ADR and Public Law

by CHSpurin

We now have the benefit of three significant cases on the role of ADR in Public Law matters in the UK., namely **Cowl v Plymouth City Council** [2002] 1 WLR 803: , **Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence** [2003] EWHC 1479 and **Anufrijeva v London Borough of Southwark; R v S of S for Home Department ex parte N & ; R v S of S for Home Department ex parte N M** [2003] EWCA Civ 1406, heard together by the CA in a combined hearing. Public Law litigation is now big business and a significant aspect of legal practice. The advent first of the European Union and secondly of human rights legislation has introduced for the first time the concept of damages for breach of public law duties, though it remains the case that no damages are available outside these limited areas. It is now possible to draw some tentative conclusions about this area of ADR practice, firstly as to what amounts to ADR for the purposes of Public Law and secondly, when damages are permitted, as to how they will be assessed by the court.

Cowl makes it clear that there is scope in certain situations for the representatives of public bodies to lawfully enter into settlement negotiations without compromising their statutory duties. Cowl however throws little light on the extent to which that is the case. Consequently, it can be anticipated that district auditors may again in the future seek to hold representatives of public bodies personally to account for funds thrown away by a compromise agreement in breach of statutory duty to manage public funds in the public interest. Alternatively, it may be anticipated that a compromise agreement may in some situations be unenforceable due to a lack of authority, which might correspondingly give rise to arguments as to the scope estoppel in public law.

Royal Bank of Canada touches on a question common to ADR in respect of civil litigation, namely when is it appropriate to reject ADR overtures? and implications on costs of so doing. It would appear that a mere confidence in the strength of one's claim in law is insufficient reason to refuse to mediate. Whilst the MOD were penalised in costs for failing to mediate, the question is still unanswered however, as to what would have happened if they had engaged in mediation and forfeited the right to repossession or paid compensation for early repossession when, as became clear from the judgement, they had a legal right to repossess and no legal liability for terminating the lease and an auditor had subsequently investigated the circumstances of that compromise settlement. Are public bodies caught in a Catch 22 situation whereby officers may be made to account for bad deals, but the public body will suffer cost penalties for failing to enter into negotiations? What point is there in engaging in negotiations knowing there is nothing you can lawfully put on the table for consideration? Further clarification is needed here.

Anufrijeva et al reveals the scope of ADR in Public Law matters, the hurdles to be surmounted in applying for Judicial Review and touches on matters of quantum in damages. In **Cowl**, the CA had already intimated that all forms of negotiation satisfy the overriding requirements of s1 CPR 1998, not simply mediation and further stated that the courts should be satisfied that an applicant had discharged his duties in this respect by pursuing all other practicable methods of resolution before acceding to an application for J.R. In **Anufrijeva** the court made it clear that the good offices of the Parliamentary Commissioner for England and Wales and other ombudsmen are included within the umbrella of ADR for the purposes of Public Law, and that whilst it is not necessary to have "***exhausted***" all other avenues of settlement, the applicant must at least explain why the ombudsman option was not appropriate in the circumstances. A short answer, whilst not canvassed by the court, must surely be that since the application sought to recover damages, these would not have been available from the Ombudsman in this series of applications. Traditionally, the remit of the Ombudsman was to provide a form of redress in respect of mal-administration, where the aggrieved citizen lacked the locus standii, in the absence of breach of a legal interest, to sue either at law, or to apply for judicial review. In normal circumstances therefore it is difficult to see what contribution the ombudsman can make to a public law application which involves a recovery of damages, since all that the ombudsman can do is advise or recommend, with a view to improving administrative services. However, if the Ombudsman is prepared to recommend compensation in deserving situations and local authorities are prepared to follow that advice or recommendation, the ombudsman could perform a useful ADR role. An intriguing question is what the response to the courts would be where mal-administration is established and the advice of the Ombudsman has been disregarded. Would this impact on costs alone or also on the level of damages?

The next question that arises is "How does the court assess damages at public law?" The answer provided by the court, I regret to say is, like the inscrutable sphinz, not too revealing or helpful. The court stated "*The awarding of compensation under the HRA is not to be compared with the approach adopted under a claim for breach of civil law. However, rough guidance as to the level of damages to be awarded may be obtained from the guidelines issued by the Judicial Studies Board, the Criminal Injuries Compensation Board, the Parliamentary Ombudsman and the Local Government Ombudsman. The difficulty, however, is in finding a suitable comparator within these guidelines. In cases of maladministration, where damages are appropriate, awards should be moderate, but not minimal, as this would undermine the respect for Convention rights*. " What exactly amounts to "***moderate but not minimal***" is anyone's guess. Any award however small may however be sufficient to ensure that a case cannot proceed to Strasbourg, and thus enables the UK to remain in control and safeguard the public interest free from outside interference.

The European Union Law element also has an impact upon the assessment of damages, which is not canvassed by these cases, since the matter did not arise. The assessment of damages for breach of European Union law is un-problematical where civil action is involved. However, where a public law breach of European Union law occurs, Factortame and related cases have made it clear that a real and substantial remedy must be available and that no rule of English Law that bars damages can override this requirement. Hence the Spanish fishermen were entitled to and indeed received compensation. The level of compensation reflected their commercial losses and was neither "***moderate nor minimal***."

Anufrijeva throws some light on the availability of damages at Public Law. The court stated in respect of Human Rights issues that "*There are a number of features that distinguish damages under the HRA from damages in contract or tort law. **Damages under the HRA are not recoverable as of right**. When choosing whether or not to award damages, the court must have due regard to ECtHR principles and must balance the need of the individual against that of the State. **The approach adopted to awarding damages should be no less liberal than that applied by the ECtHR.** "The critical message is that damages should only be awarded when it is 'just and appropriate' and 'necessary' to achieve 'just satisfaction'" (paragraph 63). They should be awarded on an equitable basis having due regard to the seriousness of the violation, the conduct of the parties and the "degree of loss" suffered*."

The only problem with this dicta is that if a claimant can demonstrate a likelihood that if the case were to go to Strasbourg, the court there would award damages, presumably this would give rise to a "***right***" to recover damages from a UK court.

A difficult area of Public Law practice also not touched upon in this series of cases, where there may be a role to play for ADR, relates to the inter-relationships between Public Bodies. Where one public body receives public funding from another and an allegation that the money has been used for ultra-vires purposes or has not been used at all, a dispute is likely to arise where the funding body may seek to recover funds. Clearly, where a high level of wrong-doing is involved, individuals may be surcharged by the district auditor. However, where public funds are simply used for the wrong public purpose, so that something the funding body did not wish to fund has reaped a benefit, is restitution available, or alternatively set-off against future funding? Traditionally, these are civil law remedies, though the latter involves a degree of self help. Now that Public Law has embraced the concept of damages, could an award of damages be made? It may be that in order to protect itself from liability, in respect of set off from subsequent funding, taking into account the previous over-payment, a public body might seek a declaration from the High Court that there has been an over-payment or ultra vires use of funds. Whichever course of action is followed, it is submitted that recourse to ADR would be a useful way of ensuring that public funds are not dissipated on unnecessary litigation. The one problem that might arise is, that until a court has made a declaration there may be a lack of incentive to settle.

It is clear that the explosion in Judicial Review cases in the public sector is a cause of concern for the Lord Chancellor, the Department of Constitutional Affairs and the Lord Chief Justice. The Government has made concerted efforts to introduce and encourage the use of alternative dispute settlement processes such as central and local ombudsmen. In addition, it would now appear that there is a concerted effort to encourage the use of ADR. The guiding principles however are not yet finalised, so watch this space.