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CASE AND COMMENT

LEGITIMATE EXPECTATIONS AND UNLAWFUL REPRESENTATIONS

ENGLISH administrative law has long struggled with the problem of unlawful statements issued by or on behalf of public authorities, upon which individuals go on to rely. The potential injustice to those who discover, after the expenditure of time and money, that apparently authoritative assurances are actually worthless has occasionally been addressed by invoking the concept of estoppel, so as to prevent public authorities from resiling from their officials' ostensibly reliable statements (see, *e.g., Lever Finance Ltd.* v. *Westminster LBC* [1971] 1 Q.B. 222, *per* Lord Denning M.R.).

However, concern for the individual's welfare must be tempered by reference to a wider public interest in lawful decision-making by the designated agency pursuant to the statutorily-prescribed procedure. The almost insurmountable obstacle to the establishment of estoppels in public law cases erected by judicial emphasis on such public interest concerns (see *Western Fish Products Ltd.* v. *Penwith DC* [1981] 2 All E.R. 204) has now become an absolute barrier, in view of the courts' willingness to follow obiter dicta in *R. (Reprotech (Pebsham) Ltd.)* v. *East Sussex CC* [2002] UKHL 8, [2003] 1 W.L.R. 348 (noted at (2003) 62 C.L.J. 3) to the effect that estoppel should be confined to the private sphere in which it was developed, leaving legitimate expectation as the central principle in this area of public law. Does this mean that it is now possible to found a *legitimate* expectation upon an *unlawful* representation? Although some post-*Reprotech* decisions (*e.g. South Buckinghamshire DC* v. *Flanagan* [2002] EWCA Civ 690, [2002] 1 W.L.R. 2601) have hinted that this may be possible when such

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undertakings are promulgated with ostensible authority, these issues were the subject of more thoroughgoing attention in *Stretch* v. *UK* (2004) 38 E.H.R.R. 12 and *Rowland* v. *Environment Agency* [2003] EWCA Civ 1885, *The Times*, 20 January 2004.

In the former, the applicant purchased from a local authority a 22-year lease which obliged him to erect industrial buildings and conferred an option to renew for a further 21 years. When renewal negotiations had reached an advanced stage, the local authority informed the applicant that the option could not be exercised because, *inter alia*, its statutory predecessor never had legal capacity to grant such an option. This argument met with grudging acceptance in the Court of Appeal (*Stretch* v. *West Dorset DC* (1999) 77 P. & C.R. 342), Peter Gibson L.J. noting that it seems "unjust" that public bodies which misconstrue their powers should be able to "take advantage of their own errors to escape from the unlawful bargains that they have made".

The European Court of Human Rights, however, was unwilling to accept the insuperability of the legal incapacity argument. Without reference to it, the Court held that the applicant had acquired a legitimate expectation of exercising the option; that, for the purposes of Article 1, Protocol 1 of the European Convention on Human Rights, this could be characterised as attaching to the property rights arising under the lease, and that the local authority's conduct frustrated the expectation. The issue of legal incapacity was considered only at the final stage of the analysis. Here, in assessing whether the option's non-enforcement could be objectively justified, the Court accepted that the "doctrine of *ultra vires* ... provides an important safeguard against abuse of power", but concluded that damages should nevertheless be awarded because, on the facts, it could not be argued that the local authority had "acted against the public interest in the way in which it disposed of the property under its control or that any third party interests or the pursuit of any other statutory function would have been prejudiced by giving effect to the renewal option". The significance of this analysis lies in its treatment of legal incapacity merely as a factor to be placed in the balance when deciding whether the legitimate expectation may lawfully be frustrated. This is in stark contrast to the English authorities' mechanical presupposition that the public interest in legality is necessarily of overriding force.

There are considerable difficulties in attempting to map the *Stretch* approach onto domestic law, as *Rowland* illustrates. The case concerned undertakings (by way of regular and consistent practice) by the defendant and its predecessors to the effect that public rights of navigation did not exist over a stretch of the River

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Thames known as Hedsor Water. However, in 2001, the defendant decided that such rights did exist, and ordered the claimant to remove signs giving the contrary impression. The Court of Appeal agreed that public rights of navigation existed over Hedsor Water, holding that it was beyond the defendant's powers to extinguish them. Although the Court accepted that the conduct of the defendant and its predecessors was sufficient to give rise to a legitimate expectation, and that the claimant and her late husband's reliance upon the implied representations was reasonable, the claim was "bound to fail under English domestic law" because "there can only be a legitimate expectation founded on a lawful representation or practice" (*per* Peter Gibson L.J.).

While May L.J. (like Mance L.J.) reached the same conclusion, he did so with "undisguised reluctance", lamenting the fact that authority prevented the Court of Appeal from reviewing a "defective" area of law and obliging it to "uphold an unjust outcome". His Lordship would have preferred to adopt the view of Craig (see *Administrative Law* (London 2003), pp. 675–680) that legal incapacity should not automatically be considered an insuperable obstacle, and that any potentially damaging effects of enforcing unauthorised representations should instead be balanced against the harm likely to be occasioned to the individual by frustrating the expectation.

Although the legal incapacity argument prevailed at common law, the Court recognised that further reflection was required as a result of *Stretch*. The Court found that the legitimate expectation constituted a "possession" which would be entitled to protection under Article 1 of Protocol 1 unless interference could be shown to be necessary and proportionate. Mance L.J. therefore observed that, in cases concerning ECHR rights, "it can no longer be an automatic answer ... to a case of legitimate expectation, that the Agency had no power to [fulfill the expectation]". This, however, was without prejudice to the fact that the Court "cannot grant relief which would have the effect of obliging the Agency to continue to treat Hedsor Water as private".

While the latter proposition is uncontroversial, it does not follow that *any* protection of unlawfully-generated expectations is impossible. Where, for example, *ultra vires* decisions have already been taken in line with such expectations, the courts' remedial discretion might be exercised so as to leave such decisions intact. The situation which arose in *Rowland*, in which enforcement of an unlawful promise was sought, is more problematic, but a partial solution was embraced. Mance L.J. explained that while "the Agency could not, even bearing in mind any contrary legitimate

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expectation, be expected to perform acts exceeding its actual powers", it could be required to "alleviate any injustice by benevolent exercise of its powers". It was, however, sufficient for the defendant to act (as it had already undertaken to) in a manner sensitive to the claimant's expectation by not actively promoting public use of Hedsor Water. There is no reason in principle why this approach should not also be applied in cases not involving Convention rights, although its capacity to satisfy disappointed individuals will remain limited unless a more extensive duty to act benevolently is developed in subsequent cases.

Compensation in lieu of fulfilment of the expectation was not sought in *Roland*, but is advanced by some commentators (*e.g.* Wade and Forsyth, *Administrative Law* (Oxford 2000), p. 343) as the best means by which to reconcile competing public and private interests in this sphere. Others, however, including May L.J. in *Rowland*, feel that enforcement of unlawfully-generated expectations, if acceptable on a balancing test, is "a fairer and more proportionate outcome than for the public purse to compensate" the disappointed individual. It is, moreover, unclear on what basis compensation could be made available (except where misleading advice is given negligently): where breach of an expectation implies violation of a Convention right, the use of section 8 of the Human Rights Act 1998—the obvious vehicle for a damages claim in such circumstances—would seem to be barred by section 6(2), which provides that it is not unlawful for a public authority to act in a given way when primary legislation constrains it to do so.

An alternative approach—countenanced at first instance in *Rowland* by Lightman J: [2002] EWHC 2785 (Ch), [2002] Ch. 581—might be to imbue with greater substance the requirement to act benevolently when frustrating unlawfully-generated expectations. Drawing upon *S* v. *France* (1990) 65 D.R. 250 and dicta in *Marcic* v. *Thames Water Utilities Ltd.* [2002] EWCA Civ 64, [2002] Q.B. 929 (reversed by the House of Lords: [2003] UKHL 66, [2003] 3 W.L.R. 1603), it may be argued, subject to the terms of relevant legislation and any margin of appreciation, that the exercise of a given power so as to elevate community interests over those of an expectation-holder may—and hence must: section 6(1), Human Rights Act 1998—be rendered compatible with the expectation/right by compensating its holder, thus striking the fair balance between individual and wider public interests demanded by the Convention. Whether English courts are willing to give teeth of this sort to the benevolent exercise of power doctrine, however, remains to be seen.

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