

**Public Law Reviewability of Land Disposal (and Management) Decisions**

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1. The issue: When is a decision by a public authority to dispose of land or property, or decisions as to the management of land or property, amenable to judicial review? The issue arises because even where a public body is generally amenable to judicial review (e.g. because it is a statutory body, such as a local authority) it may not be judicially reviewable in respect of certain of its functions; if, for example, those functions are not regarded as themselves as being of a public nature. One example, of this is decisions in respect of the disposal and management of land or property.
2. What kind of decisions are we considering? Here are some examples:
  - a. A decision to sell or to refuse to sell land owned by a public body: *R v Barnet LBC, ex p Pardes House School Ltd.* [1989] COD 512; *R v Darlington BC, ex p Indescon* [1990] 1 EGLR 278; *R v Leeds CC, ex p Cobleigh* [1997] COD 69; *R v LB of Camden, ex p Hughes* [1994] COD 253; *R (Structadene Ltd) v Hackney LBC* (2001) 82 P&CR 25; *R (Wheeler) v Secretary of State for Environment, Transport and the Regions* (2001) 82 P&CR 1; *R (Lemon Land Limited) v LB of Hackney* [2001] EWHC Admin 336; (2001) 3 L.G.L.R. 42; *R v Bolsover DC, ex p Pepper* [2001] LGR 43; *R (Lidl) v Swale BC* [2001] EWHC (Admin) 405; *R (Ise Lodge Amenity Committee) v Kettering BC* [2002] EWHC 1132 (Admin); *R (Island Farm Development Ltd.) v Bridgend BC* [2006] EWHC 2189 (Admin); [2007] B.L.G.R. 60; *Standard Commercial Property Securities v Glasgow CC* [2006] UKHL 50; 2007 S.C. (H.L.) 33; *R (Salford Estates) v Salford CC* [2011] EWHC 2135 (Admin); [2011] B.L.G.R. 982; *R (Midlands Co-operative Society Ltd) v Birmingham CC* [2012] EWHC 620 (Admin); [2012] Eu. L.R. 640;
  - b. A decision to negotiate with only one party and not any others in respect of the possible sale of land owned by a public body or to enter into an exclusivity or an option agreement with respect to the sale of any such land: *R (Salford Estates) v Salford CC* (see above); *AG Quidnet Hounslow LLP v Hounslow LBC* [2012] EWHC 2639 (TCC); [2013] P.T.S.R. 828;
  - c. A decision to grant or not grant a lease of land owned by a public body: *R. v Pembrokeshire CC Ex p. Coker* [1999] 4 All E.R. 1007; *R (Gamesa Energy UK Limited) v National Assembly for Wales* [2006] EWHC 2167 (Admin); *Trafford v Blackpool BC* [2014] EWHC 85 (Admin); [2014] 2 All E.R. 947;
  - d. A decision by a public authority as landlord e.g. to terminate a lease or to give or not to give a consent under a lease or to deny a right to exercise an option to extend a lease: see e.g. *Cannock Chase DC v Kelly* [1978] 1 WLR 1; *R (Molinaro) v RB of Kensington & Chelsea* [2001] EWHC Admin 896; [2002] B.L.G.R. 336 and see also *Stretch v West Dorset District Council* (1999) 77 P. & C.R. 342 and *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12.
  - e. A decision whether to permit certain activities or persons on land owned (or controlled) by a public body: *Wheeler v Leicester CC* [1985] AC 1054; *R (Beer) v*

- Hampshire Farmers' Markets Ltd* [2003] EWCA Civ 1056; [2004] 1 WLR 233; *R (Agnello) v LB of Hounslow* [2003] EWHC 3112 (Admin); [2004] B.L.G.R. 536;
- f. A decision by a public body not to apply for the vacation of a caution on land owned by another: *R (Kelly) v LB of Hammersmith & Fulham* [2004] EWHC 435 (Admin); (2004) 7 C.C.L. Rep. 542.
3. There can be no dispute but that a decision by a public authority to authorise the making of a compulsory purchase order is judicially reviewable: see e.g. *Midlands* (above) and the decision of the Privy Council in *HMB Holdings Ltd v Cabinet of Antigua and Barbuda* [2007] UKPC 37.
4. Similarly in principle decisions made implementing a confirmed compulsory purchase order are reviewable: see *R (Smoke Club Ltd) v Network Rail Infrastructure Ltd* [2013] EWHC 3830 (Admin); [2014] 2 Costs L.O. 123 and *R. (Argos Ltd) v Birmingham City Council* [2011] EWHC 2639 (Admin); [2012] J.P.L. 401.
5. Public authorities (the starting point):
- a. the case-law above is all concerned with what are clearly public bodies taking land disposal or management decisions. Thus the vast majority of the cases concern local authorities or central Government Departments. The one exception from the above being *Beer* which concerned a decision by a private non-statutory company set up by a local authority to manage a farmers market programme. The Court of Appeal concluded that the decision of the company in that case was nonetheless amenable to judicial review because: (i) it involved “a public element or flavour”, the fact that “the power was being exercised in order to control the right of access to a public market”; (ii) the markets were held on publicly owned land to which the public had access; and (iii) the company was closely linked to the council.
  - b. If the body concerned is not a public authority at all then its decisions on land disposal and management will *a fortiori* not be judicially reviewable (for example Network Rail: see *Network Rail v ICO* (EA/2006/0061 and 2006/0062) and *Cameron v Network Rail Infrastructure Limited* [2006] EWHC 1133 (QB); [2007] 1 WLR 163).
  - c. But even if the body is clearly a public authority its decision on land disposal and management may not be judicially reviewable. This is because, as already noted, the determination of amenability to judicial review generally focuses on the particular function in issue rather than the status and nature of the body: see e.g. *R v Supreme Court Taxing Office, ex p Singh & Co* (1995) 7 Admin LR 849 at 853E.
6. 2 cases; 2 different approaches to reviewability in this area: There are 2 cases in this area that require particularly careful attention. They are *R v Bolsover DC, ex p Pepper* [2001]

LGR 43 and *R (Molinaro) v RB of Kensington & Chelsea* [2001] EWHC Admin 896; [2002] B.L.G.R. 336.

7. **(1) Pepper:**

- a. The facts: A developer (Pepper) obtained planning permission for a housing development on land he owned and which adjoined a recreation ground owned by the district council. The housing land had no street access, and this could only be obtained via the recreation ground. There had over the years been some “subject to contract” negotiations for the sale of part of the recreation land to Pepper for use as an access; and the matter had at one stage been referred to the District Valuer. However, by a resolution the council’s executive committee decided it would not sell the land to Pepper.
- b. The grounds of challenge: (i) that Pepper had a legitimate expectation that the council would sell the land or that the council would “at least give the applicant an opportunity to make representations on the decision whether or not to sell the land” (see p. 44); and (ii) the council was under a duty to give reasons for its decision.
- c. The result: Keene J. dismissed the judicial review on the basis that the council’s decision was not amenable to judicial review.
- d. The judgment:
  - i. Local authorities power to dispose of land is statutory: see s. 123 of the Local Government Act 1972 (“the LGA”) (see para. 19);
  - ii. The claimant argued that the decision was reviewable because the council “was discharging a statutory power” (see para. 23); and he also sought to rely on *R v Barnet LBC, ex p Pardes House School Ltd* and to distinguish *R v Leeds CC, ex p Cobleigh*. The Judge also considered *R v LB of Camden, ex p Hughes*. Keene J. said it was difficult to reconcile these older cases.
  - iii. The council argued:

“25. .... the test to be applied is the established one of whether the body in question was performing a public function or not.

26 In the present case Miss Cook says that the respondent was simply acting as a private land owner. It was pure chance that the access land required by the applicant was owned by a public body rather than by a private entity. It is quite clear that both the applicant and the respondent, when they began direct negotiations, were contemplating that a formal contract in writing would have to be entered into for the sale of the land in the normal way. That was underlined, she contends, by the repeated use of the words “subject to contract” in the correspondence.”
  - iv. Keene J. reasoned as follows (emphases added):

“30 It seems to me quite clear that the mere fact that a local authority is exercising a statutory power when it decides to sell land is not

enough by itself to render its decision a public law matter. I agree on that aspect with the judgment of Latham J in *ex parte Hughes*. Insofar as the decision in *ex parte Pardes House School* seems to suggest otherwise, it cannot stand ... The *Pardes House School* decision is understandable in the end result because of express policy decisions which applied to the disposal of land of the kind in question in that case.

31 If a decision to sell land by virtue of section 123 powers is not automatically a public law matter, the same position must obtain in respect of a decision not to sell a piece of land.

32 The appropriate test for determining whether the decision is a matter of public law or not is one whether the decision maker is performing a public function ...

33 Normally a decision by a local authority to sell or not to sell land which it owns is to be seen as a private law matter unless a public law element is introduced into the decision making process by some additional factor. That is because the starting point is that the local authority, in so deciding, is simply acting as a landowner in such cases and is not performing any public function. There may sometimes be some additional factors present; for example, if the authority has a policy which relates to the retention or disposal of certain types of land, that may make a decision a public law matter (see *Pardes House School*). A decision to dispose of open space without observing the statutory procedural requirements of section 123(2A) as to advertising the proposal would likewise involve a sufficient public law element. But neither of those factors arises here.

34 Indeed, the private law nature of the process adopted by the parties in the present case is emphasised by repeated references from both the respondent and from those acting for the applicant to the matter being “subject to contract”. That well-known phrase has the effect of preventing a binding contract for the sale of the land from coming into existence during negotiations (see *Attorney General v Humphreys Estates Ltd* [1987] 2 All ER 387. In such cases both parties contemplate that a formal contract will be required before they are bound. Until that occurs either party can withdraw from the deal ... As a matter of private law, it is clear that in the present case there was no formally concluded contract for the sale of this land. Though considerable agreement on matters of detail had been reached, the applicant could have withdrawn at any time, yet the applicant's argument in these proceedings amounts to saying that he had nonetheless a legitimate expectation which prevented the local authority from withdrawing from the contractual negotiations.

35 According to Mr Manley the authority was bound, at the very least, to go through the section 123(2A) procedure of advertising the

proposed disposal and, presumably, if no objections were then received, subsequently to convey the access land to the applicant. Yet it would be manifestly unfair if, in such negotiations for the sale of land, one party was not bound to conclude the contract because it could rely on the words “subject to contract”, but the other party was bound because of the public law principle of legitimate expectation. Since local authorities have generally have to act by way of committee resolutions, they would regularly be put at a very great disadvantage if that was a proper analysis of the situation. It could constantly be argued that their publicly available resolution gave rise to a legitimate expectation on the part of the other party which they could not break

36 I can see nothing in the present case which brings the respondent's decision into the area of public law scrutiny by the courts. This was essentially a matter of private contract law. There was nothing which introduced a public law element into it. The respondent, in making its decision now under challenge, was not performing a public function, nor was it doing so in the events leading up to the January 2000 decision. There was never any concluded contract in writing for the sale of the access land, and hence the applicant seems to have no private law remedy. That does not mean he must be provided with one in private law. In my judgment, both parties in this case contemplated that their relationship would be governed by public law. Judicial review does not apply in this case.”

8. **(2) Molinaro:**

- a. The facts: Molinaro was the lessee of premises on the Fulham Road; the landlord was the RB of Kensington & Chelsea. Molinaro applied under the lease for consent to change the use of the premises from A1 retail (it was a deli) to a restaurant. The lease provided that “the permitted use” (which was as a deli) could be changed with the landlord’s approval, such approval not to be unreasonably withheld in cases of uses falling within: (i) Class A1; and (ii) the “Landlord’s Neighbourhood Use Policy” defined as ““The Landlord's policy from time to time in force to ensure that the local community's needs are adequately catered for but without an excess of any particular trade or business.”
- b. The grounds of challenge: (i) the permitted user clause was invalid because the effect was to restrict the rent that could be obtained for the premises contrary to s. 123(2) of the LGA; (ii) the decision to refuse to amend the terms of the lease (or to agree to a surrender and re-grant on new terms) was unlawful on the basis that the use the premises as a restaurant would have resulted in consequential financial benefits to the local authority, and so the decision was in breach of its fiduciary duties and irrational; and (iii) there was as a result of correspondence a legitimate expectation that the claimant would have his application for a claim of use considered without the council having regard to its own planning policies as



set out in the Neighbourhood Use Policy. The council, it was said, led the claimant to believe that the only issue would be whether the change of use was reasonable.

- c. The result: Elias J. held that the decision was reviewable; but he rejected the claim on the merits;
- d. The judgment: Elias J. cited the relevant parts of the judgment of Keene J. in *Pepper*. The council argued that the claims advanced in the case were as in *Pepper* “are similarly private law claims”. The Judge said (emphases added):

“63. In my judgment, this argument is wholly unsustainable, at least in respect of the first two claims. Manifestly, the Council was not simply acting as a private body when it sought to give effect to its planning policy through the contract. Again, the decision not to permit a change of use, albeit one involving the exercise of discretion under a contract, was taken for the purpose of giving effect to its planning objectives.

64. In my judgment, these factors themselves injected a sufficient public element into the decisions to justify their being subject to public law principles. In any event, I would, with great respect, differ from some of the wider observations of Keene LJ in the *Bolsover* case, although for reasons I return to below, not the decision itself.

65. In my view, the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion.

66. Of course, in many circumstances the nature of the complaint is one that identifies no public law principle. In such cases the fact that the defendant is acting pursuant to statute is irrelevant. For example, if the Council sues for the rent due from a tenant, no public law issue arises. Indeed, in general questions of construction of the contract or breach will attract no special public law principles, and judicial review is not an appropriate procedure to resolve such disputes ...

67. But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organisations and their employees.

68. Moreover, there are a host of important cases where decisions relating to contracts have been subject to the principles of judicial review to prevent the power being unlawfully exercised ...

69. In my opinion, the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the courts should, in general, hear the complaint. Public law bodies should not be free to abuse

their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles.

70. I would respectfully suggest that the *Bolsover* case can be justified on that basis. As the learned judge pointed out, it would have undermined the operation of the private law of contract, and would have put public bodies at a significant disadvantage, if the doctrine of legitimate expectation could be used to defeat the right of public bodies to withdraw from a proposed contract whilst leaving the other party free to do so.

71. However, in other cases, including some I have cited, public law principles have been superimposed upon the private law relationships. The two are not necessarily incompatible. The facts of each case will need to be carefully considered to determine whether they can properly co-exist.

72. In this case I would in principle have given relief in respect to the legitimate expectation claim had I found it to be sustained. The allegation is that delay in making a decision, against the background of continuing discussions, gave rise to a legitimate expectation that the decision would be exercised in a particular manner. If there had been conspicuous unfairness of the kind alleged, in my judgment the court should not stand idly by and tell the claimant that because a private individual could exercise his contractual discretions arbitrarily, or unfairly, the public body could do likewise.

73. In my judgment, it would not have undermined the contractual relationship to superimpose public law duties in the circumstances of the particular complaint. Indeed, if representations made independently of the contract can give rise to legitimate expectations, there is no reason in principle why representations in the context of the contract should not do so, at least provided that by permitting this, the courts are not undercutting or distorting the contractual terms between the parties.

9. Views expressed on *Pepper* vs *Molinaro* since:

- a. The academic view: see “Judicial Review of Contracting Decisions” SH Bailey PL [2007] 444: (i) the approach in *Molinaro* is simpler; (ii) the *Pepper* approach has a number of potential disadvantages including that the Courts have failed to clarify what “additional elements” are sufficient for reviewability; (iii) *Pepper* “may leave a gap whereby decisions that amount to an abuse of power in public law terms cannot be challenged”; (iv) “[t]he proposition that because a private person or body is entitled to act unfairly or irrationally, a public body should be similarly entitled, is unacceptable as a generalisation as it fails to take account of the obligation of public bodies to act in the public interest”; and (v) the better basis for the decision in *Pepper* is not that the decision was not reviewable but

that there can be no *legitimate* expectation that goes beyond what would arise in commercial negotiations between private parties.

b. The judicial view:

- i. *R (Hopley) v Liverpool Health Authority* [2002] EWHC 1723 (Admin); [2003] PIQR P10. This was not a land disposal or management case, but a case concerned with contractual matters. Pitchford J. cited from *Pepper* and *Hughes* and said:

“Mr Hone Q.C. endeavoured to persuade me that I should treat *Pepper* with a degree of caution. Mr Clive Lewis in his “Judicial Remedies in Public Law”, 1st Supplement to 2nd Edition, para.2-121, had expressed the view that while Keene J. had considered that the exercise by a public body of a statutory power to contract was amenable to judicial review if some public law element was present, the better view was public law principles do, generally, apply to such decisions because of their statutory origin and, as a public body, a council ought to exercise its statutory powers in accordance with the principles designed to prevent the abuse of power. The preferable basis for the decision was submitted to be that on the facts of the case the claimant had no legitimate expectation to enforce.

53 I need not enter the debate how the decision should best be explained on the facts but I am in no doubt that Keene J. was right in principle and I follow his example. There is respectable authority for the proposition that an examination of the function being performed is, in some circumstances, essential to the question whether the decision is susceptible to review, whatever the source of the power to make the decision.

54 Mr Hone demonstrated to me that a decision made in the course of an apparently commercial process can be amenable to judicial review if there is an additional public element introduced to the process (see, for example, *Ise Lodge Amenity Committee v Kettering BC* [2002] EWHC Admin 1132 (in which both parties agreed that the present state of the law was as Keene J. had stated it in *Pepper*); *R. v Legal Aid Board Ex parte Donn* [1996] 3 All E.R. 1; and *Wandsworth LBC v A* [2000] 1 W.L.R. 1256). From that proposition I would not depart.”

- ii. *R (Nurse Prescribers Limited) s Secretary of State for Health* [2004] EWHC 403 (Admin). This was again not a property disposal case, but Mitting J. at para. 69 said he preferred the “narrower formulation of the test of whether or not a decision is judicially reviewable [in *Pepper*], to the moderately wider test stated by Elias J. in [*Molinaro*]”;
- iii. *R (Gamesa Energy UK Limited) v National Assembly for Wales* per Gibbs J. “[o]n the question of the dividing line between public law and private law matters, I have also considered *R v Bolsover District Council ex parte Pepper* [2001] LGR 43 and *R (Molinaro) v Kensington and*



*Chelsea Royal LBC* [2002] LGR 336 , both decisions of this court”. This was a judicial review brought by Gamesa Energy UK Limited against the National Assembly for Wales and the Forestry Commissioners relating to the first stage of a tendering process operated by the Commissioners for the award of seven options to lease forestry land owned by the Assembly. The purpose of the proposed options is to enable wind farms to be developed within the forest. The Judge said:

“66 As it seems to me the court is here concerned with deciding on which side of the dividing line the case falls between the category of decisions which have a sufficient element of public law to be subject to judicial review and those that do not, bearing in mind, also, the grounds of challenge to the decision.

67 It is not always an easy distinction to make. The word “sufficient” in relation to elements of public law is important. The fact that a public body is exercising statutory powers implies in itself an element of public law. It is a starting point. The fact that it is spending public money and preparing to dispose of interests in land again imply public elements in relation to the challenged tendering process. But are those features, together with other features relied on by the claimants, sufficient to render the process amenable to judicial review? Of course, if fraud for example were being alleged the balance would undoubtedly be tipped in favour of bringing the claim within the purview of challenge on public law grounds, but it is not.”

He then examined the grounds of challenge to help inform his view on reviewability. He then concluded:

“77 Under those circumstances I find that there are no sufficient public law aspects to the challenge to make it amenable to judicial review. I reach this conclusion as a matter of judgment on the facts in this case and within its overall context. I do not go so far as to say that a public law challenge to a tendering or pre-qualification process on the basis of irrationality could never be entertained. I think that the circumstances under which it could be entertained must be rare. I find that the process in this particular case is not susceptible to judicial review having regard to the subject matter of the decision challenged and the grounds of challenge and upon the application of the principles to be discerned in the authorities to which I have been referred.”

iv. *Trafford v Blackpool BC* per HHJ Davies:

1. The facts: the claimant was a solicitor who practised from office premises at the New Blackpool Enterprise Centre, Blackpool ("the Enterprise Centre"). The Enterprise Centre was owned by the defendant, Blackpool BC. He sought in judicial review proceedings to challenge the refusal to offer her a new lease of her office premises at the Enterprise Centre.

2. The grounds of challenge: (i) the decision was taken for an improper or an unauthorised purpose, namely "that of penalising and victimising the claimant precisely and solely because some of her clients have sued the defendant"; (ii) because it was irrational being "capricious, vindictive and seeks to punish or detriment someone who has acted lawfully"; and (iii) because it was procedurally unfair, in that where the defendant was considering deciding that any request for a new tenancy should be determined other than by reference to its published tenant selection criteria, and instead solely by reference to its assessment of the claimant's alleged activities, the claimant was entitled to be afforded the opportunity to make representations before that decision was made. The claim ultimately succeeded on a number of grounds.
3. The Judge referred to both *Molinaro* and also *Pepper* and said on reviewability (emphasis in original):
  - "55. Having considered these authorities my conclusions are as follows:
    - (1) In a case such as the present, involving a challenge to a decision of a public body in relation to a contract, it is necessary to consider:
      - (a) by reference to the contract in question, to the relevant statutory power, to the statutory framework (if relevant), and to all other relevant matters, whether or not, and if so to what extent, the defendant is exercising a public function in making the decision complained of;
      - (b) whether, and if so to what extent, the grounds of challenge involve genuine and substantial public law challenges to the decision complained of, or whether, and if so to what extent, they are in reality private law challenges to decisions made under and by reference to the terms of the relevant contract.
    - (2) In a case involving a challenge to a decision of a public body acting under a statutory power but in relation to a contract and in the absence of a substantial public function element, a claimant will nonetheless normally be entitled to raise genuine and substantial challenges based on fraud, corruption, bad faith, and improper motive (in the sense identified by De Smith of the knowing pursuit of an improper purpose).
    - (3) The extent to which a claimant will be entitled to raise genuine and substantial public law challenges beyond those limited classes will depend on a careful analysis of all of the relevant circumstances so as to see whether or not there is a relevant and sufficient nexus between the decision in relation

to the contract which is challenged and the grounds complained of.

56. Applying those principles, I accept that the defendant is entitled to say that the starting point is that the decision must be considered in the context of its being a decision under s.123 LGA '72, which confers an extremely wide and, in the context of a short lease such as the present, virtually untrammelled power. Thus there are no specific statutory restrictions or limitations on the exercise of the discretion whether or not to dispose of council land, nor is there any statutory guidance in such respect. Furthermore, the premises comprise commercial premises let under a commercial lease on a commercial rent, and the specific decision under challenge was a decision not to offer a new lease to someone who had no right to request a new lease because the statutory right of renewal available in the case of business tenancies had been validly contracted out.

57. However the claimant is also entitled to say, as she does, that even though the defendant's discretion under s.123 in this case is not subject to statutory restriction or guidance, nonetheless the defendant has chosen to promote a policy in relation to tenancy selection criteria, under which the defendant has stated in clear terms that it has delegated the decision on the suitability of an individual applicant to the Enterprise Centre management board, to be taken by reference to specific criteria, namely whether or not they are new start up businesses or expanding existing businesses, whether or not they are from the Blackpool area, and whether or not they create new employment opportunities, especially for local population. The claimant is also entitled to say, as she does, that this is in the context of the Enterprise Centre having been built with public funding, including funding from the ERDF with tenant eligibility conditions, and having been operated on the basis that there will be support agencies located in the Enterprise Centre which can assist tenants with their business development, and with obtaining access to public funding in the form of the discretionary hardship relief scheme and the national small business rate relief scheme. Thus, this is not solely a purely arms length commercial relationship.

58. The claimant is also entitled to say, in my judgment, that this is not a case of her seeking to challenge the defendant's decision to enter only into contracted out leases, so that she had no right of renewal under Part II of the 1954 Act. Instead, it is a case of her having been subjected to a decision that the defendant would not even consider a request by her for a new

tenancy once her existing tenancy expired, even though this was always clearly an option, as recorded on the statutory declaration signed by her at the time she entered the 2010 lease. In short, the effect of the CAMG's decision was that the defendant had decided, by reference to her firm's professional activities as the defendant had decided them to be, and in advance of any request the claimant might make for a new tenancy, that it was not prepared to consider any such application on its merits, by reference to its published tenant selection criteria.

60. ... There is in my judgment a sufficient public law element or connection to render the decision amenable to judicial review on all such grounds. At the very least there is a sufficient public law element or connection to render the decision amenable to judicial review on the ground of abuse of power, whether categorised as improper or unauthorised power."

10. A review of the other cases:

11. A decision to sell or to refuse to sell land owned by a public body:

a. *R v Barnet LBC, ex p Pardes House School Ltd.:*

- i. Facts: judicial review of a decision by the Education Committee to dispose of land at Mill Hill County High School other than for educational purposes. There was a policy in the Borough Development Plan on the redevelopment of education sites; the policy being they should not be redeveloped if they could still be used for educational purposes. Tenders were invited and bids made, including by the applicant. Eventually the site was determined to be surplus to educational requirements.
- ii. Grounds: the council failed to consider properly its policy and that the applicant had a legitimate expectation of being give a further chance to tender for the land.
- iii. Outcome: Farquharson J. held the decision was amenable to judicial review as it was made under s. 123 of the LGA; and that in exercising that statutory function the council had a duty to act fairly. The claim succeeded on both grounds.
- iv. Comment: the case is difficult to reconcile with some of the other early cases (below) as Keene J. noted in *Pepper*. In *Pepper* Keene J. cast doubt on the reasoning in relation to reviewability (see para. 31) albeit he considered that the end result was justified "because of express policy decisions which applied to the disposal". Of course, applying the *Molinaro* wider view there would be no question but that this decision as reviewable.

- b. *R v Darlington BC, ex p Indescon*:
- i. Facts: judicial review of land disposal by council.
  - ii. Grounds: it was argued that the s. 123 LGA duty not complied with; it was also said that the sale was *Wednesbury* unreasonable and also unfair.
  - iii. Outcome: the claim was dismissed; reviewability was not considered.
- c. *R v Leeds CC, ex p Cobleigh*:
- i. Facts: judicial review of decision by council not to sell two parcels of land; the applicant had agreed, subject to contract, to purchase the land. Having consulted locally on the sale the Council resolved not to proceed with the sale.
  - ii. Grounds: (i) that the decision was motivated by an improper purpose namely currying favour with local residents; (ii) the views of the public on the sale were irrelevant; and (iii) the decision was irrational (the land was needed for a scheme which the Council had resolved to grant planning permission for).
  - iii. Outcome: *Ex p Pardes* was distinguished and the claim held to be not reviewable. Kay K. Said in *ex p Pardes* the decision as to sell which engaged s. 123 of the LGA; here the decision was not to sell.
  - iv. Keene J. in *Pepper* rightly regarded the difference between a decision to sell and not to sell as an unsatisfactory basis to try and reconcile the cases (see above).
- d. *R v LB of Camden, ex p Hughes*:
- i. Facts: judicial review of decisions to dispose of the freehold of a 5 storey building to a competitor of the applicant. The building was owned by the council and used as part of a staff day nursery run by the applicant until it closed. There were 3 flats in the building, one of which the applicant occupied. There were bids from the applicant; and also from a competitor supported by Save the Children; the applicant's final bid was higher. The process had been conducted on the basis that the highest bid would be accepted. But in May 1993 following an election the relevant committee considered a report on the bids that looked at the proposed uses of the building and determined that disposal to the applicant's competitor was in the best interests of the council having regard to social and financial considerations. As it was not obtaining best value the Secretary of State's consent was needed, and obtained, under s. 123 of the LGA.
  - ii. Grounds: it was alleged that (i) having decided to sell the building at market value to the highest bidder the council was precluded by reasons of fairness and good administration from going back on that and applying different criteria in the absence of changed circumstances of overriding policy considerations; and (ii) if the council were entitled to change its position it had to give reasons for so doing and allow the applicant to



address these. The council argued that the transaction was a purely commercial one governed by private law.

- iii. Outcome: the claim failed, the Court held that until May 1993 the council was exercising “an essentially private function” and that entering into a contract pursuant to a statutory power was not susceptible to judicial review and was governed solely by private law. But after May 1993 in bringing into play other matters while it was still exercising a private function it “was considering a change of policy” and that involved the exercise of public functions.
- iv. Comment: in *Pepper* Keene J. considered that the case stood for the proposition that (see para. 27) “for the proposition that the mere fact that a body is exercising a statutory power does not of itself make the decision a public law matter” but “that there may sometimes be a public law element injected into an otherwise private law matter because of some additional factor”.

e. *R (Structadene Ltd) v Hackney LBC*:

- i. Facts: The council owned premises comprising twelve light industrial units which it let to tenants which it determined to sell. The applicant was interested in purchasing it and was informed that the property would be sold at auction. On the day of the auction the applicant was told that the council had resolved not to continue with the auction, because it had agreed to sell to the tenants. The tenants had agreed to pay £400,000. The applicant offered £450,000 before any contract was signed with the tenants. That offer, and a further offer of £500,000, were rejected. Later that day the formal contract was entered into with the tenants. The applicant obtained an injunction to prevent the sale being completed and was granted leave to apply for judicial review.
- ii. Grounds: the applicant argued there had been a breach of s. 123 LGA by the council; that it acted in breach of its fiduciary duty to the ratepayers; that it acted in a *Wednesbury* unreasonable manner; that it frustrated the applicant's legitimate expectation that the respondent should hold an auction and sell to the highest bidder, or at least give the applicant a chance to make representations before changing the sale procedure; and that it acted unfairly. The council accepted that it acted unlawfully in entering into the contract in that it did not take proper steps to obtain the best value pursuant to s. 123 nor, in the alternative, did it obtain the consent of the Secretary of State for the sale. It contended, however, that the court could not quash the decision or set aside the contract because the rights of third parties were protected by s. 128(2) of the LGA.
- iii. Outcome: the claim succeeded. The decision to sell to the tenants was quashed, and the contract declared invalid. The Judge refused an order of mandamus to hold an auction.

- iv. Comment: there was no consideration given to reviewability; which appears to have been accepted or assumed. Given that the principal ground was a failure to comply with the statutory procedural requirements in s. 123 on either the *Pepper* or *Molinaro* approach this decision could be said to be reviewable.
- f. ***R (Wheeler) v Secretary of State for Environment, Transport and the Regions:***
- i. Facts: The Highways Agency owned land which it had acquired for the purposes of the A33 Winchester by-pass. After the M3 motorway had been constructed in the vicinity of Winchester the land was no longer required. The Highways Agency then sold the land directly to Hampshire County Council without first offering it back to the former owner. They relied on an exemption found in rule 14(2) of the Crichel Down Rules which, in very exceptional cases and on specific ministerial approval, allows land to be sold to a local authority where there are strong and urgent reasons of public interest for it to be disposed of as soon as practicable. These Rules were developed, as their name suggests, as a result of the well-known Crichel Down Case of 1954. The Rules are non-statutory, but it was accepted by the Secretary of State that they governed the disposal of the land in question. Rule 5 of the Rules provides: “The rules apply to all land if acquired by or under the threat of compulsion.” They generally require (subject to certain exceptions such as rule 14(2)) land so acquired, and no longer needed, to be offered back to the previous owner.
  - ii. Grounds: it was argued that the circumstances surrounding the sale of the land to the County Council could not reasonably be judged very exceptional or strong and urgent in the public interest.
  - iii. Outcome: the claim failed on the merits; there was no issue raised as to reviewability.
  - iv. Comment: Generally it is accepted that a claim predicated on there being a failure to properly apply the Crichel Down Rules is reviewable. See e.g. also *R v Secretary of State for Defence Ex p. Wilkins* [2000] 3 E.G.L.R. 11 and *Findlay's Executor v West Lothian Council* [2006] CSOH 188.
- g. ***R (Lemon Land Limited) v LB of Hackney:***
- i. Facts: Lemon Land Limited (“Lemon”) judicially reviewed the decision of the Regeneration Committee of the council to sell a property it owned to the London Development Agency. Lemon claimed to have offered a higher price.
  - ii. Grounds: breach of the best value duty in s. 123 of the LGA.
  - iii. Outcome: the claim succeeded, no issue was raised on reviewability.
- h. ***R (Safeway Stores Plc) v Eastleigh Borough Council:***

- i. Facts: Safeway sought interim relief to prevent the disposal by the council of land to Waitrose.
  - ii. Grounds: Safeway indicated that they were prepared to offer more for the land and therefore the sale was contrary to the duty in s. 233 of the Town and Country Planning Act 1990 ("TCPA") to obtain "best consideration" for land held for planning purposes (this duty disappplies that in s. 123 LGA).
  - iii. Outcome: relief was refused; reviewability was not raised as an issue.
- i. ***R (Lidl) v Swale BC:***
- i. Facts: judicial review by Lidl of council's decision to approve "the basic terms" for disposal of its land to Aldi.
  - ii. Grounds: it was alleged that there was a breach of the s. 123 best value duty and also that the council were granting an unlawful State aid to Aldi, contrary to Article 107 (ex 87) of the TFEU.
  - iii. Outcome: the claim failed; there was no consideration of reviewability.
  - iv. Comment: the allegation of breaches of EU law is likely to provide the best explanation for reviewability.
- j. ***R (Ise Lodge Amenity Committee) v Kettering BC:***
- i. Facts: In this case the claimant was a voluntary organisation formed following a resolution by the council to sell a piece of amenity land and which sought judicial review of that decision.
  - ii. Grounds: It alleged that there was a breach of s. 123 of the LGA.
  - iii. Outcome: The claim ultimately failed because the Judge found that the resolution itself did not amount to a disposal for the purposes of that section. On reviewability the Court emphasised that the test "is whether in passing the resolution ... the local authority was performing a public function" (see para. 54). He referred to *Pepper* (para. 55). In seeking to establish reviewability the claimant referred to: (i) the purposes for which the land was gifted to the council: use by the public for amenity; (ii) the fact the council had resolved it be so used, and it had been so used for 30 years; (iii) there was effectively a council policy it would be used as amenity land until 2005; (iv) the decision to sell the land was a change of policy and it affected the public; (v) the public was consulted. The council argued (see para. 63) that the resolution was a matter of private law and there was no factor rendering it a public law matter. It was also argued that the property strategy governed the decision to dispose of it and that involved no public element. The Judge referred to *Hughes* (above) and indicated that whether there may be a legitimate expectation is of limited help in determining if there is a public law decision. The Judge concluded (see para. 65) that the matter was a public law one for the reasons given by the claimant.

- k. *Standard Commercial Property Securities v Glasgow CC*:
- i. Facts: Scottish judicial review of a decision of the council to, having compulsorily acquired land, dispose of it to its development partner. The case went to the House of Lords.
  - ii. Grounds: alleged that disposal was in breach of s. 191 of Town and Country Planning (Scotland) Act 1997, the equivalent of s. 233 TCPA;
  - iii. Outcome: the claim failed; reviewability was not considered.
- l. *R (Island Farm Development Ltd.) v Bridgend BC*:
- i. Facts: the claimants sought judicial review of a resolution of the council to refuse to sell a Science Park it owned to them. The claimants owned adjoining land and planning permission to develop it. They wanted the Science Park to facilitate their redevelopment and had been in negotiations to acquire it. The redevelopment was locally very controversial and following a change of leadership after an election the negotiations were discontinued.
  - ii. Grounds: Apparent bias and/or pre-determination by councillors.
  - iii. Outcome: the claim failed; no issue was raised on reviewability grounds; the Judge noted the statutory context was s. 123 of the LGA.
  - iv. Comment: Applying *Pepper* it might seem doubtful that this decision is reviewable; on the *Molinaro* approach it would be. Collins J. did though refer at para. 52 to the decision being one based not just on financial considerations but also what was desirable for the inhabitants of the area.
- m. *R (Salford Estates) v Salford CC*: see further below.
- n. *R (Midlands Co-operative Society Ltd) v Birmingham CC*:
- i. Facts: challenge to a decision of the council to enter into a contract to sell its interest in a plot of land comprising an indoor bowls and community centre to Tesco.
  - ii. Grounds: It was argued that: (i) the disposal was in breach of the Public Contracts Directive and the 2006 Regulations; that is to say procurement law, and (ii) the disposal was not for best consideration and so was in breach of s. 123 LGA. There were also an allegation of unfairness in the tender procedure.
  - iii. Outcome: the claim failed, reviewability was not in issue.
12. A decision to negotiate with only one party and not any others in respect of the possible sale of land owned by a public body or to enter into a lock-out or option agreement with respect to the sale of any such land:
- a. *R (Salford Estates) v Salford CC*: judicial review of a decision of the council to enter into an exclusivity agreement with Tesco and thereafter a conditional contract for sale. It was alleged this was in breach of the s. 123 duty. No

consideration was given to reviewability, but at para. 96 Hickinbottom J. said that discharge of the duties under s. 123 are judicially reviewable on the usual public law grounds.

- b. *AG Quidnet Hounslow LLP v Hounslow LBC*: the council resolved to enter into an exclusive “lock-out” agreement with a developer, the owner of one of two shopping centres in the town centre, in relation to land which subject to contract and various pre-conditions being met it was intending to grant a long lease of. The other shopping centre owners challenged this decision by way of judicial review. The grounds of challenge were: (i) breach of the procurement regulations (which part of the claim was stayed); and (ii) an allegation that in the alternative and assuming that the procurement regulations did not apply the proposed agreement was contrary to Article 56 TFEU which provides a prohibition on restrictions to provide services. That part of the claim was dismissed by Coulson J. Reviewability was not raised as an issue. It would seem that the claims of breach of EU procedural law mean that on either the *Pepper* or *Molinaro* approach this was a reviewable matter.

13. A decision to grant or not grant a lease of land owned by a public body:

- a. *R. v Pembrokeshire CC Ex p. Coker*:
- i. Facts: Ms Coker sought to judicially review a decision of the council to grant a 5 year lease of certain property at Milford Haven to a company (CSSL) and a declaration that the lease was of no legal effect. The lease contained options for further leases for 99 years of the property and certain other land.
  - ii. Grounds: (i) that the grant was ultra vires – that is to say the resolution did not in fact authorise the grant of the lease to CSSL; and (ii) it was in breach of s. 123 LGA.
  - iii. Outcome: the claim failed; reviewability was not in issue.
  - iv. Comment: given the ultra vires issue it is difficult to see how even on *Pepper* this was not a reviewable decision.
- b. *R (Gamesa Energy UK Limited) v National Assembly for Wales* : see above.

14. A decision by a public authority as landlord e.g. to terminate a lease or to give or not to give a consent under a lease or to deny a right to exercise an option to extend a lease:

- a. Decisions to seek possession: generally the Courts have held these to be reviewable: see the many cases cited in Fordham *Judicial Review Handbook* (6<sup>th</sup> ed.) at para. 32.2.6. The cases involve judicial review (a number of which were successful) of decisions to seek possession as well as decisions to serve notices to quit. See also see e.g. *Cannock Chase DC v Kelly* [1978] 1 WLR 1;
- b. Decisions to refuse consent under a lease: see *Molinaro* above;
- c. Decisions to refuse to extend an option see: *Stretch v West Dorset District Council* and *Stretch v United Kingdom*. These cases were not judicial reviews,



but given the decision of the European Court of Human Rights it seems likely in a future case on similar facts the Court might entertain a judicial review.

15. A decision whether to permit certain activities or persons on land owned (or controlled) by a public body:

- a. *Wheeler v Leicester CC*: this is the well known case where Leicester CC passed a resolution banning Leicester RFC from using the recreation ground owned by the council and which it used for matches and training because 6 players went on a tour of South Africa. The council had a policy of withholding support from and discouraging links with South Africa because of apartheid. The judicial review succeeded; reviewability was not an issue.
- b. On exclusion from markets: see *R (Beer) v Hampshire Farmers' Markets Ltd* and *R (Agnello) v LB of Hounslow* and also the earlier cases therein considered such as *R v Barnsley MBC ex p Hook* [1976] 1 WLR 1052; *R v Basildon DC, ex p Brown* (1981) 79 LGR 655 and *R v Wear Valley DC, ex p Binks* [1985] 2 All ER 699.

16. A decision by a public body not to apply for the vacation of a caution on land owned by another: In *R (Kelly) v LB of Hammersmith & Fulham* the claimant sought judicial review of a decision by the council not to apply for the vacation of a caution registered in its favour against a property in Fulham she partly owned. A declaration was also sought that the caution was registered unlawfully and should be lifted. The caution was put on because it had incurred considerable sums in paying under the National Assistance Act for the claimant's mother to be in an Elderly Persons Home but had then found on her death she was a joint tenant of a property which would have affected her entitlement. The council therefore had a charge placed on the property in respect of its expenditure. The claim ultimately failed. While reviewability as such was not raised, Wilson J. did indicate that an application under s. 56 of the Land Registration Act 1925 – which provides a procedure for challenging cautions – seemed a more appropriate remedy than judicial review of the council's decision.

17. Some conclusions:

- a. (Rightly or wrongly) the balance of authority favours the narrower approach to reviewability in *Pepper* over the wider approach in *Molinaro*;
- b. The *Pepper* approach takes as its starting point the need for there to be a “public function” and that in land disposal decisions the public authority is ordinarily “simply acting as a landowner in such cases and is not performing any public function”. Moreover, the mere fact that the authority is exercising a statutory power (e.g. s. 123 LGA or similar) is insufficient by itself to render its decision a public law matter;
- c. Under the *Pepper* approach for there to be reviewability there is a need for some “additional factor”;

- d. The so-called “additional factor” which brings reviewability can arise from a number of matters and is not well-defined, it can include:
- i. An allegation of a failure to follow the statutory procedural guidelines which regulate the use of the statutory power being exercised;
  - ii. Also it seems that an allegation of breach of EU law (such as procurement or State aid) may in itself confer reviewability;
  - iii. More generally there is a theme of the cases of looking at the grounds of challenge as a basis for determining whether the decision is reviewable – this is something which logically is difficult to justify;
  - iv. The existence of a policy relating to the retention or disposal of land (although as Elias J. said in *Molinaro* it is difficult to see any logical reason why a decision made pursuant to some policy should be treated differently, in reviewability terms, from one made on a specific occasion, and absent any policy);
  - v. The nature of the land being dealt with, see e.g. *Ise Lodge* where the fact that the land was public amenity land seemed a crucial factor in determining reviewability;
  - vi. Choosing to dispose of, or manage, land by reference to planning matters or what is desirable for residents of the area generally or on other wider social considerations, rather than just financial matters: see *Hughes, Island Farm* and also *Molinaro* itself;
- e. It seems that the issue of whether a land disposal or management decision is reviewable is largely a matter of judicial instinct; unfortunately that means that there are some difficulties in reconciling all the decisions – not just the earlier cases considered by Keene J in *Pepper* but the case-law generally.
- f. Despite *Pepper* being preferred over *Molinaro* where the two have both been considered, a number of the cases cite *Pepper* but not *Molinaro*. Furthermore, in a number of the cases the Court appears to have assumed, without any consideration, that the decisions in issue were reviewable. The reviewability in such cases may be explicable on the basis of either *Pepper* or *Molinaro* but the assumption of reviewability may be said implicitly to favour the approach in *Molinaro*, such an approach is inherently inconsistent with *Pepper*;
- g. Given the difficulties in applying the *Pepper* approach the alternative wider (and simpler) approach to reviewability in *Molinaro* has obvious attractions.

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