

## **W201 The Individual and the State**

### **Study notes on the exclusivity rule in judicial review**

This rule has its origins in the procedural rules applying before 1977.

#### **Position before 1977**

Public law litigants had a choice. They could apply for a prerogative writ (certiorari mandamus or prohibition) but this required leave, meeting time limits and had procedural disadvantages (no provision for discovery or cross-examination).

Because of the disadvantages litigants were also allowed to use the private law writ or originating summons procedure which offered a declaration or injunction as a remedy.

#### **Post 1977**

A new procedure for applying for judicial review was created by Order 53 of the Rules of the Supreme Court ( now contained in part 54 of the Civil Procedure Rules 1998).

Discovery and cross-examination were now available. The requirement of leave (renamed 'permission to proceed' in the 1998 Rules) and a three month time limit remained. All remedies (including injunction and declaration) were available.

The only disadvantage to the new procedure was the leave and three month time limit requirement.

In **O'Reilly v Mackman** 1983 Lords the court had to decide whether the 'private law action' route was still available where the only issue to be raised was one of public law.

On the facts of O'Reilly (prisoners involved in a riot had their remission reduced by the Board of Visitors - they wished to allege that the Board had acted contrary to natural justice) a public law issue only was to be raised.

The Lords held that it was an abuse of process for the private law procedure to be used for a purely public law matter.

#### **The problem**

The practical problem is that it is sometimes difficult to tell whether an issue is public law or private law and if a lawyer makes a genuine mistake his client's action may be struck out for purely procedural reasons - which brings the law into disrepute.

## **The exceptions**

The Lords in O'Reilly allowed three exceptions to the rule:

1. Mixed public/private cases could still be brought under writ proceedings.
2. If the parties both consented a writ could be used.
3. Courts were allowed to develop other exceptions on a case by case basis.

## **Developments since O'Reilly v Mackman**

1. Mixed public/private law issues

**Roy v Kensington and Chelsea and Westminster FPC** 1992 Lords (The FPC reduced a GP's payments for NHS work. The GP sued in private law. Held - the fact that the GP had a public law right as well as a private law right to recover the payments did not preclude the use of the private law remedy.)

3. Case by case development

Public law issues can be raised as a **defence** in private proceedings

**Wandsworth LBC v Winder** 1985 Lords (Council sued tenant for rent arrears. Tenant's defence was that the increase was void as unreasonable (a public law issue). Held - this was permissible.)

**Boddington v British Transport Police** 1998 Lords where an accused in a criminal case (smoking ban in a railway carriage) was allowed to raise a public law defence in a Magistrates Court despite the exclusivity rule.

In **Clarke v University of Lincolnshire and Humberside** 2000 CA Lord Woolf reviewed the developments in procedure since O'Reilly v Mackman and emphasised that differences between judicial review and ordinary civil procedure are now more limited. He said that "Courts today will be flexible in their approach." He concluded "The emphasis can therefore be said to have changed since O'Reilly v Mackman."