Estoppel in Public Law: Theory, Fact and Fiction

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> When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.[1]

The doctrine of estoppel in all its branches has caused particular difficulty in public law situations. Other than for cause of action estoppel (*res judicata*) the basic principle is that one party should be precluded from alleging in legal proceedings that a fact is otherwise than it has appeared from the circumstances of his dealings with another and which formed the basis of those dealings. This apparently flexible and useful doctrine has become "overloaded with cases" and has been sought to be limited in a variety of ways.[2] In public law it is frequently defeated by the supposedly countervailing doctrines of ultra vires, jurisdiction and that a statutory duty or discretion should not be fettered.

When the cases are examined it will be seen that the courts have not been consistent in giving priority to the public law principles of ultra vires, jurisdiction and non-fetter of statutory duties and discretion because (a) public law doctrines, like natural justice are sometimes invoked to operate in much the same way as estoppel, and (b) other branches of law, such as negligence will similarly have much the same effect as an estoppel argument. In the result, the courts should adopt a less rigid rule in the interests of better public administration which will allow the operation of estoppel since the courts' reservations about estoppel are generally misplaced.

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1. *Amalgamated Investments and Property Co. Ltd* v. *Texas Commerce International Bank Ltd* [1982] Q.B. 84, 122 *per* Lord Denning M.R.
2. *Ibid.*

1. Categories of estoppel

It is customary to classify the categories of estoppel into three: by record, by deed and by conduct.[3] Although the difficulties which have arisen in the application of estoppel in public law have primarily concerned estoppel by conduct, it is worth dwelling for a moment on the other two. Estoppel by record is that doctrine which holds that once judgment has been obtained on an issue or matter it should no longer be the subject of litigation between the parties to the action or their privies. This branch of estoppel can be further subdivided into estoppel by *res judicata* (cause of action estoppel) and issue estoppel,[4] the distinction being that as to the former the cause of action no longer exists, whilst with the latter the plea is merely that a relevant issue or matter has been disposed of.[5]

Estoppel by deed was neatly stated by Bayley J. in *Baker* v. *Dewey*[6] in these terms: "A party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated." "Deeds", of course, is a legal term of art and this estoppel is subject to other restrictions in its operation:[7] it will not operate against a person claiming rectification of the deed;[8] the action must be on the deed;[9] the statements must be clear and unambiguous;[10] and the doctrine cannot prevent the plea of illegality or fraud.[11]

The third type of estoppel, estoppel by conduct (or estoppel *in pais*) is the more frequently invoked. The rule was stated by Parke B. in *Freeman* v. *Cooke* as being:

> that, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averting against the latter, a different state of things as existing at the same time.[12]

Although equitable in flavour, this doctrine applies equally at

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3. J.A. Gobbo, D. Byrne and J.D. Heydon, *Cross on Evidence* (2nd Aust. ed. 1980) 315.
4. *Id.*, 317-319.
5. *Id.*, 319.
6. (1823) 1 B & C 704, 707.
7. Note 3 *supra*, 331-332.
8. *Wilson* v. *Wilson* [1969] 3 All E.R. 954.
9. See *Commissioner of Taxes (Queensland)* v. *Ford Motor Company of Australia Proprietary Limited* (1942) 66 C.L.R. 261.
10. *Onward Building Society* v. *Smithson* [1893] 1 Ch. 1.
11. *Hayne* v. *Maltby* (1789) 100 E.R. 665. *Horton* v. *Westminster Improvement Commissioners* (1852) 155 E.R. 1165.
12. (1848) 154 E.R. 652, 656.

common law,[13] and relies upon the fact that the representation which was made and relied upon was one of present fact.[14]

To these three heads of estoppel there is now added a fourth, promissory estoppel,[15] which is frequently based upon the holding of Denning J. as he then was, in *Central London Property Trust Ltd* v. *High Trees House Ltd*[16] that

> [a] promise intended to be binding, intended to be acted upon and in fact acted on, is binding insofar as its terms properly apply.[17]

What distinguishes promissory estoppel from ordinary estoppel by conduct (whether in equity or law) is that in the former the representation is as to the future. It is based upon the equitable notion that a person who makes representations must "make his representations good"[18] even if those representations are inconsistent with formally contracted rights and obligations. In the words of Lord Cairns L.C. in *Hughes* v. *Metropolitan Railways Company*:

> it is the first principle upon which all courts of equity proceed, that if parties who have entered into definite and distinct terms involving certain legal rights... afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.[19]

In Australia, the existence of the doctrine has been most recently accepted in *Legione* v. *Hateley*,[20] although its operation may be restricted to cases where the parties were in some pre-existing contractual relationship.[21]

Similar to promissory estoppel is "proprietary estoppel" which may give rise to an equity (the "equity of acquiescence") to prevent a person from enforcing his legal rights if he "acquiesces" in another's conduct which leads that other person to believe that

13. *Pickard* v. *Sears* (1837) 112 E.R. 179. *Jordan* v. *Money* (1854) 10 E.R. 868.
14. *Halsbury's Laws* (4th ed.) 16, para. 1514.
15. *Ibid.*, although it is still regarded by some as a sub-heading of estoppel *in pais*.
16. [1947] 1 K.B. 130.
17. *Id.*, 136.
18. *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, 360 *per* Lord Selborne L.C.
19. (1877) 2 App.Cas. 439, 448.
20. (1983) 57 A.L.J.R. 292.
21. For an excellent discussion on promissory estoppel in Australia, and of the decision in *Legione* v. *Hateley* (1983) 57 A.L.J.R. 292, see K.C. Lindgren and K.G. Nicholson "Promissory Estoppel in Australia" (1984) 58 *A.L.J.* 249.

the strictly legal rights which would otherwise govern them will not be insisted upon. Although this equity is said to find its basis as an extension of the doctrine of estoppel,[22] it differs from the other branches in that there is no doubt that it can form the basis of a cause of action[23] and it would thus be more appropriate to see it as a separate rule of equity derived from the dicta of Lord Kingsdown in *Ramsden* v. *Dyson*[24] that:

> [i]f a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such a promise or expectation.[25]

Nevertheless, this doctrine does operate "by way of estoppel"[26] and has clearly been held to apply to statutory bodies,[27] although, at least in Victoria, it will not apply in the face of express legislative prohibitions, since against "such express statutory prohibitions equity must be powerless".[28]

2. *Estoppel and Public Law*

When attempts have been made to apply these principles in public law situations they have frequently been met with ostensibly powerful objections. It has been said that *res judicata* "must yield to two fundamental principles of public law: that jurisdiction cannot be exceeded; and that statutory powers and duties cannot be fettered".[29] In England issue estoppel has been held to be inappropriate to the proceedings for judicial review because there are no formal pleadings, because there is no true "*lis*" between the Crown and the respondent or applicant,

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22. J. Wallace and Y. Grbich, "A Judge's Guide to Legal Change in Property: Mere Equities Critically Examined" (1979) 3 *U.N.S.W.L.J.* 175, 187. See also editorial note in (1982) 56 *A.L.J.* 265.
23. *Dillwyn* v. *Llewellyn* (1862) 45 E.R. 1285; *Inwards* v. *Baker* [1965] 2 Q.B. 29; *Moorgate Mercantile Co. Ltd* v. *Twitchings* [1975] 3 W.L.R. 286; *Legione* v. *Hateley*, note 20, *supra*. M.P. Thompson "From Representation to Expectation: Estoppel as a Cause of Action" (1983) 42 *Cambridge L.J.* 257.
24. (1866) L.R. 1 H.L. 129.
25. *Id.*, 170 *per* Lord Kingsdown.
26. *Halsbury's Laws* (4th ed.) 16, para. 1510.
27. *Crabb* v. *Arun District Council* [1976] 1 Ch. 179.
28. *Victoria* v. *Rossignoli* [1983] 2 V.R. 1, 13, *per* Fullagar J. See also *Keen* v. *Holland* [1984] 1 W.L.R. 251, 261.
29. H.W.R. Wade, *Administrative Law* (5th ed. 1982) 239.

because issue estoppel could not operate against the Crown, and because in many administrative and tribunal decisions there cannot be said to be a final decision.[30] To the other forms of estoppel it has been objected that estoppel cannot legitimate what is ultra vires and illegal,[31] that estoppel cannot prevent the exercise of a statutory duty[32] or discretion,[33] and that where jurisdiction is exercisable only subject to statutory provisions the parties cannot confer jurisdiction by estoppel which could not be conferred by express agreement.[34]

In fact these principles have not been so rigorously applied as to exclude completely the operation of estoppel in public law situations, but they have substantially narrowed its scope and frequently led to apparently unfair decisions.

A useful illustration of the ultra vires principle can be seen in *Commonwealth* v. *Burns*[35] where Mrs Burns sought to raise an estoppel against the Commonwealth with respect to an overpayment made out of consolidated revenue. Mrs Burns had been in receipt of her father's pension on his behalf until his death in 1960 and those payments continued for some years thereafter. On two occasions in 1961 she queried the payments and on the second occasion was reassured by the Repatriation Department that she was entitled to the money. As subsequently discovered, this reassurance had been given in error, making the payments "illegal" since they were made from consolidated revenue without statutory authority. The claim by Mrs Burns that the reassurance would operate to estop the Crown from seeking repayment of the money was rejected on the principle that:

> a party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says that he shall not do. . . nobody had, or could have had any lawful authority to make the payments in question to Mrs Burns.[36]

Although expressed in wide terms it is important to recall that in *Burns* the overpayment was made from consolidated revenue thus raising the important constitutional principle that "no money can

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30. *R.* v. *Secretary of State for the Environment; ex parte Hackney London Borough Council* [1983] 1 W.L.R. 524, 538-539.
31. See *Commonwealth of Australia* v. *Burns* [1971] V.R. 825; *Re Callaghan* (1978) 1 A.L.D. 227.
32. *Maritime Electric Company Limited* v. *General Dairies Limited* [1937] A.C. 610.
33. *Southend-On-Sea Corporation* v. *Hodgson* [1962] 1 Q.B. 416.
34. *Keen* v. *Holland*, note 28 *supra*, 261.
35. Note 31 *supra*.
36. *Id.*, 810; see also *Re Callaghan*, note 31 *supra*.

be taken out of the consolidated fund" without distinct parliamentary authority.[37]

The general principle that estoppel cannot convert an ultra vires act into a lawful act would be misleading if taken literally. The reality is that the principle is not so absolute and in other cases of overpayments by statutory authorities the results have been different. One may readily concede that in the face of an express statutory prohibition the estoppel can hardly be raised,[38] but the courts have allowed the defence in the case of an overpayment made by a local council where the representation was construed as being a mistake of fact[39] and in the case of an agent of the government where the representation was a mistaken one of law.[40] Indeed, reconciliation of these cases is difficult.[41]

The second principle limiting the operation of estoppel is equally capable of leading to unfair results and equally qualified with exceptions. This principle holds that estoppel cannot be raised to prevent the exercise of a statutory duty[42] or discretion[43] and its operation can best be seen from the leading case of *Southend-on-Sea Corporation*.[44] There the respondent corporation sought to buy and operate a builder's yard on a site they thought had an existing user right which obviated the need to obtain planning permission from the local authority. In an apparently bona fide attempt to ensure that this was the case they wrote to the authority outlining their understanding of its existing use and requested information about its continued use. The authority's engineer replied that:

> the land you have shown on the plan...has an existing user right as a builder's yard and no planning permission is therefore necessary.[45]

Sometime after the respondent had established operations and after the authority had received complaints and further evidence

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37. *Auckland Harbour Board* v. *R.* [1924] A.C. 318; *Commonwealth* v. *Burns*, note 31 *supra*, 826.
38. *Victoria* v. *Rossignoli*, note 28 *supra*, 13.
39. *Avon County Council* v. *Howlett* [1983] 1 V.L.R. 605.
40. *Holt* v. *Markham* [1923] 1 K.B. 504. Note that there is ample authority which minimises the significance, in this field of law, of the fact and law distinction. *Halsbury's Laws* (4th ed.) 16, para. 1594.
41. Compare: *Holt* v. *Markham*, note 40 *supra* with *Commonwealth* v. *Burns*, note 31 *supra*; and *Avon County Council* v. *Howlett*, note 39 *supra* with *Re Callaghan*, note 31 *supra*.
42. *Maritime Electric Company Limited* v. *General Dairies Limited* [1937] A.C. 610.
43. Note 33 *supra*.
44. *Ibid.*
45. *Id.*, 418.

about its prior use the plaintiff was required to discontinue operations as it was operating without a permit.

The respondent sought to raise an estoppel based on its prior dealings with the local authority and the written assurances given to it. The leading case on the issue at the time, *Maritime Electric Co. Ltd,*[46] had held that an estoppel could not be raised to prevent the exercise of a statutory *duty* but here the authority had been vested with a *discretion.* The Court rejected that any logical distinction could be made between a "duty" and a "discretion" and applied the reasoning of the earlier decision that an estoppel could not be allowed where to do so, as here, would have the effect of placing a fetter upon a statutory power (the discretion).[47] Accordingly, the loss fell upon the innocent respondent even though it had taken steps to ascertain the correct position from the body most likely to know the legal position and which alone could exercise the legal discretion reposed in it.

Just as with the ultra vires principle, however, the rule against fetters upon statutory discretions is also subject to qualifications and the general statement would be misleading if read strictly. Thus, if the defect is a mere technicality or irregularity then the doctrine of waiver may permit the estoppel to run,[48] and if the duty or discretion is capable of delegation then the general rules of agency may apply so that where "an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be".[49] This is all subject to the overriding qualifications, however, (a) that the person relying on estoppel has acted to his detriment,[50] and (b) that the person relying on the estoppel acted on the representation on the basis of *some evidence* justifying the belief that the officer could bind the

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46. Note 42 *supra.*
47. Note 33 *supra,* 427.
48. *Wells* v. *Minister of Housing* [1967] 1 W.L.R. 1000, 1007.
49. *Lever Finance* v. *Westminster (City) London Borough Council* [1971] 1 Q.B. 222, 230; S.A. De Smith, *Judicial Review of Administrative Action* (4th ed. 1980) 101, 103.
50. Whether this requires the expenditure of money may depend on the head of estoppel relied upon. In *Victoria* v. *Rossignoli,* note 28 *supra,* 14, the *Ramsden* v. *Dyson* (note 24 *supra*) principle was held to require that "the plaintiff must expend some money on the faith of his mistaken belief, or at least do some act on the faith of his belief, which act is seen to be to his disadvantage once his belief is seen to be mistaken". A much broader notion of detriment is offered by Windeyer J. in *Brickworks Limited* v. *The Council of the Shire of Warringah* (1963) 108 C.L.R. 568, 578.

authority.[51] It should also be noted that it may always be open to argue estoppel on the simple basis that the discretion or duty has in fact been exercised.[52]

A third principle of public law limiting the operation of estoppel can be found in *Laker Airways* v. *Department of Trade*[53] where the plaintiffs sought to invoke the doctrine against the Crown when it had changed its policy on the number of airlines to be licensed in the United Kingdom for given long-haul routes. The effect of the change in policy was that the plaintiff could not commence its "sky train" service between London and New York and suffered consequent financial loss. With Lord Denning M.R. in dissent on the estoppel issue[54] the Court of Appeal held that estoppel cannot be invoked to hinder the formation of government policy[55] or the constitutional results of a general election.[56] As will be seen later even this principle may be subject to some qualification from within public law.

3. How fundamental?

What emerges thus far is that public law is predicated upon a number of fundamental principles which, at first sight, are apparently hostile to the operation of the doctrine of estoppel: in public law the plea that fairness demands that a party cannot act inconsistently with conduct, acts or representations which have caused another to act to his detriment, is met by arguments based upon ultra vires, jurisdiction and non-fetter of duties and discretions.

The problems stem from the differences between public law and private law litigation. In private law cases whether estoppel should be allowed comes down to a contest between individuals representing private interests. By allowing the doctrine to operate the courts are favouring one set of private interests where to do otherwise would perpetuate a perceived injustice. The difference in public law cases is that the party against which the doctrine is sought to be invoked represents not just a private interest, but either has been entrusted with a public obligation or represents some aspect of the public interest. In this context, for the courts

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51. *Western Fish Products Ltd* v. *Penwith District Council* (1978) 38 T. & C.R. 7, 30: "Holding an office, however senior, cannot be enough".
52. *Brickworks Limited* v. *The Council of the Shire of Warringah*, note 50 *supra*, 577 *per* Windeyer J.
53. [1977] 1 Q.B. 643.
54. *Id.*, 707 *per* Lord Denning.
55. *Id.*, 709 *per* Roskill L.J.
56. *Id.*, 709, 728.

to allow estoppel would seem to favour the private interests above that of the public and, moreover, where that interest is conferred by an Act of parliament, the courts might be exposed to the challenge that they have no constitutional power to frustrate the will of parliament, hence the objection that the recognition of an estoppel would operate, in some cases, to authorise an ultra vires act giving it effect and legitimacy where parliament had not intended.

This last concern should not trouble the courts overmuch for they have an armoury of devices available to them through which the doctrines of estoppel and ultra vires can be reconciled. Apart from the great flexibility which arises from the almost insuperable conceptual difficulties of deciding what is ultra vires and what is not,[57] the courts have always applied a set of presumptions to the interpretation of legislation, and, if it be permissible for the courts to presume that parliament intended any error of law by administrative tribunals and authorities to be reviewable by the courts, even in the face of apparent express statutory prohibition,[58] then it seems a short step to hold that as a matter of statutory interpretation parliament intended that a public authority be estopped from enforcing "its rights" in circumstances where a private litigant would be estopped. There is, furthermore, the analysis proferred by Lord Denning M.R. in *Laker Airways*[59] which attempts to reconcile estoppel with the ultra vires doctrine by regarding situations where estoppel might be raised as situations where a body is acting unfairly and that where bodies are acting unfairly they are *ipso facto* acting ultra vires.

The greater difficulty is the very real policy conflict facing the courts in choosing which of the two sets of interests, the private or public, should be favoured. Clearly, there is a need for the common law to strike a balance between these two competing sets of interests when the doctrine of estoppel has been raised in aid of the private interest to defeat the public interest. Even this analysis is too simplistic for there can be found a public interest in the policy sustaining the doctrine of estoppel itself, namely, the avoidance of injustice which would result in allowing someone to

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57. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; B.C. Gould, "Anisminic and Jurisdictional Review" [1970] *Pub. L.* 358; D.M. Gordon, "What Did the *Anisminic* Case Decide?" (1971) 34 *Mod. L. Rev.* 1; Wade, note 29 *supra*, 249-272; De Smith, note 49 *supra*, 108-121; *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56.
58. *In Re Racal Communications Ltd* [1981] A.C. 374 *per* Lord Diplock.
59. Note 53 *supra*.

act contrary to representations or conduct which have caused another to act to his detriment. In such an analysis the question would be whether this public policy is outweighed by the countervailing public law considerations that a body of limited powers should not exceed those powers, that a duty or discretion imposed upon that body in the public interest should not be prevented from being exercised by the doctrine of estoppel, and that the doctrine cannot legitimate an act for which there is no legal basis. Furthermore, there is the public interest in the formulation of a rule which promotes and facilitates public administration.

4. Striking a Balance

Some of the complexity of the problem can be seen in the case of *Lever Finance* v. *Westminster L.B.C.*[60] where the estoppel was allowed. The facts were complex and centred on an alteration to a building permit which had been obtained by property developers who were developing a block of fourteen houses. It was found as a fact that where "minor modifications" of the plan might be required the practice had developed of permitting approval by the Planning Officer without the need for formal act of Council. A month after receiving approval of the detailed plan the architect prepared a larger plan with some small variations and submitted it to the Planning Officer. The Planning Officer decided that the variations were minor and that they did not require further permission from the Council. The builders were thus led to believe that they were entitled to proceed and did so.

During the course of construction some residents complained when it was discovered that one of the houses rather than being 40 feet away from them would be only 23 feet away. The builders were recommended to apply for formal Council approval but when they did so the Council refused to give it. By this stage the houses were almost completed and their demolition would have involved substantial loss. The Court of Appeal decided that in view of the past practice of approval by the Planning Officer in the case of minor alterations and the possibility of delegation of the power to individual officers, the Council was estopped from denying that it had given Council's approval. Given that the Council's discretion had not been exercised, the effect of allowing the estoppel was to preclude any exercise.

The case highlights the difficulties faced by the courts in balancing the many competing interests. First, there is the set of

60. [1971] 1 Q.B. 222.

public interests reposed in the local authority: that in ensuring a supervisory role over local planning, the general interest in ensuring that procedural requirements are complied with, the interest of ensuring a mechanism for persons affected to lodge complaints, etc. Secondly, there are two sets in private interests: the local residents adversely affected by the end result and the builders. Paradoxically the public interest in the local authority can be seen as having been reposed in it to protect *both* private interests: the procedural aspects of planning notices and approvals can be seen to be protecting, initially, the residents, and upon approval, the builders. In other words, the statutory formula in this case can itself be seen as the expression of a balance struck between competing private interests by the legislature. What upsets this balance is the act of the "guardian" of the public interest in not following the procedures. Thirdly, there is the public interest in formulating a rule which does not unduly hinder the administrative process when it is being carried on bona fide but mistakenly. After all, the practice of permission from the Planning Officer developed for ease of administration and, had parliament given the matter some consideration, it may have made precisely that provision. Yet administrative ease must be balanced with judicial scrutiny ensuring that powers are not exceeded.

From the standpoint of public law theory there are powerful objections to allowing an estoppel against a public authority. A public body is simply not a private person representing only a private interest and to treat the body sought to be estopped as being the party that must bear the burden of its conduct or representation totally ignores the fact that other parties and interests, both private and public, will also suffer.

One suggestion that has been made is that the courts should adopt the more flexible approach in the United States which would allow estoppel to bind the government "in the same manner as a private party when the elements requisite for such an estoppel against a private party are present, and in the considered view of a court of equity the injustice which would result from the failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest on policy which would result from the raising of an estoppel."[61]

This suggestion should not be seized too readily for at base it is a solution that does little more than identify a problem still leaving it to the courts to balance the competing interests without

61. *Long Beach* v. *Mansell* 476 P. 2d 423, 448 (1970) quoted in P.P. Craig, "Representations by Public Bodies" (1977) 93 *Law Q. Rev.* 398.

the guidance of a useful conceptual framework within which to articulate and assess them. It may also be criticized because on one analysis of the existing cases that is precisely what the courts have done; the current law may indeed represent just that balance. If the argument is that more flexibility is required, then what must be shown is how that additional flexibility should be exercised and how the balancing of the competing interests in future cases will or should somehow result in different decisions.

Compensation might be seen to be an appropriate remedy in some cases (presumably like *Lever Finance*) where one party has "suffered loss of amenity",[62] but it is difficult to see how this solution does anything more than sidestep the public law objection that powers should not be exceeded since it effectively legitimates an invalid act through payment of compensation to the injured party. Even allowing that there might be cases where compensation would seem appropriate, such as where one party has "suffered loss of amenity", there would be many instances where that expedient would simply be inadequate; for example, where the public authority's action leads to deportation or reversal of policy leading to no loss calculable in monetary terms or conversely in sums so large that compensation would still effectively clog the free development and change of policy.[63]

5. The proper place of estoppel in public law

It could be argued, as suggested above, that the current place of estoppel in public law does represent the adequate striking of a balance between the competing interests with the courts deciding that the law should generally prefer to uphold the concerns of public law over those in favour of estoppel. Cases in which preference to those concerns is not given would thus be seen as instances where the courts have attempted to mitigate any potential harshness and as an acceptance by them that there are competing interests to be balanced.

Such an approach, however, would ignore the fact that much of the problem is purely conceptual and that the pressures against the use of estoppel in public law are seriously undermined by other developments in public law. In the first place it should be recalled that although the public law rules precluding estoppel find frequent expression in rigid terms (an ultra vires act cannot be legitimized; a statutory duty or discretion cannot be fettered) in reality, as explained, there are numerous exceptions to them.

62. Craig, note 61 *supra*, 419.
63. For example, as in the Laker Airways suit (*Laker Airways* v. *Department of Trade*, note 53 *supra*) involving sums in the order of $700 million.

In the second place it needs to be noted that by pursuing claims in other areas of law a result may be achieved which would seem seriously at odds with the policy ostensibly being served by the preclusion of estoppel. Thus where a licence inspector of a municipality gave an applicant negligent advice regarding suitable addresses for a used car business the municipal authority was held liable in negligence where the applicant was later required by the municipal authority to discontinue his business as it was conducted contrary to the authority's zoning by-laws.[64] Similarly, where a Council failed to give information regarding a road-widening scheme, even though not required in law to do so, but where the practice had developed of giving such information, the Council was held liable in negligence for the subsequent economic loss suffered by the applicant.[65]

In both cases the law is allowing the innocent party, in effect, to rely upon a representation which the public body has no power to make. In these cases *private law* is being used to supplement the deficiency in *public law* and to allow a representation which might not sustain a successful plea of estoppel to found a cause of action against the public body resulting in an award of damages as compensation for the negligent exercise of public duties and discretions. Any objections that, in a sense, these actions give effective legitimacy to ultra vires acts or that they fetter the exercise of public duties and discretions are met by the words of Lord Reid that

> [w]hen Parliament confers a discretion ... there may, and almost certainly will, be errors of judgment ... But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of discretion which Parliament has conferred. The person exercising the discretion has acted in abuse or excess of his powers. Parliament cannot be supposed to have granted immunity to persons who do that.[66]

The irony of Lord Reid's statement is that, in a sense, the doctrine of ultra vires which is employed to exclude estoppel is here being used to justify the action in negligence.

In cases involving government policy, even where public law prevents estoppel on the grounds that such policy should not be prevented from development and change, the law will sometimes permit a result similar to that which would obtain had the estoppel been allowed but on other grounds. The dictates of natural justice

64. *Windsor Motors Ltd* v. *District of Powell River* (1969) 4 D.L.R. (3d) 155.
65. *Shaddock* v. *Parramatta City Council* (1981) 36 A.L.R. 385.
66. *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004, 1031. The same may be true of the exercise of discretion at the policy level: *Anns* v. *Merton London Borough Council* [1978] A.C. 728.

may require that where a public body or official has created a "legitimate expectation" by the announcement of a policy, the government may be prevented from acting contrary to that expectation without first affording the person affected an opportunity to be heard.[67] Again it is seen that public law itself has evolved devices which operate in much the same way as an estoppel. Thus, where a public body gave a public undertaking about the number of taxi cab licences to be issued, it was precluded from breaking it without first giving a hearing.[68] The principle of ultra vires has operated in much the same way as estoppel when it has been held that the way in which a decision has been reached or a discretion exercised has been unreasonable.[69] In *R.* v. *Inland Revenue Commissioners; ex parte Preston*[70] it was held that the Inland Revenue had acted unreasonably (and hence ultra vires) by not having taken into consideration prior agreements reached with the taxpayer when they decided to reopen the file.[71]

Even from these few examples it can be seen that it would substantially overstate the importance of the doctrines of ultra vires and non-fetter of duties and discretions, even within the corpus of public law, to insist that estoppel can never be invoked. In reality both public and private law admit of exceptions. Furthermore the doctrine of ultra vires can be used both to preclude estoppel[72] or as the justification for allowing it, as suggested in the negligence and legitimate expectation cases.

Faced with these complexities it might be tempting to conclude that any answer to the problem of the extent to which estoppel should apply in public law cannot be given a single answer since the

> balance of public and individual interests will produce different answers in areas as diverse on planning and licensing, social security and taxation, and even within each area. A doctrine with sufficient flexibility to recognise this diversity is needed.[73]

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67. *Attorney-General of Hong Kong* v. *Ng Yuen Shin* [1983] 2 W.L.R. 735; *cf. Salemi* v. *MacKellar* (No.2) (1977) 137 C.L.R. 396.
68. *R.* v. *Liverpool Corporation; ex parte Liverpool Taxi Fleet Operations' Association* [1972] 2 Q.B. 299.
69. *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1928] 1 K.B. 223; *cf. Williams* v. *City of Melbourne* (1933) 49 C.L.R. 142, 149 *per* Dixon J.
70. [1983] 2 All E.R. 300.
71. *Id.*, 306. The Court distinctly rejected the proposition that the Crown could be estopped.
72. *E.g. Commonwealth of Australia* v. *Burns*, note 31 *supra*.
73. Craig, note 61 *supra*, 420.

One might also add that the complexity is increased by the different varieties of estoppel. Yet it would be no answer to create a flexible approach which reduces the issue to one which asks "should an estoppel be allowed on *these* facts?" Such a flexibility does not sufficiently inform the courts or litigants of the relevant criteria which must be used to answer that question and any resort to notions of "fairness" will yield few useful results. Furthermore, it goes no way either to challenge the argument that the current law needs no change because it does in fact represent a sufficiently flexible approach, or to suggest how given cases should be decided. Nor does it address what are the more central problems in public law, namely, bureaucratic control and how the courts can make public authorities liable for actions of officers exercising public powers.

One thing is clear, namely, that the complexity of the current law points to difficulties of the application of the doctrine in public law. Nevertheless some general statements can be made about the extent of its operation. First, there will be some occasions where the ultra vires doctrine must prevail to exclude estoppel but these occasions should be confined to ones which invoke such fundamental countervailing doctrines, such as the constitutional doctrine that moneys cannot be withdrawn from consolidated revenue without parliamentary authority.[74] But these cases should be restricted as much as possible so as to preserve the countervailing principle rather than to see extensions of it where none exist; thus, it should have no application where a statutory authority pays money out of an allocated fund or some other independent source of finance.[75] In other words we should (a) remember the reason for restricting the doctrine of estoppel (that is, the countervailing principle) and (b) not allow the restriction to be couched in terms broader than is required to satisfy the countervailing principle. We should also remember that to insist on a broad exclusion would logically necessitate denying any award of damages against public authorities exercising discretions in abuse or excess of powers.[76]

Secondly, in cases which invoke the principle that statutory duties or discretions should not be fettered we need to ask whether public policy is best served by excluding estoppel. As shown above, the issues cannot be reduced to a question of the public interest in seeing unfettered duties or discretions prevailing over the private interest of the litigant seeking to raise the estoppel for,

74. *E.g. Commonwealth of Australia* v. *Burns*, note 31 *supra*.
75. Note 39 *supra*.
76. Note 65 *supra*.

at very least, there is a public interest in the policy underlying the estoppel which would lend support to the private interest. In these cases, it is suggested that the appropriate criterion to decide whether estoppel ought to be allowed should be the proper functioning of public administration. We should not be concerned about whether to allow an estoppel in any given case would fetter particular public powers but, rather, whether a general rule is more or less conducive to better public administration.

Couched in such terms it might, at first sight, seem inevitable that any fetter on the exercise of any public power must hinder public administration, yet this may not prove to be the case. If the estoppel had not been allowed in *Lever Finance* the workings of the local authority would have been hindered through the courts insisting upon excessive conformity to the statutory procedures and would thus allow the administration little flexibility to establish a working and workable administrative procedure.

If we assume, as we are compelled to do, that the public officers are acting bona fide then the question of the availability of estoppel is really a question of what approach the courts should take to the administration either having made a bona fide error or having read down the strictness of the legislative requirement imposed upon it. To place the burden upon the innocent member of the public serves little purpose since he must *per force* rely upon the administration with which he is dealing in circumstances where he has no reason to doubt what he is being told. If public officials act contrary to their charter then the courts should develop a series of mechanisms to deal with ensuring greater accountability and conformity, and not foster a rule which allows the administration to act without responsibility. If administration of public powers is necessary in our community, then our law should encourage reliance upon it by individuals who have to deal with it; if our administrators deviate from the letter of the law then mechanisms should be developed to encourage greater compliance where the deviation is not justified.

Another way of looking at some of these issues, and as an example of how the courts might find justification for administrative deviation, is to see the question of whether to allow the estoppel in the *Lever Finance* situation as one of the strictness with which the court should insist upon compliance with the procedures; in other words, whether to regard the procedures as directory or mandatory.[77] Notwithstanding the conceptual

77. A recent case where this approach is suggested, though not applied, is *Keen* v. *Holland*, note 28 *supra*, 261.

difficulties which such an analysis might involve[78] the courts would, by this mechanism, be able to introduce a substantial degree of flexibility in deciding whether in a given case an estoppel should be allowed; it permits the simple expedient of holding that the regulations were either mandatory or directory. In deciding this question, and hence the question of parliamentary intent, the needs of the administrators to depart from the strict procedures might be relevant in the context of the legislation taken as a whole.[79] It would be hoped that the cases where estoppel would be rejected were thus confined to those relatively rare cases where, notwithstanding the needs of the administration, the words of the statute could simply not be interpreted more generously.

This leaves out of consideration estoppel by record which gives rise to very different issues. In *Weaver* v. *Law Society of New South Wales*[80] it was sought to raise an issue estoppel to prevent a statutory body from reopening a finding in favour of the appellant in relation to an inquiry into his misconduct. In addition to the grounds that the plea was not available where the earlier finding was procured by false evidence[81] it was said that the

> court cannot disable itself from hearing and determining the very serious complaint...merely because the complaint may or will involve the re-litigation of allegations of misconduct of which the solicitor has previously been found not guilty.[82]

On principle there can be no objection to such an exclusion.

More generally, where the discretion is granted to make determinations on numerous occasions (for example, annual rating determinations) it would be wholly inappropriate to allow a plea of *res judicata*.[83] Subject to such qualifications however it should make no difference, provided the requisite elements have been established to raise the estoppel, that there is technically no "*lis*"[84] or that the administrative agency was not technically exercising judicial power.[85]

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78. J. Evans, "Mandatory and Directory Rules" (1981) 1 *Legal Stud.* 227.
79. *E.g.*, *S.S. Constructions Pty Ltd* v. *Ventura Motors Pty Ltd* [1964] V.R. 229.
80. (1979) 53 A.L.J.R. 585.
81. *Id.*, 587.
82. *Ibid.*
83. Wade, note 29 *supra*, 243. See also 246-248.
84. *Id.*, 243. *Cf. R.* v. *Secretary of State for the Environment; ex parte Hackney London Borough Council*, note 30 *supra*.
85. *Cf. Australian Transport Officers Federation* v. *State Public Services Federation* (1981) 34 A.L.R. 406.

6. Conclusion

The many branches of the doctrine of estoppel, but particularly the doctrine of estoppel by conduct, have caused acute problems in public law. It has seemed difficult to rationalize the principles of ultra vires and non-fetter of duties and discretions with a doctrine which seems to have the effect of legitimating ultra vires acts, imposing fetters upon the exercise of statutory powers, and imposing unrealistic standards of control of an individual official's acts by his employer agency.

Nevertheless when a broader view is taken it is apparent that the public law objections to estoppel are not themselves absolutes and have been substantially qualified in other branches of law. It would improve analysis and permit more consistent results if a proper role of estoppel in public law could be permitted and if this role is the simple role of using estoppel to ensure better public administration. The doctrine of estoppel should be allowed to operate and be seen in the context of the role of public law as managing public bodies. The doctrine should thus be given an overt and judicially manageable function.