that, on orthodox principles, the question to consider was "what reasonable parties should be taken to have intended by the words used in the agreement in relation to the event which they did not foresee". ³⁸ Henderson J. at first instance had taken a similar approach, when he said that:

"the parties ... must be taken to have envisaged that [the covenant for quiet enjoyment] could not be relied upon so as to prevent or hinder the proper exercise of public duties in

the public interest by a landlord in whom the freehold reversion might subsequently become vested.”³⁹

Asking what the parties “should be taken to have intended”, or “must be taken to have envisaged” may appear to resolve the issue of interpretation by reference to the intentions of the parties, but, as both expressions’ qualified phrasing suggests, they are in reality fictions. The less elaborate approach of Devlin L.J., which was simply to say that such a covenant must “by necessary implication” be read as excluding measures taken for the public good, seems preferable, because it acknowledges that it is the court itself that has felt compelled by public policy considerations to read down the general language of the contract.

11-008

It does not follow from the reasoning in *Page*’s case that the Crown is free to disregard its own contractual obligations with impunity. On the contrary, it is crucial that the situation involves an interpretation of contractual obligations that would inhibit the Crown from exercising its statutory powers in pursuance of the public interest. The Crown, like other parties, is subject to the general rule that a contracting party should neither disable himself from performance, nor prevent the other party from performing the contractual obligations⁴⁰; but where performance has been disrupted by the passage of legislation, or the performance of some executive function, the disruption is not regarded as being a case of self-disablement or prevention by the Crown. Instead, the contract is seen as frustrated⁴¹; the fact that the frustrating event emanated from the Crown is regarded as irrelevant.⁴²

Express terms fettering the Crown’s discretion

11-009

Where an express term, properly construed, commits the Crown to exercising its executive functions in a particular way, the position is more controversial. In *R. v Rederiaktiebolaget Amphitrite*⁴³ the claimant steamship company had sent its vessel, during the First World War, to a British port. It had done so only after being given a guarantee by the Crown that the vessel would not be detained. The vessel was detained by the Crown, and the claimants sought damages for breach of contract. Rowlatt J. held that no damages were recoverable. He held that whilst the Crown was bound by commercial contracts it made, the facts of the case did not show such a contract. Rather, it was “an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future”.⁴⁴ This arrangement was not contractually enforceable because:

“... it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.”⁴⁵

Although the decision in *The Amphitrite* was applied by the Privy Council in *Buttigieg v Cross*,⁴⁶ it has subsequently been treated with caution, and its scope remains uncertain. Thus, in *Commissioners of Crown Lands v Page*⁴⁷ the Court of Appeal refused the opportunity to endorse the principle,⁴⁸ and in *Robertson v Minister of Pensions*⁴⁹ Denning J. suggested that the broad principle from the *Amphitrite* case was a dictum, the ratio of the decision being that the statement of the Crown was not binding, since there was no intention to create legal relations.⁵⁰ It is true that Rowlatt J. said that the Crown’s guarantee was “merely an expression of intention”,⁵¹ but he continued, in the next sentence, to explain that his “main reason” for reaching that conclusion was that the government could not validly fetter its future executive action. It is therefore submitted that Denning J.’s reading of the *Amphitrite* case is unconvincing.⁵² Denning J. also suggested that the defence of executive necessity was based on an implied term. But this is directly contrary to the facts of the *Amphitrite* case, where the defence succeeded despite an express undertaking to exercise powers in a particular way: no term relating to executive necessity could have been implied, since it would have contradicted the express terms. Commentators have drawn attention to the lack of authority cited in *The Amphitrite*, and

argued that the case should not be followed.⁵³ However, it is submitted that, whilst the language used in the *Amphitrite* case was perhaps too broad,⁵⁴ its main support, and the best guide to interpreting its scope, is the analogous rule that statutory bodies have no power to fetter their own discretion.⁵⁵ Of course, the Crown's source of power is non-statutory,⁵⁶ but such reasoning by analogy was expressly endorsed by Devlin L.J. in *Commissioners of Crown Lands v Page*,⁵⁷ and would allow the important policy justifications underlying the non-fettering rule to inform the application of the *Amphitrite* principle.⁵⁸ In particular, it should be emphasised that neither the decision in *The Amphitrite*, nor the interpretation given to that decision in later cases, entitles the Crown to disregard its contractual obligations with impunity. On the contrary, *The Amphitrite* expressly affirmed that the Crown would be liable under commercial contracts in the ordinary way. The exception arose where "the welfare of the State" required that executive action "be determined by the needs of the community".⁵⁹ In *The Amphitrite* itself this test was satisfied by wartime conditions.⁶⁰ In *Buttigieg v Cross* it was admitted that the requirements were met where the military authority in Malta had found it necessary to rule a club to be out of bounds to service personnel, despite having initiated the creation of that club, and having indicated that the club would remain open during the Second World War. Again, the wartime context—and particularly the importance of maintaining military discipline in wartime—may go a long way towards explaining the decision, but it should be noted that neither court formulated the relevant principle in terms of war. Rather, the public interest in the defence of the realm provides a powerful example of the kind of overriding justification that justifies a court in releasing the Crown from what would otherwise have been a binding obligation.

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- ^{11.} Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.
 - ^{30.} *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274; *Molton Builders Ltd v City of Westminster London Borough Council* (1975) 30 P. & C.R. 182 at 188.
 - ^{31.} [1960] 2 Q.B. 274.
 - ^{32.} *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274, 287.
 - ^{33.} *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274, 292.
 - ^{34.} [2014] EWCA Civ 305, [2014] 2 P. & C.R. 6.
 - ^{35.} [2014] EWCA Civ 305 at [50]–[51]. Henderson J. had also relied on the same passage: [2013] EWHC 948 (Ch) at [54].
 - ^{36.} On the guardian of the public interest point see *Zenios v Hampstead Garden Suburb Trust Ltd* [2011] EWCA Civ 1645. As the Trust was a statutory body, an alternative, perhaps more orthodox approach, would have been to ask whether the Trust's contractual promise was incompatible with the performance of its public functions (see below, paras 11-028—11-032).
 - ^{37.} [2014] EWCA Civ 305 at [34].
 - ^{38.} [2014] EWCA Civ 305 at [36].
 - ^{39.} [2013] EWHC 948 (Ch) at [62]. The point is repeated at [63].
 - ^{40.} *Board of Trade v Temperley S.S. Co Ltd* (1926) 26 Ll.L. Rep. 76; (1927) 27 Ll.L. Rep. 230.
 - ^{41.} *Reilly v The King* [1934] A.C. 176.
 - ^{42.} *William Cory & Son Ltd v London Corp* [1951] 2 K.B. 476, 487, per Harman L.J.
 - ^{43.} [1921] 3 K.B. 500.
 - ^{44.} *R. v Rederiaktiebolaget Amphitrite* [1921] 3 K.B. 500, 503.

- [45.](#) *R. v Rederiaktiebolaget Amphitrite* [1921] 3 K.B. 500, 503.
- [46.](#) Privy Council, *October 10, 1946* (available at <http://www.bailii.org>).
- [47.](#) [1960] 2 Q.B. 274.
- [48.](#) See especially *Commissioners of Crown Lands v Page* [1960] 2 Q.B. 274, 293, per Devlin L.J. (no need to consider whether the Crown could fetter its future executive action by express words, since it was “most unlikely” ever to attempt to do so).
- [49.](#) [1949] 1 K.B. 227.
- [50.](#) *Robertson v Minister of Pensions* [1949] 1 K.B. 227, 231.
- [51.](#) *Amphitrite case* [1921] 3 K.B. 500, 503.
- [52.](#) J. Mitchell, *The Contracts of Public Authorities* (1954), pp.30–31; Turpin, *Government Contracts* (1972), pp.21–22.
- [53.](#) Holdsworth (1929) 45 L.Q.R. 162, 166; Street (1948) 11 M.L.R. 129, 131; Williams, *Crown Proceedings* (1948), pp.9–10.
- [54.](#) *A v Hayden (No.2)* (1984) 59 A.L.J.R. 6, 8: “The suggestion made by Rowlatt J. in [The Amphitrite] that the government cannot by contract fetter its executive action in matters which concern the welfare of the State is too wide” (per Gibbs C.J.).
- [55.](#) J. Mitchell, *The Contracts of Public Authorities* (1954), p.57–65; Street, *Governmental Liability* (1953), pp.98–99; Turpin, *Government Contracts* (1972), p.22. See also *Re Solinas* [2009] NIQB 43 at [26]–[27], where, in the context of an application for judicial review, the decision in the *Amphitrite case* was seen as exemplifying a general principle against fettering of powers, and was applied to actions by the Minister for Social Development (Northern Ireland). For detailed analysis of the rule in its application to statutory bodies, see below, paras 11-028–11-032.
- [56.](#) See above, para.11-004.
- [57.](#) [1960] 2 Q.B. 274, 292. See also Harris (1992) 108 L.Q.R. 626, 644 (commenting on the courts’ playing down the importance of the source of authority in judicial review cases).
- [58.](#) Davies (2006) 122 L.Q.R. 98, especially 104–105. See also J. Mitchell (above, n.55), 26 (suggesting that the same general principles underlie the rules applying to the Crown and to statutory bodies).
- [59.](#) *Amphitrite case* [1921] 3 K.B. 500, 503.
- [60.](#) J. Mitchell (above, n.55), 52–54.

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(c) - Agency

Agency in general

11-010

Contracts made by Crown servants in the course of their service, or by Crown agents within the scope of their authority bind the Crown. The right to contract on behalf of the Crown must be established by reference to statute or otherwise; merely being a Crown servant is not enough. ⁶¹ Thus, in *Nixon v Att-Gen* ⁶² the claimants proved that they had entered employment in the Civil Service on the basis of a minute issued by the Lords Commissioners of the Treasury and published in the Civil Service Year Book, which stated that civil servants would be "entitled" to superannuation payments calculated on a particular basis if certain conditions were met. The claimants satisfied those conditions, but, following their retirement, the Treasury Commissioners applied a less generous method of calculation to their superannuation payments. The House of Lords held that the minute did not bind the Crown, since the only authority conferred on the Treasury Commissioners was a discretion; they had no authority to make contracts promising that the discretion would be exercised in a particular way. ⁶³

Whether servant or agent of the Crown

11-011

Since Crown contracts are subject to certain special rules, both substantive ⁶⁴ and procedural, ⁶⁵ it may be crucial to determine whether the contracting party has entered the contract as a servant or agent of the Crown. The starting point is the list of "authorised departments" published under Crown Proceedings Act 1947 s.17. ⁶⁶ These departments may institute "civil proceedings by the Crown", ⁶⁷ and may be sued in "civil proceedings against the Crown" ⁶⁸; it can therefore be assumed that they are Crown servants or agents. ⁶⁹ However, the list is not exhaustive. For contracting parties not on the list a common law test must be applied which balances a range of factors. The main factor to consider is the degree of control which the Crown is entitled to exercise over the party who is alleged to have made the contract on its behalf. ⁷⁰ If that party has wide powers, which can be exercised independently of the Crown, that will strongly suggest that the contracting party is not a Crown servant. ⁷¹ Conversely, if the Crown has the right to exercise a close degree of control, that will suggest that the contracting party is a Crown servant or agent. It may even be possible, where a contracting party exercises several functions, to distinguish between functions in respect of which the Crown is entitled to exercise control, and those in respect of which it is not. The contracting party would be a Crown servant for contracts relating to the former functions, but not for contracts relating to the latter. ⁷² It should be emphasised that, in ascertaining the degree of control, the statutory provisions setting out the contracting party's rights and duties are "highly important" ⁷³; whether, as a matter of fact, the Crown exerted its right of control is irrelevant. ⁷⁴ It also seems that the statutory definition of rights and duties prevails over other statutory indications. Thus, in *Hills (Patents) Ltd v University College Hospital Board of Governors* ⁷⁵ the question was whether the defendants occupied hospital premises as agents for the Minister of Health. Despite the statement in the National Health

Service Act 1946 s.13 that hospital boards managed hospitals “on behalf of” the Minister, it was held that the Board’s statutory duties to manage, control and maintain the hospital, and appoint its staff, meant that the board occupied as a principal, not as the Minister’s agent. A second factor to consider in determining whether a contracting party is a servant or agent of the Crown is whether the contracting party is performing a function linked to an existing Crown prerogative. Thus, for instance, in *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* ⁷⁶ both Lord Tucker and Lord Asquith were influenced in their decision that the Custodian of Hungarian Property was a Crown servant by the fact that his functions were linked to the Crown prerogative to wage war. ⁷⁷ Similarly, in *Gilbert v The Corp of Trinity House* ⁷⁸ it was held that the defendants’ remoteness from the scope of the Crown’s prerogative powers indicated that they were not Crown servants. It is submitted that the relationship between the contracting party’s functions and the Crown’s prerogative powers deserves only little weight. As has been powerfully pointed out, to emphasise the importance of the prerogative powers is, in effect, to confine the sphere of potential Crown servants to activities which, historically, were seen as the Crown’s responsibility: it freezes the law in a condition which will inevitably fail to reflect contemporary understandings of the Crown’s role. ⁷⁹ Other relevant factors suggesting that a party is not a Crown servant are financial independence, ⁸⁰ liability of property to be levied, ⁸¹ and incorporation. ⁸²

Unauthorised contracts

11-012

Where a Crown servant or agent enters a contract outside the scope of his actual authority, the contract will not bind the Crown unless the agent’s authority can be established on some other basis. Although Lord Denning put forward the view that all contracts should bind the Crown where government officers or departments took it upon themselves to assume authority, ⁸³ that view was rejected by dicta in the House of Lords, ⁸⁴ and criticised persuasively in the literature. ⁸⁵ The better view, it is submitted, is that the general principles of the law of agency apply to the Crown—in particular, that a contract will bind the Crown if the agent had either ostensible or usual authority to make it. Although ostensible authority is a form of estoppel, ⁸⁶ it is treated as an exception to the general principle that estoppel cannot be relied upon to rehabilitate a transaction entered in excess of powers. ⁸⁷

Ostensible authority

11-013

In order to establish ostensible authority it must be shown that the principal held out the agent as having authority; a representation by the agent as to the extent of his own authority is insufficient. In *Att-Gen for Ceylon v Silva* ⁸⁸ the Privy Council indicated that the requirement of a representation by the principal limited the potential application of ostensible authority to the Crown:

“No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the Crown when in fact no such right exists.” ⁸⁹

Such a special power will be rare, although not impossible to find. ⁹⁰ Alternatively, it might be shown that the agent had usual authority. For usual authority, no representation by the principal is necessary, ⁹¹ although the status of usual authority as a separate category is not uncontroversial. ⁹² In any case, it is submitted that any recognition that contracts outside an agent’s actual authority bind the Crown should be made sparingly. In particular, where the agent’s authority is defined by statute, there is much force in the Privy Council’s comment that to hold the Crown bound would be undesirable, because it would, in effect, be:

“... to hold that public officers had dispensing powers because they then could by

unauthorized acts nullify or extend the provisions of the [statute].”⁹³

Furthermore, where the agent’s actual authority is set out in statute, it is open to the other contracting party to ascertain the scope of that authority for himself; in these circumstances it is, therefore, justifiable not to enforce a contract made in excess of authority.⁹⁴

Personal liability of agents

11-014

Where a Crown servant or agent has entered a contract as agent, he cannot be held liable for a breach of that contract.⁹⁵ Nor will a declaration be issued against him.⁹⁶ Only if it is found that he contracted personally, on his own behalf, will he be made liable.⁹⁷ This rule accords with the general position in the law of agency,⁹⁸ but the courts have also consistently made it clear that they are very reluctant to conclude that an individual Crown agent has contracted personally. The concern is that exposure to personal liability:

“... would, in all probability, prevent any proper and prudent person from accepting a public situation at the hazard of such peril to himself.”⁹⁹

Thus, for instance, in *Dunn v Macdonald*¹⁰⁰ Lopes L.J. contrasted the position of public and ordinary agents, saying that for the former to be personally liable, “something special which would be evidence of an intention to be personally liable”¹⁰¹ was needed. Similarly, in *Graham v His Majesty’s Commissioners of Public Works and Buildings*¹⁰² Ridley J. stated that even where an agent had:

“... put his own name in the contract without saying that he was agent for the Crown, yet, if you could gather from the surrounding circumstances of the case that he did in fact contract as agent for the Crown, and in that capacity only, he would not be liable upon the contract.”¹⁰³

There is no reported instance in the last two hundred years of an individual Crown agent being held personally liable.¹⁰⁴ Where the agent is incorporated, on the other hand, the concern about exposing individuals to personal liability has no application, and the courts have been willing to find that the agent in fact contracted on its own behalf.¹⁰⁵

Warranty of authority

11-015

Individual Crown agents cannot be sued for a breach of warranty of authority.¹⁰⁶ This departure from the general rules of agency¹⁰⁷ is justified by the same concern about exposure to personal liability which informs the courts’ approach to the personal liability of Crown agents on contracts.¹⁰⁸ It is submitted that, as with the approach to personal liability under the contract, the concern about exposure to personal liability can have no application to incorporated servants or agents; and that, therefore, a breach of warranty of authority by such an incorporated servant or agent should be actionable.

^{11.} Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.

- [61.](#) *Nixon v Att-Gen* [1931] A.C. 184; *Att-Gen for Ceylon v Silva* [1953] A.C. 461.
- [62.](#) [1931] A.C. 184.
- [63.](#) [1931] A.C. 184 at 193.
- [64.](#) See above, paras 11-005—11-009.
- [65.](#) Particularly under the Crown Proceedings Act 1947. For further discussion see below, paras 11-016—11-020.
- [66.](#) The most recent list, published by the Cabinet Office in October 2012, can be accessed at <http://www.justice.gov.uk>.
- [67.](#) Crown Proceedings Act 1947 s.17(2).
- [68.](#) Crown Proceedings Act 1947 s.17(3).
- [69.](#) Griffith (1951–1952) 9 University of Toronto Law Journal 169, 169; Treitel [1957] P.L. 321, 328.
- [70.](#) *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584; *Intraline Resources SDN BHD v Owners of the Ship or Vessel "Hua Tian Long"* [2010] HKCFI 361 at [50]–[52]; Treitel [1957] P.L. 321, 327 (describing this criterion as “entitled, if not to exclusive recognition, at any rate to pre-eminence”).
- [71.](#) *Metropolitan Meat Industry Board v Sheedy* [1927] A.C. 899.
- [72.](#) *Intraline Resources SDN BHD v Owners of the Ship or Vessel "Hua Tian Long"* [2010] HKCFI 361 at [52].
- [73.](#) *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584, 616, per Lord Reid.
- [74.](#) [1954] A.C. 584, 617.
- [75.](#) [1956] 1 Q.B. 90.
- [76.](#) [1954] A.C. 584.
- [77.](#) *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] A.C. 584, 628, per Lord Tucker, 632, per Lord Asquith. See also *BBC v Johns (Inspector of Taxes)* [1965] 1 Ch. 32 (broadcasting outside province of government).
- [78.](#) (1886) 17 Q.B.D. 795. The test of whether the body in question is an “emanation” of the Crown, used in this case, has subsequently been disapproved: *Tamlin v Hannaford* [1950] 1 K.B. 18; *BBC v Johns (Inspector of Taxes)* [1965] 1 Ch. 32.
- [79.](#) Friedmann (1948) 22 A.L.J. 7; Friedmann (1950) 24 A.L.J. 275; Griffith (1951–1952) 9 University of Toronto Law Journal 169.
- [80.](#) *Metropolitan Meat Industry Board v Sheedy* [1927] A.C. 899.
- [81.](#) *Tamlin v Hannaford* [1950] 1 K.B. 18. Crown property cannot be levied: Crown Proceedings Act 1947 s.25(4).
- [82.](#) *Tamlin v Hannaford* [1950] 1 K.B. 18; *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 Q.B. 90; cf. *Metropolitan Meat Industry Board v Sheedy* [1927] A.C. 899, 905: “[t]hat they were not incorporated does not matter.” For a powerful argument that incorporation should be decisive against being a Crown servant or agent see Friedmann (1948) 22 A.L.J. 7; (1950) 24 A.L.J. 275.

- [83.](#) *Robertson v Minister of Pensions* [1949] 1 K.B. 227; *Falmouth Boat Construction Co Ltd v Howell* [1950] 2 K.B. 16.
- [84.](#) *Howell v Falmouth Boat Construction Co Ltd* [1951] A.C. 837.
- [85.](#) Treitel [1957] P.L. 321, 335–337.
- [86.](#) *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 at [124].
- [87.](#) For the general principle see below, para.11-046.
- [88.](#) [1953] A.C. 461.
- [89.](#) *Att-Gen for Ceylon v Silva* [1953] A.C. 461, 479.
- [90.](#) Treitel [1957] P.L. 321, 338 n.4 suggests that it might exist where the holding out was done by the “directing mind” of the relevant government department. cf. Turpin, *Government Contracts* (1972), p.35, where it is suggested that the “special power” would exist wherever an officer had actual authority to do the act that he was holding out the agent as having authority to do. In *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 it was held that the Mongolian Ministry of Justice had such a power in respect of the Minister of Finance's authority to sign a guarantee. (This aspect of the decision was not challenged on appeal: [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [6].)
- [91.](#) *Watteau v Fenwick* [1893] 1 Q.B. 346; Treitel [1957] P.L. 321, 336.
- [92.](#) See Vol.II, para.31-064, describing the cases as “extremely doubtful”.
- [93.](#) *Att-Gen for Ceylon v Silva* [1953] A.C. 461, 481. See also Bowstead and Reynolds on Agency, 20th edn (2014), para.8-041; para.8-044 of the 17th edn (containing the text now in para.8-041) was quoted with approval in *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 at [124].
- [94.](#) Turpin, *Government Contracts* (1972), p.35.
- [95.](#) *Macbeath v Haldimand* (1786) 1 T.R. 172; *Unwin v Wolseley* (1787) 1 T.R. 674; *Rice v Chute* (1801) 1 East 579; *Palmer v Hutchinson* (1881) 6 App. Cas. 619.
- [96.](#) *Hosier Brothers v Earl of Derby* [1918] 2 K.B. 671.
- [97.](#) *Macbeath v Haldimand* (1786) 1 T.R. 172; *Prosser v Allen* (1819) Gow. 117; *Gidley v Lord Palmerston* (1822) 3 B. & B. 275; *Dunn v Macdonald* [1897] 1 Q.B. 555; *Commercial Cable Co v Government of Newfoundland* [1916] 2 A.C. 610.
- [98.](#) See Vol.II, para.31-083.
- [99.](#) *Gidley v Lord Palmerston* (1822) 3 B. & B. 275, 286, per Dallas C.J. See also *Macbeath v Haldimand* (1786) 1 T.R. 172, 181–182, per Ashhurst J.; *Unwin v Wolseley* (1787) 1 T.R. 674, 678, per Ashhurst J.
- [100.](#) [1897] 1 Q.B. 555.
- [101.](#) *Dunn v Macdonald* [1897] 1 Q.B. 555, 557.
- [102.](#) [1901] 2 K.B. 781.
- [103.](#) *Graham v His Majesty's Commissioners of Public Works and Buildings* [1901] 2 K.B. 781, 788. cf. *Auty v Hutchinson* (1848) 6 C.B. 266.

- [104.](#) cf. *Rice v Everitt* (1801) 1 East 583n, which turned on its own unusual facts. In *Samuel Bros, Ltd v Whetherly* [1907] 1 K.B. 709, [1908] 1 K.B. 104 the personal liability of the commanding officer of a volunteer corps was imposed under statutory regulations (Regulations for the Volunteer Force 1901 reg.407).
- [105.](#) e.g. *Graham v His Majesty's Commissioners of Public Works and Buildings* [1901] 2 K.B. 781 (Ridley J.); *International Railway Co v Niagara Parks Commission* [1941] A.C. 328.
- [106.](#) *Dunn v Macdonald* [1897] 1 Q.B. 401, 555; *The Prometheus* (1949) 82 L.I.L. Rep. 859. For criticism of *Dunn v Macdonald*, and suggestions that the decision is best explained on other grounds see Williams, *Crown Proceedings* (1948), p.3; Street, *Governmental Liability* (1953), p.93.
- [107.](#) See Vol.II, paras 31-100—31-107.
- [108.](#) See previous paragraph.

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(d) - Crown Proceedings Act 1947

Purpose of the Act

11-016

Before 1947 the Crown could not be sued on its contracts by bringing an ordinary action for breach of contract or debt. Litigants had to use the petition of right procedure, as amended by the Petitions of Right Act 1860. This procedure, even as amended, was “antiquated and cumbersome”, ¹⁰⁹ and it came to be seen as an anachronistic defect in the law. Section 1 of the Crown Proceedings Act 1947 abolished the need to bring a petition of right to enforce a contractual claim in most cases. It provided that:

“Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty’s fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.”

The Act also repealed the Petitions of Right Act 1860. ¹¹⁰ However, it did not entirely remove a role for the petition of right. The Act has no application to proceedings “by or against ... his Majesty in His private capacity” ¹¹¹; nor does it apply to proceedings:

“... against the Crown ... in respect of any alleged liability of the Crown arising otherwise than in respect of his Majesty’s Government in the United Kingdom.” ¹¹²

Contractual liability coming under either of these heads can only be enforced using the petition of right procedure. And, since the 1947 Act repealed the Petitions of Right Act 1860 for all purposes, the petition must be in its pre-1860 form. ¹¹³ This “most peculiar thing”, ¹¹⁴ as Glanville Williams described it, was, apparently, intended. ¹¹⁵

Remedies against the Crown

11-017

The Crown Proceedings Act 1947 introduced new rules relating to the availability of remedies. Section 21(1) provided as follows:

“In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that—

(a)

where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b)

in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.”

By removing the possibility of an injunction or an order for specific performance the subsection reduced the rights enjoyed by claimants. Before 1947 various government departments had been subject to awards of specific performance or injunctions in relation to contractual performance,¹¹⁶ with courts commenting that the defendant’s status did not call for any special treatment.¹¹⁷ The same approach could be seen where statutes expressly provided that, in relation to Crown contracts, certain ministers could “sue and be sued”¹¹⁸; and there was also support for the idea that the mere fact of incorporation indicated that a department could be sued in the ordinary way.¹¹⁹ The 1947 Act repealed those statutory provisions stating that departments could sue and be sued, but that left open the question whether incorporated departments could still be sued in the ordinary way, thereby circumventing the limitation on remedies contained in s.21(1). Commentators disagreed, and the point has never been settled.¹²⁰ It is submitted, however, that the repeal of the statutory provisions expressly authorising departments to be sued showed a legislative intention that s.21(1) should be definitive. Furthermore, it would be undesirable as a matter of policy to allow the statutory definition of the position in s.21(1) to be undermined where the government department happened to be incorporated: there is no convincing reason to make such departments subject to more extensive remedies than those departments which are not incorporated.

Interim remedies

11-018

Where parties have applied for interim relief against the Crown, the language of s.21(1) has proved difficult to apply. Although parts of the subsection seem to confer a broad discretion (for instance, “power ... to give such appropriate relief as the case may require”), it has been held that since a declaration is, in its nature, final, no interim declaration can be made against the Crown.¹²¹ Whatever the merits of that analysis,¹²² it is submitted that it has now been superseded by the Civil Procedure Rules, which expressly provide for interim declarations to be granted.¹²³ Since interim declarations are now available in “proceedings between subjects” they must, applying the language of s.21(1), also be available in proceedings against the Crown.

Specific remedies against Crown servants

11-019

Where a contract has been made by a Crown servant in the course of service or by a Crown agent acting within his authority, the servant or agent is not personally liable on the contract. ¹²⁴ Hence, the question of specific remedies against such a servant or agent does not arise. However, a contracting party might seek to prevent a breach of contract by the Crown by bringing proceedings in tort against the servant or agent responsible for the contractual performance. For instance, it might be alleged that the servant or agent's threatened acts will amount to the tort of inducing breach of contract by the Crown. ¹²⁵ In such a situation, Crown Proceedings Act s.21(2) would become relevant. That subsection states that:

"The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

The subsection has been described as "somewhat obscure" ¹²⁶ and "of Delphic opaqueness". ¹²⁷ One obscurity concerns its scope. Its language refers only to proceedings against an "officer" of the Crown and it is not clear whether corporate entities are included. The Crown Proceedings Act states that:

"'Officer' in relation to the Crown, includes any servant of His Majesty, and accordingly (but without prejudice to the generality of the foregoing provision) includes a Minister of the Crown and a member of the Scottish Executive." ¹²⁸

The language of the statutory definition is inclusive, rather than limiting, but it was said in *British Medical Association v Greater Glasgow Health Board* ¹²⁹ that a hospital board admitted to be exercising functions on behalf of the Minister of Health ¹³⁰ could not have been argued to be an officer of the Crown for the purposes of s.21(2). ¹³¹ No reasons were given for this assertion, and it is respectfully submitted that it is difficult to support: a legal person is perfectly capable of being a servant or agent of the Crown, ¹³² and nothing in the Crown Proceedings Act definition of "officer" indicates that a narrow approach is needed. Furthermore, the effectiveness of s.21(2) would be seriously undermined if it only prevented the circumvention of s.21(1) in relation to actions against a limited class of representatives of the Crown. It is therefore submitted that the assertion in the *British Medical Association* case was mistaken, and that the decision of the House of Lords can be supported only on the ground that the special legislation creating hospital boards expressly provided for those boards to be liable as principals. ¹³³

Injunctions against Crown servants

11-020

A second obscurity in s.21(2) relates to its effect. The immediate aim of the subsection may simply have been to reverse two earlier authorities, which had been doubted by commentators. ¹³⁴ But the more difficult question is whether the subsection, in effect, prevents any injunction being granted against a Crown servant in respect of activities in the course of service. In *M v Home Office* ¹³⁵ it was held that s.21(2) did not have that effect; rather, it only prevented injunctions from being granted against Crown servants in a representative capacity (such as being the superior of a Crown servant who had actually committed a tort). The House of Lords supported this narrow reading by reference to the position before the Crown Proceedings Act came into force: before 1947 specific remedies had been available against individual servants who had committed torts. ¹³⁶ The subsection, in their view, was intended to apply only to situations where no cause of action had previously been available; as they put it:

“... it is only in those situations where prior to the Act no injunctive relief could be obtained that section 21 prevents an injunction being granted.” ¹³⁷

This interpretation of s.21(2), particularly the reliance on the position before 1947, has been questioned, however. In *Davidson v Scottish Ministers*, ¹³⁸ without expressing a concluded view, Lord Rodger put forward the following analysis:

“There are, however, no words in subsection (2) which refer to the position before the passing of the 1947 Act. If, as seems likely, Lord Woolf was thinking of the closing words of the subsection, I would respectfully prefer to interpret them as referring to the hypothetical situation where the claimant or pursuer has brought proceedings against the Crown rather than against an officer of the Crown. The purpose of the subsection seems to be to prevent the claimant or pursuer from circumventing the ban on an injunction, interdict or order for specific performance against the Crown in subsection (1)(a) by seeking a similar remedy against an officer of the Crown.” ¹³⁹

Lord Mance shared Lord Rodger's doubts about whether s.21(2) referred to the position prior to the 1947 Act. “However”, he continued:

“... even without that phrase, the purpose of subsection (2) can hardly have been to remove or preclude a right on the part of a claimant to injunctive relief against an officer of the Crown threatening to commit a tortious act against the claimant.” ¹⁴⁰

The matter has not been settled. ¹⁴¹ It is submitted that, of the two competing interpretations, Lord Rodger's view is the more persuasive. It avoids a strained reading of the statutory language, and, perhaps more importantly, it recognises that the 1947 legislation responded to deep-rooted dissatisfaction with the complexity and anachronisms of the existing law by redefining the relationship between the Crown and litigants. Lord Mance's objection to Lord Rodger's interpretation is, it is submitted, not convincing. There is no inherent reason why the subsection should not have removed a right to an injunction which existed prior to the Act; on the contrary, the Act expressly repealed statutory provisions that had provided for certain government departments to “sue and be sued” to the same extent as private parties.

^{11.} Wade and Forsyth, *Administrative Law*, 11th edn (2014), Ch.21; Street, *Governmental Liability* (1953), Ch.III.

^{109.} *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 S.C.(H.L.) 41 at [8].

^{110.} Crown Proceedings Act 1947 s.39 and Sch.2. Both s.39 and Sch.2 were themselves repealed by Statute Law Revision Act 1950 s.1, but that did not have the effect of reinstating the provisions that had been repealed by the 1947 Act (see proviso to Statute Law Revision Act 1950 s.1).

^{111.} Crown Proceedings Act 1947 s.40(1).

^{112.} Crown Proceedings Act 1947 s.40(2)(b). The certificate of a Secretary of State to this effect is conclusive: s.40(3); *Trawnik v Lennox* [1985] 1 W.L.R. 532.

^{113.} *Franklin v Att-Gen* [1974] 1 Q.B. 185; Street (1948) 11 M.L.R. 129, 132–133.

^{114.} Williams, *Crown Proceedings* (1948), p.8.

115. Williams, *Crown Proceedings* (1948), p.8, n.24, states that the situation “was pointed out to those responsible for the measure when it was a Bill before Parliament”. It was, in fact, Williams himself who had done so, writing a letter to Lord Chorley which Chorley forwarded to the Lord Chancellor (Jacob [1992] P.L. 452, 481–482).
116. *Rankin v Huskisson* (1830) 4 Sim. 13 (injunction against Commissioners of Woods and Forests); *Thorn v Commissioners of Her Majesty’s Works and Public Buildings* (1863) 32 Beav. 490; *Corbett v The Commissioners of Her Majesty’s Works and Public Buildings* (1868) 18 L.T. 548.
117. See, for instance, *Thorn v Commissioners of Her Majesty’s Works and Public Buildings* (1863) 32 Beav. 490, 493: “a public Government board cannot be treated in any different manner from that in which a private individual would be dealt with.”.
118. Williams, *Crown Proceedings* (1948), p.4. e.g. *Minister of Supply v British Thomson-Houston Co Ltd* [1943] 1 K.B. 478.
119. *Graham v His Majesty’s Commissioners of Public Works and Buildings* [1901] 2 K.B. 781, per Phillimore J.; *Roper v The Commissioners of his Majesty’s Public Works and Buildings* [1915] 1 K.B. 45.
120. Street (1948) 11 M.L.R. 129, 132; Williams, *Crown Proceedings* (1948), p.6; Street, *Governmental Liability* (1953), p.94.
121. *Underhill v Ministry of Food* [1950] 1 All E.R. 591; *International General Electric Co of New York Ltd v Commissioners of Customs and Excise* [1962] 1 Ch. 784.
122. For criticism see Wade (1991) 107 L.Q.R. 4, 8.
123. CPR r.25.1.
124. See above, para.11-014.
125. See generally, Clerk & Lindsell on Torts, 21st edn (2014), Ch.24.
126. Williams, *Crown Proceedings* (1948), p.136.
127. *Davidson v Scottish Ministers* [2005] UKHL 74, (2006) S.C.(H.L.) 41 at [8], per Lord Nicholls.
128. Crown Proceedings Act 1947 s.38(2).
129. [1989] 1 A.C. 1211.
130. *British Medical Association v Greater Glasgow Health Board* [1989] 1 A.C. 1211 at 1225. Quaere whether the admission was correct: in *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 Q.B. 90 it was held that, although the statute stated that the defendants carried out their functions “on behalf of” the Minister of Health, their independence from ministerial control showed that they actually occupied hospital premises as principals, not as agents of the Minister.
131. *British Medical Association v Greater Glasgow Health Board* [1989] 1 A.C. 1211, 1226.
132. *BBC v Johns (Inspector of Taxes)* [1965] 1 Ch. 32 at 79, where Diplock L.J. comments that it “has been increasingly the tendency over the last hundred years” that Crown agents are “fictitious persons—corporations”; Williams, *Crown Proceedings* (1948), p.117.
133. *British Medical Association v Greater Glasgow Health Board* [1989] 1 A.C. 1211, 1226–1227; National Health Service (Scotland) Act 1978 s.2(8).
134. Street (1948) 11 M.L.R. 129, 138; Williams, *Crown Proceedings* (1948), p.136; both authors

refer to *Rankin v Huskisson* (1830) 4 Sim. 13 and *Ellis v Earl Grey* (1833) 6 Sim. 214.

[135.](#) [1994] 1 A.C. 377.

[136.](#) *Raleigh v Goschen* [1898] 1 Ch. 73; *Hutton v Secretary of State for War* (1926) 43 T.L.R. 106. Actions against such individual servants were not caught by the general pre-1947 rule that the Crown was not liable in tort, because it was said that since the Crown could do no wrong, it could never authorise the commission of a tort (see *M v Home Office* [1994] 1 A.C. 377, 410).

[137.](#) *M v Home Office* [1994] 1 A.C. 377, 413.

[138.](#) [2005] UKHL 74, 2006 S.C.(H.L.) 41.

[139.](#) *Davidson v Scottish Ministers* (2006) S.C.(H.L.) 41 at [93]. See also *British Medical Association v Greater Glasgow Health Board* [1989] 1 A.C. 1211 at 1226.

[140.](#) *Davidson v Scottish Ministers* (2006) S.C.(H.L.) 41 at [102].

[141.](#) In *Davidson v Scottish Ministers* (2006) S.C.(H.L.) it was anticipated that the matter would be settled when their Lordships heard the then pending appeal in *Beggs v Scottish Ministers* (see e.g. per Lord Mance at [103]). However, when the appeal in *Beggs* was heard, the appellant abandoned the points he had raised in relation to s.21. See *Beggs v Scottish Ministers* [2007] UKHL 3, [2007] 1 W.L.R. 455 at [28], per Lord Rodger and [51], per Lord Mance.

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The position in outline

11-021

Public authorities, as the creations of statute, have the capacity to enter contracts only to the extent that their statutory powers permit. Any contract entered outside those powers (*ultra vires*) is void; similarly, a contractual promise outside the statutory powers is unenforceable.¹⁴² Hence, it has been said that “the *ultra vires* concept of corporate capacity is inextricably linked to nullity: they are two sides of the same coin”.¹⁴³ To determine whether a contract or contractual obligation is *intra vires* the public authority, three tests must be satisfied. First, the contract or obligation must be within the scope of the authority’s statutory powers. Second, it must not unduly fetter the authority’s discretion. Third, the authority’s entering into the contract or obligation must have been as a result of a proper exercise of its powers. If a contract or contractual obligation is found to be *ultra vires*, the consequences will depend on a variety of factors. It may be possible to identify an alternative contract, arising from the parties’ conduct, which it was within the statutory body’s powers to make. If no such contract can be identified, no contractual remedies are available, and the parties must have recourse either to claims in unjust enrichment or under the Human Rights Act 1998. There is, however, one important exception to these principles, which arises when a local authority has certified, pursuant to the Local Government (Contracts) Act 1997, that the contract is within its powers. In such situations, the contract takes effect as if the authority had the power to enter into it.

^{142.} For discussion of whether the *ultra vires* term can be severed from the contract, leaving the remainder of the contractual terms enforceable see *Re Staines Urban DC’s Agreement ; Triggs v Staines Urban DC* [1969] 1 Ch. 10 and paras 16-211 et seq.

^{143.} *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549 at [135] (Etherton L.J.).

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Construction of statutory language

11-022

⚠ In ascertaining whether the contract or promise in question is within the scope of the authority's statutory powers, the statute must be construed. There is no typical form of words for the conferment of powers to contract, and the range of bodies on whom such powers are conferred has led to an equally diverse array of statutory language. No special rules of construction apply ¹⁴⁴—the aim is to identify a “reasonable” interpretation of the words. ¹⁴⁵ The power to contract may be narrowly set out, as it is in the Police Act 1996 s.25(1), which limits the power to charge for policing to “special police services” provided “at the request of any person”. As the Court of Appeal has observed, this subsection envisages a contract between the parties, in the sense that a request must have been accepted by the chief constable. ¹⁴⁶ However, the power may also be expressed more broadly, and need not refer specifically to contracts. For instance, Local Government Act 2000 s.2 (which now applies only in Wales) ¹⁴⁷ confers a power on local authorities to do “anything which they consider is likely to achieve” the “promotion or improvement” of the “economic”, “social”, or “environmental well-being of their area”. In *Brent London BC v Risk Management Partners Ltd* ¹⁴⁸ the Court of Appeal held that, although the section should be construed broadly, it did not authorise entering transactions solely for the purpose of improving the authority's financial position; some “reasonably well defined outcome which [the authority] considers will promote or improve the well-being of its area” was required. ¹⁴⁹ The Localism Act 2011 s.1(1) supersedes the broad power set out in the Local Government Act 2000, by providing that “A local authority has power to do anything that individuals generally may do”. ¹⁵⁰ The breadth of this statutory language is such that, where a contract falls under the Act, no recourse to implied powers of contracting will be required to justify it. However, the Act does not eliminate all restrictions on local authorities' powers, since pre-existing restrictions are preserved, the power to charge for services is limited, and things may only be done for a commercial purpose if they could also be legitimately done for a non-commercial purpose under the general power. ¹⁵¹ The effect of the Act is, therefore, to alter the focus of legal analysis from whether an authority's activity is permitted to whether there are any restrictions on it. ¹⁵²

Local Government (Contracts) Act 1997 s.1(1)

11-023

One particularly important statutory power is that conferred by Local Government (Contracts) Act 1997 s.1(1), which states that:

“Every statutory provision conferring or imposing a function on a local authority confers

power on the local authority to enter into a contract with another person for the provision or making available of assets or services, or both, (whether or not together with goods) for the purposes of, or in connection with, the discharge of the function by the local authority.”

It has been held that a contract of insurance would not come within the section.¹⁵³ No definition of “function” is given in the Act. It almost certainly bears the same meaning as “function” in the Local Government Act 1972 s.111, namely, any one of the “multiplicity of specific statutory activities the [authority] is expressly or impliedly under a duty to perform or has power to perform”.¹⁵⁴ The requirement that a contract be “for the purposes of, or in connection with the discharge” of a function is not elaborated on further in the Act, and it has not been considered in case law. However, it is submitted that the test authorises the same contracts as would be authorised under the test for implying a power to contract¹⁵⁵—namely, whether such a power is reasonably incidental to the relevant statutory purpose: in both tests the focus is on the nexus between the statutory power and the contract. The “reasonably incidental” test has received extensive judicial consideration which, it is submitted, should be used to guide the application of the test set out in s.1(1) of the 1997 Act. It is also submitted that the very general terms of s.1(1) should not be taken to override specific statutory limitations on a local authority’s power to contract.¹⁵⁶

Procedural irregularity

11-023A

⚠ An authority’s failure to follow its own procedures for entering a contract does not render the agreement ultra vires. As the Privy Council put it in *Central Tenders Board v White*, “There is a difference between a case of procedural irregularity in the formation of a contract of a kind which a public body has power to enter, and a case of a public body purporting to conclude a contract of a kind which it has no power to make”.¹⁵⁷ ⚠ In that case the authority had accepted a tender for a building project despite the tenderer failing to comply with the authority’s instructions that all tenderers must state, on their form of tender, what the duration of the works would be. The authority was found not to have departed from its own procedures (since the procedures permitted non-conforming tenders to be considered), but the court went on to express the view that, assuming there had been a procedural irregularity on the facts, it would not have made the ensuing contract void. The court explained that any attempt to nullify a contract entered into following a procedural irregularity would have to be assessed in the light of “the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invalidating the act”, as well as “any alternative remedies available to a person legitimately aggrieved by the conduct of the public body”.¹⁵⁸ ⚠ The court observed that it would be “a serious denial of [a party’s] rights” to invalidate a contract because of a procedural defect in the contractual process,¹⁵⁹ ⚠ and indicated that “it would be wrong for a court to [quash an administrative decision] in such a way as to nullify a contract made between a public body pursuant to a legal power and a person acting in good faith, except possibly on terms which adequately protect that person’s interest”.¹⁶⁰ ⚠ Where a tenderer had been unfairly disadvantaged by the authority’s failure to follow its own procedures, the Privy Council envisaged that recourse could be had to an implied tender process contract, of the kind recognised in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*.¹⁶¹ ⚠

^{144.} *Att-Gen v London CC* [1901] 1 Ch. 781, 788; *Att-Gen v Manchester Corp* [1906] 1 Ch. 643, 653.

^{145.} *Att-Gen v London CC* [1901] 1 Ch. 781, 788.

^{146.} *West Yorkshire Police Authority v Reading Festival Ltd* [2006] EWCA Civ 524, [2006] 1 W.L.R. 2005 at [21] and [50]. See further *Glasbrook Brothers Ltd v Glamorgan County Council* [1925]

A.C. 270; Harris v Sheffield United Football Club Ltd [1988] 1 Q.B. 77; Leeds United Football Club Ltd v Chief Constable of West Yorkshire Police [2013] EWCA Civ 115, [2014] Q.B. 168 and discussion at para.4-064 above. The statutory provision may implicitly exclude a claim for unjust enrichment where no request for police services is shown: *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd [2008] EWCA Civ 1449, [2009] 1 W.L.R. 1580* at [51].

[147.](#) Localism Act 2011 Sch.1 para.3.

[148.](#) *[2009] EWCA Civ 490, [2010] P.T.S.R. 349.* Under the Local Democracy, Economic Development and Construction Act 2009 s.34, which is not yet in force, a local authority is empowered to enter mutual insurance arrangements of the kind that gave rise to the litigation in the *Brent* case. The appeal to the Supreme Court in *Brent LBC v Risk Management Partners Ltd [2011] UKSC 7, [2011] 2 A.C. 34* was confined to the claim for damages for breach of the Public Contracts Regulations 2006.

[149.](#) *[2009] EWCA Civ 490* at [180].

[150.](#) The statutory section came into force on February 18, 2012 (Localism Act 2011 (Commencement No.3) Order 2012 (SI 2012/411) art.2).

[151.](#) Localism Act 2011 ss.2, 3 and 4 respectively.


[152.](#) See further, Layard [2012] *Env. Law Rev.* 134; Bowes and Stanton [2014] *P.L.* 392.


[153.](#) *R. v Brent LBC Ex p. Risk Management Partners Ltd [2008] EWHC 692 (Admin).*


[154.](#) *Hazell v Hammersmith and Fulham LBC [1990] 2 Q.B. 697, 722.* This definition, given by the Divisional Court, was approved by the Court of Appeal (*[1990] 2 Q.B. 697, 785*) and the House of Lords (*[1992] 2 A.C. 1, 29*, per Lord Templeman, 45, per Lord Ackner).


[155.](#) See below, paras 11-024—11-027.


[156.](#) e.g. the limitations on borrowing imposed by Local Government Act 1972 Sch.13 Pt I (as interpreted in *Hazell v Hammersmith and Fulham LBC [1992] 2 A.C. 1*).

[157.](#)  *[2015] UKPC 39, [2015] B.L.R. 727* at [19]. *Law Debenture Trust Corp Plc v Ukraine [2017] EWHC 655 (Comm)* at [134]. Cf. the public procurement regulatory regime, outlined at para.11-051, below.

[158.](#)  *[2015] UKPC 39, [2015] B.L.R. 727* at [22].

[159.](#)  *[2015] UKPC 39, [2015] B.L.R. 727* at [25].

[160.](#)  *[2015] UKPC 39, [2015] B.L.R. 727* at [26].

[161.](#)  *[1990] 1 W.L.R. 1195.* See Vol.I, paras 11-042 et seq.

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(a) - The Scope of Statutory Powers
(ii) - Implied Powers

General principle

11-024

The scope of statutory powers is not limited to the express language of the statute. As Lord Selborne L.C. explained in *Att-Gen v Great Eastern Railway Co* ¹⁶² the ultra vires doctrine:

“... ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.” ¹⁶³

Lord Blackburn, in the same case, added that:

“... those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.” ¹⁶⁴

The emphasis on first identifying the main purpose, then deciding what is incidental to it, was echoed by Lord Selborne L.C. shortly afterwards ¹⁶⁵ and remains good law. The principle of implied powers was subsequently recognised by statute ¹⁶⁶ in the Local Government Act 1972 s.111(1):

“... subject to the provisions of this Act ... a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

Where a public authority claims an implied power to charge, the test is narrower: rather than a reasonable implication, the power must be shown to arise by necessary implication. ¹⁶⁷

Consistency with other statutory provisions

11-025

An incidental power will only be implied if it is consistent with the express statutory provisions. Thus,

where a statutory borrowing power was limited to a set amount “but not further or otherwise”, no additional borrowing power could be implied.¹⁶⁸ Similarly, if the statutory provisions were intended to provide an exhaustive enumeration of powers, there will be no room for a further, implied power. In *Hazell v Hammersmith and Fulham LBC*,¹⁶⁹ for instance, it was held that Local Government Act 1972 Sch.13 Pt 1 established “a comprehensive code which defines and limits the powers of a local authority with regard to its borrowing”¹⁷⁰; it followed that no further power to borrow could be implied. The same analysis has been applied to both housing¹⁷¹ and planning¹⁷² legislation.

Incidental or ancillary power

11-026

Where there is room for a power to be implied, the power can only authorise activities that are incidental to, or ancillary to, the public authority’s functions. It is not enough that the contract is, in itself, profitable, useful or desirable.¹⁷³ There must, in other words be “a sufficient nexus”¹⁷⁴ between the authority’s functions and the activity sought to be carried on. Thus, for instance, it is incidental to a local authority’s duty to manage its housing for it to introduce a parking scheme on one of its housing estates.¹⁷⁵ Similarly, printing and bookbinding work is incidental to a variety of local authority functions.¹⁷⁶ However, the necessary nexus would be broken if the authority undertook additional work, for a profit, beyond what was necessary for its own functions.¹⁷⁷ The activity would then no longer be truly subsidiary to the main statutory purpose; it would be a separate business.¹⁷⁸ Furthermore, where a statutory power permits a function to be carried on within a defined geographical area, an ancillary power to operate outside that area will be unlikely.¹⁷⁹ It is also unlikely that an activity will be regarded as ancillary to the statutory purpose if it is not (or cannot be) restricted to those individuals who participate in the expressly permitted activity. Thus, for instance, in *Att-Gen v London CC*¹⁸⁰ the authority had express statutory powers to operate three tramway services, and claimed that it had implied power to operate a bus service between the termini of the three tramway lines. However, it was held that no such implied power existed because as a matter of fact the bus service was used by the general public, and as a matter of law the bus service could not be confined to tramway passengers.¹⁸¹

Sufficient connection with statutory function

11-027

There must also be a sufficiently close connection between the express statutory function and the activity claimed to be incidental to it, such that the activity can be said directly to facilitate the performance of that function. It is not enough that the activity facilitates some intermediate function which, in turn, facilitates the statutory function.¹⁸² For instance, in *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC*¹⁸³ it was held that a local authority had acted ultra vires by charging developers for consultations with its planning officers before a formal planning application was made. The authority’s statutory function was solely to adjudicate on planning applications; consultations with planning officers before the submission of a formal application were incidental to the performance of that statutory function, but to charge for those consultations was incidental only to the consultations, not the adjudication. Charging was, therefore, merely “incidental to the incidental”,¹⁸⁴ and, therefore, too far removed from the duty to determine planning applications to be implicitly authorised by it. When a local authority enters a contract under Local Government (Contracts) Act s.1(1),¹⁸⁵ it is not performing a “function”; the “function” is the task carried out or the result achieved by contractual performance. The contract is merely a means of carrying out that function. It follows, therefore, that activities incidental to the contract cannot be justified under s.111; those activities are merely incidental to the incidental power of contracting.¹⁸⁶

^{162.} (1880) 5 App. Cas. 473.

^{163.} *Att-Gen v Great Eastern Ry Co* (1880) 5 App. Cas. 473, 478.

- [164.](#) *Att-Gen v Great Eastern Ry Co* (1880) 5 App. Cas. 473, 481.
- [165.](#) *Small v Smith* (1884) 10 App. Cas. 119, 129.
- [166.](#) *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 722 DC, 785 CA, [1992] 2 A.C. 1, 29; *Akumah v Hackney LBC* [2005] UKHL 17, [2005] 1 W.L.R. 985, [24].
- [167.](#) *Att-Gen v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884, (1922) 38 T.L.R. 781; *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC* [1992] 2 A.C. 48. Quaere whether Local Government (Contracts) Act 1997 s.1(1) includes a power for authorities to charge others for the provision of services by the authority. The statutory language seems broad enough to bear this interpretation.
- [168.](#) *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354.
- [169.](#) [1990] 2 Q.B. 697; [1992] 2 A.C. 1.
- [170.](#) *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1, 33. cf. *Re Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236.
- [171.](#) *Crédit Suisse v Waltham Forest LBC* [1997] Q.B. 362; *Sutton LBC v Morgan Grenfell & Co Ltd* (1996) 29 H.L.R. 608; *R. (Kilby) v Basildon DC* [2006] EWHC 1892 (Admin), [2006] H.L.R. 46 at [2]–[16]; [2007] EWCA Civ 479, [2007] H.L.R. 39, per Rix and Moses L.JJ.
- [172.](#) *Bielecki v Suffolk Coastal CC* [2004] EWHC 3142 (QB).
- [173.](#) *Att-Gen v London CC* [1901] 1 Ch. 781, 802, [1902] A.C. 165, 169; *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1, 31; *Brent LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490, [2010] P.T.S.R. 349.
- [174.](#) *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 723.
- [175.](#) *Akumah v Hackney LBC* [2005] UKHL 17, [2005] 1 W.L.R. 985.
- [176.](#) *Att-Gen v Smethwick Corp* [1932] Ch. 562.
- [177.](#) *Att-Gen v Smethwick Corp* [1932] Ch. 562 at 566, per Eve J., 572, per Hanworth M.R. See also *Att-Gen v Fulham Corp* [1921] 1 Ch. 440; *Deuchar v Gas Light and Coke Co* [1925] A.C. 691.
- [178.](#) *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 723.
- [179.](#) *Att-Gen v Manchester Corp* [1906] 1 Ch. 643; *Trustees of the Harbour of Dundee v D. & J. Nicol* [1915] A.C. 550.
- [180.](#) [1901] 1 Ch. 781, [1902] A.C. 165.
- [181.](#) See, similarly *Att-Gen v Mersey Railway Co* [1907] A.C. 415, especially 418, per Lord James.
- [182.](#) *Att-Gen v Manchester Corp* [1906] 1 Ch. 643; *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 724.
- [183.](#) [1992] 2 A.C. 48.
- [184.](#) *McCarthy & Stone (Developments) Ltd v Richmond Upon Thames LBC* [1992] 2 A.C. 48, 75.
- [185.](#) See above, para.11-023.
- [186.](#) *Brent London LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490, [2010] P.T.S.R. 349 at [61], [123].

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(b) - Fettering of Discretion

General principle

11-028

A contract or contractual obligation which unduly fetters the public authority's performance of its statutory functions will be ultra vires. The doctrine first emerged, and has also received the most attention, in cases concerning grants of servitudes.¹⁸⁷ The leading case is *R. v The Inhabitants of Leake*,¹⁸⁸ where the question was whether commissioners of drainage could have granted a public right of way over an earth bank adjacent to the drain. The Court of Exchequer held, by a majority, that the commissioners did have such power, since, on the evidence before them, the grant of a public right of way was not incompatible with the performance of their statutory duties. The compatibility test from the *Leake* case has been applied "again and again"¹⁸⁹ in later cases, but it should be noted that the Court of Exchequer did not consider whether, as a matter of statutory construction, the commissioners had the power, either express or implied, to grant a right of way.¹⁹⁰ The failure to consider that point is easily explicable: the decision in the *Leake* case predated by more than forty years the House of Lords' decisions in *Ashbury Railway Carriage and Iron Co v Riche*,¹⁹¹ *Att-Gen v Great Eastern Railway Company*¹⁹² and *Small v Smith*,¹⁹³ which were to emphasise the statutory limitations on public authorities' powers.¹⁹⁴ Those House of Lords cases represent the current general approach to ultra vires: it follows, therefore, that whilst the *Leake* case articulates an important general principle, it does not set out a complete test for ultra vires. However, it should be noted that even in cases decided after *Ashbury Railway Carriage and Iron Co v Riche*,¹⁹⁵ the courts continued to apply the principle from the *Leake* case as the exclusive test for ultra vires where the issue concerned a right of way.¹⁹⁶ There is some authority to support the use of the incompatibility test as the sole criterion of ultra vires in other situations,¹⁹⁷ but this has been doubted,¹⁹⁸ and it is submitted that the doubts are well founded. A more generous approach than normal to the question of vires may be justified in the case of public rights of way by the combination of the resulting benefit to the public at large,¹⁹⁹ and the policy of maximising land use.²⁰⁰ But, since such an approach has the potential to authorise acts which are beyond the authority's express or implied statutory powers, its use should remain exceptional.

Application of the compatibility test

11-029

The compatibility test focuses on how the contract or contractual obligation in question affects the authority's performance of its statutory functions. The impact is judged in the first instance by setting the statutory powers and duties affected alongside the contractual undertaking.²⁰¹ The contractual term may be so wide-ranging,²⁰² or the statutory functions affected so fundamental²⁰³ that it is clear that the authority's discretion has been unduly fettered.²⁰⁴ However, it may be (and, perhaps, is more likely to be) necessary to prove the incompatibility by evidence. Such evidence need not demonstrate an immediate conflict between contractual performance and statutory functions,²⁰⁵ but, on the other hand, the mere possibility of future incompatibility is not enough. Rather, an assessment must be

made of the likelihood of incompatibility and of its potential severity.²⁰⁶ Thus, although the doctrine is not limited to cases of servitudes,²⁰⁷ it is not surprising that servitudes have provided the context in which it has been most frequently applied: the grant of a servitude in perpetuity creates an obvious permanent restriction on the authority's freedom of action. It is not finally settled whether the assessment should be made using only knowledge available at the time the contract was made, or whether all information available at the time of trial can be used.²⁰⁸ It is submitted that the use of all available knowledge is preferable: the assessment of incompatibility is not based on what the parties ought to have contemplated, but on the actual effect of the contractual obligation; a more accurate and informed assessment of that effect can be made with knowledge of events occurring after the contract was formed.²⁰⁹

Promises not to exercise powers

11-030

The more straightforward cases of incompatibility concern express undertakings not to exercise particular powers; in these cases the question is, simply, what impact that undertaking has. Thus, in *Ayr Harbour Trustees v Oswald*²¹⁰ the trustees acquired, by compulsory purchase, a part of the claimant's land fronting the harbour; they argued that an undertaking not to exercise any of their statutory powers to build on that land should be taken into account when assessing the compensation due to the claimant for damage to his remaining land. But the House of Lords held that the promise was ultra vires, since to enforce it would have effectively given the trustees power to repeal their own statute,²¹¹ and prevent them or their successors from developing the harbour in future. Similarly, where a statute conferred a power on a railway company to acquire land for the building of "works ... or other purposes", a covenant by the company not to construct works on land acquired under that power was held to be ultra vires.²¹² In both of these cases, it could be said that the promise disowned core parts of the authority's powers: as was later said of the *Ayr Harbour* case, the trustees there were seeking to "renounce ... a part of their statutory birthright".²¹³ By contrast, there was held to be no fetter where an authority had acquired land for one particular statutory purpose and had covenanted not to use the land for any other purpose.²¹⁴ Furthermore, if the promise is merely in relation to the renunciation of an ancillary power, it will not be held to be incompatible with the authority's performance of its functions. Thus, in *Stourcliffe Estates Co Ltd v Corp of Bournemouth*²¹⁵ an authority acquiring land for use as a public park had undertaken not to exercise its power to construct public toilets on the land. This promise, relating only to an ancillary power, was enforceable.²¹⁶

Positive promises

11-031

Where the contractual obligation in question consists of a positive promise to act, the position is more complex. Such a promise may, in effect, equate to a promise not to perform a statutory duty—as, for instance, where magistrates with a duty to preserve the St Andrews golf links purported to grant an unlimited right of way over a road alongside the golf course. The grant was held to be ultra vires, since it deprived the magistrates of their power to regulate traffic along the road.²¹⁷ Such cases can be dealt with on the same basis as express renunciations of statutory powers. Where the positive promise does not effectively renounce a power, however, but commits the authority to exercising a power in a particular way, analysis has proved more problematic. In *York Corp v Henry Leetham and Sons Ltd*²¹⁸ the authority had the power to levy tolls on river users; it agreed with the defendants that rather than charging them per use of the river, it would accept a fixed annual payment in lieu. The contract was held ultra vires. In *Birkdale District Electric Supply Co Ltd v Corp of Southport*,²¹⁹ by contrast, a promise by a statutory corporation not to charge more for electricity than was charged in the neighbouring borough for a period of five years was held to be intra vires. Both cases ostensibly involved a public body committing itself to a certain method of implementing its power to charge, and the differing results have proved difficult to reconcile. Suggested grounds of distinction have included that in the *York* case the authority was effectively renouncing its power to charge²²⁰; and that the authority in the *York* case was not profit-making. The latter point had potentially dual significance: first, there was an obligation to apply the tolls to the upkeep of the river, and the funds for that enterprise should be maximised²²¹; second, the importance of commercial freedom was far less for a

non-profit public body.²²² Whatever the merits of the distinction between the two cases,²²³ which may be fact specific, the two decisions illustrate the difficulty of drawing a line between a valid exercise of a discretion and an invalid fettering of that discretion; they also show how policy reasons may inform where that line is ultimately drawn.

Prioritisation of powers

11-032

Where an authority's undertaking has the effect of prioritising one of its powers at the expense of another, it is not seen as automatically engaging the rule against fettering. In *R. v Hammersmith and Fulham LBC Ex p. Beddowes*,²²⁴ for instance, an authority decided to carry out its duty to manage its housing by selling off part of a large complex of flats to a developer on terms that prohibited the council from letting the remainder of the flats in the complex to short-term tenants. These terms effectively committed any future council to selling the rest of the complex to developers. The Court of Appeal held that the restrictive covenants relating to short-term tenants were intra vires since they were reasonably made in pursuit of the statutory object of managing housing. Similarly, the grant of a long-term licence under statutory powers was held not to be subject to an implied term that the licence could be terminated if the authority wanted to use the land for some other statutory purpose.²²⁵ In both instances, the authority was seen as having made a valid choice as to which of its powers to prioritise.

^{187.} *Southport District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 368, per Lord Sumner.

^{188.} (1833) 5 B. & Ad. 469.

^{189.} *British Transport Commission v Westmorland CC* [1956] 2 Q.B. 214, 227. For the House of Lords consideration of this case see [1958] A.C. 126.

^{190.} The only observation on this question was made by Denman C.J., who commented that good roads were "extremely useful for the general purposes of the drainage, by facilitating the conveyance of persons and property" (*Leake* (1833) 5 B. & Ad. 469, 487). Quaere whether this would be sufficient to satisfy the current test to imply an ancillary power to grant a public right of way (see above, para.11-026).

^{191.} (1875) L.R. 7 H.L. 653.

^{192.} (1880) 5 App. Cas. 473.

^{193.} (1884) 10 App. Cas. 119.

^{194.} These three cases in particular were highlighted by Neill L.J. in *Crédit Suisse v Allerdale BC* [1997] Q.B. 306, 337. See also *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354.

^{195.} (1875) L.R. 7 H.L. 653.

^{196.} *Grand Junction Canal Co v Petty* (1888) 21 Q.B.D. 273 (public right of way); *Re An Arbitration between E. Gonty and the Manchester, Sheffield and Lincolnshire Ry Co* [1896] 2 Q.B. 439 (private right of way); *Great Western Ry Co v Solihull Rural DC* (1902) 86 L.T. 852 (public right of way); *South Eastern Ry Co v Cooper* [1924] 1 Ch. 211 (private right of way); *British Transport Commission v Westmorland CC* [1956] 2 Q.B. 214, [1958] A.C. 126 (public right of way). cf. *Mulliner v Midland Ry Co* (1879) 11 Ch. D. 611 where Jessel M.R. took a narrower approach to construing the relevant statute in relation to the creation of a private right of way.

^{197.} *Foster v London, Chatham and Dover Ry Co* [1894] 1 Q.B. 711.

198. *Trustees of the Harbour of Dundee v D. & J. Nicol* [1915] A.C. 550, 570–571, where Lord Parmoor stated that *Foster* [1894] 1 Q.B. 711 should be explained in terms of an implication from the express statutory powers.
199. *The Board of Works for the Greenwich District v Maudslay* (1870) L.R. 5 Q.B. 397, 401–402, per Cockburn C.J.
200. *British Transport Commission v Westmorland CC* [1958] A.C. 126, 142, per Viscount Simonds.
201. *Great Western Ry Co v Solihull Rural DC* (1902) 86 L.T. 852, 853, per Collins M.R.
202. e.g. *Creyke v Corp of the Level of Hatfield Chase* (1896) 12 T.L.R. 383 (alleged unrestricted right to take water from a clough to warp adjoining land).
203. e.g. *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623 (authority created to develop harbour undertaking not to exercise any powers to build on certain land); *Yarl's Wood Immigration Ltd v Bedfordshire Police Authority* [2008] EWHC 2207 (Comm), [2009] 1 All E.R. 886 at [80] giving the example of a promise by a police authority not to exercise its powers to enforce law and order within an immigration detention centre. There was no adverse comment on this example in the Court of Appeal [2009] EWCA Civ 1110, [2010] Q.B. 698. See further, Lord Sumner's comments on the *Ayr Harbour* case in *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 372.
204. *British Transport Commission v Westmorland CC* [1958] A.C. 126, 155, per Lord Radcliffe.
205. *Great Western Ry Co v Solihull Rural DC* (1902) 86 L.T. 852, 855, per Cozens-Hardy L.J.
206. *British Transport Commission v Westmorland CC* [1958] A.C. 126, especially 144, per Viscount Simonds.
207. *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 372, per Lord Sumner.
208. *British Transport Commission v Westmorland CC* [1958] A.C. 126, 145, per Viscount Simonds; cf. 152–153, per Lord Radcliffe and 160, per Lord Cohen, favouring all available knowledge.
209. cf. Turpin, *Government Contracts* (1972), p.24.
210. (1883) 8 App. Cas. 623.
211. *Ayr Harbour Trustees v Oswald* (1883) 8 App. Cas. 623, 639–640, per Lord Watson.
212. *Heywood's Conveyance; Re Cheshire Lines Committee v Liverpool Corp* [1938] 2 All E.R. 230. See also *Re Staines Urban DC's Agreement; Triggs v Staines Urban DC* [1969] 1 Ch. 10 and *Camurat v Thurrock Borough Council* [2014] EWHC 2482 (QB), [2015] E.L.R. 1 at [65]–[67].
213. *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 372. See also J. Mitchell, *The Contracts of Public Authorities* (1954) pp.60–61.
214. *Earl of Leicester v Wells-next-the-Sea Urban DC* [1973] 1 Ch. 110.
215. [1910] 2 Ch. 12.
216. See also *Blake v Hendon Corp* [1962] 1 Q.B. 283, 303.
217. *Paterson v Provost of St Andrews* (1881) 6 App. Cas. 833. See similarly *Att-Gen v Corp of Plymouth* (1845) 9 Beav. 67. cf. *South Eastern Railway Co v Cooper* [1924] 1 Ch. 211 (wide grant of right of way intra vires because expressly subject to grantor's by-laws).
218. [1924] 1 Ch. 557.

- [219.](#) [1926] A.C. 355.
- [220.](#) *Southport Corp v Birkdale District Electric Supply Co Ltd* [1925] Ch. 794, 820, per Warrington L.J. Such an analysis is echoed by the reasoning in *Al Fayed v A.G. for Scotland* [2004] S.T.C. 1703.
- [221.](#) *Southport Corp v Birkdale District Electric Supply Co Ltd* [1925] Ch. 794, 822–823, per Sargant L.J.; *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] A.C. 355, 366, per Earl of Birkenhead.
- [222.](#) *William Cory & Son Ltd v London Corp* [1951] 2 K.B. 476, 485–486, per Lord Asquith.
- [223.](#) The trial judge in the *Southport* case held that the *York* case was indistinguishable: *Southport Corp v Birkdale District Electric Supply Co Ltd* [1925] Ch. 63.
- [224.](#) [1987] 1 Q.B. 1050; noted by Tromans [1987] C.L.J. 377.
- [225.](#) *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 1 W.L.R. 204; the authority subsequently achieved its aims by exercising its statutory planning powers: *Dowty Boulton Paul Ltd v Wolverhampton Corp (No.2)* [1976] 1 Ch. 13.

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(c) - Proper Exercise of Powers

General principle

11-033

The authority's power to contract must have been exercised properly, in accordance with its public law obligations.²²⁶ The same is true of any power to vary the contractual terms.²²⁷ Thus, for instance, a decision to enter a contract must comply with any relevant procedural requirements,²²⁸ and it must also be consistent with the general principles of public law governing the exercise of powers. These principles include the requirement to have regard only to relevant matters, the requirement not to exercise powers for a collateral purpose, and the requirement not to exercise powers irrationally.

Relevant matters

11-034

The decision to enter, or to vary a contract, must be taken after having considered all relevant matters, and disregarding all irrelevant matters.²²⁹ Thus, in *Roberts v Hopwood*²³⁰ a local authority's decision to fix a minimum wage for its employees was held to be ultra vires because, inter alia, its decision had been taken pursuant to the legally irrelevant consideration that it should act as a model employer, and in disregard of the relevant consideration that the cost of living had gone down.²³¹ Similarly, in *London & South Eastern Railway v British Transport Police Authority*²³² the authority was held to have acted ultra vires when it decided to reduce the charges it made to certain train operators, because it had failed to consider whether it could levy correspondingly higher charges against other operators.²³³

Collateral purpose

11-035

The power to enter or to vary a contract must not be exercised in order to achieve a collateral, improper or extraneous purpose.²³⁴ If the power has been exercised for such a purpose, it is irrelevant that an authority, acting properly, might have made the same decision about how to exercise its powers.²³⁵ Thus, in *Crédit Suisse v Allerdale BC*²³⁶ an authority guaranteed the overdraft of a company as part of a scheme designed to evade borrowing restrictions imposed by central government; this was held to amount to the pursuit of an improper purpose, and the transaction was held to be ultra vires.²³⁷ Similarly, in *Hinckley and Bosworth BC v Shaw*²³⁸ the claimant council had agreed a redundancy package with the defendant, under which the defendant would receive a significantly enhanced salary for the final year of his employment, and—despite being given notice of the termination of his employment—would also receive a payment in lieu of notice of termination. Both the increase in salary and the payment in lieu of notice were made in order to increase the defendant's redundancy benefits. It was held that this contract, having been entered for an

extraneous purpose, and not in order to fix the defendant's rate of pay, was ultra vires.

Irrationality

11-036

A contract will be found to be ultra vires on the ground of irrationality where no reasonable authority would have entered that contract. ²³⁹ It should be emphasised that "irrationality" cannot simply be equated with a contractual obligation to act reasonably: irrationality is a distinctive public law concept denoting that the authority acted as no reasonable authority would act, and it requires a court to assess different factors from those involved in a determination of whether a contractual obligation to act reasonably has been satisfied. ²⁴⁰ Irrationality may be manifested by the nature of the transaction itself, or by the terms of the agreement. An example of the former kind of irrationality is provided by *Hazell v Hammersmith and Fulham LBC*, ²⁴¹ where an authority entered multiple complex financial transactions despite lacking officers with the training or experience to deal with such transactions, and without having taken any legal advice. It was held that the authority's actions had been irrational, and the contracts were, therefore, ultra vires. ²⁴² A contract will also be ultra vires on the ground of irrationality where, despite being of a legitimate type, its individual terms are irrationally generous. ²⁴³ Thus, in *Roberts v Hopwood*, ²⁴⁴ a local authority's decision in 1922 to fix a minimum wage of £4 a week for all of its employees, and to disregard reductions in the cost of living, was seen as creating "no rational proportion" between the rates paid by the authority and a reasonable wage. ²⁴⁵ Similarly, in *Re Magrath* ²⁴⁶ an authority's decision to make additional payments to the county accountant in respect of work for which he had already received an increased salary was held to be "unreasonable in the highest degree". ²⁴⁷ However, more recent cases have emphasised that the court will not be astute to allow a public authority to escape from commercial obligations by relying on its own irrationality, particularly where there are legitimate expectations in the other party to the contract and the contract concerns an essentially private law matter. ²⁴⁸

A recent challenge to the proper exercise of powers requirement

11-037

Dicta in the Court of Appeal's decision in *Charles Terence Estates Ltd v Cornwall Council* ²⁴⁹ may indicate that the courts are considering introducing a more flexible approach to situations where a public body has entered agreements pursuant to an improper exercise of its powers. Maurice Kay L.J. indicated that it depended on the circumstances whether such transactions were enforceable against the public body. ²⁵⁰ Etherton L.J. went further, stating that the validity of such transactions should be governed by the principle set out by Browne-Wilkinson J. in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* ²⁵¹ for determining the validity of transactions entered by companies. ²⁵² Under that principle, the validity of transactions entered by a company in excess of its powers turns on whether the party with whom the transaction was entered "had notice that the transaction was in excess or abuse of the powers of the company". Both judges found support for their views in the dicta of Hobhouse L.J. in *Credit Suisse v Allerdale BC* ²⁵³; and they both disapproved the dicta of Neill L.J. in the same case, which were to the effect that contracts entered into pursuant to an improper exercise of power were void. It is respectfully submitted that, although they have received some support, ²⁵⁴ the Court of Appeal's dicta should not be followed for two reasons. First, the Court was not referred to leading authorities (discussed in the preceding paragraphs), where the issue was directly in point, such as *Hinckley and Bosworth BC v Shaw* ²⁵⁵ and *London & South Eastern Railway Ltd v British Transport Police Authority*. ²⁵⁶ Second, the assertion of Etherton L.J. that he could "see no sound reason why the position should be any different" for public authorities as compared with the position for companies requires closer analysis than was given to it by the Court of Appeal. ²⁵⁷ It might legitimately be thought more important to protect public funds from misuse than corporate funds, and, in any case, the position of public authorities is materially different as a matter of law, since private parties contracting with public authorities can protect themselves against a defence of ultra vires by using the Local Government (Contracts) Act 1997. ²⁵⁸ It should also be noted that the ultra vires principle applicable to companies has been abrogated by legislation, in order to ensure the security of transactions between companies and those with whom they deal. ²⁵⁹ So, if the validity of contracts entered by public authorities were in future to be governed by the principle from *Rolled Steel Products (Holdings) Ltd v British Steel Corp*, that would not create consistency between public and corporate

contracts.

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- [226.](#) *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697; *Crédit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep. 315, [1997] Q.B. 306; *London & South Eastern Railway Ltd v British Transport Police Authority* [2009] EWHC 460 (Admin) at [47]–[48]. cf. the dicta in *Charles Terence Estates Ltd v Cornwall Council* [2012] EWCA Civ 1439, [2013] 1 W.L.R. 466, followed in *Pro-Vision Systems (UK) Ltd v United Lincolnshire Hospital NHS Trust Unreported*, February 21, 2014 (Judge Waksman QC) at [176].
- [227.](#) *Wandsworth LBC v Winder* [1985] 1 A.C. 461.
- [228.](#) e.g. *R. (Transport & General Workers Union) v Walsall MBC* [2001] EWHC 452 (Admin).
- [229.](#) *Roberts v Hopwood* [1925] A.C. 578; *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 (not irrelevant, on the facts, to consider employee's previous loyalty and service in fixing compensation for termination of employment—see in particular [21]); *London & South Eastern Railway Ltd v British Transport Police Authority* [2009] EWHC 460 (Admin).
- [230.](#) [1925] A.C. 578.
- [231.](#) [1925] A.C. 578, 600 (Lord Atkinson), 609 (Lord Sumner).
- [232.](#) [2009] EWHC 460 (Admin).
- [233.](#) [2009] EWHC 460 (Admin) at [46].
- [234.](#) *Roberts v Hopwood* [1925] A.C. 578; *Credit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep. 315; affirmed [1997] Q.B. 306; *Hinckley and Bosworth BC v Shaw* [2000] L.G.R. 9; *Eastbourne BC v Foster* [2001] EWCA Civ 1091, [2002] I.C.R. 234; *Tower Hamlets LBC v Wooster* [2009] I.R.L.R. 980 at [39]–[40].
- [235.](#) *Hinckley and Bosworth BC v Shaw* [2000] L.G.R. 9 at 39–40.
- [236.](#) [1995] 1 Lloyd's Rep. 315; affirmed [1997] Q.B. 306.
- [237.](#) [1995] 1 Lloyd's Rep. 315, 343–347; affirmed [1997] Q.B. 306, 333–334. See also the dissenting judgment of Kerr L.J. in *R. v Hammersmith and Fulham LBC Ex p. Beddowes* [1987] 1 Q.B. 1050.
- [238.](#) [2000] L.G.R. 9.
- [239.](#) The classic test for irrationality is set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223 at 229.
- [240.](#) *R. (McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin) at [28]–[36], particularly at [31].
- [241.](#) [1990] 2 Q.B. 697.
- [242.](#) *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, 729–730 (DC; the point was not dealt with by either the Court of Appeal or the HL).
- [243.](#) *Newbold v Leicester City Council* [1999] I.C.R. 1182; *Eastbourne BC v Foster* [2001] EWCA Civ 1091, [2002] I.C.R. 234; *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 (not irrationally generous on the facts); *Killen v Department of Regional Development* [2010] NIQB 127, [19].

- [244.](#) [1925] A.C. 578.
- [245.](#) [1925] A.C. 578, 600 (Lord Atkinson). See also at 613 (Lord Wrenbury).
- [246.](#) [1934] 2 K.B. 415.
- [247.](#) [1934] 2 K.B. 415, 425 (Scrutton L.J.).
- [248.](#) *Newbold v Leicester City Council* [1999] I.C.R. 1182; *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786 at [6]–[7].
- [249.](#) [2012] EWCA Civ 1439, [2013] 1 W.L.R. 466.
- [250.](#) [2012] EWCA Civ 1439 at [37].
- [251.](#) [1986] Ch. 246, 302–303 and 304 (discussed in detail at paras 10-020—10-026).
- [252.](#) [2012] EWCA Civ 1439 at [48]–[49].
- [253.](#) [1997] Q.B. 306
- [254.](#) *Pro-Vision Systems (UK) Ltd v United Lincolnshire Hospital NHS Trust* Unreported, February 21, 2014, Judge Waksman QC at [176].
- [255.](#) [2000] B.L.G.R. 9.
- [256.](#) [2009] EWHC 460 (Admin).
- [257.](#) [2012] EWCA Civ 1439 at [49].
- [258.](#) See further the discussion of this provision at para.11-041.
- [259.](#) See para.10-027 above.

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(d) - Alternative Contracts Formed by Conduct

Identification of alternative contract

11-038

⚠ Where a contract has been found to be ultra vires, it may be possible to infer a different, intra vires contract, from the dealings between the parties. ²⁶⁰ Thus, in *Eastbourne BC v Foster* the parties were an employer and employee who had come to an arrangement in respect of the employee's early retirement which involved a "compromise agreement". Under this agreement, the employee would continue to work for only three days a week, but at his full salary, until the month of his 50th birthday. The employee worked for three days per week for the specified period, but the "compromise agreement" was held to be ultra vires on the grounds of irrational generosity and improper purpose. ²⁶¹ The Court of Appeal held that whilst the ultra vires contract must be disregarded, the conduct of the parties showed that a relationship of employment continued to exist between them, and the employee was entitled to claim for work done on a contractual basis. Unfortunately, the reasoning of the Court of Appeal is not free from difficulty. The Court relied on the decision in *Craven-Ellis v Canons Ltd*, ²⁶² which concerned a quantum meruit claim for the value of services conferred at the defendant's request, in which Greer L.J. had been careful to point out that the claim was not contractual. The Court then went on to cite more recent judicial observations criticising the implied contract theory of the law of unjust enrichment. However, in the next paragraph of its judgment, Rix L.J., giving the only full judgment, stated that ²⁶³:

"Whether the obligation imposed by law in such a case is normally described as contractual, quasi-contractual or restitutionary, may not matter for the purposes of this case, since in any event I would consider that where, as here, the relationship between the parties is best described as a relationship of employment the law must necessarily impose a contractual solution. I do not think that this is inconsistent with the parallel existence of restitutionary remedies. Thus, in this case, it is possible to say that in contract Mr Foster was entitled to claim reasonable remuneration for the work he did, or in other words a quantum meruit, while in restitution he was both prima facie obliged to return the sums he received under the void compromise agreement and at the same time entitled to a defence of change of position."

It is submitted that it was very unfortunate that the Court invoked the idea of a "quasi-contractual" obligation, since it is now widely accepted that "quasicontract" is a misleading and unhelpful label. ²⁶⁴

⚠ It is also regrettable that the Court regarded the quantum meruit remedy as "contractual", since this blurred the fundamental distinction between claims for breach of contract, and claims in unjust enrichment. Furthermore, it seems to be rather artificial to regard the employee as having implicitly contracted to do work for a "reasonable remuneration" when in fact he had expressly agreed to do it for his full salary. The artificiality of the contractual analysis suggests that greater consideration should have been given to the possibility of analysing the situation purely in terms of unjust enrichment. This could have been done by regarding the services provided by the employee as

having been performed on the understanding, subsequently shown to be incorrect, that a valid contractual obligation existed for remuneration. In other words, the situation could have been analysed in terms of failure of basis.²⁶⁵ This analysis has three advantages over the contractual analysis. First, it avoids the need to construct a parallel, implicit contract on different terms to the agreement actually made between the parties. Second, it is a more accurate reflection of what actually took place. Third, it has the advantage of simplicity, since it eliminates the need to investigate any potential relationship between claims in contract and for unjust enrichment.

Consequences of alternative contract analysis

11-039


The importance of the contractual analysis in *Eastbourne BC v Foster* can be seen in *Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam*.²⁶⁶ There the claimant had been employed by the defendant as a locum consultant cardiologist for a period of nearly three years. The regulations only permitted the employment of locum consultants for up to 12 months.²⁶⁷ The Employment Appeal Tribunal held that the claimant's employment as a locum consultant beyond the first 12 months had been ultra vires, but it went on to hold that a relationship of employment had, nevertheless, subsisted between the claimant and the defendant for the entire period of the defendant's work. The Tribunal emphasised that there was no general prohibition on the trust that prevented it from employing the claimant, and that both parties regarded their relationship as one of employment.²⁶⁸ It followed, therefore, that the claimant was an employee for the purposes of the Employment Rights Act 1996, and was entitled to pursue a claim for unfair dismissal. In this situation, it can be seen that it was crucial whether the situation was analysed in terms of contract or unjust enrichment: the contractual analysis entitled the claimant to bring any claims open to an employee; the unjust enrichment analysis would have entitled him to recover sums reflecting the value of the benefit that his services conferred on the defendant, but the claim would have rested on the failure of the basis of the transaction. In other words, on the unjust enrichment analysis there could have been no claim as an employee. It is possible that the decision in *Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam*²⁶⁹ may be partially explained by a concern not to deprive claimants of their employment rights. However, it rests on an analytical foundation which is unconvincing.

^{260.} *Eastbourne BC v Foster* [2001] EWCA Civ 1091, [2002] I.C.R. 234; *Shrewsbury and Telford NHS Hospital Trust v Lairikyengbam* [2010] I.C.R. 66. On the formation of contracts by conduct, see above paras 2-005, 2-029—2-030.

^{261.} See paras 11-035 and 11-036 for discussion of these grounds for holding contractual arrangements ultra vires.

^{262.} [1936] 2 K.B. 403, cited in [2001] EWCA Civ 1091, [2002] I.C.R. 234 at [41].

^{263.} [2001] EWCA Civ 1091, [2002] I.C.R. 234 at [43].

^{264.}  *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] A.C. 669, 710 (Lord Browne-Wilkinson), 718 (Lord Slynn), 720 (Lord Woolf), 738 (Lord Lloyd). See further below, paras 29-005—29-008; Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 1-06—1-08. The pioneering work on this subject was undertaken by Peter Birks: see, for example, Birks (1984) 37 C.L.P. 1, and *An Introduction to the Law of Restitution* (1985).

^{265.} See paras 29-057 et seq.

^{266.} [2010] I.C.R. 66 (EAT).

^{267.} National Health Service (Appointment of Consultants) Regulations 1996 (SI 1996/701) reg.5(1)(c).

[268.](#) [2010] I.C.R. 66 at [47].

[269.](#) [2010] I.C.R. 66 (EAT).

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(e) - Ultra Vires and Human Rights

Impact of human rights on ultra vires

11-040

⚠ In general, parties to transactions held to be ultra vires must have recourse to the law of unjust enrichment in order to recover any benefits conferred under such transactions. ²⁷⁰ ⚠ However, where a public body makes an ultra vires agreement conferring a right to property, the intended recipient of that property right may also have a remedy for breach of his human rights. ²⁷¹ According to European human rights jurisprudence, an ultra vires transaction purporting to confer a property right gives rise to a legitimate expectation of receiving that right; the legitimate expectation is, in itself, a possession for the purposes of art.1 Protocol No.1. ²⁷² The right expected to be conferred may be an interest in property, ²⁷³ or it may relate to a component of the property, such as the existence of planning permission, ²⁷⁴ or the absence of any public navigation right over a stretch of river. ²⁷⁵ What is recognised as a legitimate expectation for these purposes is not dependent on domestic law definitions or classifications. ²⁷⁶ Any interference with the right must be for a legitimate aim ²⁷⁷ and proportionate. ²⁷⁸ The mere fact that the public authority is reverting to its statutory mandate does not automatically satisfy the tests of justification and proportionality; some form of compensation may be required. ²⁷⁹ The remedy for infringement of the right to property cannot require the defendant to confer the property interest which the claimant expected. ²⁸⁰ If it takes the form of compensation, the European Court of Human Rights has held that the sum awarded should reflect the proportion of the initial consideration paid that can be attributed to the ultra vires element of the transaction. ²⁸¹ Such an award has been said to be based on unjust enrichment ²⁸², as such, it transcends the usual requirement that restitution is only available for a total failure of consideration. ²⁸³

^{270.} ⚠ See generally, Ch.29 below, and Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), Chs 12–14.

^{271.} art.1 Protocol No.1, European Convention for the Protection of Human Rights and Fundamental Freedoms; *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12, (2003) 5 E.H.R.L.R. 554.

^{272.} *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319. cf. *Al Fayed v AG for Scotland* [2004] S.T.C. 1703 at [120], where it was conceded that a forward taxation agreement, under which the taxpayer paid a set sum per year, instead of being subject to assessment on actual transactions, created an expectation that engaged art.1. It is difficult to reconcile this concession with the requirement that there should be the expectation of a property right.

^{273.} *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12, (2003) 5 E.H.R.L.R. 554.

^{274.} *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319.

- [275.](#) *Rowland v Environment Agency* [2003] EWCA 1885, [2004] 2 Lloyd's Rep. 55.
- [276.](#) *Beyeler v Italy* (2001) 33 E.H.R.R. 1224 at [100]. cf. *Al Fayed v AG for Scotland* [2004] S.T.C. 1703 at [120], where counsel for the defender reserved the right to argue "if the case went further" that an expectation under an ultra vires agreement was a nullity and could not, therefore, give rise to a legitimate expectation. An appeal to the House of Lords was lodged on January 31, 2005, but was not pursued.
- [277.](#) e.g. *Al Fayed v AG for Scotland* [2004] S.T.C. 1703; *Eden* [2005] B.T.R. 21 (forward taxation agreement repudiated in order to apply the taxation system equally to all taxpayers). *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319 (annulment of outline planning permission in order to protect the environment). Quaere, whether the aim of ceasing to act outside statutory powers should not automatically be regarded as a legitimate aim.
- [278.](#) e.g. *Rowland v Environment Agency* [2003] EWCA 1885, [2004] 2 Lloyd's Rep. 55 (reinstatement of public navigation right carried out so as to cause minimal interference to riparian owner).
- [279.](#) *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12; cf. *Pine Valley Developments Ltd v Ireland* (1991) 14 E.H.R.R. 319 (inherently risky nature of property development justified awarding no compensation where claimant deprived of planning permission).
- [280.](#) *Rowland v Environment Agency* [2003] 1 Lloyd's Rep. 427 at [80] (Lightman J.); expressly approved by the Court of Appeal [2003] EWCA 1885, [2004] 2 Lloyd's Rep. 55 at [85] (Peter Gibson L.J.) and [140] (Mance L.J.).
- [281.](#) *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12 at [47]–[50].
- [282.](#) *Rowland v Environment Agency* [2003] EWCA 1885, [2004] 2 Lloyd's Rep. 55 at [88].
- [283.](#) See above, para.29-057.

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(f) - Statutory Certification

Local Government (Contracts) Act 1997

11-041

The Local Government (Contracts) Act 1997 introduces a new procedure of certification by local authorities. ²⁸⁴ If a contract is certified, it takes effect “as if the local authority had power to enter into it (and had exercised that power properly in entering into it)”. ²⁸⁵ In other words, it will be no defence to an action on the certified contract that the authority lacked capacity to enter it. The certification requirements must be strictly observed, ²⁸⁶ including the time limits prescribed. ²⁸⁷ The Act sets out a list of matters that the certificate must contain. ²⁸⁸ Most importantly, the certificate must identify the power under which the local authority purports to act, ²⁸⁹ and it must state that the contract is within s.4(3) or s.4(4) of the Act. ²⁹⁰ Section 4(3) states that a contract falls within the subsection:

“... if it is entered into with another person for the provision or making available of services (whether or not together with assets or goods) for the purposes of, or in connection with, the discharge by the local authority of any of its functions ...” ²⁹¹

and it operates, or is intended to operate for at least five years. ²⁹² Contracts within s.4(4) essentially relate to the financing or insurance arrangements connected with contracts within s.4(3). It appears, therefore, that the certification process applies only to contracts for the provision of services for five years or more, and contracts ancillary to those contracts, although once a certificate has been issued, it cannot be invalidated “by reason that anything in the certificate is inaccurate or untrue”. ²⁹³ It should be noted, however, that certification has no effect on either judicial review or audit review ²⁹⁴; a certified contract may still be held to be of no effect under either of these procedures. ²⁹⁵

²⁸⁴. Local Government Contracts Act 1997 s.1(3). The new procedure also applies (with amendments) to contracts made by Welsh government authorities: the Government of Wales Act 2006 (Local Government (Contracts) Act 1997) (Modifications) Order 2007 (SI 2007/1182).

²⁸⁵. Local Government (Contracts) Act 1997 s.2(1).

²⁸⁶. Local Government (Contracts) Act 1997 s.2(2).

²⁸⁷. Local Government (Contracts) Act 1997 s.2(3) and s.2(5).

²⁸⁸. Local Government (Contracts) Act 1997 s.3.

²⁸⁹. Local Government (Contracts) Act 1997 s.3(2)(d).

- [290.](#) Local Government (Contracts) Act 1997 s.3(2)(c).
- [291.](#) Local Government (Contracts) Act 1997 s.4(3)(a).
- [292.](#) Local Government (Contracts) Act 1997 s.4(3)(b).
- [293.](#) Local Government (Contracts) Act 1997 s.4(1).
- [294.](#) Local Government (Contracts) Act 1997 s.5.
- [295.](#) See Local Government (Contracts) Act 1997 ss.6 and 7 for the consequences of such a finding.

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The nature of tender process contracts

11-042

Where a party initiates a process of competitive tendering and tenders are submitted, a contract may come into existence between the party and the tenderers that governs the manner in which the competition will be conducted. Such a contract may be based on an express undertaking by the party inviting tenders, but may also be implied.²⁹⁶ Thus, in *Blackpool and Fylde Aero Club Ltd v Blackpool BC*²⁹⁷ the Council formally invited six parties to tender for a concession to operate pleasure flights from the local airport. The invitation to tender specified, amongst other things, the deadline for receipt of tenders and also stated that no late tenders would be considered. The claimants submitted a tender before the deadline, but as a result of a careless failure by Council staff to empty the post box at the town hall, it was treated as late and excluded from consideration. The Court of Appeal held that a contract should be implied between the parties; one of the terms of that contract was that if a conforming tender was submitted before the deadline, it would be “opened and considered in conjunction with all other conforming tenders or at least ... will be considered if others are”.²⁹⁸ While in principle there seems nothing to prevent the implication of a similar contract where the party inviting tenders is a private body or person,²⁹⁹ similar implied contracts are particularly likely to arise when the invitation is made by a public authority.

^{296.} For an example of an (arguable) express contract see *Turning Point Ltd v Norfolk County Council* [2012] EWHC 2121 (TCC).

^{297.} [1990] 1 W.L.R. 1195; noted by Adams and Brownsword (1991) 54 M.L.R. 281, Davenport (1991) 107 L.Q.R. 201. See also Arrowsmith (2004) 5 P.P.L.R. NA125.

^{298.} *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1202.

^{299.} Though the public character of the defendant was relied on by the plaintiff as support for the existence of the contract as it had as a matter of public law a duty to comply with its standing orders (to consider tenders) and a fiduciary duty to ratepayers to act with reasonable prudence in managing its financial affairs: *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1201; and Bingham L.J. gave some weight to this: *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1202. See further below, para.11-043.

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(a) - Conditions for the Implication of a Tender Process Contract

Legal conditions

11-043

A contract arising out of the tender process will only be implied where both the legal and the factual matrix permit. So far as the legal matrix is concerned, the implication of a tender process contract may be precluded by the existence of another legal mechanism regulating the relationship of the parties. Thus, for instance, in *St George Soccer Football Association Inc v Soccer NSW Ltd*,³⁰⁰ the Supreme Court of New South Wales held that the implication of a tender process contract was precluded by the fact that the relationship between the parties was already governed by the constitution of the defendant. It is submitted that this decision reflects English law. The same principle applies where the tender process is subject to public procurement regulations.³⁰¹ If the regulations apply to the transaction, no tender process contract can be implied, since such a contract would be both “unnecessary and would, if implied, be inconsistent with the statutory scheme”.³⁰² Thus, for instance, a disappointed tenderer who failed to bring a claim under the regulations within the prescribed three-month time limit could not opt to take advantage of the longer limitation period applicable to contractual claims.³⁰³ If, on the other hand, the transaction falls outside the scheme of the regulations, there is nothing to prevent the implication of a contract between the parties under which the authority promises to consider the tender in good faith.³⁰⁴

Factual conditions

11-044

⚠ Once any legal obstacles to the implication of a tender process contract have been dealt with, the factual matrix must be examined, in order to ascertain whether the implication of a contract is justified. The express dealings and discussions between the parties may exclude any such implication.³⁰⁵ If a tender process contract has not been negated, a variety of factors must be assessed. In *Blackpool & Fylde Aero Club Ltd v Blackpool BC*³⁰⁶ it was particularly emphasised that tenders had been solicited by the invitor,³⁰⁷ there was a small number of invitees,³⁰⁸ who were known to the invitor,³⁰⁹ and the invitation set out a “clear, orderly and familiar” procedure.³¹⁰ Some weight was also given to the fact that the defendant was a local authority.³¹¹ ⚠ It seems that there is no need to identify a particular offer or acceptance in the facts (the Court of Appeal in the *Blackpool* case did not do so)³¹², but it is necessary to show an intention to create legal relations.³¹³ Subsequent English authorities have held that tender process contracts have come into existence in similarly formal contexts³¹⁴; and there is Australian authority to support the view that no contract can be inferred where the tender process is highly informal.³¹⁵ Whether such a contract can only be implied where the party inviting tenders is a public body, is more controversial. As mentioned above, some weight seemed to be given to the defendant’s status as a public body in the *Blackpool* case, and a similar emphasis can be seen in some Commonwealth authorities.³¹⁶ However, in *J & A Developments Ltd v Edina Manufacturing Ltd*³¹⁷ the High Court of Northern Ireland held that the implication of tender process

contracts was not limited to cases of public authorities.³¹⁸ It is submitted that this is the better view: the fundamental question is whether a tender process contract can be inferred from the parties' conduct and is consistent with the surrounding legal and factual matrix; such an inference is perfectly possible where the party inviting tenders is not a public body.

^{300.} [2005] NSWSC 1288.

^{301.} Described in outline below at paras 11-051 et seq.

^{302.} *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [60]; see also *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch) at [212], *J Varney & Sons Waste Management Ltd v Hertfordshire County Council* [2010] EWHC 1404 (QB) at [232]–[235]. The more ambivalent approach visible in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1, which seems to have been to deny an implied contract only where the tenderer had a valid claim under the Regulations (as opposed to the transaction merely coming within the Regulations) seems to have been abandoned.

^{303.} *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [58]–[59]; *Montpellier Estates Ltd v Leeds City Council* [2013] EWHC 66 (QB) at [465]–[467].

^{304.} *JBW Group Ltd v Ministry of Justice* [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [61]–[63].

^{305.} *Greville v Venables* [2007] EWCA Civ 878 at [36]–[40], per Lloyd L.J.


^{306.} [1990] 1 W.L.R. 1195.

^{307.} *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham L.J.

^{308.} *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1203, per Stocker L.J.

^{309.} *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham L.J.

^{310.} *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham L.J.

^{311.}  *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham L.J.; *Central Tenders Board v White* [2015] UKPC 39, [2015] B.L.R. 727 at [28].

^{312.} See similarly the exposition by the Supreme Court of Western Australia in *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211 at [121], which acknowledged that, in the tender process context, “a contract may be made without the formalities of offer and acceptance”. cf. *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* [2006] NZCA 295 at [15], where the Court of Appeal of New Zealand asserted that offer and acceptance must be shown in order for a tender process contract to be created.

^{313.} *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1202, per Bingham L.J. and 1204, per Stocker L.J.

^{314.} *Fairclough Building Ltd v BC of Port Talbot* (1992) 62 B.L.R. 82; *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1. See also *Prime Commercial Ltd v Wool Board Disestablishment Co Ltd* [2006] NZCA 295 at [16]: “the less formal the tender process, the less scope there is for implying any, or at least any onerous, obligations on the party calling for tenders”.

- [315.](#) e.g. *Hickinbotham Developments Pty Ltd v Woods* [2005] SASC 215, (2005) 92 S.A.S.R. 52.
- [316.](#) *Hickinbotham Developments Pty Ltd v Woods* [2005] SASC 215, (2005) 92 S.A.S.R. 52 at 57. See also Samuel (2004) 24 O.J.L.S. 335, 356–357.
- [317.](#) [2006] NIQB 85.
- [318.](#) *J & A Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85 at [49].

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(b) - Contents of a Tender Process Contract

The terms of tender process contracts

11-045

The terms of a tender process contract are collected from the language used by the parties and supplemented by implication. Thus, for instance, an express undertaking by the invitor as to the grounds on which a tender would be disqualified would be part of the contract.³¹⁹ Similarly, the tender documents might incorporate an otherwise voluntary code of practice; that code will then form part of the contractual terms.³²⁰ Where it is sought to imply terms, the courts have been cautious, and have tended to focus on questions relating to the procedure to be followed in the tendering competition. In *Blackpool & Fylde Aero Club Ltd v Blackpool BC*,³²¹ for instance, it was held that whilst there was an obligation to *consider* a conforming tender, there was no implied obligation about which tender should be accepted.³²² Nor, it was said, could there be an implied term that the invitor must accept one of the tenders that it received. The Court of Appeal also suggested that, on the facts of that case, a term could be implied not to consider late applications,³²³ and not to make a decision before the deadline for receipt of applications had expired. Similarly, in *Fairclough Building Ltd v BC of Port Talbot*³²⁴ it was held that the party inviting tenders could only exclude a conforming tender from consideration on reasonable grounds, such as a concern about the appearance of bias. On the other hand, there is no implied term that the competitive process must be free from apparent bias.³²⁵ However, where the party inviting tenders is a public authority, there is some support for the view that more extensive terms may be implied. In *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons*³²⁶ it was said that:

“... it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly (see the *Blackpool* and *Fairclough* cases).”³²⁷

The judge indicated that such contractual obligations derived from the European-inspired statutory procurement Regulations. Those Regulations govern not merely the procedure for considering or excluding tenders, but also deal with the methods of evaluating bids and selecting a winner. It is submitted, however, that the decision in the *Harmon* case should not be seen as imposing implied terms as to methods of evaluation and selection; rather, it should be read in the light of its facts, which concerned procedural unfairness, and in the context of its approving reference to the *Blackpool* and *Fairclough* cases. It is submitted that what the decision in the *Harmon* case establishes is that the requirements to consider conforming tenders and not to exclude them without reasonable cause are illustrations of a wider procedural principle to give equal opportunity to all bidders to make their case. Any wider interpretation would bring the *Harmon* decision into conflict with the Court of Appeal's more recent decision in *JBW Group Ltd v Ministry of Justice*,³²⁸ where it was held that importing principles from the regulations into the implied contract between the parties could not be justified in terms of the traditional tests for implication, such as business efficacy, and would, in effect, be impermissibly using principles of EU law to alter the way in which contractual terms were implied.³²⁹ A broad general

principle of procedural fairness may indeed only be applicable to tender processes initiated by public authorities, on the basis that higher standards of impartiality and fairness can be expected from state contractors. But, if the law is to reflect the “confident assumptions of commercial parties”, ³³⁰ as Bingham L.J. suggested in the *Blackpool* case, there seems to be no good reason why such a general principle of procedural fairness should not apply to all parties. ³³¹

^{319.} *Fairclough Building Ltd v Port Talbot BC* (1992) 62 B.L.R. 82 at 94, per Nolan L.J.

^{320.} *J & A Developments Ltd v Edina Manufacturing Ltd* [2006] NIQB 85.

^{321.} [1990] 1 W.L.R. 1195.

^{322.} *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1204, per Stocker L.J. In *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1 at [210] Humphrey Lloyd Q.C. commented that the *Blackpool* case “is perhaps no more than authority for the proposition that a contracting authority undertakes to consider all tenders received”.

^{323.} *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195, 1201, per Bingham L.J. For criticism see Arrowsmith (1994) 53 C.L.J. 104, 128, who argues that an authority should be free to accept late tenders “provided that all bidders are treated equally”. However, if all bidders are treated equally, that seems to be not so much an acceptance after the deadline as a moving of the deadline. Bingham L.J. seemed to have in mind a situation where only one tender had been accepted late; that would be a clear case of inequality of treatment.

^{324.} (1992) 62 B.L.R. 82.

^{325.} *Pratt Contractors Ltd v Transit New Zealand* [2004] B.L.R. 143.

^{326.} (1999) 67 Con. L.R. 1.

^{327.} *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1 at [216].

^{328.} [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10.

^{329.} [2012] EWCA Civ 8, [2012] 2 C.M.L.R. 10 at [62]–[63].

^{330.} *Blackpool & Fylde Aero Club Ltd v Blackpool BC* [1990] 1 W.L.R. 1195 at 1201.

^{331.} Arrowsmith (1994) 53 C.L.J. 104, 127 describes any bidder in a competitive tendering process as “generally expect[ing] only that they will be given a fair opportunity to obtain the contract by demonstrating that they are able to offer the best value”.

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Section 5. - Estoppel

General principles

11-046

Equitable estoppel may be successfully invoked against the Crown ³³² and public authorities, ³³³ but not to the same extent that it is available against private parties. There are four restricting factors. First, estoppel cannot be used to uphold an ultra vires transaction. Second, it cannot be used to prevent the performance of a statutory duty. Third, estoppel must not prevent or hinder the exercise of statutory powers. Fourth, estoppel has no role in matters of public law; where the circumstances are such that they would give rise to an estoppel in private law, they must be dealt with in public law using the doctrine of legitimate expectation.

Estoppel and ultra vires

11-047

Estoppel cannot prevent an act from being challenged on the ground of ultra vires. ³³⁴ For example, in *Rhyl Urban DC v Rhyl Amusements Ltd* ³³⁵ the Council had granted a succession of leases over Council land to the defendants in circumstances which would otherwise have estopped the Council from denying that it had the capacity to do so. However, it was said that “a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires”, ³³⁶ and the supposed leases were held invalid.

Estoppel and statutory duty

11-048

Estoppel cannot be used to prevent the performance of a statutory duty, provided that the duty is imposed by a statute “enacted for the benefit of a section of the public”. ³³⁷ In *Maritime Electric Co Ltd v General Dairies Ltd* ³³⁸ an electricity supplier had undercharged one of its customers by mistake; the customer had relied on the supplier’s statements as to the amounts due, and there was evidence that it had suffered detriment as a result of that reliance. However, it was held that no estoppel could be relied upon, because the supplier, in seeking payment of the full amount, was fulfilling its mandatory, unconditional statutory duty not to charge “a greater or less compensation for any service” than that fixed by statute. ³³⁹ The Privy Council was careful to limit its reasoning to statutory duties “enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense”. ³⁴⁰ It is difficult to see what kinds of statutory duties would fail to satisfy this test, but their Lordships perhaps had in mind duties imposed under a private Act of Parliament.

Estoppel and the exercise of statutory powers

11-049

Estoppel cannot be used to prevent or hinder the exercise of statutory powers.³⁴¹ Thus, for instance, in *The Mayor, Aldermen and Burgesses of the Borough of Sunderland v Priestman*³⁴² it was held that a local authority could not be prevented from exercising its powers in relation to the upkeep of roads by any prior acts done as private contractors.³⁴³ So far as hindering the exercise of a power is concerned, it was held in *Southendon-Sea Corp v Hodgson (Wickford) Ltd*³⁴⁴ that an estoppel which prevented the planning authority from adducing evidence in a dispute over the previous use of premises was not permissible.³⁴⁵ However, the Court of Appeal also stated that the principle governing the availability of estoppels against public bodies was analogous to the principle preventing an authority from fettering its discretion by contract.³⁴⁶ This indicates that not all estoppels will be held to hinder the authority's exercise of its statutory powers; rather, as with the fettering principle, an assessment must be made of the likely effect of upholding the estoppel. One situation where it would seem that an estoppel would not hinder the exercise of statutory powers is where an authority treats an application as validly made, despite it having some purely formal defect.³⁴⁷

Estoppel and public law

11-050

Where the facts of a case concern a matter of public law, estoppel has no role³⁴⁸; it cannot be asserted either by or against the public authority concerned.³⁴⁹ Any questions which would have related to estoppel, if the matter had been one of private law, must be dealt with in terms of legitimate expectation. This is not a mere matter of labelling³⁵⁰; in particular, any remedies in public law take into account the interests of the general public, whereas in private law they do not. What marks out an activity as relating to public law is difficult to define precisely. But it has been said that public law activities engage the public interest, and have an effect on members of the public who are not parties to the process to an extent that distinguishes them from private law matters, in which "interests only of those directly involved must be considered".³⁵¹ The main instances of estoppels being denied on the basis that the matter relates to public law are in the area of planning control³⁵²; it has also been held that estoppel could not be relied upon in a dispute over the granting of moorings in a public harbour.³⁵³ The question of a Minister's authority to issue a commercial guarantee has, by contrast, been held not to fall within public law; it is governed by the private law principles of agency.³⁵⁴

^{332.} e.g. *Orient Steam Navigation Co Ltd v The Crown* (1925) 21 Ll.L. Rep. 301; *Street, Governmental Liability* (1953), pp.156–157.

^{333.} e.g. *Crabb v Arun DC* [1976] Ch. 179.

^{334.} *Fairtitle v Gilbert* (1787) 2 T.R. 169; *Minister of Agriculture and Fisheries v Hulkan* Unreported 1948, summarised in *Minister of Agriculture and Fisheries v Matthews* [1950] 1 K.B. 148, 153–154; *Minister of Agriculture and Fisheries v Matthews* [1950] 1 K.B. 148; *Rhyl Urban DC v Rhyl Amusements Ltd* [1959] 1 W.L.R. 465.

^{335.} [1959] 1 W.L.R. 465.

^{336.} *Rhyl Urban DC v Rhyl Amusements Ltd* [1959] 1 W.L.R. 465 at 474.

^{337.} *Maritime Electric Co Ltd v General Dairies Ltd* [1937] A.C. 610 at 620. See also *R. v Blenkinsop* [1892] 1 Q.B. 43, 46, per Mathew J.; but quare whether, if the facts of that case arose today, the authority would not be regarded as having made a determination as to the rate, which it would be bound by (*Re 56 Denton Road, Twickenham* [1953] 1 Ch. 51).

^{338.} [1937] A.C. 610.

^{339.} *Maritime Electric Co Ltd v General Dairies Ltd* [1937] A.C. 610, 616. Breach of this duty was punishable by fine.

- [340.](#) *Maritime Electric Co Ltd v General Dairies Ltd* [1937] A.C. 610, 620.
- [341.](#) *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 Q.B. 416.
- [342.](#) [1927] 2 Ch. 107.
- [343.](#) *The Mayor, Aldermen and Burgesses of the Borough of Sunderland v Priestman* [1927] 2 Ch. 107, 116. See similarly *Stockwell v Southgate Corp* [1936] 2 All E.R. 1343.
- [344.](#) [1962] 1 Q.B. 416.
- [345.](#) Since the case related to planning matters, it would not be dealt with today in terms of estoppel; rather, as a public law matter, it would be dealt with in terms of legitimate expectation. See below, para.11-050.
- [346.](#) *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 Q.B. 416, 424. For the principle that a statutory body cannot fetter its discretion by contract see above paras 11-028—11-032.
- [347.](#) *Wells v Minister of Housing and Local Government* [1967] 1 W.L.R. 1000, 1007. Lord Denning M.R. may have been mistaken in his application of this proposition to the facts of the case: see *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348 at [30].
- [348.](#) *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348.
- [349.](#) *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2004] EWHC 1475 (QB), [2005] Env. L.R. 4 at [35].
- [350.](#) *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348 at [34]; *R. (on the application of Wandsworth LBC) v Secretary of State for Transport Local Government and the Regions* [2003] EWHC 622 (Admin), [2004] 1 P. & C.R. 32 at [22].
- [351.](#) *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348 at [6].
- [352.](#) *R. (Reprotech (Pebsham) Ltd) v East Sussex CC* [2003] 1 W.L.R. 348; *South Bucks DC v Flanagan* [2002] EWCA Civ 690, [2002] 1 W.L.R. 2601; *R. (on the application of Wandsworth LBC) v Secretary of State for Transport Local Government and the Regions* [2003] EWHC 622 (Admin), [2004] 1 P. & C.R. 32; *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2004] EWHC 1475 (QB), [2005] Env. L.R. 4.
- [353.](#) *Yarmouth (Isle of Wight) Harbour Commissioners v Harold Hayes (Yarmouth Isle of Wight) Ltd* [2004] EWHC 3375 (Ch), [2004] All E.R. (D) 66 (Dec).
- [354.](#) *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep. 198 especially at [97]–[102] (summarising counsel's submission that public law concepts should apply), and [123]–[127] (rejecting that submission). The question of authority was not challenged on appeal: *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [6].

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Section 6. - Public Procurement
(a) - European Union Legislation

11-051

⚠ Contracts made by the Crown, by public bodies and by the European Union are subject to fundamental principles of EU law such as freedom of movement of goods, freedom of establishment and freedom to provide services. The EU has also made special legislative provision to regulate the formation of such contracts in a series of Directives, ³⁵⁵ which have been implemented in the United Kingdom by statutory instruments. ³⁵⁶ ⚠ The Directives make very detailed provision for every stage of the contracting process, and require public authorities to base the award of a contract on the “most economically advantageous tender”. ³⁵⁷

Remedies for failure to follow the contract award procedure commenced after December 20, 2009 ³⁵⁸

11-052

⚠ Where a contracting authority fails to follow the prescribed procedure, damages can be awarded ³⁵⁹ ⚠; in addition, the new Regulations specify three detailed grounds on which a contract that has been entered into shall be held ineffective, including, for instance, that the authority failed to publish the required contract notice. ³⁶⁰ ⚠ If one of those grounds is satisfied, the court must make a declaration of ineffectiveness, ³⁶¹ ⚠ unless “overriding reasons” of “general interest” require that the contract should continue, ³⁶² ⚠ and it must also impose penalties. ³⁶³ ⚠ A declaration of ineffectiveness makes the contract “prospectively, but not retrospectively, ineffective as from the time when the declaration is made”. ³⁶⁴ ⚠ Wherever such a declaration is made, the court must also impose a fine, payable to the Minister for the Cabinet Office ³⁶⁵ ⚠; if a declaration is denied on the grounds of overriding general interest, either a financial penalty, a reduction in the duration of the contract, or both, must be ordered. ³⁶⁶ ⚠ In addition to these mandatory remedies, the Regulations also permit the courts to make orders addressing the consequences of declarations of ineffectiveness, such as “issues of restitution and compensation”. ³⁶⁷ ⚠

^{355.} The current Directives are Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ([2014] O.J. L 94/65), Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([2014] O.J. L 94/243) and Directive 2007/66 amending Council Directives 89/665 and 92/13 with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] O.J.

L335/31.

- [356.](#)  Public Contracts Regulations 2015 (SI 2015/102) and Utilities Contracts Regulations 2016 (SI 2016/274).
- [357.](#) 2014/24/EU art.67; 2014/25/EU art.82.
- [358.](#) For remedies relating to contract award procedures commenced before this date see the 31st edition of this work at para.10-050.
- [359.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.98(2)(c) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.113(2)(c). See further *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2017] UKSC 34, [2017] 1 W.L.R. 1373.
- [360.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.99 and Utilities Contracts Regulations 2016 (SI 2016/274) reg.114.
- [361.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.98(2)(a) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.113(2)(a).
- [362.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.100 and Utilities Contracts Regulations 2016 (SI 2016/274) reg.115.
- [363.](#)  Public Contracts Regulations 2015 (SI 2015/102) regs 98(2)(b) and 102; Utilities Contracts Regulations 2016 (SI 2016/274) regs 113(2)(b) and 117.
- [364.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.101 and Utilities Contracts Regulations 2016 (SI 2016/274) reg.116.
- [365.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.102(7) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.117(7).
- [366.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.102(3) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.117(3).
- [367.](#)  Public Contracts Regulations 2015 (SI 2015/102) reg.101(4) and Utilities Contracts Regulations 2016 (SI 2016/274) reg.116(4).

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International agreements

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Various international agreements require the United Kingdom to open its markets to the industry of particular countries outside the European Union. Such agreements do not, typically, have direct effect in English law, and may be implemented by conferring on economic entities from those countries the same rights as would be available to them under the European procurement legislation. For example, the obligations of Member States under the World Trade Organization Agreement on Government Procurement will be satisfied by applying the Community Directives on procurement to economic operators from those countries. ³⁶⁸

Domestic legislation

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Whilst there is no comprehensive domestic legislation dealing with public procurement, there are certain broad statutory obligations, especially in relation to public authorities, which may affect which contracts are entered, and on what terms. For instance, the Local Government Act 1999 imposes a duty on local authorities to:

“... make arrangements to secure continuous improvement in the way in which [their] functions are exercised, having regard to a combination of economy, efficiency and value.” ³⁶⁹

Similarly, the Local Government Act 1988 requires local authorities to exercise procurement functions without regard to certain “non-commercial” matters. ³⁷⁰ This latter obligation will be particularly significant where the contract in question is not governed by the European public procurement regime because, for instance, its value falls below the minimum specified threshold.

³⁶⁸. Directive 2014/24 preamble para.(17); Directive 2004/25 preamble para.(27). World Trade Organization, Revised Agreement on Government Procurement, art.IV.

³⁶⁹. Local Government Act 1999 s.3(1).

³⁷⁰. Local Government Act 1988 s.17.

