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Damages in Judicial Review: The Commercial Context

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INTRODUCTION

The Law Commission has again called for reform of the remedies available in judicial review proceedings. Alongside a range of proposed reforms in the field of tort (which are outside the scope of this article), the Commission recommends the statutory introduction of damages as a remedy in judicial review proceedings, irrespective of any tortious or other private law claim giving rise to a right to damages.[1]

As noted in Christopher Knight's recent review of this journal's, now decade-old, survey of leading public law silks, there is a long-standing desire amongst some members of the profession for damages to be available for maladministration, or on other judicial review grounds, in order to address the perceived inadequacies in certain circumstances of the existing prerogative and other remedies.[2] However, the difficulties (of both practice and principle) involved in the introduction of judicial review damages have also long been recognised.

While the Law Commission has identified many areas requiring further analysis, it appears to have failed fully to consider some of the grounds for caution that arise particularly in the field of commercial judicial review. This article highlights the possible effect of the introduction of a damages remedy on commercial entities, both as would-be claimants and as potential defendants (or interested parties), and on public authorities engaged in the commercial sector.

PURPOSE OF JUDICIAL REVIEW AND THE ROLE OF DAMAGES

The absence of a right to damages on judicial review grounds has historically been justified principally on the basis that the purpose of the supervisory jurisdiction of the Administrative Court is not to compensate individuals but to act as a check on the exercise of the powers of public bodies. As noted by Lord Woolf in the 2005 ALBA annual lecture:

"*The justification for not giving damages for judicial review is that the proceedings are brought for the benefit of the public as a whole, good administration being for the benefit of the public as well as the individual applicant*."[3]

However, like the Law Commission, and many members of the profession, Lord Woolf also questioned why the court should not also be empowered to award damages to an individual who has suffered loss as a result of maladministration.

The theoretical distinction between a supervisory and compensatory jurisdiction is brought into stark contrast when the practicalities of awarding damages in judicial review proceedings are considered. The court is rightly wary of substituting its own decision for that of the public authority. The introduction of a damages remedy may, however, undermine this approach, as the quantum of, if not entitlement to, damages is likely to be contingent upon the remaking of the impugned decision.

There may, of course, be circumstances where the only lawful outcome is obvious, and then the court will be justified in effectively substituting its own decision. However, such occasions are rare. Unless the long-standing judicial jurisprudence preventing the court from substituting its own decision for that of the public authority is overturned (which would raise further, serious issues), the court will in most cases have to remit the decision to the original decision-maker, with determination of damages to be deferred until the decision has been "re-made".[4] The Law Commission suggests that, in these circumstances, if the decision-maker makes a lawful decision that renders any loss of the claimant nugatory (ie does not make a decision in favour of the claimant), then no damages could be awarded (paras 4.24-4.25).

However, such deferral will create, at the very least, an extremely awkward situation. Unless prohibited from doing so, the award of significant damages upon the making of a particular decision may well be a legitimate relevant consideration to be taken into account by the public authority when making that decision. As a matter of reality, it is bound to be a significant part of the context in which any new decision is made. As such, it risks creating a perverse incentive for the public authority not to make the decision in favour of the claimant.

LIMITATIONS ON THE AVAILABILITY OF DAMAGES AND THE QUESTION OF "TRULY PUBLIC"

Recognising that any right to damages for victims of substandard administrative action must be tempered by consideration of the "multifaceted burdens placed on public bodies" (para. 4.1),[5] the Law Commission proposes that the availability of judicial review damages should be restricted to circumstances where the claimant could establish (inter alia) (para. 4.103):

(a) that the defendant was engaged in a "truly public" activity;

(b) that the applicable legislative scheme confers a benefit on the claimant;

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1 Law Commission Consultation Paper No. 187, "Administrative Redress: Public Bodies and the Citizen" (17 June 2008).

2 Christopher Knight, "Judicial Review's Silk Survey - Ten Years On" [2008] JR 184, para. 6.

3 Lord Woolf, "Has the Human Rights Act made Judicial Review Redundant?" Alba Annual Lecture (23 November 2005).

4 Law Commission, n. 1 above, para. 4.171

5 See also paras 4.9, 4.84 - 4,85, Appendix A

(c) that the relevant failure of the defendant was a "serious fault"; and

(d) that failure of the defendant caused loss to the claimant.

Each of those limitations will inevitably raise questions of interpretation, but perhaps the most difficult is the requirement that the defendant be engaged in a "truly public" activity. Exactly what this means (and how it differs from the existing justiciability test) is unclear. The question of justiciability has, in any event, caused no little difficulty for the court in the context of human rights and judicial review claims.

According to the Commission (para. 4.103(1)):

"*The proposed ambit of the scheme is when public bodies act in a manner which is 'truly public'. In the public law scheme, this will be satisfied by virtue of the body being amenable to judicial review .... In determining what constitutes 'truly public', we suggest a test based on whether the contested action was conducted in the exercise of a statutory power or the prerogative*."

The two tests apparently elided in this suggestion are inconsistent: if the concept of "truly public" is intended to be limited to the exercise of a statutory power (or duty) or of the prerogative (paras 4.123, 4.131), then it is clearly a long way from being equivalent to the question of amenability to judicial review. Similarly, the proposed requirement that the legislative scheme confer a benefit on the claimant fails to address the fact, recognised elsewhere, that many public law powers and duties are non-statutory. These inconsistencies (which are not addressed in the consultation paper) make it difficult to understand the intended scope of the damages remedy.

IMPACT ON COMMERCIAL ENTITIES

The consultation paper seems to assume that the adverse consequences of an expanded liability in public law will be borne solely by public bodies. This assumption is also reflected in the lengthy prior consultation apparently focused on central and local government.

Given the continuing expansion of the types of bodies amenable to judicial review resulting from the increasing emphasis on function over nature and the growth of PPP, PFI and similar arrangements, such an assumption is unsustainable. Thus, private regulatory bodies.[6] airport operators,[7] industry trade associations,[8] independent schools[9] and the managers of a private psychiatric hospital[10] have all been found to be amenable to judicial review.

In some cases, this amenability to judicial review has been based on the exercise of statutory powers or duties by the private organisations on behalf of public authorities. In such cases, even on the restrictive view of the meaning of "truly public", the proposals may, at least occasionally, provide a new public law remedy in damages against commercial entities. In this regard, despite stating repeatedly throughout the consultation paper that the new liability should only be available against bodies carrying out functions that are uniquely carried out by public bodies (paras 4.110, 4.120, A.32), the Commission does acknowledge, without any further consideration, that "a private body exercising a public function, such as a private company providing a prison, should be treated as if it were a public body performing that function" (para. 4.114).

It may be the case that, for many of the same reasons said to justify judicial review damages against public authorities, commercial entities carrying out public functions should also be liable for compensatory damages in circumstances where they fail to perform those functions properly. However, the impact of such an expansion needs to be properly considered: as it will introduce new risks for commercial entities working on behalf of or with public authorities, those risks will need to be factored into the costs paid for services by the public authorities. The "hidden costs" arising from such increased legal risk will ultimately be borne by the public purse.

The involvement of commercial entities in the exercise of "truly public" functions also raises interesting questions as to their liability in proceedings where they are joined as interested parties. For example, a commercial entity may contribute to the exercise of a statutory duty, such as by carrying out public consultation that forms the basis for the impugned decision of a public authority. That entity will consequently be involved in proceedings as an interested party. If the consultation is found to be inadequate, will it be jointly and severally liable for, or will the public authority be able to seek a contribution from it to, any damages that are awarded? The answer to that question will not only affect the "hidden costs" in any arrangement between the public and private sectors, but also the involvement of such commercial parties in judicial review proceedings. If damages are potentially to be awarded against interested parties, then their own interests will be engaged and their full involvement in the proceedings necessary. As such, the general presumption against such parties being awarded their costs will therefore also need to be reconsidered.

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6 *R v Panel on Takeovers and Mergers ex p. Datafin plc* [1987] QB 815; *R v Advertising Standards Authority Ltd ex p. Insurance Service plc* [1989] 133 SJ 1545; *R v Code of Practice Committee of the Association of the British Pharmaceutical Industry ex p. Professional Counselling Aids Ltd* (1990) 10 BMLR 21; *R (Ford) v Press Complaints Commission* [2001] EWHC (Admin) 683 [2002] EMLR 5.

7 *R v Fairoaks Airport Lid ex p. Roads* [1999] COD 168.

8 *R v Code of Practice Committee of the British Pharmaceutical Industry ex p. Professional Counselling Aids Lid* (1991) 3 Admin LR 697

9 *R v Cobham Hall School ex p. S* [1998] ELR 389.

10 *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin) [2002] 1 WLR 2610.

PROCEDURAL CONSIDERATIONS

The extent of such "hidden costs" is also likely to be exacerbated by the procedural requirements of introducing a new judicial remedy in damages. In this regard, one of the common reasons given for not introducing a right to judicial review damages relates to the perceived procedural limitations of the judicial review process. For example, the Administrative Court is generally not considered an appropriate forum for deciding complex questions of fact, given the general presumption against significant disclosure of documents and the cross-examination of witnesses (para. 420). The Law Commission addresses such concerns by referring to the inherent flexibility of the court to adjust its procedures under the Civil Procedure Rules and proposes that such additional procedural requirements could therefore be easily accommodated (para. 421).

The Law Commission does, in part, also recognise the obvious criticism to such proposals: the Administrative Court is already hugely overburdened and any increase in the use of disclosure and cross-examination is unlikely to improve this situation. However, the Law Commission's response - that measures are underway to reduce the court's burden (para. 4.12)[11] and that, according to their research, damages would only be available in a small number of cases (9 out of 310 in 2007) (paras 6.20-621) - fails properly to recognise either the potential extent of the burden or of the "hidden costs" resulting from such additional procedures, particularly in a commercial context.

Seemingly implicit in the Law Commission's analysis is that disclosure and the hearing of witnesses is likely to be relatively simple. That may be so in "traditional claimant" judicial review. It would, however, rarely be the case in a commercial context. For example, in the case of a challenge to a commercial regulatory decision, the disclosure and examination of (factual and expert) witnesses likely to be required for the consideration of "serious fault", "causation" and, ultimately, the quantum of damages will be considerable and well beyond the extent envisaged by the Law Commission, and the traditional role of the Administrative Court.

Such an increase in the extent of disclosure and witness involvement is likely to have three significant adverse effects. First, where a claim is unsuccessful, the irrecoverable costs of defending the claim may be substantial, particularly if only one set of costs is awarded in multi-party judicial review. This increased cost risk, together with the increased obligation of disclosure and risk of liability, will be likely to affect the willingness of commercial entities to operate in the public sector, and, if they do, the risk margins they charge onto the public purse.

Secondly, the risk of such significant adverse cost consequences may dissuade claimants from commencing proceedings, thereby leaving a decision reached by way of maladministration in place and heightening the very injustice the introduction of judicial review damages is designed to eliminate. Such risk is unlikely to be mitigated by a protective costs order; the significant private interest required to support a claim in damages is likely to be inconsistent with the criteria for making such an order.

Thirdly, increased use of disclosure and cross-examination of witnesses would inevitably result in further delays even if the court was not already overburdened, particularly in commercial cases. Such delays are not conducive to efficient public administration and decision-making, which the short limitation period for bringing judicial review proceedings and the comparatively efficient procedures used thereafter have been introduced to protect, and will potentially result in additional costs being incurred by the public authority and any third parties affected by the relevant decision as a result of extended delays.

The increased availability of disclosure also brings with it a related risk that claimants (including, potentially, commercial claimants) will use damages claims to justify extensive disclosure applications, which are in reality "fishing expeditions" for information either to bolster their judicial review claim or for other ulterior purposes. The court has long been adverse to the use of disclosure for such purposes, but avoiding such use may be difficult where questions of "serious fault" and "causation" need to be considered properly by the parties and the court.

IMPACT OF THE COMMERCIAL CONTEXT ON PUBLIC AUTHORITIES

The impact on public authorities of claims for damages by commercial entities in judicial review must also be considered. The substantial increase in risk faced by the public authority may well have consequential effects on the authority's style of administration.

With respect to the extent of the potential liability of public bodies, the Law Commission makes clear that it envisages that damages should be available where a statutory licence is wrongly refused to compensate for any lost income resulting from not having a licence. Where a licence is refused to a large organisation the potential losses of that organisation will be considerable. It is obvious that there are a range of analogous decisions in the regulatory sphere that have substantial commercial implications and thus could give rise to very significant liability.

This is not to say that such damages should not be paid as of principle. They will, however, have a significant impact on the relevant public authority's accounts and will potentially hinder the performance of their other functions, and it is important that such effects are properly assessed. Furthermore, the Law Commission acknowledges that additional liability risk

[11] See also para. 4.32

could have a range of effects on a public body's style of administration (B.83). In this respect, such significant damages will undoubtedly create further perverse incentives for public authorities to grant licences or to award contracts to those organisations they think most likely to pursue litigation, thereby avoiding the risk.

CONCLUSION

That there are cases in which individuals suffer loss at the hands of a maladministrative public authority, and yet those individuals are unable to be compensated for that loss, is irrefutable. There is, therefore, as has long been recognised, a sound moral case to be made for providing such a remedy. Such a proposal is not, however, without difficulties in practice and the implications for judicial review proceedings, for commercial entities engaging with the public sector, and for the way in which public authorities conduct themselves, are potentially very significant. Those implications appear not to have been fully appreciated by the Law Commission, and need to be addressed.

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