



JUDICIARY OF  
ENGLAND AND WALES

**Public law illegality in private law claims:  
some recent developments\***

**A Lecture to the London Common Law and Commercial Bar Association  
and the Administrative Law Bar Association**

**24 February 2021**

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Professor Dicey took pride in the fact that English law knew no “droit administratif”, suggesting that “in England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law, and the very principles upon which it rests, are in truth unknown”.<sup>1</sup> Dicey was particularly exercised by the suggestion that the state, or servants or agents acting on its behalf, might benefit from privileges or immunities not afforded to non-state actors, but issues equally arise as to the extent to which public bodies should be subject to special disabilities or liabilities. We have now reached a stage where the distinction between public and private law may well have become the key structural divide in English law, one of significantly greater moment than that between law and equity. While, as with the pre-Judicature Act relationship between law and equity, it is possible to define the spheres of public and private law by reference to the jurisdiction of the Administrative Court, and other courts, such an approach is apt to run into difficulties when ostensibly public law issues arise for determination in private law litigation, and vice versa. The distinction is perhaps more usefully formulated, although perhaps less-easily applied, by reference to the differing functions of the two systems.<sup>2</sup> For the purposes of this paper, when referring to private law I mean the mutual rights and obligations of those who are, in the relevant legal context, juridical equals, and whose rights and obligations within that legal context derive from the same set of legal principles. When referring to public law, I am referring to that body of law concerned with the relationship of citizens and the state or between state bodies, and in particular with ensuring that the special powers and privileges given to public bodies in that capacity are exercised appropriately.<sup>3</sup>

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\* I would like to thank Sir Jeremy Stuart-Smith and Dame Justine Thornton DBE for their comments.

<sup>1</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* 1<sup>st</sup> (London, Macmillan & Co, 1885), 180.

<sup>2</sup> For a criticism of this approach, see Jason Varuhas who argues against “reliance on any putative ‘general’ divide between public law and private law”: Jason NE Varuhas, “The Public Interest Conception of Public Law: Its Procedural Origins and Substantive Implications” in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016), p.47. See also Carol Harlow “‘Public’ and ‘Private’ Law: Definition Without Distinction” (1980) 43 MLR 241.

<sup>3</sup> For other definitions see Peter Cane, *Administrative Law*, 5th edn (Oxford: Oxford University Press 2011), 4 where he describes public law as that part of the law which “deals primarily with the public sector and with relations between citizens and the bureaucracy” and private law as that part of the law “concerned primarily with relations between citizens”.

My purpose is not to seek to question or justify the existence of the divide between public and private law, nor to seek to allocate particular legal doctrines to one or other side of it.<sup>4</sup> Instead, I want to consider three recent cases which have raised the issue of the application of private law doctrines in public law contexts, and see what they reveal about the interaction of public and private law. The first concerns the entry into contracts by public bodies, a subject considered in a decision of mine, School Facility Management Ltd v Governors of Body of Christ the King.<sup>5</sup> The second involves claims in unjust enrichment brought by and against public bodies, the subject of a recent decision of Mrs Justice Thornton in Surrey County Council v NHS Lincolnshire Clinical Commissioning Group.<sup>6</sup> Next I will consider the particular issues raised by issues of counterfactual analysis when private law claims are brought against public bodies for false imprisonment, including the decision of the High Court of Australia in Lewis v ACT.<sup>7</sup> And finally, I will consider counterfactual analysis in unjust enrichment claims against public bodies, a topic which was the subject of the Court of Appeal's decision in Vodafone Ltd v Office of Communications.<sup>8</sup>

### The effect of public law illegality in a decision to contract

The SFM case concerned a contract entered into by a local authority school to lease a modular building to use as a sixth-form centre. In the third year of the contract, the School ceased paying the rent, and contended that the decision to enter into the lease contract had been illegal as a matter of public law, which was said to deprive the school of capacity to enter into the contract. The matters which were said to render the decision to contract unlawful as a matter of public law ranged far and wide: it was said that the lease violated a statutory prohibition on the school borrowing without the permission of the Secretary of State; that the lease had been entered into for the improper purpose of evading the statutory prohibition on borrowing; that the decision was Wednesbury unreasonable;<sup>9</sup> and that entering into the lease breached the school's Roberts v Hopwood duty not to expend public funds "thrifllessly but to deploy the full financial resources available to it to the best advantage".<sup>10</sup> One of the issues which I had to consider was whether any type of public law illegality in the decision to contract would render the lease void, or only certain types (and, if so, which).

This was an issue which had come before the courts before. In particular, it produced a divided decision in Credit Suisse v Borough Council of Allerdale.<sup>11</sup> At first instance, Colman J held that any public law illegality in the decision to contract deprived the public body of the power to contract as a matter of private law, absent some statutory saving. The Court of Appeal split on the issue – Neill LJ agreeing with Colman J,<sup>12</sup> Hobhouse LJ expressing the view that only the absence of the statutory power to enter into a guarantee amounted to a lack of contractual capacity at common law,<sup>13</sup> and Peter Gibson LJ not expressing a view. These views were

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<sup>4</sup> For the argument that the tort of misfeasance in public office and claims for exemplary damages belong to the domain of public law and not private law see Nolan, "Tort and public law: overlapping categories?" (2019) 135 LQR 272.

<sup>5</sup> [2020] EWHC 1118 (Comm).

<sup>6</sup> [2020] EWHC 3550 (QB).

<sup>7</sup> [2020] HCA 26.

<sup>8</sup> [2020] EWCA Civ 183.

<sup>9</sup> Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

<sup>10</sup> Roberts v Hopwood [1925] AC 578; Bromley LBC v Greater London Council [1983] AC 768, 829 (Lord Diplock).

<sup>11</sup> [1995] 1 Lloyd's Rep 315, 373 (Comm Ct); [1997] QB 306 (CA).

<sup>12</sup> At 339-32, 343.

<sup>13</sup> At 350, 355-56.

obiter, because entering into the contract was found to be outside the council's statutory powers regardless of any deficiencies in the decision-making process in the exercise of the power. Thereafter, there have been a number of obiter dicta in private law cases supporting the narrower approach,<sup>14</sup> and others – generally originating outside Rolls Building – in which it has been assumed that any public law illegality in the decision to contract renders the contract void.<sup>15</sup> Those of the latter view find support from the editors of *Chitty on Contracts*.<sup>16</sup>

In the Administrative Court, and its predecessors, it has long been accepted that relief awarded in respect of an unlawful public law decision which involves a public body entering into a contract can involve declaring the contract to be invalid, almost regardless of the type of public law illegality.<sup>17</sup> That conclusion inevitably follows from what, since the decision in Anisminic v Foreign Compensation Commission,<sup>18</sup> has been an article of faith in English administrative law: that a public law decision will be a nullity as a matter of public law both when the public body has no jurisdiction (in the narrow sense) to do such an act or where such jurisdiction is wrongly exercised. As Lord Dyson JSC noted in R (Lumba) v Secretary of State for the Home Department,<sup>19</sup> “the importance of Anisminic is that it established that there was a single category of errors of law, all of which rendered a decision *ultra vires*.”

However, relief sought in public law proceedings to impugn the decision of a public body to contract is subject to the protections which apply to all public law challenges brought in the Administrative Court: the need for the applicant to have standing, the need to seek relief as expeditiously as possible and, absent exceptional circumstances, within 3 months (CPR 54.4), and the discretionary nature of the relief available. One of the factors which can shape the relief ordered, and preclude some types of relief being ordered altogether, will be where innocent third parties have acted on the validity of the decision which the applicant seeks to impugn.<sup>20</sup> In SFM, I noted that in these respects, the “cultural clash” between private and public law had strong echoes of that between common law and equity. The former promoted certainty through clear and generally absolute rules, which placed significant emphasis on the objective appearances. The latter involved broad-textured principles, many of them conscience-based, whose application was tempered by the need to seek relief promptly (laches), the protection of *bona fide* third parties, and the need for those seeking relief to come with clean hands. However, the interrelationship of law and equity has been clearly regulated, initially through their application in separate courts, and after the Judicature Act by 1873, by the provision in that Act that the rules of equity will prevail in the event of conflict or variance, and the degree

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<sup>14</sup> Charles Terence Estates Ltd v Cornwall Council [2012] EWCA Civ 1439, [37] (Maurice Kay LJ) and [44-47], [49] and [51] (Etherton LJ); Pro-Vision Systems (UK) Ltd v United Lincolnshire [2014] WL 511530 [176] (His Honour Judge Waksman QC).

<sup>15</sup> In particular cases concerned with “irrationally generous” payments by public bodies to employees under employment or settlement agreements: Newbold v Leicester CC [1999] ICR 1182; Hinckley and Bosworth BC v Shaw [2000] LGR 9; Eastbourne Borough Council v Foster [2000] All ER (D) 2407 and Rose Gibb v Maidstone & Tunbridge Wells NHS Trust [2010] EWCA Civ 678. Neil LJ's view received some support from within the Rolls community: Bedfordshire County Council v Fitzpatrick Contractors Ltd [2011] 11 WLUK 790, [19] (Dyson J).

<sup>16</sup> 33rd ed (2019), para 11-038.

<sup>17</sup> R (Structadene) Ltd v Hackney LBC [2001] 2 All ER 225; R (TGWU) v Walsall Metropolitan BC [2002] ELR 327; London & South Eastern Railways Ltd v British Transport Police Authority [2009] EWHC 460 (Admin).

<sup>18</sup> [1962] AC 147, 171.

<sup>19</sup> [2012] 1 AC 245, [66].

<sup>20</sup> S.31 Senior Courts Act 1981, e.g. Inland Revenue Commissioners v national Federation of Self-Employed and Small Business Ltd [1982] AC 617, 656.

of conflict is limited by the maxim that equity generally follows the law.<sup>21</sup> In contrast, the interrelationship of public law and private law throws up a number of difficult issues which the courts have not yet definitively resolved.

It is clear that an argument that the decision of a public body is unlawful as a matter of public law can be raised, where relevant, in private law proceedings, and when it is raised, it is not subject to the procedural restrictions which would apply to a public law challenge in the Administrative Court.<sup>22</sup> It is equally clear that the mere fact that the protections which apply to public law proceedings do not apply in private law proceedings does not prevent a public law argument being so raised.<sup>23</sup> The cases in which this happens generally involve a public body relying on the exercise of a public power to bring its private law rights into being, or to provide a legal justification for conduct which would otherwise be an actionable interference in the claimant's private law rights. In Wandsworth LBC v Winder (No 1),<sup>24</sup> a defendant to the council's claim for re-possession of a council flat for non-payment of rent challenged the validity of the council's rent demand on public law grounds. The House of Lords rejected the suggestion that such an argument could only be deployed by way of a separate challenge for judicial review of the council's decision brought in compliance with the strictures of the then RSC Order 53, rather than by way of a defence to the council's private law claim. However, the public authority was relying on the validity of its own public law decision unilaterally to increase the rent in order to establish its private law right to rent in the amount claimed. In those circumstances, it is scarcely surprising that it was open to the tenant to contend, by way of defence, that the exercise of the power to increase his rent was a nullity as a matter of public law so that rent at the enhanced rate was not due. In R (Lumba) v Secretary of State for Home Department<sup>25</sup> the claimant brought proceedings for the tort of false imprisonment, and the only answer of the Home Secretary to such a claim was that she had validly exercised a public law power of detention. Once again, it is scarcely surprising that it was open to the claimant in a private law tort claim to contend that the public law decision to detain him was a nullity as a matter of public law. Those cases seem to raise fundamentally different issues to those which arise when a public body seeks to invoke its own public law illegality to resist a private law claim in contract.

Further, there are real difficulties – at least from the private lawyer's perspective – in treating all types of public law illegality in a decision to contract as depriving the public body of contractual capacity. Absence of capacity is a defence which operates as a matter of absolute entitlement, and without limit as to time. It can be raised by either party at any stage during the period of contractual interaction, depending on the fluctuating economic benefits of the arrangement. The usual legal mechanism for protecting settled expectations in the absence of contract – estoppel – cannot be invoked because of the principle that a statutory body cannot, by estoppel, confer on itself a power it does not have.<sup>26</sup> And it is far from clear whether representations by the public body as to its capacity to contract can be relied upon so at least

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<sup>21</sup> *Snell's Equity* 34<sup>th</sup> para. 5-005.

<sup>22</sup> *Colman J in Credit Suisse* at 351, 356-7.

<sup>23</sup> *Lumba* at [67], [70].

<sup>24</sup> [1985] AC 461.

<sup>25</sup> [2019] UKSC 56.

<sup>26</sup> *Rhyl Urban DC v Rhyl Amusements Ltd* [1959] 1 WLR 465; *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* (unreported) 14 July 1983; *Eastbourne BC v Foster* [2002] ICR 234, [32].

to protect a reliance interest, certainly where the reliance interest in question is said to manifest itself in the loss of an opportunity to contract elsewhere.<sup>27</sup>

These considerations led me to adhere to the Rolls Building consensus. I concluded:<sup>28</sup>

“A contract will be void if a public body lacked power to enter into a contract of that type, in the same way as a contract entered into by a private statutory corporation would be void, absent (in each case) the effect of saving legislation. In such a case, the public law lack of power provides the basis for the private law defence of lack of capacity. Where the public body in question has the power to enter into a contract of the relevant kind, but the exercise of that power is unlawful on public law grounds (for example because the exercise is for an improper purpose or is unreasonable in the Wednesbury sense), then it will be necessary for the facts giving rising to the public law unlawfulness to provide a basis for impugning the contract recognised in private law.”

However, I noted that this distinction between the absence of a power, and abuse of power, comes “under particular strain when the abuse of power in question arises from it being exercised with the improper purpose of seeking to do indirectly that which there is no power to do directly”. In such cases, it might well be the case that, properly construed, the statutory limitation on capacity extends both to direct and indirect attempts to accomplish the forbidden object.

I favour this analysis because it avoids the unattractive consequences of the wide public law doctrines applying in private law proceedings without the associated public law limitations (rather as if specific performance or equitable rescission became available as remedies as of right for common law claims). Further, the public law cases recognise the protection of third party interests as a relevant factor when determining to grant relief. For example the Privy Council in a public law tender case, Central Tenders Board v White<sup>29</sup> observed that “it would be wrong for a court ... 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.” Those public law protections would be set at naught if any public law illegality automatically rendered the contract void in private law proceedings. Finally, any suggestion that what Hobhouse LJ referred to as the “broader and less rigorous” public law doctrines should be applied to serve the “key public law function by controlling and sanctioning the abuse of public power”<sup>30</sup> carries less conviction in those cases in which it is the public body itself which seeks to pray-in-aid its own public law wrong. It will remain open to other interested parties to challenge such decisions within the parameters (and subject to the constraints) of public law proceedings, if necessary seeking interim relief to prevent private law rights being acquired in the meantime.<sup>31</sup> However, it would prevent public bodies enjoying (or enduring) some special privilege or disability in contractual disputes and, to that extent,

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<sup>27</sup> The issue is discussed in SFM (n 5), [359-366] and see also South Tyneside Metropolitan BC v Svenska International plc [1995] 1 All ER 545, 565-67; Salmon Harvester Properties Ltd v Metropolitan Authority [2004] EWHC 1159 (QB).

<sup>28</sup> SFM (n 5), [159-161],

<sup>29</sup> [2015] BLR 727, [26].

<sup>30</sup> Nolan, (n 4) 281.

<sup>31</sup> As in R v Hammersmith and Fulham LBC, Ex p Beddowes [1987] QB 1050.

might be said to promote the “constitutional principle of equality” between public and private bodies in their private law obligations.<sup>32</sup>

But while I remain of the view that this was the right destination, the case signals a need for consideration at a higher level of how public law arguments may be deployed in private law proceedings and, in particular, when they have direct application and when their instrumentally must be achieved through a private law analogue.

### Claims by and against public bodies in unjust enrichment

The second recent case I want to consider is Thornton J’s decision in Surrey County Council v NHS Lincolnshire Commissioning Group.<sup>33</sup> This involved a claim in unjust enrichment by one public body (“Surrey Council”) against another (“Lincolnshire CCG”) to recover amounts paid by Surrey Council for the costs of specialist accommodation and care for JD. It was common ground that Lincolnshire CCG had made an error of public law in refusing to assess JD’s care needs. The judge concluded that, had it carried out the assessment, it was highly likely that Lincolnshire CCG would have decided to provide the funding. It was also common ground that, in the absence of funding from Lincolnshire CCG, Surrey Council came under a public law duty to pay for the care itself. The case concerned, therefore, a private law claim both by and against a public body, arising from the performance and non-performance of public law obligations.

### *Unjust enrichment claims by public authorities*

The law of unjust enrichment has developed some special rules for claims involving public bodies. A payment which is made out of public funds without lawful authority is recoverable at common law, under the principle recognised in Auckland Harbour Board v R.<sup>34</sup> This recognises a particular ground for unjust enrichment for public bodies at common law, which has been supplemented by a number of statutory rights of recovery. This common law rule has been justified in distinctly public law terms, Lord Haldane stating:

“It has been a principle of the British Constitution now for more than two centuries, ... that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced.”

While originally formulated by reference to payments from the Consolidated Fund, the principle is to be regarded as one of due public administration, and it has been held to apply to payments by local authorities.<sup>35</sup> It has not, however, to date been extended to cases where the

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<sup>32</sup> See Deutsche Morgan Grenfell Group Plc v IRC [2007] 1 AC 588, [132-133] in which the Supreme Court referred to “the constitutional principle of equality”, namely that “... under the rule of law, the Crown (that is the executive government in its various emanations) is in general subject to the same common law obligations as ordinary citizens”.

<sup>33</sup> (n 6).

<sup>34</sup> [1924] AC 318 (PC), 326-27.

<sup>35</sup> Charles Terence Estates Ltd v Cornwall Council [2011] EWHC 2542, [11] and Surrey County Council v NHS Lincolnshire Commissioning Group (n 6), [105].

*ultra vires* benefit conferred by the public body is something other than the payment of money: for example the transfer of property or the provision of services. In principle, it is difficult to see why it should not, although the identification and quantification of benefit will be less straightforward.

In the Surrey CC case, Thornton J was not directly concerned with the Auckland Harbour principle, because the payment made by the public authority in that case was made lawfully, albeit only because another public body had illegally (in public law terms) refused to meet the cost itself. However, Thornton J considered the ambit of the Auckland Harbour principle, and approved the formulation of the doctrine in Lord Burrows' JSC's *A Restatement of the English Law of Unjust Enrichment*.<sup>36</sup> That restatement defined the doctrine as one applying where a public authority illegally confers a benefit on the defendant (para 21(3)) and provides that "the question whether the obtaining or conferral of the benefit was unlawful is to be decided by applying the principles of public law".<sup>37</sup> In the commentary, Lord Burrows said that Auckland Harbour principle will apply to "the misconstruction or misapplication of a relevant statute or regulation as well as where the relevant regulation is *ultra vires* and invalid... ..".<sup>38</sup> What about other forms of public law illegality, such as where the decision to make the payment is Wednesbury unreasonable, procedurally unfair or in breach of the Roberts v Hopwood duty? The public law rationale of the rule, and Lord Burrows' formulation, would suggest that that if the decision to make the payment is illegal as a matter of public law for any reason, there is a right to recover it. It has been held that the related principle (recovery of tax unlawfully demanded) can be invoked when tax had been levied in breach of HMRC's duty to act fairly between different classes of taxpayers,<sup>39</sup> as well as in cases of misconstrued or *ultra vires* enactments.

If so, that raises the issue of whether my conclusion in SFM that only the absence (rather than wrongful exercise) of a power to contract amounts to a lack of contractual capacity in private law can sit alongside a principle that payments made by a public body which are unlawful for other public law reasons are recoverable. It will not surprise you that I have persuaded myself that there is no inconsistency. The defence of change of position generally provides sufficient protection for the security of receipt for those who act on the payment of public funds. However, entry into a contract engenders a rather more extensive range of activities and omissions in reliance than those which follow from the bare receipt of a payment. The particular sanctity of contractual dealings is reflected in the fact that the grounds on which contractual consent can be impugned are much narrower than those which constitute an unjust factor to reverse an enrichment, as seen in particular in the very limited role for unilateral vitiating factors in contract.<sup>40</sup> Where the sole ground on which it is said that the payment under the contract is illegal is that the decision to enter into the contract in the first place was unlawful as a matter of public law, it is suggested that there is no room for the Auckland Harbour principle to operate if the contract is binding on the public body. That would be no more than an attempt to revisit the issue as to the status of the contract at the stage of performance. The issue of whether there is a claim in unjust enrichment is ultimately

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<sup>36</sup> Surrey CC (n 6), [106-108].

<sup>37</sup> *A Restatement of the English Law of Unjust Enrichment* (Oxford, OUP 2012), 15: ¶¶ 21(3) and (4).

<sup>38</sup> *Ibid*, 111: commentary on ¶21(1).

<sup>39</sup> British Sky Broadcasting Group Plc v Customs and Excise Commissioners [2001] EWHC Admin 127, [36].

<sup>40</sup> Essentially very narrow categories of unilateral mistake or non est factum and lack of capacity: see generally *Chitty on Contracts* 33<sup>rd</sup> (London, Sweet & Maxwell, 2018) Vol 1 chapter 3 sections 2(c) and 3, and chapters 9-11.

a matter of private law, even where the unjust factor arises as a matter of public law. As Beatson LJ noted in R (Hemming t/a Simply Pleasure Ltd and others):<sup>41</sup>

“The factor making the payee's enrichment unjust is rooted in public law, but the right to restitution and the obligation to make restitution are part of the private law of obligations.”

As a matter of private law, the fact that a benefit is rendered in performance of a legal (and *a fortiori* contractual) obligation will generally preclude a claim in unjust enrichment.<sup>42</sup>

What, however, where there is a separate reason, beyond public law illegality in entering into the contract under which the obligation to transfer the benefit arose, why the payment is illegal as a matter of public law – for example because the monies used come from a fund which the public body can only use for a particular purpose? This issue was canvassed, but not resolved, in SFM, where I noted:

“Is there a defence to the claim in unjust enrichment that the sum has been paid to discharge a valid debt and hence good consideration has been provided apply ... Or can a claim in unjust enrichment by the payor to recover the sums paid be defeated by a defence of set-off based on the payee's debt claim?”

The argument that, the contract notwithstanding, there should nonetheless be an Auckland Harbour claim in these circumstances cannot lightly be dismissed. As is clear from the Woolwich principle, discussed below, there are occasions when the public law policy which gives rise to the relevant unjust factor is powerful enough to override some private law defences to unjust enrichment claims.

Thornton J in Surrey CC had to consider a related issue: whether a public authority could bring a claim in unjust enrichment when it had been performing its own public law obligations in conferring the benefit. As noted above, the general rule in private law is that a party cannot bring a claim in unjust enrichment in respect of a benefit which it conferred in the performance of a legal obligation.<sup>43</sup> However, as Thornton J noted, there are limited exceptions to that principle.<sup>44</sup> One example was Deutsche Morgan Grenfell v IRC,<sup>45</sup> in which a payment of tax which was due was held to be recoverable, because the Revenue had unlawfully failed to allow the tax payer to elect for an alternative taxation treatment pursuant to which the tax would not have been due. Deutsche Morgan Grenfell is a case in which it was the unjust factor led to the legal obligation coming into existence, and there is clearly a strong case for treating such an unjust factor as overriding the subsequent legal obligation to pay the money. Thornton J thought the case before her analogous:<sup>46</sup>

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<sup>41</sup> [2013] EWCA Civ 591, [138].

<sup>42</sup> *Goff & Jones' The Law of Unjust Enrichment* (9th Ed.) para 3-13: "Where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie while the contract is subsisting"; Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, 407-408; Avonwick Holdings Ltd v Azitio Holdings Ltd [2020] EWHC 1844 (Com), [797] (Picken J). The principle is subject to a small number of exceptions discussed by Picken J at [780-797].

<sup>43</sup> Burrows, *Restatement* (n 37), 32 ¶3(6).

<sup>44</sup> Surrey CC (n 6) [113-115].

<sup>45</sup> [2007] 1 AC 558

<sup>46</sup> *Ibid*, [115].

“Surrey Council only found itself with statutory responsibility for JD's care because of Lincolnshire PCT's unlawful decision that it was not responsible for commissioning care services for JD and its consequent failure to assess JD's eligibility for continuing care. This occurred in circumstances where the Court has found it highly likely that the PCT would have been responsible for JD's care had it not acted unlawfully. On this basis I consider that the Council's legal obligations to JD during the relevant period are outweighed by the unjust factors at play in this case.”

This was a case in which, in private law terms, it was Lincolnshire CCG which had the primary obligation to meet JD's care, with Surrey Council's role being essentially secondary, as a funder of “last resort”.<sup>47</sup> Private law routinely awards a remedy to a secondary obligor who has discharged an obligation against the primary obligor,<sup>48</sup> often by subrogating the secondary obligor to the obligee's claims against the primary obligor<sup>49</sup> but also through the restitutionary remedy of reimbursement.<sup>50</sup> The former remedy is provided when the effect of the payment is not to discharge the primary obligation, the latter when it is. These private law concepts cannot be wholly transferred into a public law context. The payment made by Surrey Council did not discharge Lincolnshire CCG's public law duty to JD (which was, in any event, a public law duty to assess JD's eligibility for NHS care in the first instance and, consequent responsibility to fund it if JD was eligible for NHS care). And JD would not have had a private law claim against Lincolnshire CCG for the costs of his care if Surrey Council had not paid it, but rather a public law claim for an order requiring Lincolnshire CCG to perform its public law duty to assess his eligibility for care which the Judge found would, as a matter of fact, have led Lincolnshire CCG to conclude that JD was eligible (and hence come under a public law obligation to fund JD's care).<sup>51</sup> Nonetheless, the private law analogy provides support for Thornton J's principled extension of the Auckland Harbour doctrine.

### *Unjust enrichment claims against public authorities*

When an unjust enrichment claim is brought against a public body, is it open to the public body to invoke the private law defence of change of position? In relation to unlawful demands for tax, or where a statute purports to create a legal obligation to pay the tax in question,<sup>52</sup> the answer is no. This result was initially rationalised by Henderson J on the basis that the defence is not available to a “wrongdoer”, and that the effect of the unlawful demand for tax is to render the IRC a “wrongdoer”.<sup>53</sup> That analysis was subject to some academic

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<sup>47</sup> Ibid, [11]].

<sup>48</sup> *Goff and Jones' The Law of Unjust Enrichment* 9<sup>th</sup> chapter 19.

<sup>49</sup> As for example where a guarantor discharges the principal's debtor's obligation: Andrews and Millett, *The Law of Guarantees* 7<sup>th</sup> ed (London, Sweet & Maxwell, 2015) chapter 10.

<sup>50</sup> *Goff and Jones* (n 48) chapter 19 section 2.

<sup>51</sup> If JD had paid for the care himself, he would have had a claim for compensation from Lincolnshire CCG, but this would still have been a public law claim. In R (CP) v North East Lincolnshire Council [2019] EWCA Civ 1614, in similar case, Haddon-Cave LJ held that the public authority “was liable in principle to compensate CP in respect of any monetary shortfall in accordance with normal public law principles of legal accountability of public bodies” (at [83]), but stressed that “CP is not asserting private law rights: like other social security and benefit claimants, she is simply asserting an orthodox public law right to be paid monies due to her under the Care Act 2014 and which the Council has unlawfully failed or refused to pay” ([89]).

<sup>52</sup> The Woolwich unjust factor applies in both of these situations: Test Claimants in the FII Litigation v HMRC (No 1) [2012] UKSC 19, [64]-[81], [171-174].

<sup>53</sup> The Test Claimants in the FII Group Litigation v HMRC [2008] EWHC 2893 (Ch), [337-340] (“FII (High Court) 1”).

criticism<sup>54</sup>, and in a further judgment in the same litigation, Henderson J held that the defence was not available because recognition would “stultify” the policy reason for ordering restitution:<sup>55</sup>

“To allow scope for the defence would unacceptably subvert, and be inconsistent with, the high principles of public policy which led to recognition of the Woolwich cause of action as a separate one in the English law of unjust enrichment, with its own specific “unjust factor”.

He had expressed the view in FII (High Court) 1 that where the unjust factor relied upon by the tax payer was not the illegality of the tax, but the tax payer’s own mistake in paying it, the defence should in principle be available.<sup>56</sup> For that reason, he held that it was not open to the tax payer to revisit that issue in FII (High Court) 2, while expressing the view that the issue required urgent determination by a higher court,<sup>57</sup> and expressing some support for Professor Mitchell’s view.<sup>58</sup> The view that the defence should not be available in any over-paid tax unjust enrichment claims is strongly supported by Professor Charles Mitchell, principally on the basis that “the defence would seriously undermine the constitutional principle that taxation must not be levied without Parliamentary authority, and the wider principle that public bodies are constrained by the rule of law”.<sup>59</sup>

In summary, it is clear that the defence of change of position is not available to meet claims for unjust enrichment in respect of tax paid which is not due, when the unjust factor relied upon is the unlawful nature of the tax – the so-called Woolwich factor. There is an open argument as to whether the same constitutional principles which support that conclusion also extend to tax which is overpaid for some other reason, such as a mistake by the payer. The editors of *Goff and Jones* suggest that the principle should extend to claims against “any other sort of public authority which has acted beyond its powers to exact duties, fees and other levies”.<sup>60</sup> That view finds strong support in the cases which affirm the need for Parliamentary sanction for the levying of money by public bodies, which do not distinguish between charges of different kinds. As Wilde CJ noted in Gosling v Veley<sup>61</sup>:

"The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate, or toll, except under clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it."<sup>62</sup>

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<sup>54</sup> In particular in Elise Bant, “Restitution from the Revenue and Change of Position”, [2009] LMCLQ 166 and Burrows, (n 37) ¶23(2) and commentary, 122.

<sup>55</sup> The Test Claimants in the FII Group Litigation v HMRC [2015] EWHC 2883 (Ch), [314-215] (“FII (High Court) 2”).

<sup>56</sup> FII (High Court) 1, [339], [341].

<sup>57</sup> FII (High Court) 2, [318-319], [339-340].

<sup>58</sup> *Ibid* [322].

<sup>59</sup> *Goff and Jones* (n 48) para. 27-51.

<sup>60</sup> *Ibid*, para. 22-21.

<sup>61</sup> (1850) 12 QB 328, 407.

<sup>62</sup> See also Scrutton LJ in Attorney-General v Wilts United Dairies Ltd (1921) 37 T.L.R. 884, 885-6: “A great deal of time was occupied in arguing whether the requirement of this payment was a ‘tax’. I prefer to use the words of the Bill of Rights which forbids ‘levying money for the use of the Crown without grant of Parliament’”.

The unjust enrichment in issue in Surrey Council did not involve the payment of tax, nor the direct receipt of a benefit by a public authority to which it had asserted an entitlement, nor had a statute or regulation been promulgated purporting to create an obligation to confer that benefit. Rather it was a case in which an unlawful failure by Lincolnshire CCG to assess JD's care needs led to Surrey Council meeting costs which would have been met by Lincolnshire CCG if it had performed its public law obligations. Thornton J held that as the case "did not fall squarely within the Woolwich doctrine", the defence of change of position was "in principle" available.<sup>63</sup> It might still be argued that the policy of encouraging the proper administration of public bodies would justify denying the defence of change of position to Lincolnshire CCG – on the basis that it was its unlawful act which had caused the benefit to be conferred. However, the case for depriving a public body of the defence of change of position in such a case is much less compelling than in cases where money or charges have been levied. The public law error, after all, did not involve demanding or obtaining the benefit, but a failure properly to assess JD's need for care. The argument that allowing the defence of change of position would "stultify" the policy which underpins the Woolwich unjust factor in these circumstances is much less strong, and the connection between the defendant's wrongdoing and the benefit sought to be reclaimed is more attenuated than where the benefit is directly and wrongfully levied. I would respectfully agree with Thornton J's conclusion.

So much for the argument that the defence of change of position should never be available to a public body which has obtained a benefit as a result of its own public law error. What of the other extremity - the argument that a defence should almost always be available, because the public body (as an entity which is not concerned with making and retaining profit) is unlikely to have derived any permanent surplus from the enrichment. This argument rests on the assertion that spending agencies of the state are likely to deploy their entire annual budget (and to have rationed the provision of services to the public accordingly). The argument found strong support in the first instance decision in R (CP) v North East Lincolnshire Council,<sup>64</sup> HHJ Graham Wood QC stating:

"Public authorities which are found to be in error in the way in which they administer funds under statutory duties and responsibilities do not, in my judgment, readily fall into the category of those who achieve unjust or unfair advantage from monies which should have been allocated to a Claimant, but which were not. Invariably there will be mistakes or failures to make payment which are capable of challenge by review. In many instances, if the failure is corrected, provision can be made for retrospective payment of entitlement. Otherwise, the reality is that resources are merely reallocated perhaps to another individual or group of individuals who have a statutory entitlement. In my judgment, it is illogical that a public authority in such circumstances should be regarded as 'unjustly enriched' and it would be contrary to public policy that such a claim is sustainable."

The extreme – "no benefit" – aspect of this submission found favour in British Columbia, in Skibinski v Community Living British Columbia,<sup>65</sup> a case in which the claimant had provided care for a severely disabled adult ("Lynn") without recompense because CLBC had unlawfully refused to do so. In circumstances in which the demand for financial support from CLBC

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<sup>63</sup> (n 6), [122-124], citing Burrows (n 37), 122.

<sup>64</sup> [2018] EWHC 220 (Admin), [115]. The decision was reversed on appeal without express consideration of this issue, on the basis that the claimant was exercising a public law and not a private law right: [2019] EWCA Civ 1614, [89].

<sup>65</sup> [2012] BCCA 17.

exceeded the available funds, the Appeal Court held that “CLBC's not paying for Lynn's care did not increase the amount of money in its coffers, except perhaps temporarily within the current fiscal year. Within its budget, it merely applied elsewhere the money it might have paid for Lynn's care. For this simple reason, it cannot be said that CLBC was enriched by the service given to Lynn by Ms. Skibinski.”<sup>66</sup> The argument that there is no enrichment if the authority later spends its full budget is unpersuasive. By being able to spend money on some other application(s) and further promote its public purpose, the CLBC was benefited, The more appropriate analysis is that there is an immediate benefit, albeit one which subsequent events might render irrecoverable.<sup>67</sup> That was the conclusion reached by Thornton J in Surrey Council:<sup>68</sup>

“In my view, Surrey Council discharged a liability to JD, which but for the PCT's unlawful decision, would have been owed by the PCT. In doing so the PCT was enriched to the extent of the cost of the care fees paid by the Council to JD's care home. The PCT was freed to spend an equivalent sum on other patients . . . . However, the fact that the money was spent on others would seem to give rise to a potential defence of change of position”.

However, that potential defence failed for lack of evidence.<sup>69</sup>

It has been noted that central revenue authorities are likely to find it particularly difficult to make out a change of position defence as a matter of fact.<sup>70</sup> In theory, that challenge ought be less exacting for a limited purpose local body such as Lincolnshire CCG which operates within budgetary constraints, whether for particular types of provision or in respect of all its operations. If such a public body has no relevant budget surplus at the end of the financial year in which the enrichment took place, that would be suggestive of a change of position. Even if it does, a change of position might still be made out if such a surplus has to be returned to its central funding body, or reduced the amount allocated by that body for the following year. At all events, unlike Woolwich claims, any restriction on the availability of the defence of change of position for public bodies in other scenarios is not the result of any special legal disability for public bodies, but from difficulties in making out the private law defence.

### Counterfactual analysis in public law cases

A defendant to a private law claim may sometimes argue that the loss which it unlawfully caused could have been inflicted in whole or part by a lawful exercise of its powers. In contract cases, a party facing a claim for unlawfully depriving its counterpart of the benefit of a contract can reduce or eliminate its liability on the basis that it was entitled to achieve the same result by exercising a termination clause, an argument which appears to be open as a matter of law without the need to prove that, absent the breach of contract which did take place, the right to

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<sup>66</sup> Ibid, [63].

<sup>67</sup> The argument calls to mind the debate in unjust enrichment law as to whether change of position is about dis-enrichment, or preventing hardship to the defendant: *Goff and Jones* (n 48) ¶¶27-03 to 27-06.

<sup>68</sup> (n 6), [121].

<sup>69</sup> [127].

<sup>70</sup> See Test Claimants in the FII Group Litigation v HMRC [2016] EWCA Civ 1180, [286-312] and the observation in the same case in the Supreme Court at [2020] UKSC 47, [295] that "many public authority defendants, including the Revenue, may be unlikely in practice to be able to rely" on the defence.

terminate would have been exercised in any event.<sup>71</sup> That conclusion has been criticised, on the basis that a truly compensatory approach to damages should consider not what the defendant *could* have done but for the breach, but what it *would* have done.<sup>72</sup> However the rule has been justified on the basis that damages should be assessed by reference to the claimant's legal entitlement,<sup>73</sup> and (presumably) that the value of the right interfered with should reflect the inherent qualification of the defendant's right to terminate.<sup>74</sup>

What happens, however, where it is public law illegality which gives rise to the private law claim, and the public body wishes to contend that it could have achieved the same result through a lawful exercise of its powers? This issue has been considered in two lines of authority, the first concerned with claims for false imprisonment following allegedly unlawful arrest and detention; the second with the unlawful levying of charges by public bodies.

### *Damages claims*

The false imprisonment cases begin with Lumba v Secretary of State for the Home Department, a case in which the detention of the applicant was unlawful on the basis that the Home Secretary had in fact applied an unpublished policy which involved a presumption of detention, rather than her published policy.<sup>75</sup> However, Lumba would have been detained under the terms of the published policy, and in these circumstances damages for false imprisonment were held not to be recoverable. That was a case which it was "inevitable" that Lumba would have been detained had the policy been lawfully applied.<sup>76</sup> Even if, therefore, the very public law error on which Lumba relied had been correct – and the published rather than the unlawful unpublished policy applied – detention would have followed. Lumba, therefore, was a case in which both the "could" and "would" requirements were established, and the counterfactual lawful detention did not require any further action by the public body (for example the promulgation of a different policy). Nonetheless, the decision did involve the court, as part of its causation and damages analysis, hypothesising a decision by the public body which has not in fact been made (viz a decision to detain Lumba arrived at by applying the published policy).

Sometimes, however, the counterfactual analysis in a public body case is more challenging. In Bostridge v Oxleas NHS Foundation Trust<sup>77</sup> the defendant had unlawfully detained the applicant by requiring him to return to hospital under the terms of a community treatment order which had not been validly made. It was held to be an answer to a claim for substantial damages that, if the defendant had appreciated the community treatment order was invalid, it would have taken the necessary steps (including obtaining supportive reports from two medical practitioners) to have the applicant and admitted to and detained on the authority of the managers of the hospital under ss.3 and 6 of the Mental Health Act. The counterfactual analysis involved hypothesising a public law decision by the managers of the hospital on the basis of

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<sup>71</sup> British Guiana Credit Co v De Silva [1965] 1 WLR 248, 259-260; Comau UK Ltd v Lotus Lightweight Structures Ltd [2014] EWHC 2122 (Comm); Sirko Harder, "The exculpation of repudiating parties by a right to terminate the contract" [2009] JBL 679.

<sup>72</sup> David McLaughlan, "The Minimum Performance Rule in Contractual Damages" [2019] LMCLQ 76.

<sup>73</sup> Andrew Burrows, *Remedies for Torts and Breach of Contract* 4<sup>th</sup> (Oxford, OUP, 2019) 72.

<sup>74</sup> If this is the rationale, it would appear to fall foul of Lord Sumption JSC's finding that the law of damages is not concerned with providing a substitute for the right infringed, but for the loss in fact caused by its infringement: Bunge SA v Nidera BV [2015] UKSC 43, [21].

<sup>75</sup> [2011] UKSC 12.

<sup>76</sup> *Ibid*, [95].

<sup>77</sup> [2015] EWCA Civ 79.

materials which did not exist, but would – not merely could - have been brought into existence in the counterfactual world.

In Parker v Chief Constable of Essex Police,<sup>78</sup> the public law power of arrest was wrongfully exercised by the arresting officer, who did not personally have reasonable grounds for making the arrest. That officer had effected the arrest because the designated arresting officer – who did have reasonable grounds for making the arrest – was delayed. Stuart-Smith J, at first instance, found that if the arresting officer had not made the arrest, another officer, also lacking reasonable grounds, would have effected the arrest, similarly unlawfully.<sup>79</sup> Holding that *Lumba* required not simply that the claimant could have been lawfully arrested, but that he would have been, Stuart-Smith J held that the claimant was entitled to substantial, rather than merely nominal damages. That finding was reversed by the Court of Appeal, who held that for the purpose of postulating the counterfactual, it was necessary to ask not what would have happened if the unlawful arrest by the arresting officer had not been effected, but what would have happened if the officers had appreciated what was necessary to effect a lawful arrest.<sup>80</sup> The Court drew a distinction, for the purposes of counterfactual analysis, between different types of public law error in the decision to detain – “the lawfulness of the substantive detention” and “the lawfulness of the procedure whereby the detention was effected”. The Court concluded:

“This conclusion depends on the distinction between the underlying substantive requirements and the process which must be undertaken. In relation to *Lumba*, the substantive requirement was the ability to detain based on the lawful policy; the application of an unlawful policy did not justify substantial damages if the lawful policy would still have led to detention.”<sup>81</sup>

In the context of unlawful arrest and detention, which public law errors are substantive and which are procedural? Presumably the failure to conduct a required review of continuing detention is procedural in nature, whereas the absence of grounds on the undertaking of such a review to continue detention is substantive. In Parker, the substantive requirement appears to have been that there were reasonable grounds for effecting arrest, or perhaps reasonable grounds known to at least some of the officers involved, and the procedural requirement that the actual arresting officer personally had such reasonable grounds.<sup>82</sup> That distinction between procedural and substantive deficiencies did not find favour in the Australian High Court in Lewis v ACT<sup>83</sup> which concerned a decision to order the return of a prisoner to full-time imprisonment on the basis of a decision-making process which was procedurally unfair. The High Court held that it was not enough to show that that the applicant could have been returned to prison, but that he would have been so returned if the procedurally unfair (and unlawful) decision to imprison him had not taken place.<sup>84</sup>

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<sup>78</sup> [2017] EWHC 2140 (QB); [2018] EWCA Civ 2788.

<sup>79</sup> There was no finding as to what would have happened in a scenario in which none of its employees had acted unlawfully.

<sup>80</sup> [2018] EWCA Civ 2788, [104].

<sup>81</sup> *Ibid*, [105].

<sup>82</sup> *Ibid*, [107].

<sup>83</sup> (n 7).

<sup>84</sup> Both Gageler J at [39] (implicitly) and Gordon J ([94]) and Edelman J ([182]) expressly preferred the analysis of Stuart-Smith J at first instance.

The approach to counterfactual analysis in false imprisonment cases was considered by the Supreme Court in R (Hemmati) v SSHD,<sup>85</sup> a case which involved the detention of failed asylum applications pending their removal. The detention in Hemmati was unlawful because the policy published and applied by the Home Secretary – “the EIG” – did not comply with the legal obligations imposed on member states by the Dublin III Regulation. The Home Secretary argued that if it had been appreciated what Dublin III required, she would have published a policy under which Hemmati would have been lawfully detained. The Supreme Court appears to have accepted that the relevant counterfactual enquiry was that adopted in Parker and criticised by the High Court of Australia in Lewis, describing the counterfactual question in Parker as what would have happened “had this requirement” – viz the need for the arresting officer personally to have reasonable grounds for making the arrest – been appreciated. But they rejected the Home Secretary’s contention nonetheless, because the counterfactual hypothesised not simply a decision to detain under the existing legal framework, but a change to the existing legal framework under which the applicant could and would have been detained. Lord Kitchen SCJ stated:<sup>86</sup>

“In my view the Secretary of State is seeking to apply these principles well beyond their proper limits ... [A] claimant will be awarded nominal damages if it is established that the detention could have been effected lawfully under the existing legal and policy framework ... It can be no answer to a claim for damages for unlawful imprisonment that the detention would have been lawful had the law been different”.

This limitation was necessary to give effect to the right under Article 5.1 of the ECHR requiring “any deprivation of liberty to have a legal basis in domestic law” which was “sufficiently precise and accessible in order to avoid all risk of arbitrariness”, and about the operation of which it was possible to make relevant representations.

Will considerations of constitutional propriety always limit counterfactual analysis in cases concerned with the illegal acts of public bodies? An interesting, but no doubt very special, case is where the cause of action is one for damages under the HRA 2006 on that basis that legislation violates the applicant’s human rights. R (Wilkinson) v IRC<sup>87</sup> was one of a series of cases concerned with the payment of bereavement allowances, which the relevant statute granted to widows, but not widowers. Lord Hoffmann<sup>88</sup> would have rejected a claim for damages on counterfactual grounds, which hypothesised the inequality being addressed by legislation which withdrew all bereavement allowances:

“A general principle applied to affording just satisfaction is to put the applicant so far as possible in the position in which he would have been if the state had complied with its obligations under the Act. In a discrimination case, in which the wrongful act is treating A better than B, this involves forming a view about whether the state should have complied by treating A worse or B better. Normally one would conclude that A’s treatment represented the norm and that B should have been treated better. In some cases, however, it will be clear that A’s treatment was an unjustifiable anomaly.

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<sup>85</sup> [2019] UKSC 56, [11].

<sup>86</sup> *Ibid*, [112].

<sup>87</sup> [2005] 1 WLR 1718. The approach was approved by the ECtHR when the case went to Strasbourg: see Hobbs v United Kingdom (63684/00) (2007) 44 EHRR 54 at [67-68].

<sup>88</sup> [26-28].

... There was no justification whatever for extending the widows' allowance to men. If, therefore, Parliament had paid proper regard to article 14, it would have abolished the allowance for widows. Mr Wilkinson would not have received an allowance and no damages are therefore necessary to put him in the position in which he would have been if there had been compliance with his Convention rights.”

These authorities give rise to three interesting issues so far as claims for damages against public authorities in false imprisonment are concerned. The first is the existence of what appears to be a special (favourable) rule for counterfactual enquiry, namely what would have happened if the public body had appreciated what was required for a lawful arrest or detention, rather than simply asking what would have happened if the unlawful arrest or detention had not occurred. The second is whether, in this context, it is relevant to distinguish between public law errors going to the substantive right to detain, and the procedural requirements for a lawful exercise of that substantive right, it being suggested in Parker that this is necessary to give effect to “the principle that although procedural failings are lamentable and render detention unlawful, they do not, of themselves, merit substantial damages”<sup>89</sup> and, if so, how easy is it to draw that distinction. And finally, the issue of whether there any limits to the steps which the public authority may be assumed to have taken in the counterfactual analysis, arising from fundamental constitutional principles.

#### *Unjust enrichment claims*

In unjust enrichment cases brought against public bodies, the counterfactual issue arises in a rather different way: a public body, which has unlawfully levied a charge or tax, may seek to resist giving restitution to the extent of any charge or tax it might lawfully have levied. This topic was the subject of Court of Appeal’s decision in Vodafone Ltd v Office of Communications, a case concerned with licence fees levied by Ofcom under regulations which were subsequently quashed.<sup>90</sup> Ofcom argued that, absent the unlawful regulations, it would lawfully have charged fees at a similar level, so that it had not been enriched (or at least not unjustly so). That contention was resisted, on the basis that a public body can only act on the basis of its legal authority, and on the basis that ensured that those who had paid the sums unlawfully demanded by Ofcom were not disadvantaged as compared with those who had not. The Court of Appeal rejected Ofcom’s counterfactual case.

At first instance,<sup>91</sup> Adrian Beltrami QC had held that for the purpose of the counterfactual analysis, a public body could ask the court to hypothesise that it had taken different administrative steps, but not that it would have acted on the basis of alternative primary or secondary legislation because that would undermine the principle of legality, by allowing the public body to recover a charge without a lawful basis for doing so. That analysis shares some similarities with the distinction between counterfactual decisions on the basis of the existing legal framework, held to constitute a legitimate counterfactual analysis in false imprisonment cases, and a counterfactual premised on altering the legal framework which was held to be a step too far in Hemmati. The Court of Appeal held that it was not even permissible to hypothesise alternative administrative decisions, which would involve “uncharted speculation”.<sup>92</sup> The public body was only entitled to recover those sums which it could lawfully have charged. That seems to allow the court to step in and perform

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<sup>89</sup> Parker (CA) (n 78), [104].

<sup>90</sup> [2020] EWCA Civ 183.

<sup>91</sup> [2019] EWHC 1234 (Comm).

<sup>92</sup> (n 90), [92].

calculations or valuations which were not performed (or performed correctly), even if those were matters which, under the relevant regulatory regime, were for the public body to determine. The Court of Appeal recognised that this might involve some “imprecision at the margins”.<sup>93</sup> However, it would seem to preclude hypothesising decisions by public bodies which are quasi-judicial in character, or which involve the balancing of competing policy considerations in the exercise of a “strong” discretion.<sup>94</sup> Even in this narrow form, the analysis appears to place public body defendants to unjust enrichment claims in a privileged position. Claims in unjust enrichment are generally concerned with reversing an existing state of affairs, rather than reconstructing an alternative outcome, and the role of counterfactual analysis is limited to ascertaining the effect of receipt on the recipient, rather than hypothesising a position in which the same receipt could have occurred without an unjust factor.

The issue of whether a public body had been unjustly enriched is, of course, very a different one to determining whether the unlawful act of a public body has caused loss, and there is no reason why the same principles should apply to the counterfactual analysis in both.<sup>95</sup> That said, it is legitimate to ask whether, if the principle of legality precludes a public body retaining a gain which it says it would have nonetheless obtained had it realised what the law required of it, it should not equally preclude a public body resisting an award of damages on the same basis.

### **Tentative conclusions**

The issues considered in this lecture suggest that the relationship between public and private law will not be susceptible to the (relatively) straightforward hierarchy of equity and the common law. The competing policies in play may well have different weight in different contexts. By way of a tentative summary of where we seem to be on the basis of the cases considered:

- (a) Where a public body relies on a public right to establish or enhance its private law claim, or to resist a private law claim, its entitlement to do so can be challenged on public law grounds. The invocation of a public law privilege carries with it, at least on this occasion, the susceptibility to a public law disability.
- (b) Where one of the parties to a contract involving a public body wishes in private law proceedings to rely on public law to raise a defence of lack of contractual capacity, it can only do so if the illegality is of a kind which would amount to lack of capacity as a matter of private law, or at least the circumstances would establish a defence based on abuse of power or authority as a matter of private law.
- (c) Most species of public law errors should in principle be capable of constituting an unjust factor for the purpose of private law claims in unjust enrichment. Query whether

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<sup>93</sup> Ibid, [93].

<sup>94</sup> Cf Professor Dworkin’s distinction between strong and weak discretions referred to be Leggatt J in Brogden v Investec Bank Plc [2014] EWHC 2785 (Comm), [95-96].

<sup>95</sup> A point made by Adrian Beltrami QC, (n 91), [61-62] when commenting on “a panoramic section of the skeleton argument, entitled ‘*The Counterfactual Principle across Private Law as a Whole*’” in which “Ofcom provides various examples of cases, in tort, contract, equity and unjust enrichment where Courts address issues of causation or loss, insofar as they arise under specific causes of action, by considering a variation of a “*but for*” question.”

in some cases, a public law error can provide a basis for recovering an amount paid under a binding contract, even though the public body's capacity to impugn that contract cannot be challenged.

- (d) The private law defence of change of position will not be available for some (but not all) unjust enrichment claims brought against public bodies, where this would subvert fundamental constitutional principles. However, where the defence is available, public bodies may be factually (rather than legally) inhibited from establishing it.
- (e) In private law claims for compensation against public bodies, it is legitimate to hypothesise counterfactuals which involve different decisions by the public body under the existing legal framework, but not a change in the legal framework. It may be legitimate, for that purpose, to hypothesise what the public body would have done if it had appreciated what the law required, rather than simply to ask what would have happened if it had not acted unlawfully.
- (f) In unjust enrichment claims, it will not be possible for a public body to resist giving restitution on the basis that it could have recovered some of the amount in issue if it had taken different administrative decisions, but only where (on the facts as they were) it was lawfully permitted to levy the relevant charge. This is the case even if the public body would have taken those alternative steps had it appreciated what was necessary lawfully to levy the charge.