THE ENFORCEMENT OF MEDIATED AGREEMENTS AS CONTRACTS

1.1 This paper discusses:

(1) a few commentators' thoughts on the enforceability of mediated agreements; and

(2) principles of contract law relevant to the contractual status and enforceability of mediated agreements, in particular:

(a) why, if a promise to perform a pre-existing contractual or public duty is not consideration, a settlement of a legal dispute is a binding contract;

(b) enforceability of contractual promises which would not themselves constitute good consideration; and

(c) promises by public bodies to exercise a discretion in a particular way.

Some of the issues or scenarios discussed may be very unlikely to arise in practice, but are included to illustrate the theoretical constraints imposed by contract law.

1.2 Given its focus on contract law, this paper does not, however, discuss:-

(1) the suitability or effectiveness of the remedies for breach of contract as compared with other potential remedies in housing disputes or remedies to enforce a court order;

(2) the circumstances in which mediated agreements which are not binding as contracts might be upheld under other legal doctrines such as estoppel.

1.3 This document does not represent the Law Commission's official view of the matters discussed, nor is it an authoritative statement of the law.

1.4 The legal research for this paper was completed on September 2004. Originally, two separate research notes were produced, the second of which discussed the matters referred to in paragraph 1.1(2) above. This paper combines the two earlier papers in a single document, but does not involve any further research (so it does not reflect any changes in the law since September 2004).

Summary

1.5 Disadvantages of relying on contracts to settle housing disputes are that:

(1) not all mediated agreements will be contracts, because of:

(a) a lack of agreement between the parties (or an incomplete agreement);

(b) the agreement not being set out in writing or a court order, if the parties had agreed this would be necessary before they were to be bound;

(c) unless a deed is used, a lack of consideration from one party (promises not to complain, not to commit crimes, or to do no more than one's pre-existing public (or possibly contractual) duty not being consideration);

(d) a lack of intention to create legal relations;

(e) a lack of required formalities (eg writing for contracts to transfer land);

(2) mediated agreements which are contracts may not be enforceable against both parties (eg if one party is a child);

(3) the "victim" of fraud, duress or misrepresentation may avoid a contract;

(4) a contract entered into on a common mistake of law or fact will be void ab initio, but only if the mistake renders the performance of the contract impossible;

(5) the Crown and local authorities cannot fetter their discretion by contract;

(6) local authorities and other "creatures of statute" cannot act ultra vires – a "creative" mediated solution must be within their powers;

(7) the terms of a mediated agreement may not prevent the parties pursuing any legal proceedings the agreement purported to settle;

(8) a mediated contract may create legal rights and causes of action additional to any underlying the original dispute and thus prolong the litigation;

(9) the remedies available for breach of contract may not be as extensive as those available for the original housing dispute cause of action.

Views of commentators on the enforceability of mediated agreements

Margaret Doyle

1.6 We set out below extracts from *Advising on ADR: the essential guide to appropriate dispute resolution* by Margaret Doyle.[1] The italic emphasis is mine.

1.7 Margaret Doyle states at page 6 that:

> Non-adjudicatory processes – such as negotiation, conciliation, mediation, and early neutral evaluation – are not binding in themselves, but agreements reached through those processes can be made binding. For example, a mediated agreement *can be* expressed in a binding contract, which can then be enforced in court.

[1] 1st edition, June 2000, published by the Advice Services Alliance.

"Can be" suggests that not all mediated agreements are or are expressed in, a binding contract.

1.8 At page 11 she comments that:

> Like negotiation, mediation and conciliation are usually non-binding, although *any* agreements can be made into binding contracts.

"Any" could be read as suggesting that all mediated agreements can be made into binding contracts. For reasons set out below, I do not think this is true.

1.9 Margaret Doyle notes at page 13 that:

> Mediation is a non-binding process. A *signed* mediated agreement, however, *is* a contract and could, in theory, be legally enforced as such, but this has not been tested in British courts.[2] In England and Wales, a mediated agreement made via a court-annexed mediation scheme can be made into a consent order and enforced in court. In Scotland – where no court-annexed schemes exist at the moment – a mediated agreement cannot be made into a consent order. The advantage of a consent order is that parties will not have to prove the contract before enforcing it. Should the mediated agreement be breached, the parties are that much further along the enforcement route.
>
> In most cases, however, enforcement is not necessary because parties tend to keep to mediated agreements.

Contrary to the suggestions in that extract, I think that oral or unsigned mediated agreements could be binding contracts, not all signed mediated agreements are necessarily binding contracts, and mediated agreements reached other than in court-annexed mediation schemes could be made into consent orders.

1.10 In relation to community mediation (potentially useful in some housing disputes) Margaret Doyle explains that:

> Community mediation agreements are self-enforcing. This means that it is up to the parties themselves to see that the terms of the agreement are kept. Mediators might take a role in following up the agreement – checking later to see if it is working – but they will not act as enforcers.

[2] Since the book was published the Vice Chancellor decided in *Thakrar v Ciro Citterio Menswear plc* (in administration) [2002] EWHC 1975 (Ch) that a mediated settlement was an enforceable contract.

> The theory is that mediated agreements are longer lasting than imposed settlements, such as court orders, because the parties have voluntarily participated in drawing up the terms of the agreement. The absence of enforcement powers and procedures, however, can mean a lack of finality, which is one of mediation's disadvantages. A mediated agreement can break down, even some time after the mediation has taken place, forcing the parties to consider another means of resolving the dispute.
>
> Nevertheless, a mediated agreement *is* a contract and can theoretically be enforced through the courts. This has not been tested in British courts, however. Nor has the mediator's immunity from being called to testify, although it is unlikely that a mediator would agree to testify, since all mediation proceedings are treated as confidential and "without prejudice".[3]

1.11 Again I do not agree that all mediated agreements are necessarily contracts.

1.12 In a description of the 1996-1998 Central London County Court mediation pilot scheme, Margaret Doyle reports that:

> If agreement is reached on one or more issues, the mediator can set these out in writing. Parties can choose whether they want:
>
> > A verbal agreement, with nothing put in writing except the fact that they have resolved the dispute. The court will then be notified that the case is closed.
> >
> > A written agreement, which remains a private agreement between the parties. Again, the court will be notified that the case is closed. Mediated agreements *can be* enforced as binding contracts in court, but given that compliance is high, this is usually not necessary.
> >
> > A written agreement that is to be made into a court order. The court is notified of the terms of the agreement, and should either party feel later that the agreement has been breached, they can apply to the court to enforce it (upon the payment of enforcement fees; see **p205**). Enforcing a court order is considerably easier than enforcing a contract (as above), because a contract must first be proved.[4]

Although the reference to enforceability is in a sub-paragraph on written agreements, as writing is not an essential ingredient of every contract, I think that in some cases oral mediated agreements could also be enforceable as contracts.

[3] op cit, p 99.

[4] op cit, p 112.

The Centre for Effective Dispute Resolution

1.13 The Centre for Effective Dispute Resolution ("CEDR") describes itself as:

> an independent non-profit organisation supported by multinational business and leading professional bodies and public-sector organisations

and its mission as being:

> to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public-sector disputes and civil litigation.

CEDR trains and accredits mediators and provides a dispute resolution and prevention service "CEDR Solve". Its website includes articles, case law and other legal materials relating to ADR.

1.14 CEDR appears satisfied that mediated agreements can be enforced. A report of a CEDR members' forum on 5 February 2003 records that "recent judgments give comfort that agreements negotiated at mediation will be upheld and enforced by the courts".

1.15 In April 2002 the European Commission published a Green Paper on the future of civil and commercial mediation.[5] CEDR's response to this paper stated that:

> 18.1 As a general rule, we believe that an agreement reached through a proper ADR process ought to have the same force and effect, and receive the same recognition and enforcement under the law, as any agreement reached by direct negotiation. Within the English civil and commercial context, this is generally achieved by recording settlement agreements in writing in such a form that they become fully binding as enforceable contracts. If litigation proceedings have been commenced, terms of settlement reached between parties can also be given the force of a court order by using a Consent or "Tomlin" Order to impose a stay on the proceedings, except for the purposes of enforcing the terms of settlement. The advantage of such an order is that, depending on the way it is phrased, its terms can be enforced through the court as if it were a judgment without the need for starting a fresh action.

[5] The Green Paper can be found on the Commission's website at http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf.

> 18.2 We believe that the English system is effective in achieving the enforceability of settlement agreements within the English jurisdiction. However, as is evident from paragraphs 85 to 87 of the Green Paper, there is a wide diversity of approach within the European Union. There might well, therefore, be an argument in favour of greater harmonisation, although given the diversity of the underlying legal systems this may well be difficult to achieve.[6]

Mediation UK

1.16 Mediation UK on its website states that:

> The agreement is usually written down, and signed by both parties and the mediators. However, it is not legally binding and cannot be enforced in court *unless the parties decide to make it a legal contract*. The agreement does not affect anyone's legal rights either, allowing the freedom to find another way of dealing with the dispute at any time.[7]

I agree that the parties' intentions are critical to whether a mediated agreement can be enforced as a contract.

Relevant Principles of Contract Law

1.17 A background of pending or proposed court proceedings, or the use of a mediation process to arrive at the agreement, does not add to or detract from the essential legal requirements for the formation of a contract, namely agreement, contractual intention and consideration (or a deed). If there is no consideration for a promise, the promise is not enforceable merely because the agreement is reached against a background of pending or proposed court proceedings. Even where there is agreement, consideration (or a deed) and an intention to create legal relations, the contract may be void, voidable, or unenforceable against one or other party due to factors such as the absence of a particular form (such as writing), illegality, duress, fraud or incapacity of one of the parties.

1.18 Without a clear definition of "housing disputes", it is hard to know the likely contents of mediated agreements to settle such disputes. (Even with such a definition, parties' imagination makes it difficult to second guess). My discussion below cannot be guaranteed to be exhaustive of the contract law issues which may arise in mediated agreements in housing disputes.

1.19 While the existence of a contract may be implied from the parties' conduct, I am assuming that following mediation, there will be an express agreement between the parties, so that it is not necessary to consider the law relating to implied contracts.

[6] See http://www.cedr.co.uk/library/articles/EUGreenPaperResponse.pdf for the full response.

[7] See http://www.mediationuk.org.uk/template.asp?lv=1&MenuItemID=115&MenuID=1.

Agreement

1.20 The courts apply an objective test as to whether the parties have reached agreement.[8] Normally this is analysed in terms of one party having made an offer which the other has accepted. If to all outward appearances the parties have agreed on the subject-matter in the same terms, they generally cannot rely on a reservation or qualification which they had not expressed.[9] However, if one party knows that the other did not in fact intend to be bound, there will be no agreement.[10] Where negotiations continued for some time, the courts will look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms.[11]

1.21 An agreement may, however, not give rise to a binding contract if it is incomplete or insufficiently certain. An agreement in principle may not be a contract if certain critical details were not settled. For example, an agreement to enter into a lease was held not to be a contract because it failed to specify the date on which the term was to commence.[12] If the parties have left some matters vague or even to be agreed but their conduct shows that they regarded the agreement as binding, the courts may, however, give effect to the agreement, due to a reluctance "to hold void for uncertainty any provision that was intended to have legal effect.[13] The agreement itself may provide a mechanism for resolving outstanding issues such as recourse, or further recourse, to the mediator.[14]

1.22 If, however, the parties had certain matters still to agree or had said that the agreement should be put into writing, that may show that they did not intend the agreement to be binding until the matters had been agreed or the agreement had been put into writing. An example of a case in which a court found that the parties had not reached agreement in the mediation so that there was no binding contract, is *Oil and Mineral Development Corporation Ltd v Mahdi Sajjad and Oasis International LLC*.[15] Morison J refused to allow the defendant in that case to amend the defence to refer to a mediated agreement. At paragraphs 16 and 17 he held that:

[8] See *Smith v Hughes* (1871) LR 6 QB 597.

[9] See *Thoresen Car Ferries v Weymouth Portland BC* [1977] 2 Lloyd's Rep 614.

[10] See *Ignazio Messina and Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep 566, 571.

[11] *Hussey v Horne-Payne* (1879) 4 App Cas 311.

[12] *Harvey v Pratt* [1965] 1 WLR 1025.

[13] *Brown v Gould* [1972] Ch 53, 57-58, *Foley v Classique Coaches Ltd* [1934] 2 KB 1.

[14] See *Cable and Wireless PLC v IBM UK* [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041, in which a clause in a contract providing for the parties to try to settle disputes under it using ADR before resorting to litigation was held to be binding.

[15] 3 December 2001 QBD (Comm), available on Lawtel.

> The documents show, I think, a clear intention that whatever was orally agreed would need to be reduced to a formal written agreement. The written document was not to be a mere formality. There were important details which required clarification and further agreement: for example, was the first defendant committed to assigning the benefit of the on-sale contract, were the parties really intending to compromise not just the existing litigation but also claims arising in the future "from any other activity or business in which either has been involved with the other" as stated in the draft August letter which is said to show that a compromise was reached. Further, Mr Livingstone [*the mediator*] is unable to say more than that Mr Al Tajir, at the meeting in August, said "we should sort them [the disputes] out as recommended in [the May letter]". That is not the language of the conclusion of an agreement binding in law and the letter to which the witness refers makes it quite clear that step 1 was to acknowledge that the proposals were generally acceptable and that thereafter Mr Livingstone would prepare a further document for presentation to both parties "as a basis for progress". It is of some significance, I think, that Mr Sajjad re-activated the Isle of Man proceedings in about March and, thus, arguably has accepted Mr Al Tajir's repudiation [if such it was] of the settlement agreement, if such were concluded.
>
> In short, on the material before me it is clear that the parties never reached a binding settlement agreement as alleged in the proposed amendments. This was a mediation which failed to produce a compromise …

Consideration

1.23 A promise is not generally binding as a contract unless it is either made in a deed, or supported by consideration. Purported compromises of legal claims have been held not to be binding contracts for lack of consideration. For a promise to be enforceable "something of value in the eye of the law" must be given.[16] The consideration for a promise may be either a detriment to the promisee, or benefit to the promisor, in exchange for the promise.[17] The authors of Butterworths' The Law of Contract comment that:

> … it may be said that relatively few situations remain where the court will strike down an exchange, intended to be legally binding, on the grounds of lack of consideration. … There remain some cases where a promisee pays the price requested for his promise by the promisor and the court will nevertheless hold the promise unenforceable, on the grounds that the price paid is not a consideration in the eyes of the law, but even if cloaked in the language of the "sufficiency of consideration" most such cases can be explained on grounds of policy.[18]

[16] See *Thomas v Thomas* (1842) 2 QB 851.

[17] See *Currie v Misa* (875) LR 10 Ex 153, 162.

[18] 1st edition, 1999, p 175, paragraph 2.8.

I think it possible that the courts might hold that some mediated agreements are not enforceable for lack of consideration.

1.24 Whether a promise which is not consideration can be enforced by the other party to the contract (assuming that both parties do provide consideration) appears to depend on why the promise is not consideration. Some promises are not consideration *because* they are not legally binding for public policy reasons or illegality. For example a promise by a wife on separation from her husband not to apply to the court for maintenance was held in several (pre Matrimonial Causes Act 1973) cases to be unenforceable for public policy reasons, so it could not be consideration for a counter-promise by the husband to pay her maintenance.[19]

COMPROMISE OF CLAIMS

1.25 Mediated agreements may frequently involve parties agreeing to abandon legal proceedings that they were bringing or contemplating. A promise not to enforce a valid claim can be consideration for a promise given in return.[20] Cockburn JC in *Callisher v Bischoffsheim* said that:

> Every day a compromise is effected on the grounds that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with the action, he escapes from the vexations incident to it …".[21]

Bowen LJ in *Miles v New Zealand Alford Estate Co* noted that:

> … if an intending litigant bona fide forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence …[22]

[19] *Hyman v Hyman* [1929] AC 601; *Bennett v Bennett* [1952] 1 KB 249.

[20] See *Pullin v Stokes* (1794) 2 HBl 312.

[21] (1870) LR 5 QB 449 at p 452.

[22] (1885) 32 ChD 266 at p 291.

1.26 Likewise a promise to give someone extra time to comply with a legal obligation (eg to pay a debt) can be consideration.[23] It appears not to matter whether the legal proceedings have actually been commenced.[24] A promise to abandon a good defence or not to pursue a particular remedy (such as arbitration proceedings) could also be consideration.[25]

1.27 The party giving up the claim must show that he seriously intended to pursue it, and must not conceal from the other party facts which would have allowed that other person to defeat the claim.[26] Mediated agreements may be reached in cases where there is uncertainty about the validity of the legal claims of the parties concerned. (That uncertainty may be one reason why a party is keen to try ADR rather than proceeding to trial). If a party asserting a legal claim knows or believes that it is invalid, a promise not to pursue that claim would not be good consideration, probably for public policy reasons.[27] If the party offered other consideration for the promise, there could still be a binding contract.[28] A promise not to pursue a claim which the party does not know to be invalid, but merely has legal doubts as to its validity, or as to the facts, could be enforceable as long as he believed in good faith that it had a fair chance of success.[29]

PERFORMANCE OF PUBLIC DUTIES

1.28 It has been held that a person cannot recover money promised to him in return for his performance of, or promise to perform, a (public) duty imposed by law. In *Collins v Godefroy*, a defendant's promise to pay a guinea a day to an attorney who had been subpoenaed to give evidence for him was held to be given without consideration, as the attorney was already required by law to attend.[30] The authors of Chitty on Contracts consider that public policy in discouraging extortion is a better explanation than lack of consideration for the unenforceability of a promise to pay a person under a public duty.[31] They note that other promises eg to pay a reward for information that could lead to the arrest of a felon, were held to be enforceable, even when it was a criminal offence not to provide such information.[32] Public policy in encouraging people to look for such information supported the enforcement of the promise to pay a reward.

[23] See *Crowther v Farrer* (1850) 15 QB 677.

[24] See *Wade v Simeon* (1846) 2 CB 548, 565, 567.

[25] See *Banque de l'Indochine v J H Rayner (Mincing Lane) Ltd* [1983] QB 711 and *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925, 933 respectively.

[26] See *Cook v* Wright (1861) 1 B and S 559, 569 and Miles *v New Zealand Alford Estate Co* (1886) 32 ChD 267.

[27] See *Wade v Simeon* (1846) 2 CB 548, 564.

[28] See *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293, 334.

[29] See *Callisher v Bischoffsheim* (1870) LR 5 QB 449.

[30] (1831) 1 B and Ad 950.

[31] 29th edition, 2004, published by Sweet and Maxwell.

[32] *England v Davidson* (1840) 11A and E 856; 113 ER 640.

1.29 This principle may be relevant in housing disputes where one party (such as a local housing authority) is under a public duty. If that party agrees, following mediation, to do no more than its public duty, the promise may not be enforceable as a matter of contract (although arguably, it may be enforceable by an application for judicial review on legitimate expectation grounds). If, however, the party agrees, following mediation, to do more than its public duty, this may be consideration, so the agreement could be upheld as a contract.[33] In practice, however, the issue of whether a promise to do no more than one's public duty can be enforceable in contract law is may seldom arise in housing dispute cases, as the settlement of such cases will involve a compromise, to which the principles discussed in paragraphs 1.25 to 1.27 above will apply.

1.30 A person cannot enforce a promise made in consideration of his forbearing to engage in a criminal course of conduct.[34] This is likely to be on public policy grounds: discouraging extortion. A promise in a mediated agreement to cease harassing a neighbour or vandalising the neighbour's property would not appear to be binding as a matter of contract law.

1.31 If a party's only promise was not to vandalise his neighbour's property, *Collins v Godefroy* implies that he could not enforce a promise by *his victim* (eg to abandon a legal claim for trespass). It would be contrary to public policy to require the victim to provide *any* consideration for the vandal to behave lawfully. The victim's promise to abandon the legal claim is unenforceable by the vandal, in order to protect his victim. It is not the substance of the victim's promise that means it should not be enforced against him (as a promise to abandon a civil legal claim is capable of being consideration); it is the fact that the victim is making *any* promise.

1.32 This example could be contrasted with cases in which a party makes a promise, the substance of which is illegal or contrary to public policy (eg a promise amounting to an unreasonable restraint of trade). Such a promise would be unenforceable. It could be argued that the law makes such a promise unenforceable to protect the maker of that promise (in the same way that the law making the vandal's victim's promise unenforceable is to protect him). If an unenforceable promise (in restraint of trade) is the sole or main "consideration" given by the party, he cannot enforce the other party's counter-promise, even if the other party is promising to do something which is not inherently unlawful (eg to pay him a sum of money), as the law seeks to discourage illegal bargains.[35] This might suggest that the vandal's victim could not enforce the vandal's promise either, to discourage parties from entering into contracts that could be construed as protection rackets.

1.33 On the other hand, it could be argued that if the vandal was already under a public duty not to vandalise his neighbour's property (which could be enforced eg by bringing a claim for trespass, as well as his possibly being liable for prosecution for criminal damage) it would not be objectionable as a matter of public policy for that duty to be upheld through contractual means as well.

[33] *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270.

[34] *Brown v Brine* (1875) LR 1ExD 5.

[35] *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793; *Goodinson v Goodinson* [1954] 2 QB 118

1.34 Furthermore, the absence of reciprocity does not necessarily prevent enforcement of a promise in a contract if a public policy consideration intervenes. A child can enforce a contractual promise made to him, even if the only consideration for it is his own promise which does not bind him due to his age. [36] Parties cannot contract out of Rent Act protection.[37] However, a tenant can agree to vacate premises of which he is a statutorily protected tenant in return for the landlord paying him a sum of money. If the tenant complies and moves out, he can enforce the landlord's promise to pay him, even though the landlord could not enforce the agreement to require the tenant to vacate the property.[38] That contract is not void for want of mutuality.

1.35 While I have found no clear case law, and the Law Commission itself recognises,[39] the legal consequences of illegality and public policy in contracts are not straightforward, on balance I think that the vandal's promise would be unenforceable by the victim. Taking the example to an extreme, it is hard to imagine the courts allowing a shopkeeper who was told by gangsters "If you pay us £1000 a week protection, we won't burn your shop down" to sue for damages for breach of contract if the gangsters did burn his shop down, despite his making the payments, just as the court would not uphold an action by the gangsters to enforce the shopkeeper's promise to pay. To do so would arguably clothe such an agreement with an unwarranted degree of legal respectability.

PERFORMANCE OF PRE-EXISTING CONTRACTUAL DUTIES

1.36 It is not entirely clear whether a promise to carry out a pre-existing contractual (as opposed to public) duty can be consideration for a promise by the other party to the contract. A tenant may believe that the landlord is already required under the terms of a lease to repair the house. If the landlord agreed, after mediation, to carry out repairs in exchange for the tenant paying rent or service charges withheld in protest at the disrepair, arguably the parties are promising to do no more than the lease already required.

1.37 The traditional view was that performance by one party to a contract of a pre-existing contractual duty (or a promise to perform such a duty) was no consideration for a new promise by the other party to the contract.[40] For example, where a debt was already due in full, a promise by the debtor to pay it in stated instalments was held to be no consideration for the creditor's promise not to take bankruptcy proceedings in respect of the debt.[41] This was on the long established principle that in general terms, an agreement to accept a part payment of a debt is not binding because the debtor gives no consideration.[42]

[36] *Holt v Ward Clarencieux* (1732) Stra 937; 93 ER 953.

[37] *AG Securities v Vaughan* [1990] 1 AC 417.

[38] *Rajenback v Mamon* [1955] 1 QB 283, CA.

[39] Illegal Transactions: The Effect of Illegality on Contracts and Trusts, Consultation Paper No 154.

[40] *Stilk v Myrick* (1809) 2 Camp 317; 6 Esp 129.

[41] *Vanbergen v St Edmunds Properties Ltd* [1933] 2 KB 223.

[42] *Foakes v Beer* (1884) 9 App Cas 605.

1.38 It has, however, been held in *Williams v Roffey Bros and Nicholls (Contractors) Ltd* that where performance by one of the parties to a contract (A) of his pre-existing contractual duty in fact benefits the other party to the contract (B), and where the promise by B was not obtained by duress, A can enforce B's new promise.[43] The factual as opposed to legal benefit obtained by B in securing A's performance amounts to consideration. The authors of Chitty on Contracts argue that

> The insistence in the earlier cases on the stricter requirement of legal benefit or detriment is no longer justified (if it ever was) by the need to protect B from the undue pressure which A might exert by refusing to perform his original contract; for this need can now be met by the expanding concept of duress.[44]

1.39 *Williams v Roffey* suggests that a mediated agreement in which the parties agree to do no more than they were already required to do by a contract (such as a lease) might nevertheless be enforceable as a contract. However, *Stilk v Myrick*, and a line of cases which applied it, were not overruled in *Williams v Roffey*. Purchas LJ in *Williams v Roffey* described *Stilk v Myrick* as a "pillarstone of the law of contract".

1.40 The authors of *Chitty on Contracts* say that in relation to the *Stilk v Myrick* line of authority, "The now more generally-held view is that the new promises in the present group of cases are unenforceable for want of consideration" (not public policy grounds). If both parties do provide consideration in addition to promises to perform pre-existing contractual duties, I think the latter promises (eg to pay the rent, repair the property) would also be enforceable (assuming no duress etc). It also appears that, in the absence of duress, where one party promises extra payment or services in exchange for the other performing its existing contractual duty, there is consideration for the promise.

[43] [1991] 1 QB 1.

[44] 29th edition, 2004, published by Sweet and Maxwell.

PERFORMANCE OF OTHER PRE-EXISTING LEGAL DUTIES

1.41 In *Arrale v Costain Civil Engineering Co Ltd* the claimant, an employee of the defendant, was injured in an accident at work in Dubai.[45] Dubai legislation entitled him to a fixed sum of compensation for his injuries, unless his employer proved that he had disregarded, or been seriously negligent in implementing, health and safety instructions. The defendant's policy was not to rely on that provision to defeat compensation claims. The claimant was paid the statutory compensation and signed a receipt acknowledging that it was accepted "in full satisfaction and discharge of all claims in respect of personal injury whether now or hereafter to become manifest arising directly or indirectly from" the accident. The claimant then sought common law compensation, and the defendant argued that the terms of the receipt prevented him. The Court of Appeal held that the claimant could proceed. Even if the receipt did exclude the common law claim (which it did not) the defendant had given no consideration for such an agreement. Geoffrey Lane LJ decided that the defendant gave no consideration for the claimant's promise not to sue at common law because:

(1) by paying the sum under the Dubai legislation, the defendant was doing no more than performing an obligation already cast upon it by law; and

(2) having decided in this case never to invoke the provision (allowing it to seek to prove that the claimant had disregarded or negligently implemented health and safety instructions) the defendant gave nothing up in return for the claimant's promise.

David Foskett QC, in *The Law of Compromise*, commented that:

> On the question of consideration, it is submitted, with respect, that the first reason given by Geoffrey Lane LJ (with which Stephenson LJ agreed) is the most persuasive and the most consistent with ordinary contractual principles.[46]

OTHER MATTERS NOT AMOUNTING TO CONSIDERATION

1.42 If all one party to a mediated agreement promises is to stop complaining, the agreement would appear not to be a binding contract. In *White v Bluett* it was held that a son's promise to desist from complaining was not consideration for his father's promise to release him from liability on a promissory note.[47] Nor was consideration provided by the son actually ceasing complaining in that case. The authors of Butterworths' *The Law of Contract* comment that:

> It may be significant that that case arose in a family, rather than a commercial, setting. The same result might perhaps now be reached on the basis that the agreement was not intended to be legally binding.[48]

[45] [1976] 1 Lloyd's Rep 98.

[46] 5th edition, 2002, p 20.

[47] (1853) 23 LJ Ex 36.

[48] 1st edition, 1999, p 178, footnote 4

1.43 Parties may often resort to mediation in an attempt to maintain amicable relations where there is an ongoing relationship, for example between neighbours or landlord and tenant. In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron* [1979] QB 705, the plaintiffs had agreed to make a payment "in order to maintain an amicable relationship" with the defendants, their supplier. The court held that this did not amount to consideration (although the contract was upheld as an agreement by the plaintiffs to extend a letter of credit to the defendant was found to be consideration for the additional payment).

DEEDS

1.44 A contract in a deed is enforceable without consideration from both parties.[49] If the parties to a mediated agreement doubt whether consideration has been given, they could set out the agreement in a deed. The disadvantages of relying on a deed where there is no consideration from one party are that:

(1) it may not be a solution readily apparent to the parties unless they have taken legal advice; and

(2) specific performance will not be granted in respect of a contract set out in a deed which is entirely without consideration.[50]

Intention to create legal relations

1.45 An agreement with consideration from both parties may not be a binding contract if there was no intention to create legal relations. The question of contractual intention is one of fact.[51] Intention to create legal relations is judged objectively, although a party who did not intend to be bound could not involve the objective test so as to hold the other party to the contract.[52] The lack of legal certainty, or the vagueness of the alleged agreement, may also evidence a lack of intention to create legal relations.[53] The parties may intend the agreement not to be legally binding at all, or not until it is set out in a particular form. The mediated agreement may contain express wording to the effect that it is not legally binding.[54]

1.46 At paragraph 2-154 in *Chitty on Contracts* it is stated that:

[49] See Plowd 308; *Morley v Boothby* (1825) 3 Bing 107, 111-112.

[50] *Wycherley v Wycherley* (1763) 2 Eden 175, 177; *Jefferys v Jefferys* (1841) Cr and Ph 138.

[51] *Zakhem International Construction Ltd v Nippon Kohan KK* [1987] 2 Lloyd's Rep 596.

[52] *Lark v Outhwaite* [1991] 2 Lloyd's Rep 132, 141.

[53] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737.

[54] A boundary dispute between neighbours might be settled on terms that land be transferred: the inclusion of "subject to contract" in the agreement would affect the enforceability of the settlement as a contract.

> In the case of ordinary commercial transactions it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. The onus of proving that there was no such intention "is on the party who asserts that no legal effect is intended and the onus is a heavy one."[55]

1.47 Housing disputes do not arise only in such a commercial context. *Chitty* lists a number of situations in which intention to create legal relations may be in issue including "social agreements",[56] "domestic agreements between spouses",[57] "domestic agreements between cohabitants", "other shared households" and "parents and children".[58] Housing disputes will arise in those contexts. I think lack of intention to create legal relations is the factor most likely to prevent mediated agreements from being enforceable as contracts. Where the mediated agreement was intended as a settlement of a significant dispute, the courts do tend to find the intention was to create legal relations, despite the social or domestic context.[59]

1.48 In *ADR Principles and Practice* Marriott and Brown comment that

> Some parties, however, may not want the terms of their resolution to be concluded in a legal context, but would rather have a non-binding, personal agreement honoured through the commitment of the parties and not enforceable in law. This kind of outcome is more likely to arise in inter-personal disputes, including for example disagreements between neighbours, or involving local children or other issues arising in a community context. In this event, the practitioner needs to find a form of recording that satisfies the parties and meets their requirements. If agreements of this nature were breached, they would not be enforceable through the legal process.[60]

1.49 Likewise, in *Mediation: Principles Process Practice*, Boulle and Nesic state that

> A mediator does not usually draft a memorandum in a family mediation or an informal agreement in a community mediation on the basis that these constitute a binding agreement.[61]

[55] *Edwards v Skyways Ltd* [1964] 1 WLR 349, 355.

[56] See *Horrocks v Forray* [1976] 1 WLR 230, in which a man's mistress was held not to have a contractual licence to occupy the home he provided for her.

[57] See *Balfour v Balfour* [1919] 2 KB 571, in which Atkins LJ said at p 578, in respect of domestic arrangements between husbands and wives that: "Those agreements, or many of them, do not result in contracts at all … even though there may be what as between other parties would constitute consideration for the agreement … They are not contracts … because the parities did not intend that they should be attended by legal consequences … Agreements such as these are outside the realm of contracts altogether."

[58] See *Ellis v Chief Adjudication Officer* [1998] 1 FLR 184 in which a mother's gift of a flat to her daughter on condition that the daughter look after her there was held not to amount to a contract because it was not intended to have contractual force.

[59] See *Merritt v Merritt* [1970] 1 WLR 1211.

[60] 2nd edition, 1999, published by Sweet and Maxwell, p 505.

[61] 1st edition , 2001, published by Butterworths, p 510.

1.50 In theory an oral mediated agreement could be binding (provided it did not include matters for which the law requires writing or a deed). The parties may, however, have intended not to be legally bound until a written agreement was produced. Sometimes the parties may have first signed a "mediation agreement", in which they agree to use a particular mediation method to settle a particular dispute. One of the terms in CEDR's model procedure is that:

> Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties.

1.51 Alternatively, the settlement may not be binding until the parties have taken legal advice and thereafter agreed to be bound. The Law Society's Code of Practice on Family Mediation published in April 1999 provided that:

> The parties must be offered the opportunity to obtain legal advice before any decision can be turned into a binding agreement on any issue which appears to the mediator or to either party to be of significance to the position of one or both parties.

1.52 If the parties do not intend the settlement agreement to take effect and be legally binding unless and until it is embodied in a court order, this needs to be clearly agreed. In *Thakrar v Ciro Citterio Menswear PLC (in administration)* the parties had signed a CEDR Solve Mediation Agreement.[62] The mediation was successful, and the solicitor for the defendant completed a draft Tomlin order. The terms of the agreed settlement were included in a schedule to the draft order, signed by the solicitors for the parties, the administrators, and the mediator. The Court of Appeal refused to agree the Tomlin order.[63]

1.53 The claimant, Kirit Thakrar, sought a declaration that the defendant company was bound by the terms of the settlement reached in the mediation, as the schedule can, and was intended to, operate as a free-standing agreement. The defendant company's counsel argued that it was not bound because there was a single agreement conditional on the making of the Tomlin order and that the agreement, if not conditional, is unenforceable for illegality.

1.54 The Vice-Chancellor, Sir Andrew Morritt, granted a declaration "that the agreement contained in the Schedule to the draft Tomlin order is both unconditional and enforceable". He held that:

[62] [2002] EWHC 1975 (Ch).

[63] [2002] EWCA Civ 1304.

32. I prefer the submissions for Kirit. Existing proceedings may be settled in a number of ways as described by Slade J in *Green v Rosen*[64]. Likewise differences may be compromised without the need for any proceedings at all. The purpose of a Tomlin order is to enable the enforcement of the terms of settlement of an existing action by summary process in that action. The alternative in most cases is to commence separate proceedings for the specific performance of the contract of settlement. Thus, as is common ground, the contract of settlement is capable of being distinct from the Tomlin order or any agreement to procure it. An example of such distinct contracts is afforded by *Horizon Technologies Ltd v Lucky Wealth Consultants Ltd*[65]. Plainly the parties can achieve that result without going through the laborious process of first making a contract and then scheduling it to the Tomlin order. In my view that is what the parties did in this case.

33. First, the compromise included issues arising outside the litigation pending before the Court of Appeal. …

34. Second, the terms negotiated in the mediation and set out in the Schedule to the draft Tomlin order were expressly subject to two conditions, namely that contained in paragraph 13 of the CEDR Solve Mediation Agreement requiring those terms to be reduced to writing and signed by or on behalf of the parties and that which was orally agreed requiring the approval of a majority of the creditors' committee. Both those conditions were satisfied. In those circumstances effect should be given to the terms contained in the schedule unless the intention to subject them to a third condition is clearly established.

35. Third, the terms of the Schedule are in themselves complete except for the reference to the order in paragraph 2 ….

36. Fourth, the recital to the order set out in paragraph 18 above "the parties having agreed the terms set out in the Schedule hereto" indicates an intention that the parties are to be treated as having already made a contract in those terms even though in this case there was no earlier agreement in fact. It is true that the recital is in the standard form of Tomlin order and that a compromise scheduled to such an order may be conditional on the order being made. Nevertheless given the terms of this schedule I regard the recital as express confirmation of an intention in this case that the compromise should be regarded as both prior to and independent of the making of the order.

37. Fifth, in the same way that the Schedule is in terms independent of the order the order is required for purposes additional to providing for the enforcement of the terms in the schedule. …

[64] [1955] 1 WLR 741.

[65] [1982] 1 WLR 24.

> 38. For all these reasons I conclude that the agreement contained in the schedule to the draft Tomlin order was not conditional on the making of that order.

Formalities

1.55 The law may require certain formalities for an agreement to take effect. Mediated agreements settling some housing disputes (eg boundary disputes between freehold owners, and some landlord and tenant disputes) may include one party agreeing to sell or transfer an interest in land to the other party. Section 2(3) of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act") requires a contract for the sale or disposition of an interest in land to be made (not merely evidenced) in writing, signed by the parties, and to incorporate all the terms which the parties have expressly agreed. Section 2 allows for the contract to become binding on exchange of identical copies, one signed by the vendor, the other by the purchaser.

1.56 Interest in land is widely defined to mean "any estate, interest or charge in or over land".[66] Disposition is said in section 2(6) to have the same meaning as in the Law of Property Act 1925, section 205(1)(ii) of which provides that:

> "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest, or an appointment of property contained in a will; and "dispose of" has a corresponding meaning;

1.57 Section 2 of the 1989 Act does not require a written contract for:

(1) a contract to grant a lease for a term of no more than 3 years at the best rent reasonably obtainable without taking a fine;

(2) a contract regulated by the Financial Services Act 2000 (other than a regulated mortgage); or

(3) a contract made during a public auction.

1.58 An agreement that one party will convey land (as so defined) to another would be void if it did not comply with section 2 of the 1989 Act. In addition to the requirement for a written contract, the actual conveyance of the interest in land pursuant to that contract would require a deed in order to take effect in law (and not just in equity).[67] There will also be land registration formalities.

[66] Law of Property (Miscellaneous Provisions) Act 1989, section 2(6).

[67] Law of Property Act 1925, section 52.

1.59 Article 9 of the European Directive on Electronic Commerce 2000 requires Member States to ensure that the legal requirements applicable to contracts do not create obstacles to electronic contracts or deprive them of their effectiveness.[68] Article 9(2)(a) allows for exceptions to this duty for contracts that create or transfer rights in real estate, except for rental rights.

Illegality

1.60 Some housing disputes may involve allegations of both civil wrongs and criminal offences (eg disputes between neighbours alleging deliberate property damage). An agreement can only lawfully be reached between the parties in respect of the civil claims. If the agreement also included an express or implied term that one of the parties would not report matters to the police, it runs the risk of being considered a stifling of a prosecution and may void on public policy grounds.[69] Where an inducement to withdraw or alter a witness statement already made to the police (even if intended as compensation for the wrong), would be a criminal attempt to pervert the course of justice.[70] Such an agreement would be unenforceable.

1.61 It is also a criminal offence (contrary to section 5 of the Criminal Law Act 1967) for someone who knows or believes that an arrestable offence has been committed, and who has information which might be of material assistance in securing the prosecution or conviction of an offender for that offence, to accept any consideration for not disclosing that information, other than reasonable compensation or the making good of any loss or injury occasioned by that offence. An agreement that was criminal contrary to section 5 of the Criminal Law Act 1967 would be unenforceable.

Where one of the parties is a minor

1.62 Housing disputes may involve children, for example complaints by neighbours about noisy children or footballs being kicked against their walls, or a landlord and tenant dispute with a 17 year old tenant. A mediated contractual agreement is unlikely to be enforceable against a party who is aged under 18.

1.63 At common law, the only contracts which are binding on children are contracts for "necessaries", which include necessary goods and services supplied to the child, appropriate for his age and condition in life,[71] and contracts for the child's benefit such as contracts for education or apprenticeship.[72] Even a contract for necessaries will not bind the child if it contains harsh or oppressive terms which mean that overall it cannot be said to be for the child's benefit.[73]

[68] Dir 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[69] *Keir v Leemen* (1846) 9 QB 371.

[70] *R v Panayiotou* [1973] 1 WLR 1032.

[71] *Wharton v Mackenzie* (1844) 5 QB 606, *Peters v Fleming* (1840) 6 M and W 42, 46, *Cowern v Nield* [1912] 2 KB 419, 422.

[72] *Walter v Everard* [1891] 2 QB 369, *Roberts v Gray* [1912] 1 KB 520, 525, 528, 529.

[73] *Fawcett v Smethurst* (1914) 84 LJKB 473.

1.64 Whether a mediated agreement in which a child agreed to stop certain behaviour or activities is a contract for necessaries which would bind a child is an interesting question. It could be argued that if the minor is a tenant, and housing is a necessary so that the lease is binding, any related agreement such as a compromise of a claim arising out of the lease could also be binding.

1.65 Even if a mediated agreement with child who is not a tenant is not a necessary, it might it be a contract for the child's benefit and thus binding. For example, might a mediated agreement by a child, to stop bad behaviour which was causing a nuisance to his neighbours, be to his benefit if the alternative would have been the local authority seeking an anti-social behaviour order against him?

1.66 Contracts which are not for necessaries are binding on the other party, but the child can choose to avoid them. A contract under which the child acquires an interest in land, such as a lease, will be binding on him unless he repudiates it while he is a child or within a reasonable time of attaining majority.[74] Most contracts entered into by a child are unenforceable against him unless expressly ratified on his coming of age, although the child could still enforce them against the other parties. While normally a child is not bound by a release of a legal claim, rule 21.10(2) of the Civil Procedure Rules allows the court to sanction a compromise by a child even if no court proceedings had been started.

Duress

1.67 If a contract is entered into as the result of duress, it can be avoided by the party who was threatened. Threats to the victim's person,[75] his property,[76] and wrongful or illegitimate threats to his economic interests (ie economic duress),[77] where he has no practical alternative but to submit, can all amount to duress. The victim can choose whether to affirm or avoid the contract, and if he voluntarily acts under it, or does nothing to set it aside, knowing the full circumstances, he may be held bound by it on the grounds that he ratified it.[78] A threat to enforce one's legal rights by bringing civil proceedings would not, however, amount to duress.

[74] *Blake v Concannon* (1870) 4 Ir Rep CL 323, *Kelly v Coote* (1856) 5 Ir CLR 459.

[75] See *Friedeberg-Seeley Klass* (1957) 101 SJ 275; *Barton v Armstrong* [1976] AC 104.

[76] See *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293, 335, *Maskell v Horner* [1915] 3 KB 106.

[77] See *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 2 QB 617, *Pao On v Lau Yiu Long* [1980] AC 614, *Dimskal Shipping Co Ltd v ITWF* [1992] 2 AC 152, 159, 160, 162, 165, 170.

[78] See *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 2 QB 617, *Pao On v Lau Yiu Long* [1980] AC 614.

Mistake

1.68 Contracts entered into on the basis of a common mistake of fact or law can be set aside. The practical effect of this in the case of agreements reached to compromise legal proceedings has been limited by the Court of Appeal's decision in *Brennan v Bolt Burdon*. [79] The court in that case considered whether a compromise agreement could be set aside on the grounds of mistake of law, in particular where that mistake of law arose due to the retrospective effect of a later court judgment declaring that the law was other than what the parties had believed at the time of making the agreement.[80]

1.69 Maurice Kay LJ, at para 17 of the judgment stated that:

> (1) As with any other contracts, compromises or consent orders may be vitiated by a common mistake of law.
>
> (2) It is initially a question of construction as to whether the alleged mistake has that consequence.
>
> (3) Whilst a general release executed in a prospective or nascent dispute requires clear language to justify an inference of an intention to surrender rights of which the releasor was unaware and could not have been aware (*Ali*)[81], different considerations arise in relation to the compromise of litigation which the parties have agreed to settle on a give-and-take basis (*Huddersfield Banking*)[82].
>
> (4) For a common mistake of fact or law to vitiate a contract of any kind, it must render the performance of the contract impossible (*The Great Peace*)[83].

1.70 Bodey J considered that if one party to a contract can be said to have borne the risk that the parties might be mistaken in some respect, then there is no operative mistake. This is because the deal can be seen to have anticipated what actually occurred and to have provided for it. In contracts of compromise he considered that each party normally takes a risk that the law may change. In paragraph 51 he commented that:

> So important is the principle of seeking to uphold contracts of compromise that in my view the court should not permit them to be reopened for mistake of law created by the retrospective impact of the declaratory theory of judicial decisions except where, for some truly exceptional reason, justice very clearly demands.

[79] [2004] EWCA Civ 1017, [2005] 2 QB 303.

[80] Following the House of Lords decision in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

[81] *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251.

[82] *Huddersfield Banking Company Limited v Henry Lister and Son Limited* [1895] 2 Ch 273. This case is authority for the proposition that a compromise enshrined in a consent order can be set aside by reason of common mistake – in that case a mistake of fact.

[83] [2002] EWCA Civ 14.

1.71 Sedley LJ considered that a test other than impossibility of performance should apply in cases of mutual mistake of law, namely whether, had the parties appreciated that the law was what it is now known to be, there would still have been an intelligible basis for their agreement: in other words whether the state of the new law destroys the identity of the subject-matter as it was in the original state of the law.

1.72 If courts in subsequent cases follow the majority decision, it is unlikely that in practice a mediated agreement reached to settle a housing dispute could be held to be void ab initio as a result of a mistake.

Misrepresentation and Fraud

1.73 A party induced to enter into a contract by a result of a fraudulent misrepresentation can have the contract set aside. Where the misrepresentation was not fraudulent, section 2(2) of the Misrepresentation Act 1967 allows the court to award damages instead of allowing the contract to be rescinded. A party to a mediation may allege that he was misled and seek to have the mediated agreement set aside.

1.74 In *Gillford Pty Ltd v Burdon Pty Ltd*, an Australian case, the claimant sought to have a mediated agreement set aside on account of purportedly fraudulent misrepresentations made by a party in the mediation about its assets and liabilities.[84] The court declined the relief sought because it did not find that the claim had been made out on the facts. That is not to say that in other cases a mediated agreement might be set aside due to a misrepresentation.

Mediated agreements and public bodies

Public bodies, discretion and contracts

1.75 Many housing disputes relate to the actions of public bodies, such as local authorities, who may be under certain public duties. I discuss in paragraphs 1.28 to 1.35 above whether a promise in a contract to perform a public duty would necessarily be unenforceable. What about a promise to do more than perform a public duty (eg by a public body to exercise a discretion in a particular way? Would that be enforceable as a contractual term?

1.76 Some promises by public bodies in mediated agreements to exercise a discretion in a particular way might be enforceable. Nigel Giffin in David Foskett QC's *The Law of Compromise* gives the following example of an administrative law compromise:

[84] 20 April 1995, Federal Court of Australia, NSW Registry, General Division (No AG79 of 1994 FED No 169/95) (Lockhart J).

> … a claimant may be prepared to withdraw an application for judicial review of a housing authority's decision to take possession proceedings against him in return for a commitment by the authority to permit him to remain in his present accommodation for longer than would have been the case if the decision under challenge had been upheld by the court.[85]

The authority's promise in that example is arguably to exercise a discretion in a particular way (by not enforcing its strict legal rights against the claimant). However, such promises by public bodies give rise to certain public law issues.

ULTRA VIRES – GENERAL ISSUES

1.77 Firstly, as a matter of public law, a local authority or other public body whose powers were conferred by statute could not act ultra vires. If it was specifically prohibited by law from taking a particular step (eg housing or providing financial assistance to someone subject to immigration control) an agreement by the authority with that person to accommodate him would be ultra vires. (Arguably, in such a case, the authority does not have the legal discretion in purported to exercise. See for example *R oao Khan v Oxfordshire CC*.[86])

1.78 A contract entered into ultra vires is void and therefore unenforceable by and against the public authority concerned (*Credit Suisse v Allerdale BC*).[87] This principle now needs to be read in light of the decision of the European Court of Human Rights in *Stretch v UK*.[88] *Stretch* concerned a local authority's refusal to grant a lease pursuant to an ultra vires option to renew contained in a lease granted by its predecessor. The Court held that there had been a breach of Article 1 of the First Protocol to the European Convention on Human Rights because the refusal on ultra vires grounds was a disproportionate interference with S's peaceful enjoyment of his possessions. S had entered into the original lease on the basis of the option and in reliance on it he had built on the land, paid ground rent to the authority and granted sub leases. The ultra vires nature of the grant was only raised late in the renewal negotiations, with the result that S had a legitimate expectation that the lease would be renewed, which expectation amounted to a possession for the purposes of Article 1 of the First Protocol. The doctrine of ultra vires, although important in preventing the abuse of power, did not respect the principle of proportionality in the instant case.

[85] 5th edition, 2002, p 510, para 40-04.

[86] [2004] EWCA Civ 309.

[87] [1997] QB 306.

[88] (2004) 38 EHRR 12.

1.79 The Court in *Stretch* recognised the importance of the ultra vires principle for the rule of law.[89] It also noted that in some cases, though not in *Stretch*, where a contract is held to be ultra vires, the law of restitution (unjust enrichment) may provide a remedy. If in future a court decides that a mediated agreement reached to solve a housing dispute is ultra vires, it may need to be more creative in providing a remedy than has hitherto been the case, if a strict application of the ultra vires principle would lead to an unjustified interference with human rights. In that respect *Stretch* may be helpful in encouraging mediated contracts as a means to settle housing disputes.

UNLAWFUL FETTERING OF DISCRETION

1.80 The Crown cannot by contract unlawfully fetter its discretion. Rowlatt J stated in *The Amphitrite* that:

> … it is not competent for the Government to fetter its future executive action which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.[90]

The authors of *Chitty on Contracts* comment that "it is difficult to state the extent and effect of the non-fettering principle with precision."[91] Wade and Forsyth state that "the rule thus laid down is very dubious; it rests on no authority, and it has been criticised judicially."[92]

1.81 A similar principle applies to local authorities. In *Birkdale District Electric Supply Co v Southport Corp* it was stated that:

> If a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.[93]

1.82 The authors of *Chitty on Contracts* say that

[89] At paragraph 38 of the judgment.

[90] *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500.

[91] 29th edition, 2004, p 666, para 10-006, citing *Robertson v Minister of Pensions* [1949] 1 KB 227 and *Howell v Falmouth Boat Co* [1951] AC 837.

[92] 8th edition, 2000, p 824.

[93] [1926] AC 355, 364.

> … it is submitted that the decision in the *Birkdale* case at least established that the contractual stipulations must be clearly proved to be incompatible with the full observance of the terms and the full attainment of the purposes for which the statutory powers have been granted.[94] If the incompetence of the public authority is only an incompetence *sub modo*, beyond which the powers necessary to its operation may be freely exercised,[95] the contract will stand.

1.83 Both the precise terms of the contractual promise and the terms and purpose of the relevant statutory provisions must therefore be examined, to see if a local authority's promise to exercise its discretion in a particular way unlawfully fetters its discretion and is thus ultra vires.

The effect of mediated agreements with public bodies which do not amount to contracts

1.84 Not all agreements with public authorities will necessarily be contracts. The authors of *Chitty on Contracts* note that:

> An arrangement with a public authority which does not constitute a contract because of the non-fettering principle may, however, have some effect in the sense that later action inconsistent with it might be judicially reviewed for unfairness amounting to an abuse of power: *HTV v Price Commission* [1976] ICR 170.[96]

1.85 Nigel Giffin, in David Foskett's *The Law of Compromise* comments that:

> … the true construction of the "agreement" may be that it amounts to no more than a giving of the assurance by the defendant as to how it proposes to exercise its powers in future. Such an assurance would undoubtedly give rise to a legitimate expectation that it would be fulfilled, of a substantive and not merely a procedural kind,[97] so that a failure to do what had been promised without some compelling reason would constitute grounds for a fresh application for judicial review.[98]

[94] [1926] AC 355, 369.

[95] [1926] AC 355, 370.

[96] 29th edition, 2004, p 674, footnote 99.

[97] See the discussion in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

[98] 5th edition, 2002, p 512, para 40-09.

1.86 Part 54 of the Civil Procedure Rules governs judicial review. Part 54 rule 20 allows the court to order a claim to continue as if it had not been started under Part 54 of the CPR. Part 30 rule 5 of the CPR allows the court to transfer cases to and from the Administrative Court. Permission is required for a claim for judicial review transferred to the Administrative Court just as for one started there.[99] So a case which was originally brought as a breach of contract claim, but where it subsequently turns out that the mediated agreement between the parties was not in fact a contract could in theory be transferred to the Administrative Court to proceed as an application for judicial review, if the court gave permission.

Effect of the contract on parties' pre-existing litigation rights

1.87 The effect of a mediated contract (not embodied in a court order) on the parties' pre-existing rights (eg to bring possession proceedings relying on a particular breach of the tenancy agreement, or bring a claim in nuisance or for disrepair) will depend on the terms of the contract.

(1) Where the mediated contract is silent about the parties' ability to resurrect their original claims, the agreement supersedes those claims, unless there are grounds on which the court could invalidate it. In the event of a breach, the parties would have to sue for breach of that agreement, rather than pursue the original claims.[100] Evans LJ in *Korea Foreign Insurance Company v Omne Re SA* cited with approval David Foskett QC's statement that:

> Generally speaking, therefore, an agreement of compromise *[which he defines as the settlement of a dispute by mutual concession, its essential foundation being the ordinary law of contract]* will discharge all original claims and counterclaims unless it expressly provides for their revival in the event of breach.[101]

(2) The parties could, however, expressly include a term in the mediated contract allowing them to pursue the original claims in the event of a breach of the agreement. In that case, they'd normally have a choice of whether to pursue the original claims or a breach of contract claim in respect of the agreement.[102]

There is therefore no guarantee that a mediated agreement will necessarily settle the original dispute once and for all.

[99] Civil Procedure Rules Part 54, rule 4.

[100] See David Foskett QC *The Law and Practice of Compromise*, 5th edition, 2002, p 148, para 8-02; Boulle and Nesic *Mediation: principles process practice* 1st edition, 2001, p 467; Brown and Marriott *ADR Principles and Practice*, 2nd edition, 1999, p 513, para 23-044.

[101] *The Law and Practice of Compromise*, 5th edition, 2002, p 116, para 6-36.

[102] See *Smith v Shirley and Baylis* (1875) 32 LT 234 and *Korea Foreign Insurance Company v Omne Re SA* [1999] EWCA Civ 1166.

1.88 Where there are more than two parties to a dispute, a settlement with one of the defendants may prevent the claimant from then bringing further legal proceedings against any other defendants. David Foskett QC comments that

> It is not easy to state with confidence precisely what principles are to be applied to this kind of situation. The law has become complex and unnecessarily technical to an extent that may impede the process of settlement.[103]

1.89 I attempt to summarise the relevant principles below.

(1) The release of one joint tortfeasor by way of accord and satisfaction will operate to release all the others.[104] (Joint tortfeasors have committed the same wrongful act for which they are jointly and severally liable for the whole of the damage caused). The claimant must reserve his right to pursue any of the other tortfeasors expressly or impliedly at the time of settlement if he wants to do so.

(2) Concurrent (or several) tortfeasors commit separate tortious acts which cause or contribute to the same damage.[105] Where an action against one tortfeasor is founded on specified damage suffered by the claimant and the existence of that damage is essential to the success of the action, if the claimant has entered into an agreement with a concurrent tortfeasor under which he accepts a sum as full compensation for that damage (even if the sum is less than that which a judge would have awarded had liability been proved), the action cannot proceed. Whether a particular agreement has that effect is a question of construction of the words, in the light of all the relevant facts surrounding it. Where the claimant accepts a sum from one tortfeasor, other than as full compensation, he could bring a claim against concurrent tortfeasors.[106]

(3) A compromise by way of an accord and satisfaction between a claimant and one or more of a number of joint, or joint and several, contractors discharges his claim against all.[107]

[103] *The Law and Practice of Compromise*, 5th edition, 2002, p 116, para 6-36.

[104] *Clerk and Lindsell on Torts* (18th edition, 2000), para 4-104.

[105] *Clerk and Lindsell on Torts* (18th edition, 2000), para 4-101 *et seq*.

[106] *Jameson v Central Electricity Generating Board* [2000] 1 AC 455.

[107] *Deanplan Ltd v Mahmoud* [1993] Ch 151.

(4) Where a claimant has overlapping claims for successive breaches of contract against two defendants (concurrent contractors) and had concluded a compromise agreement "in final settlement" with one defendant, the proper approach to the question whether he could pursue an action against the other defendant was to ascertain the intended effect of the compromise agreement by interpreting the words used in the context of the particular circumstances, and where the agreement had not fixed the full measure of the claimant's loss his action would not be precluded.[108]

Other disadvantages of contracts as a means of settling housing disputes

1.90 The introduction of a fresh contract (a binding mediated agreement) into a housing dispute could give rise to litigation which would not have been possible had the parties reached a non-binding mediated agreement. For example, suppose a tenant is upset by noise from her neighbours. She complains to the neighbours about the noise, and to the landlord about the poor sound insulation in the building. The noisy behaviour complained of is actually a reasonable user of the neighbours' flat (not legally a nuisance), and the landlord is not required by the tenancy agreement to provide better sound insulation for the flats, nor is liable in nuisance for permitting the neighbouring tenant's noise.[109] The parties agree to mediation and a binding agreement is made. The noisy neighbour agrees in the mediated contract to stop doing some of the acts complained which were not legally a nuisance, the landlord agrees to fit additional sound insulation to the flats, and the complainant agrees to pay some of the costs of the sound insulation. In that case, although the parties may not have had any causes of action or rights which a court would have upheld in the original dispute, the contract gives them rights so that in the event of a breach, they could sue. While this may be in the interests of the party given the new rights by the mediated agreement, it is arguably not in the interests of the party on whom the agreement imposes a new legal obligation, or in the wider public interest (if it could be seen as contributing to a "compensation culture").

1.91 Where there were pre-existing rights and causes of action (eg nuisance or trespass), if the mediated agreement supersedes them, in addition to proving that the other party has performed the acts complained of, a party would also have to prove that there was a contract and the acts complained of were in breach of contract. If the parties had provided that in the event of a breach they could resurrect their original legal claims, or had simply reached a non-binding "gentleman's agreement" as a result of the mediation, there would be no need to prove these additional matters in the court proceedings.

Remedies

1.92 I had wondered whether the remedies available for a breach of contract would be less advantageous to the parties in a housing dispute than the remedies available in other housing cases (nuisance, trespass, possession proceedings, disrepair etc). The remedies normally available for breach of contract are damages, injunctions and specific performance.

[108] *Heaton v AXA Equity and Law* [2002] 2 AC 329.

[109] See *Southwark LBC v Mills* [2001] 1 AC 1.

1.93 In many trespass or nuisance cases I would expect parties seek an injunction to stop the behaviour complained of. The parties would not normally be prevented from obtaining that remedy merely by having entered into a contract and suing for breach of contract, rather than suing in tort.

1.94 If, however, the housing dispute arose between an individual and the Crown, and if it would (but for the mediated agreement) have been determined by an application for judicial review, entering into a contract with the Crown to settle the dispute would prevent the claimant obtaining an injunction to enforce the Crown's obligations. Sections 21(1) and 38(2) of the Crown Proceedings Act 1947 mean that an injunction (or order for specific performance or recovery of land) cannot be obtained against the Crown in civil proceedings. However, judicial review does not count as Crown proceedings for this purpose: *M v Home Office*.[110] (Admittedly, I imagine there are few public law housing disputes between the Crown and an individual as opposed to between a local authority and an individual).

[110] [1994] 1 AC 377.