

# The Changing Face of Legitimate Expectation

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A number of recent judicial decisions have attempted to reduce uncertainty in the doctrine of legitimate expectation. It has been accepted that the law normally requires a legitimate expectation to be founded on a clear and unqualified representation to the claimant and/or to those for whom he or she may be taken as speaking, as a foundation for showing that departure from it by the maker is so unfair as to amount to an abuse of power

In the *R (Bath) v. North Somerset Council* [2008] EWHC 630 the public authority had obtained consent from the Secretary of State and the majority of tenants to effect a Large Scale Voluntary Housing Transfer (LSVT).

The claimant argued a legitimate expectation was created that the entire proceeds would be applied to capital housing projects. The expected proceeds were between £6-£8 million. The actual proceeds were significantly higher at £22 million. The Council decided to allocate £8 million to housing projects with the remainder to other areas of responsibility. Bath sought a declaration that the council was bound to spend all the net capital receipts on housing.

In the case Sir Robin Auld addressed the balance to be struck between a legitimate expectation created by a public authority, and the public interest in not fettering the discretion of the authority.

Auld LJ identified judgements from the Court of Appeal which showed a consensus has emerged on the proper approach in a claim based on legitimate expectation of a substantive benefit:

1. to consider whether the departure from a relevant representation is so unfair as to amount to an abuse of power. (Unfairness normally results in detriment to the holder of the legitimate expectation)
2. weigh unfairness against the overriding public interest relied upon for departure from the representation. (*R. v. North and East Devon Health Authority, ex parte Coughlan*)

Auld LJ felt it was unhelpful to place a persuasive burden on one side or the other, rather it was up to the court to decide if a change of tack affecting a claimant who has been led to expect something different is 'a just exercise of power'.

Proportionality is key. Auld LJ said a public body may change statements of intent if and when the public interest requires it, if it does so without unfairness to the claimant and does so proportionately.

Proportionality will be judged in accordance with *Nadarajah v. Secretary of State for the Home Department* (2005) EWCA Civ 1363

"Where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure... On the other hand, where the decision maker is concerned to raise wide ranging or macro political issues of policy, the expectation's enforcement in the court will encounter a steeper climb."

In *R. (Bath) v. North Somerset Council* the court noted the change in circumstances which meant the local authority had a pot of £22 million rather than £8 million and took into consideration the many responsibilities of local governance. It was felt the unfairness caused to the claimant was outweighed by the overriding public interest.

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In *R (Niazi and Others) v. Secretary of State* [2008] All ER (D) 127, Lord Justice Laws attempted to give the doctrine sharper edges. In the course of his judgement however he stated proportionality was to be “considered amongst other things”, thereby opening up the broad landscape of public policy considerations.

Litigation will continue to arise on the basis of legitimate expectation as aggrieved claimants seek to show the unfairness of the public authorities decision outweighs the public interest in altering the policy. As the sands continue to shift on the doctrine there will remain considerable scope for claimants to bring actions against public authorities who alter their position, however, the Bath decision arguably makes it more difficult to succeed in a claim based on legitimate expectation.

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