

PUBLIC LAW BULLETIN

Issue One - 2007

Welcome to the first issue of the Public Law Bulletin, produced by members of 3 Hare Court. We look at -

- The Public Law Shield
- Arbitration and Art 6 Rights
- The Inquiries Act 2005 and the Inquiry Procedure (UK Inquiries) Rules
- Legitimate Expectation
- Reviewing Statutory Functions

We undertake work in all areas of public and administrative law, appearing regularly for claimants, local authorities, central government departments and regulatory authorities, offering a specialist advisory and advocacy service at all levels of seniority.

Head of Chambers **James Guthrie QC**, **James Dingemans QC** and **Peter Knox QC** are recommended in the leading law directories in Administrative and Public Law.

Particular areas of public law expertise within 3 Hare Court include:

- Civil Liberties and Human Rights - Head of Chambers **James Guthrie QC** and **James Dingemans QC** are listed as Leading Silks in the Legal 500. A particular feature of our public law practice is the experience we have of cases which involve a mix of public law and civil liberties/human rights issues - examples include cases involving gender recognition, religious rights and freedoms, corporal punishment in schools and 'right to life' cases.
- Central and Local Government- **Tom Poole** is on the Treasury Solicitors' 'C' Panel of Junior Counsel to the Crown
- Judicial Review
- Parliamentary and public affairs- including drafting and advice on proposed legislation in both the UK and several overseas jurisdictions (including the *Civil Partnership Bill*); advocacy and drafting before select committees and inquiries into Private Bills (including *Crossrail*)
- Public Inquiries - **James Dingemans QC** and **Peter Knox** (now QC) were appointed Senior and Junior Counsel to the Hutton Inquiry, and **James Dingemans** is recommended in Chambers UK in this area.

We hope that you find this Bulletin interesting, and we look forward to continuing to work with you. If you would like to receive further copies, or to register to receive future issues, please contact Liz Heathfield, our Marketing Director.

James Guthrie QC, Head of Chambers; **Tom Poole**, Bulletin Editor

By Thomas Roe



It is generally an abuse of process to bring a public law challenge by an ordinary civil claim, thereby depriving the decision-maker of the protections of the judicial review procedure: *O'Reilly v Mackman* [1983] 2 AC 237. A well-known exception to that principle arises where a defendant to an ordinary civil claim raises questions of public law in his defence. The exception's scope was considered recently in *Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Limited* [2006] EWHC 1183 (Ch).

Welsh Water sued Corus for non-payment of bills which had been calculated according to 'charges schemes' it had devised under statutory powers. Such schemes required prior approval by the Director General of Water Services. The schemes had been so approved. Corus had been notified but had not, at the time, sought to challenge either the schemes or their approval. Corus did not dispute that, if the schemes were valid, it was liable. But it alleged that they were invalid and the Director General had acted unlawfully in approving them.

The water company sought summary judgment, arguing that it was an abuse of process to challenge its and the Director General's decisions in this way. The company pointed to the detriment to good administration of allowing one customer, years later, to challenge decisions which it had not questioned at the time.

Hart J rejected this argument. He relied on *Wandsworth LBC v Winder* [1985] AC 461. There, a council had decided to increase council house rents. The tenant had not challenged this at the time. But he had refused to pay the increased rent and, when eventually sued, alleged that it was not payable because the increase was invalid on public law grounds. The House of Lords permitted him to do so: he was merely seeking to exercise the ordinary right of a litigant to contend that he was not liable.

The water company argued that this exception to the *O'Reilly v Mackman* principle was only applicable where a public body was bringing proceedings which depended for their success on the validity of its own public law decision. This was different from the present case, a suit between private parties in which a prior public law decision was sought to be impugned collaterally. The supposed distinction was rejected. Hart J could see no difference in principle between the water company's statutory power to make a scheme and the council's statutory power to raise rents. The role of the Director General, he held, made no difference.

In principle it is indeed hard to see a distinction between a council suing for rent and a water company suing for

water charges, both set under statutory powers. Moreover, although Hart J did not say so, it may be that the water company overstated the extent of legitimate concern about uncertainty to other customers if Corus were allowed to argue its invalidity point. Corus was not asking the court to quash the schemes (a remedy only available in judicial review proceedings) but simply to dismiss the monetary claim against it. Whereas a quashing order renders a decision a nullity for all purposes—so that no-one need respect it—it is doubtful that a mere finding of invalidity in one private action would have the same effect. It would thus be open to the water company, even if it lost against Corus, to assert against another customer that the charges schemes were valid; a defendant who wished to have the water company bound by findings of invalidity in the Corus claim would have to persuade the court that this was necessary to avoid manifest unfairness or the bringing of the administration of justice into disrepute: see *Secretary of State for Trade and Industry v Baird* [2004] Ch 1. Nor would a claim by another customer for a refund of charges already paid necessarily succeed. Such an action would be for money paid under a mistake of law and the water company would have available the usual defences to such an action, including the defence of change of position: see generally *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

Nevertheless, the fact that Welsh Water felt it worth trying to knock out Corus's defence on this procedural technicality suggests that the "unwelcome innovation" of litigation about the form of proceedings introduced by *O'Reilly v Mackman* has not yet, as Wade and Forsyth predicted in 2004, "crept unsung from the scene" (*Administrative Law* (9th ed), p678).

ARBITRATION AND ARTICLE 6 RIGHTS

By Tom Poole



Does s69(1) of the Arbitration Act 1996 ("the 1996 Act") permit the incorporation of exclusion agreements by reference without spelling them out in the body of the arbitration clause? If so, is the position different if one or both of the parties is a public authority that must comply with s6 of the Human Rights Act 1998 and Article 6 ECHR?

These two questions were considered by Colman J. in *Sumukan Ltd. v. The Commonwealth Secretariat* [2006] 2 Lloyd's Rep 53 and answered "yes" and "no" respectively, in what was an important decision concerning the tension between arbitration agreements and Article 6 rights.

Facts

The Commonwealth Secretariat (“ComSec”), an international organisation and public authority for the purposes of s6 of the Human Rights Act, entered into a contract for services with Sumukan. This contract contained an arbitration clause, which referred disputes that cannot be settled by negotiation to the Commonwealth Secretariat Arbitral Tribunal (“CSAT”) for settlement by arbitration in accordance with CSAT’s statute (“the statute”). The statute contains an exclusion agreement for the purposes of s69 of the 1996 Act.

A dispute arose and was referred to arbitration by CSAT. The dispute was resolved in the ComSec’s favour. Sumukan applied under s69 of the 1996 Act for permission to appeal against CSAT’s award on the grounds of error of law. ComSec argued that the court had no jurisdiction to grant permission to appeal because there was a valid exclusion agreement by reason of the incorporation by reference of the statute and that it was not necessary to spell out in the body of the agreement to arbitrate that the right of appeal was excluded. Sumukan on the other hand argued that the exclusion of the right to appeal is such a draconian measure when, as here, incorporated by reference and relied on by a public authority, there must be an express reference to that exclusion on the face of the agreement to arbitrate. Alternatively, if that would not be necessary at Common Law, it must be necessary in order to comply with the requirements of Article 6 ECHR.

The Law

There is no direct authority on whether it is sufficient for the purposes s69 that a contract arbitration clause incorporates an agreement to exclude a right of appeal by reference rather than expressly stating the exclusion agreement on its face. There is, however, authority under s3(1) of the Arbitration Act 1979 (whereby the right to appeal on questions of law was first introduced into English arbitration law) that a mere reference in an arbitration clause to a body of arbitration rules was sufficient to incorporate an exclusion agreement: *Arab African Energy Corporation v Oliproducten Nederland* [1983] 2 Lloyd’s 419.

In the present case, Colman J. held that s69 continues the balancing of the countervailing aspects of public policy which underlay the Arbitration Act 1979, namely supervision by the courts of the content of awards with the purpose of maintaining and developing a predictable and coherent body of English Commercial Law on the one hand and maximising finality and party autonomy on the other hand. In the circumstances, it was held that, leaving aside ECHR considerations, the provisions of s69(1) permit the incorporation of exclusion agreements by reference.

Does the ECHR and in particular the power of the English courts under s3 of the Human Rights Act 1998 affect this conclusion?

Sumukan argued that if effect were given to the exclusion agreement by application of Common Law principles of construction of s69(1) and the analysis set out above, given that ComSec is a public authority, there

would be a breach of Article 6 ECHR by ComSec's reliance on that exclusion agreement and by the court's enforcement of it. The foundation for this argument is that the effect of an enforceable exclusion agreement would be to deprive the parties of "a fair and public hearing ... by an independent and impartial tribunal established by law".

In rejecting Sumukan's argument Colman J. held that there can be no doubt that a public authority can enter into an agreement to refer all disputes to arbitration thereby entitling them as of right to have such disputes resolved in accordance with Article 6 ECHR. Parties who, by entering into an arbitration agreement, contract into the restricted supervisory regime of s69, are not by agreeing to such restrictions acting inconsistently with the human rights of the opposing party, regardless of whether one is a public authority. In the circumstances, there is no reason why any special mechanism of communication should be introduced for the purpose of utilising the facility offered by s69(1).

Analysis

Established Common Law principles provide that contractual terms which have the effect of excluding liability can be incorporated by reference to general conditions provided that the notice given is reasonable in all the circumstances: *Circle Freight International Ltd. v. Medeast Gulf Exports Ltd* [1988]_2 Lloyd's Rep 427. In the premises, where consensual exclusion of the right to appeal represents a means of enhancing party autonomy and the achievement of finality, both of them foundations of the 1996 Act, there is no good reason why the test of what is reasonable notice of an exclusion agreement should present a particularly high threshold and, in particular, one which would be higher than that required under the 1979 Act.

This is the position whether one or both of the parties concerned is a public authority for the purposes of s6 of the Human Rights Act 1998. The rationale being that no more protection is needed when excluding a right of appeal than the initial stage of agreeing to arbitrate, for both involve a statutorily permissible consensual disengagement from what would otherwise be an entitlement under Article 6.

THE INQUIRIES ACT 2005 AND THE INQUIRY PROCEDURE (UK INQUIRIES) RULES

By James Dingemans QC



Introduction

The Inquiries Act 2005 received Royal Assent on 7 April 2005 and came into force on 7 June 2005. It is designed

to provide a single, uniform set of rules and procedure for the establishment and conduct of statutory inquiries set up by a Minister in response to a matter of public concern.

The Act repealed and replaced the Tribunals of Inquiry (Evidence) Act 1921. It also repealed numerous sections in some 47 other pieces of legislation regarding statutory inquiries (listed in Schedule 3). It should ensure that *ad hoc* inquiries, which are currently set up without any statutory backing, are put on a proper footing and given proper powers to have evidence given on oath. This is important in circumstances where there has been increasing use by the executive of *ad hoc* inquiries.

Scheme of the Act

Sections 1 to 14 of the Act concern the steps to be taken by the relevant Minister in setting up the inquiry, with particular regard to the constitution of the inquiry panel, the time period over which the inquiry is to run, terms of reference and duties of the Minister to consult the inquiry chairman. By s1, a Minister may cause an inquiry to be held in any case where it appears to him that particular events have caused, or are capable of causing public concern; or there is public concern that particular events may have occurred.

Sections 15 and 16 provide for the conversion of inquiries under previous schemes into inquiries to which the new scheme applies.

Sections 17 to 23 deal with the conduct of proceedings, in particular in relation to evidence, the powers of the chairman and public access to the proceedings. Under s18, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able to: attend the inquiry and hear a simultaneous transmission of the proceedings; and to obtain or to view a record of the evidence and documents given to the inquiry (s18(b)). However, this duty is subject to s19.

Sections 24 to 26 make provision for reports of the inquiry and their publication. Sections 27 to 31 concern Scottish, Welsh and Northern Irish inquiries. Sections 32 to 34 deal with joint inquiries.

The remainder of the Act consists of supplementary provisions creating offences and dealing with matters such as remuneration and time limits for applying for judicial review.

Rules of Evidence and Procedure

Section 41 of the Act provides that the “appropriate authority” may, by statutory instrument, make rules dealing with, amongst other things, matters of evidence and procedure in relation to inquiries. The “appropriate authority” for inquiries for which a UK Minister is responsible is the Lord Chancellor.

The rules

The Department of Constitutional Affairs conducted a consultation on the content of a draft set of procedural rules headed the “Inquiry Procedure (UK Inquiries) Rules

2006". These rules make provision for: appointment of counsel, solicitor and secretary to the inquiry; delegation of functions; provisions of estimated budgets; timetabling; rights to legal representation; hearing of evidence; dealing with restricted evidence; warning letters; reports and records management. The consultation ran until 23 May 2006 and the response to the consultation was published on 17 August 2006. Following consultation, the Rules were submitted to Ministers to be made under s41(1) of the Act. They were subject to the negative resolution procedure in Parliament and came in to force on 1 August 2006.

For the large part the Rules provide a workable and sensible scheme to supplement the Act. However, there are a number of areas of concern. It is not possible to deal with all of these. Two of the main areas of concern are identified here.

Restriction notices

The first area of concern is that provision has been made for "restriction notices" under s19, restricting public access or the disclosure of documents. A notice under this clause may be given by the Minister without consultation, and only the Minister may vary or revoke that notice. Further, although s25 provides for the publication of this report, it also provides for the withholding of certain material. Material can be withheld from publication if it is considered necessary in the public interest. The matters to have regard to in determining the public interest are set out in s25(5).

There is a risk that these provisions might be used to prevent material entering the public domain which should be in the public domain. A Minister may issue a notice which prevents potentially relevant material from being disclosed (although it would still be available to the inquiry), or he or she may withhold the publication of such material. These provisions are in addition to powers which permit information to be withheld from the tribunal on the grounds of public interest immunity, see s22(2). It appears to follow, therefore, that material may fail to reach the threshold required for public interest immunity, but still be withheld from publication under s25 or be the subject of a restriction notice under s19. This is a very significant power granted by the legislature to the executive.

The position has not improved with the Rules, which provide at rule 20 for the making of applications in relation to the withholding of evidence or documents. The Rules provide for an important (and it might be considered unwarranted) extension of the restrictions on public access to evidence. Rule 20(1)(a) creates a category of documents of "potentially restricted evidence" in relation to evidence where a relevant application which has not been determined. A relevant application includes (rule 20(1)(b)(i)) an application to the Minister to determine that a restriction notice should apply. The net effect of all this is that documents can be disclosed to the Inquiry, who will be effectively unable to make use of them, while the Minister takes time to decide whether or not to issue a restriction notice in respect of the documents. This will enable Inquiry proceedings to

be effectively delayed. It means that the executive might be able to take control of the timetable of the Inquiry.

Restriction of funding

The second concern (which was one of the concerns highlighted by Amnesty International and the Joint Committee on Human Rights) relates to the powers given to Ministers to restrict the funding available to inquiries. If the inquiry has been set up to discharge the duties on the State to provide an independent and appropriate inquiry into deaths pursuant to Art 2 of the ECHR, it is possible that the threat of a withdrawal of funding by the Minister could, of itself, compromise the independence of an inquiry.

Provision is made in rule 12 for an estimated budget and for publication of the budget. Rule 28 provides for the making of applications for an award under section 40(1) of the Act. Rule 29 sets out the criteria to be applied in determining applications for an award. Relevant criteria include: the financial resources of the costs claimant; and the public interest in the costs claimant's expenses being paid. Provision is made for costs to be assessed by a "primary costs assessor" and on appeal, a "final costs assessor". The Chairman may prevent any appeal to the "final costs assessor" (if the Chairman considers the appeal of the costs claimant to be vexatious), but the chairman has no power to intervene in the event that the "final costs assessor" does not deliver what is considered to be an appropriate result. This means that the independence of the final costs assessor from the executive becomes of considerable importance. The definitions in rule 2 define a "final costs assessor" to mean "in England and Wales, a costs judge".

Conclusion

Although the Act and Rules do ensure that *ad hoc* inquiries are put on a proper statutory footing, the process by which it does so still might be considered in certain specific respects to leave too much power in the hands of the executive. It is the executive which is responsible for establishing the inquiry in the first place. Once the threshold (public concern) set out in s1 of the Act has been passed and an inquiry established, it might be thought that the powers of any inquiry should no longer be subjected to the powers of the executive.

LEGITIMATE EXPECTATION – CONTEXT IS EVERYTHING

By Sarah Crowther



Despite expansive judicial statements as to the principles underlying legitimate expectation as a basis for quashing administrative decisions and actions, it

appears that in fact the trend is for the ambit of the doctrine to be increasingly circumscribed.

In *R (On the application of Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 163, Laws LJ summarised the authorities and suggested that the theme which runs through them all was,

“Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so.”

However, as Bean J pointed out in *R (On the application of Tinn and others) v (1) Secretary of State for Transport (2) Cambridgeshire County Council* [2006] EWHC 193, paragraph 32, *context in these claims is everything*. And it would appear that the closer one looks into the context, the less likely it is that the courts will be persuaded that an abuse of power has taken place by virtue of a failure to fulfil a legitimate expectation.

The first practical hurdle at which many cases falter is the requirement to show a practice or policy which has not been followed. For example, the claimants in *Tinn* failed to satisfy the Court on the evidence that there was a legitimate expectation that consultation in relation to a new road development would take place on more than one route. Similarly in *R (On the application of Merseyside Passenger Transport Authority) v Secretary of State for Transport* [2006] EWHC 226, it was held that the promise of £170m funding for the Merseyside Tram Project given by the minister was conditional and the claimants had failed to show that the conditions had been complied with. Further, any such expectation as the claimants may have had would have ceased as at the date when the promise of funding was finally withdrawn.

Even if there is a clear policy or practice, following the principles set out in *ex parte Coughlan* [2001] QB 213, such policy or practice must purport to confer a benefit on an individual or individuals. This was illustrated in *R (Parents for Legal Action Limited) v Northumberland County Council* [2006] EWHC 1081. There was a statutory consultation in relation to the proposal to change the Northumberland education system from three-tier to two-tier. The claimants sought to challenge the proposals, in particular citing a resolution by the defendant to obtain independent evaluation of the plan before moving onto stage 2 of the consultation process. When the defendant in fact failed to obtain any such independent evaluation, the claimant’s claim that this was in breach of a legitimate expectation failed on the grounds that a legitimate expectation cannot arise from a decision made by a public authority purely for its own purposes. An individual must show that the practice or policy was potentially to his benefit and usually reliance.

Having got that far it is then for a claimant to persuade the Court that the decision maker’s resiling from his previously stated practice or policy is “so unfair as to

constitute an abuse of power” (*ex parte Rowland v Environment Agency* [2003] EWCA Civ 1885 [2005] Ch 1). In the *Parents for Legal Action* case, it was held that even had the promise to obtain independent evaluation formed the basis of a legitimate expectation, it involved no abuse of power for the defendant to change its mind. Similarly in *R (Thomas Lindley) v Tameside MDC* [2006] EWHC 2296, the defendant was entitled to change its mind where the factual situation (in this case the claimant’s care needs) was continually changing. Equally in the Tower Hamlets election case, *R (Begum and others) v Returning Officer for LB of Tower Hamlets* [2006] EWCA Civ 733, it was held that even though the returning officer had offered to check election nomination forms which were submitted in good time for validity but had failed to do so because the forms in question had been misfiled, it was not an abuse of power for the returning officer later to rely on the invalidity of the forms in order to exclude candidates from an election. The causative error was that of the candidates’ agent who had entered incorrect information on the forms.

REVIEWING STATUTORY FUNCTIONS

By Tom Poole



The appellant “(M)” appealed against decisions of the Supreme Court of Mauritius that decisions of the respondent Director of Public Prosecutions of Mauritius (“the DPP”) to discontinue private prosecution proceedings was not susceptible to judicial review. M had brought two private prosecutions against a senior political figure charging him with harbouring a criminal under the Mauritian Criminal Code s172(1). In each instance the DPP entered a nolle prosequi, discontinuing the private prosecution. M unsuccessfully applied for judicial review of the DPP’s decisions. M brought further private prosecutions and again the DPP entered nolle prosequis. M’s application for judicial review of those decisions was also refused.

The Supreme Court of Mauritius held that decisions of the DPP to stop a prosecution were not subject to judicial review, as the DPP was in the same position as the Attorney-General in England & Wales. In other words, the DPP in Mauritius, when entering a nolle prosequi, was exercising power akin to the prerogative power granted to the Attorney-General, which is not amenable to judicial review. M appealed to the Judicial Committee of the Privy Council.

Appeal to the Privy Council

The Privy Council approached the issue on the ordinary assumption that the powers conferred on the DPP by the

Constitution of Mauritius were subject to judicial review, *R v. Panel on Takeovers and Mergers, ex.p. Datafin Plc.* [1987] 2WLR 699 applied. In the premises, the DPP could not rely on the immunity that was provided in the past to the English Attorney-General when exercising the prerogative power to enter nolle prosequi; as the DPP, unlike the Attorney-General, was not answerable to Parliament. The DPP had no prerogative power, his power was derived from the Constitution, and the Constitution did not use the language of nolle prosequi. Decisions of the English DPP were, in principle, reviewable and the same view had been taken under the Constitution in Ireland.

Further, the extreme possibility of removal of the DPP under the Constitution did not provide an adequate safeguard against unlawfulness, impropriety or irrationality. Recognition of a right to challenge the DPP's decisions did not involve the courts substituting their own administrative decisions for his. Where the grounds for challenging the DPP's decisions were made out, it involved the courts in requiring the decision to be made again, *Lagesse v Director of Public Prosecutions* (1990) MR 194 doubted. In the circumstances, there was nothing to displace the ordinary assumption that a public officer exercising statutory functions was amenable to judicial review on grounds such as those listed in *Matalulu v DPP* (2003) 4 LRC 712, *Matalulu* applied. The case of *Matalulu* provided an accurate and helpful summary of the law applicable in Mauritius. Accordingly, the judgments of the Supreme Court would be set aside and it would be invited to reconsider M's applications.

Analysis

The Privy Council did not have to decide whether the prerogative power to enter a nolle prosequi was amenable to judicial review. In the instant case there was nothing to displace the ordinary assumption that a public officer exercising statutory functions was amenable to judicial review. Recognition of a right to challenge the DPP's decisions does not involve the courts substituting their own administrative decisions for his. Where the grounds for such challenge are made out it involves the courts requiring the decision to be made again.

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