Charles Terence Estates Limited v Cornwall Council: Public Law *Ultra Vires* as a Defence to a Private Law Claim

In *Charles Terence Estates Limited v Cornwall Council* [2012] EWCA 1439, the Court of Appeal has demarcated the limits of the defence of public law *ultra vires* to contractual claims. This case update analyses this important decision, which should give some welcome relief to private contractors dealing with local authorities. However, it will also serve to remind the private sector that the capacity of public authorities to enter into contracts continues to play an important role in circumscribing the enforceability of the underlying transactions.

Facts

Against a backdrop of a central policy requiring the securing of semi-permanent housing for those in priority need, two Cornish local housing authorities (later subsumed within the new unitary authority Cornwall Council ("Cornwall")) entered into commercial arrangements with Charles Terrence Estates Limited ("CTE"), under which CTE purchased identified properties and leased them back to the housing authorities. The housing authorities then sublet or licensed the properties to constituents in discharge of their statutory duties to provide accommodation pursuant to the Housing Act 1996. After its establishment as the unitary authority for the whole of the Duchy, Cornwall reviewed the arrangements and decided to stop paying rent. CTE commenced private law proceedings.

At first instance, Cornwall successfully raised the defence that its predecessor authorities had acted *ultra vires* by entering into leases without having regard to market rents. Cornwall said that s.17 of the Housing Act 1985 (which gives power to acquire leases) impliedly contains a condition that any such acquisitions should be at a reasonable (market) price negotiated by a local authority acting in compliance with the fiduciary duty owed to Council Taxpayers. The former authorities had not had regard to market rents, and so had breached their fiduciary duties. The result was that the leases were *ultra vires* in both a public and private law sense, and so void. CTE took the matter to the Court of Appeal, which overturned Cranston J's decision.

Decision

There were 2 issues on the appeal: (i) did Cornwall's predecessor authorities breach their fiduciary duties, and (ii) if so, what was the consequence of that finding as a matter of private law?

The Court of Appeal found unanimously in favour of CTE on the first issue, on the case-specific basis of lack of expert evidence and because there was no proper basis on which to import the words "at a reasonable price" into the Housing Act 1985.

However, the Court of Appeal took the opportunity to consider the more interesting second issue. This required it to confront its earlier decision in *Credit Suisse v Allerdale Borough Council* [1996] QB 306. Lack of capacity (whether of a natural or legal person) has long been recognised as a defence to a contractual claim. In *Credit Suisse* Allerdale was able to argue that a contract it had freely entered into was outside its capacity. It had given a guarantee to a bank in order to secure sums owed by a company created by Allerdale to develop a site by building timeshare units and a pool. The establishment of the company and the giving of the guarantee were part of a scheme intended to avoid statutory controls on borrowing and the absence of any power to provide timeshare units. Allerdale did not have power to give the guarantee. Held: it was void for lack of capacity.

There were 2 substantive judgments in *Credit Suisse*, given by Neill LJ and Hobhouse LJ. If the apparently leading judgment of Neill LJ was to be preferred, then there was on the face of it no distinction to be drawn in a private law dispute between a decision of a public body which was "narrowly" *ultra vires* (i.e. outside the authority's capacity) and one which was "widely" *ultra vires* (because, for instance, the particular power was exercised for an improper purpose or its exercise was unreasonable in a *Wednesbury* sense). Neill LJ said that *"Where a public authority acts outside its jurisdiction in any of the ways indicated by Lord Reid in Anisminic ..., the decision is void."* His reference was to *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, in which the House of Lords overturned a line of authority which had sought to draw a public law distinction between (i) decisions which go to capacity and (ii) decisions which are within jurisdiction/capacity but vitiated by legal error– all such acts are *ultra vires* the authority, and so a nullity.

The concern of the commercial lawyers was this: if it is correct to say that any act which would be *ultra vires* in the public law sense allows an absolute defence to a contractual claim, this creates massive uncertainty as well as a bizarre distinction between the flexible approach of the Administrative Court and the rigidity of the contractual doctrine of lack of capacity; the tail ends up wagging the dog. In judicial review, it is not enough just to ask whether the relevant act was *ultra vires*. The judicial review claimant must show he has capacity to bring the claim; he must do so promptly; and the remedy he seeks may be refused in any event as a matter of the Administrative Court's discretion. None of this would be relevant to a private law defence of *ultra vires*.

In *Credit Suisse*, Hobhouse LJ was less dogmatic (or, perhaps, doctrinal) than Neill LJ. He said:

> "*Private law issues must be decided in accordance with the rules of private law. The broader and less rigorous rules of administrative law should not without adjustment be applied to the resolution of private law disputes in civil proceedings...after taking into account the applicable public law, the civil law proceedings have to be decided as a matter of private law. The issue does not become an administrative law issue; administrative law remedies are irrelevant...It remains necessary to ask what amounts to a defence to a private law cause of action...*".

Dyson J in *Bedfordshire CC v Fitzpatrick Contractors Ltd* [2001] LGR 397 expressly preferred Neill LJ's wider approach to that of Hobhouse LJ. However, the Court of Appeal in the *Cornwall* case did not. Referring to Neill LJ's judgment in *Credit Suisse*, Etherton LJ held that "*insofar as he indicated that any decision of a public body which could be impugned in judicial review proceedings is a nullity for all purposes, including the enforcement in civil proceedings of private law rights under a commercial agreement between the public authority and a third party, I respectfully do not agree with him*". Likewise, Maurice Kay LJ expressly preferred Hobhouse LJ's approach, saying that *"I do not think that the assimilation of the various types of public law error in Anisminic had the effect of imposing a rule which extends inexorably to public law error as a defence to a private law claim."* It is abundantly clear that even if Cornwall had persuaded the Court of Appeal that its predecessor authorities had acted in breach of their fiduciary duties, it would have had a hard time persuading the court that the consequence of this was that the transactions were void.

Comment

The decision of the Court of Appeal on the important point is purely *obiter*. However, it is apparent that it will henceforward narrow the scope for public law concepts of *ultra vires* to be used as a defence to private law disputes. The Court of Appeal was keen to highlight the juridical autonomy of private law. Defences and remedies which have been interpreted widely in a public law context (following *Anisminic*) may be relevant in private law proceedings but not determinative, and a private law adjustment will need to be made. Where the contract is *ultra vires* in the narrow sense (i.e. outside the authority's prescribed powers), private law will recognise the defence of lack of capacity, as in *Credit Suisse*. However, where it is *ultra vires* in the wider sense, the position at private law cannot be characterised in as absolute terms as in *Anisminic*.

With public authorities increasingly looking to disclaim commercial agreements in order to rein in long-term spending commitments, private organisations which contract with public authorities should be able to take some comfort from this decision. Nevertheless, the corks should stay in the bottles for the time being. Maurice Kay LJ held his fire, saying that "*at some point, it will be desirable for there to be judicial consideration of the territory between the extremes of Credit Suisse and the present case*".

This case underscores the importance of the private sector ensuring that local authorities have the requisite *ultra vires* (in the narrow and the wide sense) to enter into contracts. To this end, the provisions of the Local Government (Contracts) Act 1997 provide a degree of protection. Contracts which meet the certification requirements of s.2 of that Act will be characterised as *prima facie* within the authority's powers (in both senses of *vires*), and are, therefore, unlikely to form the subject matter of a private law defence. If CTE had sought such protection in the present case, it is unlikely that the contracts would have been challengeable by Cornwall in the first place.

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