Bennion, Bailey and Norbury on Statutory Interpretation

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Comment

Legislation frequently imposes requirements without spelling out the consequences of breaching them. This section of the Code is concerned with the effect of such breaches.

Former approach: mandatory and directory requirements

In *R v Soneji*,[1] Lord Steyn described the approach that had built up over the years when dealing with the issue with which this section of the Code is concerned in the following terms:

> 'A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements . . . '

Having reviewed authorities within and outside the jurisdiction, and noting that the classification of a requirement as mandatory or directory recorded a conclusion which had been reached on other grounds, Lord Steyn said:[2]

> 'I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No 3 of 1999)*, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction.'

The courts remain bound by judgments that pre-date *Soneji* and apply the mandatory-directory terminology where it can be established that those judgments 'addressed the question of legislative intention'.[3]

Current approach: general principles

The leading authority on the overall approach is now *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd*.[4] In that case, Lord Briggs and Lord Sales explained the decision in *Soneji* in the following terms:[5]

> 'The point of adoption of the revised analytical framework in *Soneji* was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement.'

Accordingly, they disagreed[6] with suggestions (in a Court of Appeal case called *Osman v Natt*[7]) that cases could be divided into 'distinct and water-tight categories', and that the only choices open to the court were outright validity and outright invalidity.

Application of the principles

In some cases the application of these principles will lead to the conclusion that a requirement is intended to ' . . . operate strictly, as a bright line rule, so that any failure to comply with it invalidates the procedure which

follows', but there are many cases in which a more nuanced analysis is required, involving consideration of the purpose of the regime and the purpose of procedural protections contained in that regime.[8] Contrast the following examples.

EXAMPLE

An example of statutory requirements that are intended to operate strictly are 'the notice requirements for extending business tenancies under the Landlord and Tenant Act 1954, where failure to serve a notice in proper time means that the tenant loses their right to extend. The procedural rules there apply in a context where there is an established bilateral relationship between landlord and tenant, where the tenant is in a position to know clearly what it has to do and where both parties need to know clearly what property rights they have and may dispose of in the market.'[9]

EXAMPLE

R v Soneji[10] concerned the validity of confiscation orders made under the Criminal Justice Act 1988. In breach of s 72A of that Act, the court postponed the making of certain determinations in connection with the making of the confiscation orders for more than six months after conviction without having found that there were exceptional circumstances justifying it doing so. The House of Lords held that the breach of s 72A did not invalidate the confiscation orders. Lord Steyn noted that there were other ways of enforcing the time limit imposed by Parliament, such as the abuse of process jurisdiction, and that any prejudice arising from a postponement beyond the six month time limit was 'decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process'.[11]

EXAMPLE

In *R v Layden*,[12] the defendant's appeal against conviction had been allowed, and a retrial had been ordered, under the Criminal Appeal Act 1968, s 7(1). The prosecution proffered a fresh indictment but, contrary to s 8(1) of that Act, the defendant was not arraigned on that indictment. After conviction at the retrial, the defendant's conviction was set aside by the Court of Appeal because of the failure to comply with s 8(1). *Held* In light of the purpose of ss 7 and 8, and the consequences of holding otherwise, a failure to comply with s 8(1) did not remove the Crown Court's jurisdiction to retry the defendant. The defendant would not be prejudiced because, following conviction at the retrial, the defendant would be entitled to appeal against conviction on the ground that, if the procedure set out in s 8 had been followed, the order for retrial would have been set aside.

In the case of statutory regimes which have an effect on property or contractual rights, Lord Briggs and Lord Sales in *A1 Properties* said that it would usually be inferred that Parliament intended there to be a reasonable degree of certainty, and that a person should not be deprived of their rights without being given a fair opportunity to make representations. But that did not lead to the conclusion that any failure to comply with a requirement applying to such a regime should result in total invalidity. Rather, these were factors to be taken into account when ascertaining the legislative intention. Other factors included the degree of prejudice that a person might suffer if the court were to hold that the thing done was valid despite the failure to comply with the requirement, and the general public interest intended to be promoted by the operation of the statutory regime.[13]

EXAMPLE

A1 Properties concerned a claim, by a right to manage (RTM) company, of a right to manage a large block of flats, made under the Commonhold and Leasehold Reform Act 2002, s 79. Section 79(6)(a) required a claim notice to be given to each person who was a landlord under a lease of all or part of the premises. A claim notice was given to the freeholder and the management company, but not to an intermediate landlord. The management company served a counter-notice, and the RTM company then applied to the tribunal for a determination that it was entitled to manage the block of flats. The tribunal held that the RTM company was so entitled. On appeal to the Supreme Court, the court held that having regard to the legislative scheme, which permitted only limited grounds for objecting to a claim, a failure to give a claim notice to a landlord rendered the transfer of the right to manage voidable at the instance of that landlord. The transfer would be voidable unless and until the tribunal approved the transfer scheme. Since the tribunal had approved the transfer scheme, the appeal would be dismissed. Lord Briggs and Lord Sales added that in evaluating whether a procedural failure has the effect of invalidating the process of the transfer of the right to manage, the question is whether a relevant party has been deprived of a significant opportunity to have their opposition to the making of an order to transfer the right to manage considered, having regard to: (1) the substantive force of the objections they could have raised and would have wished to raise; and (2) whether, despite the procedural omission, they in fact had the opportunity to have their objections considered. The focus is on the position of the party directly affected by the procedural omission. There is no good reason to suppose that Parliament intended that a person who has not itself been affected by a procedural omission in relation to another should acquire, by a windfall, a power to thwart the operation of the statutory process which it would not otherwise have enjoyed.

A couple of other points of general application, made in *A1 Properties*, are worth noting:

- Where it would be easy for a person to start the statutory process afresh, that does not necessarily lead to the inference that Parliament intended that there should be strict compliance with the procedural requirements in the statutory regime.[14]
- Where a statutory regime provides that certain failures to comply with statutory requirements do not result in invalidity, this does not necessarily lead to the inference that Parliament intended other failures to result in invalidity. Rather, the consequences of those other failures were to be determined in accordance with the principles laid down in *Soneji* and *A1 Properties*.[15]

No distinction between 'must' and 'shall'

No significance is to be attributed to whether an obligation is imposed using the word 'must' or 'shall'.[16]

De minimis

In the case of a minor departure from a statutory requirement, the *de minimis* principle may apply – see Code s 9.4.

Position where legislation spells out the consequences of breach of a requirement

The above discussion is concerned with cases where the legislature does not spell out the consequences of non-compliance with a statutory requirement. Where the consequences are spelled out, the *Soneji* approach is of course inapplicable.[17]

1 [2005] UKHL 49 at [14].
2 At [23].
3 *R (Garland) v Secretary of State for Justice* [2011] EWCA Civ 1335 at [22].
4 [2024] UKSC 27.
5 At [61].
6 At [61].
7 [2014] EWCA Civ 1520.
8 *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27 at [62] and [63].
9 *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27 at [62].
10 [2005] UKHL 49.
11 At [24].
12 [2025] UKSC 12.
13 At [64]-[65].
14 At [97]-[100].
15 At [102]-[104].
16 *Natt v Osman* [2014] EWCA Civ 1520 at [39]. Most legislative drafters now use 'must'. See for example paragraph 1.2.9 of the Office of the Parliamentary Counsel Drafting Guidance (available at: www.gov.uk/government/publications/drafting-bills-for-parliament), which notes that it is the policy of that office to avoid the use of 'shall' in legislation; paragraph 3.14 of Writing Laws for Wales (available at: www.gov.wales/writing-laws-for-wales-guidance-on-drafting-legislation).
17 *Shahid v Scottish Ministers* [2015] UKSC 58 at [20]. For further examples of cases where the consequences of non-compliance were spelled out, see: *R (Trail Riders Fellowship) v Dorset County Council* [2015] UKSC 18, eg at [99]–[100]; *R (Iqbal) v Secretary of State for the Home Department* [2016] UKSC 63; *GR Property Management Ltd v Safdar* [2020] EWCA Civ 1441.

Section 9.6: Contracting out and waiver of statutory requirements

9.6 Whether a person can effectively waive performance of a statutory requirement, and whether a person bound by a statutory requirement can effectively contract out of complying with it, depends on the legislative intention.

Comment

The question whether it is legally possible to contract out of, or waive the performance of, a statutory requirement depends on the legislative intention.

The position may be spelled out in the Act in question, particularly in cases where the parties' relationship is contractual in nature and the desire is not to permit contracting out or waiver (given that in the absence of express provision it might be inferred that the terms of a contract are a matter for the parties).

Where the matter is not dealt with expressly, careful attention must be paid to the wording and purpose of the enactment, the overall legislative scheme, and any public policy considerations. As regards public policy, changes in the outlook and mores of the community (which judges inevitably and rightly reflect) are particularly relevant.

In the Victorian age of *laissez-faire*, courts were ready, even anxious, to assume that Parliament intended persons of full capacity to be able to give up statutory benefits if they wished. So, for example, in *Rumsey v North Eastern Rly Co*[1] it was held that a railway company could freely contract out of its statutory duty to allow passengers to bring luggage on their journey.[2]

By contrast, there may be a greater inclination nowadays to view it as being for people's own good that they should not be exposed to any risk of being overreached. As early as 1926 the House of Lords held that an employer could not contract out of a statutory duty to pay a pension.[3] In that case, Pollock MR said:[4]

> 'the public should be safeguarded from the melancholy spectacle of seeing a man who had done work and been in a responsible position during years of his life, suffering from poverty and distress by reason of the fact that no adequate provision had been made to enable him to spend his latter years in reasonable comfort.'

Cases where waiver and contracting out allowed: rights and obligations of private parties

As a general rule, a person for whose sole benefit a statutory requirement is imposed may waive that requirement.[5] This is, however, subject to any contrary legislative intention. In determining the legislative intention, public policy considerations and the public interest are likely to be particularly relevant.

In *Kammins v Zenith Investments (Torquay) Ltd*[6] Lord Diplock laid down the following principle:

> '. . . where in any Act which merely regulates the rights and obligations of private parties inter se requirements to be complied with by one of those parties are imposed for the sole benefit of the other party it would be inconsistent with their purpose if the party intended to be benefited were not entitled to dispense with the other party's compliance in circumstances where it was in his own interest to do so.
>
> Upon the purposive approach to statutory construction this is the reason why in a statute of this character a procedural requirement imposed for the benefit of protection of one party alone is construed as subject to the implied exception that it can be 'waived' by the party for whose benefit it is imposed even though the statute states the requirement in unqualified and unequivocal words. In this context 'waived' means that the party has chosen not to rely upon the non-compliance of the other party with the requirement, or has disentitled himself from relying upon it either by agreeing with the other party not to do so or because he has so conducted himself that it would not be fair to allow him to rely upon the non-compliance.'

Property rights

It is inherent in the concept of property that the owner is free to give it up. Where the right is conferred by Act, this liberty to renounce is precluded only where the legislature so intends. Such an intention may exist on grounds of

public policy, or where other persons have an equal right which might be adversely affected by the renunciation. The intention may be set out expressly, or may be left to be inferred.

Civil litigation

Where a statutory defence is created, in general one would expect the legislature to intend the party entitled to the defence to be able to waive it (whether by conduct or by an express agreement not to rely on the defence). This is in accordance with the usual rule whereby what is pleaded is within the control of the party pleading.[7]

Similarly, where a procedural rule is laid down for the benefit of a party to litigation, that party can usually waive compliance with it.

Notices, etc

Legislation may require notice to be given of certain matters. If there is no express or implied indication that absence of notice is fatal, the person entitled to notice can waive the requirement.[8]

Where there is a statutory requirement that notice must be in writing, or must be of a certain length, the question whether this can be waived by agreement between the parties should depend on whether the legislative intention is to prohibit the party intended to be protected by the notice requirement from giving up that protection.

> **EXAMPLE**
>
> The Agricultural Holdings Act 1948, s 23(1), provided that a notice to quit an agricultural holding 'shall (not withstanding any provision to the contrary in the contract of tenancy of the holding) be invalid if it purports to terminate the tenancy before the expiry of twelve months from the end of the then current year of tenancy'. In *Elsden v Pick*[9] the Court of Appeal held that where a tenant had given a notice to quit which was invalid because of s 23(1), the landlord could waive this defect and agree to the tenancy terminating in accordance with the notice.[10]
>
> **EXAMPLE**
>
> *Hamar v French*[11] concerned the requirements in the Pension Schemes Act 1993, s 95, as to the making of applications under that section to pension trustees for a transfer of benefits under a pension scheme. Millet LJ said:
>
> > '. . . section 95 of the 1993 Act is a hybrid. Some of its provisions clearly cannot be waived. Those which restrict the use to which the transfer value can be applied, for example, are imposed as a matter of policy. They are not imposed for the benefit of the parties, and certainly not for the benefit of the trustees. They cannot be waived. Other requirements of the Section, however, are purely formal. The requirement that the application be made in writing, for example, is clearly imposed for the benefit of the trustees; it might be unwise of them to waive the requirement, but it would be absurd to hold that they could not do so if they chose.'

Act for benefit of limited class

A distinction is drawn between benefits for a particular class of persons and benefits for the community generally. In the former case the class can renounce the benefit; but a general benefit cannot be renounced.[12]

EXAMPLE

In company law the *Duomatic* principle, named after *In re Duomatic Ltd*,[13] allows waiver of certain requirements under the Companies Acts.[14] In that case, Buckley J described the principle in the following terms: 'Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting.'[15] Clearly, the benefits are for a particular category of person, namely the group of shareholders described in the judgment.

Nature of 'waiver'

In *Kammins v Zenith Investments (Torquay) Ltd*[16] Lord Diplock said:

> 'So it becomes necessary to consider whether the respondents did waive this requirement. 'Waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him...
>
> The second type of waiver which debars a person from raising a particular defence to a claim against him arises when he either agrees with the claimant not to raise that particular defence or conducts himself as to be estopped from raising it. This is the type of waiver which constitutes the exception to a prohibition such as that imposed by section 29(3) of the Landlord and Tenant Act, 1954, and other statutes of limitation. The ordinary principles of estoppel apply to it.'[17]

Waiver of a statutory right is ineffective if not made by the beneficiary of the right.[18] Where there are joint beneficiaries, waiver by one will bind them all.[19]

Equally, a third person cannot object to the waiver of a right by the beneficiary.

EXAMPLE

The Evidence Further Amendment Act 1869, s 3, provided that 'no witness shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery'. The respondent, relying on this provision, objected when a witness was asked whether she had committed adultery with him. The witness, however, did not claim the benefit of the rule.

Held The respondent could not invoke the rule.[20]

Waiver: public law – applications, court proceedings etc

Legislation frequently provides for an application to be made to a public body. There will usually be requirements as to the form and content of the application. Where an application is made without full compliance with the requirements, the first issue to be considered is the effect of the failure to comply (as to which, see Code s 9.5). A further issue which may arise is whether the recipient of the application has waived any defect.[21]

EXAMPLE

In *R (Warden and Fellows of Winchester College) v Hampshire County Council*[22] an application was made under the Wildlife and Countryside Act 1981, s 53, to the local authority on the relevant form but it had not been accompanied by the supporting documentary evidence as required by Sch 14, para 1. The Court of Appeal agreed that, for the purposes of s 53, the local authority was entitled to waive the requirement to submit the documentary evidence. In that case, Dyson LJ contrasted failures that could be categorised as a breach of a procedural requirement and 'a breach which was so fundamental that (to use the judge's language) the application failed to 'constitute an application' at all'.[23]

Of course, waiver will not be possible where it would be inconsistent with the legislative scheme.

EXAMPLE

In *R (Basir) v Secretary of State for the Home Department*[24] the claimant had made an application under the Immigration Act 1971 for leave to remain at a time when his leave was extended by virtue of s 3C(2) of that Act. Section 3C(4) provided that 'A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.' The Secretary of State refused the application on its merits, rather than rejecting it as invalid on account of s 3C(4). The claimant contended that this amounted to a waiver of this prohibition. *Held* The Secretary of State did not have the power to waive the prohibition. Nicola Davies LJ said:

> 'There is no discretion or power expressed within section 3C(4) which confers upon the SSHD a power to waive the prohibition it lays down. Section 3C(4) is clear in its terms. It would be contrary to the language and purpose of section 3C(4) to hold that an application made contrary to it none the less operates to extend leave under section 3C(2). Its purpose is to prevent abuse of the system by the making of successive applications and to ensure that there is only one application to vary leave at any one time.'

Requirements relating to court proceedings in public law cases may be capable of being waived.

EXAMPLE

Anwar v Secretary of State for the Home Department[25] concerned the Nationality, Immigration and Asylum Act 2002, s 92(1), which provides that 'A person may not appeal . . . while he is in the United Kingdom unless his appeal is of a kind to which this section applies'. In *Anwar*, the appellant was in the United Kingdom but the appeal was not one to which s 92 of that Act applied. *Held* The provision did not operate so as to bar the making of an appeal. Sedley LJ said:

> '23. Any apparently absolute bar to justice has to be scrutinised very carefully. The one contained in the 2002 Act is not of the kind which operates independently of the will of either party so as to bind the tribunal regardless. It offers a point which can be but need not be taken . . . '

EXAMPLE

In *Adorian v Commissioner of Police of the Metropolis*[26] the court held that the Criminal Justice Act 2003, s 329, which provides that certain claims may 'be brought only with the permission of the court', did not prevent a claim being brought without permission. If the claimant brought the claim without permission and the defendant took the point, the court could consider at that point whether to give permission.

The legislative intention may however be such that waiver is not possible.

EXAMPLE

In *Seal v Chief Constable of the South Wales Police*[27] the House of Lords considered the effect of the Mental Health Act 1983, s 139(2), which provides that 'No civil proceedings shall be brought against any person in any court in respect of any [act purporting to be done in pursuance of the Act] without the leave of the High Court . . . '. *Held* Having regard to the legislative history and the purpose of the provision, proceedings brought without the leave of the court were a nullity. Lord Bingham of Cornhill said (at [7]):

> 'While, therefore, I incline to favour the chief constable's reading of section 139(2), I do not think the answer to a question such as this should ordinarily turn on a detailed consideration of the language used by Parliament in one provision as compared with that used in another. The important question is whether, in requiring a particular condition to be satisfied before proceedings are brought, Parliament intended to confer a substantial protection on the putative defendant, such as to invalidate proceedings brought without meeting the condition, or to impose a procedural requirement giving rights to the defendant if a claimant should fail to comply with the requirement but not nullifying the proceedings: see *R v Soneji* [2006] 1 AC 340, para 23. To answer this question a broader inquiry is called for.'

Cases where waiver and contracting out not allowed

Where wording precludes contracting out or waiver

An Act may expressly preclude contracting out.[28] This is particularly likely to occur in cases where the parties' relationship is contractual in nature, for the reasons given at the beginning of this comment.

EXAMPLE

The Social Security Contributions and Benefits Act 1992 Pt 12ZA confers an entitlement to 'statutory paternity pay'. Section 171ZF(1) provides that:

> 'Any agreement shall be void to the extent that it purports–
>
> (a) to exclude, limit or otherwise modify any provision of this Part of this Act, or
>
> (b) to require an employee or former employee to contribute (whether directly or indirectly) towards any costs incurred by his employer or former employer under this Part of this Act.'

However, express wording is not of course required. There are other cases where it is clear that the legislative intention was to preclude contracting out and waiver.

EXAMPLE

The Rent Act 1977, s 46(1), states that where rates borne by the landlord are increased, the recoverable rent is correspondingly increased. Section 46(2) qualifies this by providing that: 'Where the amount of the recoverable rent is increased by virtue of this section, the increase shall not take effect except in pursuance of a notice of increase served by the landlord on the tenant and specifying the increase and the date from which it is to take effect.' In *Aristocrat Property Investments Ltd v Harounoff*[29] the Court of Appeal held that this wording was clear and did not permit waiver or contracting out in relation to the notice requirement. Oliver LJ said:

> 'There were conditions precedent to the operation of recovery of rent. It was not open to the tenant to waive that and render himself liable to that which was not recoverable.'

EXAMPLE

In *Aribisala v St James Homes (Grosvenor Dock) Ltd*[30] the court held that it was not possible for the parties to contract out of the power conferred by the Law of Property Act 1925, s 49(2). Mr Steinfield QC (sitting as a Deputy Judge of the High Court) said:

> '36 . . . Parliament by section 49(2) has conferred jurisdiction on the court, in any action for the return of the deposit, to order the repayment of that deposit. That is a jurisdiction, it seems to me, which it is not open to a purchaser to waive. Indeed, bearing in mind the context of the section and how it has been interpreted, as akin to a power of the court to grant equitable relief against forfeiture, by necessity the jurisdiction, when exercised, will always interfere with the contractual rights agreed between the parties. It seems to me it would be inconsistent, if the legislature has conferred upon the court the entitlement to interfere with the contractual rights of the parties, for the legislature at the same time to allow for the parties to contract out of that interference. Of course, Parliament could do that expressly, but it has not done so . . . '

The legislature may create a procedure under which contracting out is generally prohibited, but may be allowed upon application to a court.

EXAMPLE

The Landlord and Tenant Act 1954, Pt 2 (to do with business tenancies) provided for the continuation and renewal of tenancies, including by application to a court. Section 38(1) of the Act rendered void a tenancy agreement seeking to exclude these protections. However, s 38(4) of the Act enabled a court, upon a joint application by a landlord and tenant, to exclude the protections in relation to a particular tenancy agreement.[31]

Public policy

Public policy considerations are likely to be particularly relevant when determining whether the legislative intention was to allow the provisions of an Act to be set aside by private bargain.

EXAMPLE

In *Equitable Life Assurance Society of United States v Reed*[32] Lord Dunedin described a provision relating to insurance policies in the following terms:

> '. . . this is a section intended to lay down a rule of public policy . . . it is impossible for either an assured or an assurer to contract himself out of it or to waive its effect.'

EXAMPLE

In *Bowmaker Ltd v Tabor*[33] the Court of Appeal held that a requirement imposed by the Courts (Emergency Powers) Act 1939 on lenders to seek the leave of the court before exercising certain remedies could not be waived. Public policy was to protect, during wartime, people of limited means.

EXAMPLE

In *British Eagle International Airlines Ltd v Compagnie Nationale Air France*[34] the parties were airline operators and members of the IATA clearing system, set up to enable the settlement of debts between IATA members on a monthly basis. British Eagle went into liquidation, and the question was whether a debt was to be dealt with in accordance with the statutory provisions as to debts of a company on insolvency or in accordance with IATA rules. *Held* Contracting out was contrary to public policy, so the general rules applying by virtue of the Companies Act 1948, s 302, should prevail. Lord Cross of Chelsea said:

> '. . . what the respondents are saying here is that the parties to the "clearing house" arrangements by agreeing that simple contract debts are to be satisfied in a particular way have succeeded in "contracting out" of the provisions contained in section 302 for the payment of unsecured debts "pari passu." In such a context it is to my mind irrelevant that the parties to the "clearing house" arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a "contracting out" must, to my mind, be contrary to public policy.'[35]

Criminal procedure

In general it is expected that the courts would take the view that accused persons should not be able to waive procedural requirements of the criminal law, on the basis that these requirements are imposed in the interests of justice, with a view to securing a fair trial and true verdict.[36] But as ever whether it is possible to waive a particular requirement is ultimately to be determined by ascertaining the legislative intention.

Estoppel and abandonment

In some cases of alleged waiver, the related concepts of estoppel and abandonment may be relevant (as to which, see Code s **25.13**).

1 (1863) 14 CBNS 641.
2 The judicial emphasis on freedom of contract is also shown in *Netherseal Colliery Co v Bourne* (1889) 14 App Cas 228, where Lord Halsbury remarked (at 235): 'The statute discloses the view that the mine-owner and the persons employed in the mine were not, in the contemplation of the legislature, fit to be trusted to make their own bargains.'
3 *Salford Union of Guardians v Dewhurst* [1926] AC 619.
4 At 664.
5 The maxim *quilibet potest renuntiare juri pro se introducto* (a person may renounce a right introduced for his benefit) is mentioned by Coke (2 Inst 183; see also 10 Rep 101). Another version is *omnes licentiam habent his, quae pro se indulta sunt, renunciare* (everyone has liberty to renounce those things which are granted for his own benefit): C 1, 3, 51.
6 [1971] AC 850 at 881D-F.
7 As to waiver of a defence of limitation see *East India Co v Oditchurn* (1850) 7 Moo PCC 85, 7 Moo PCC 85; *Wright v John Bagnall & Sons Ltd* [1900] 2 QB 240; *Lubovsky v Snelling* [1944] KB 44. Similar considerations would seem to apply to eg the requirement of a written memorandum imposed by enactments such as the Statute of Frauds (1677) s 4 and the Law of Property Act 1925 ss 40(1), 43 and 44 as amended. See also *Graham v Ingleby* (1848) 1 Exch 651; *Parkgate Iron Co Ltd v Coates* (1870) LR 5 CP 634; *Wilson v McIntosh* [1894] AC 129.
8 *Toronto Corpn v Russell* [1908] AC 493; *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396.
9 [1980] 3 All ER 235, [1980] 1 WLR 898.
10 The same applies to *Hounslow London Borough Council v Pilling* [1994] 1 All ER 432, [1993] 1 WLR 1242, where it seems the court would have followed *Elsden v Pick* but for the existence of a joint tenancy.
11 [1998] Pens LR 321 at [52].
12 *Great Eastern Rly Co v Goldsmid* (1884) 9 App Cas 927.
13 [1969] 2 Ch 365, [1969] 1 All ER 161.
14 *Atlas Wright (Europe) Ltd v Wright* [1999] 2 BCLC 301.
15 At 373.
16 [1971] AC 850 at 882H-883C.

17 As to the ordinary principles of estoppel, see for example *Stephens and Cutting Ltd v Anderson* [1990] 1 EGLR 95 at 97.
18 Co Rep 23; *Broom's Legal Maxims* 312 (waiver of notice by indorser of bill of exchange does not affect antecedent indorsers).
19 *Nicholson v Revill* (1836) 4 Ad & El 675 at 683. See also *Broom's Legal Maxims* 313.
20 *Hebblethwaite v Hebblethwaite* (1869) LR 2 P & D 29. The rule 'was not intended to narrow the sources of evidence, but to protect the witness': see p 30. Cf *R v Kinglake* (1870) 22 LT 335 (evidence of witness who waives the privilege of non-incrimination cannot be impugned on that ground).
21 See for example *R (Jeyeanthan) v Secretary of State for the Home Department* [2000] 1 WLR 354.
22 [2009] 1 WLR 138 at [36]-[37].
23 At [36]. In fact, the case turned on a different issue, namely whether another statutory provision applied only where the application complied strictly with the requirements of para 1, Sch 14 to the 1981 Act.
24 [2018] EWCA Civ 2612, [2019] 1 WLR 3057 at [26]-[27].
25 [2010] EWCA Civ 1275.
26 [2009] EWCA Civ 18.
27 [2007] UKHL 31.
28 Where it does so, that is of course the end of the matter. See *Edwards v Edwards* (1876) 2 Ch D 291 where Mellish J said 'The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament; but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines.'
29 (1982) 43 P & CR 284. See also *Ryan v Oceanic Steam Navigation Co Ltd* [1914] 3 KB 731 (steamer ticket contract held void for non-compliance with statutory form).
30 [2007] EWHC 1694.
31 See further *Brighton and Hove City Council v Collinson* [2004] EWCA Civ 678.
32 [1914] AC 587 at 595. See also *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 (Ch), [2004] 4 All ER 1179 at [21]–[23].
33 [1941] 2 KB 1.
34 [1975] 1 WLR 758 at 780.
35 That is not to say that all provisions under the Companies Acts, or all provisions of those Acts conferring a right to apply to the court, are incapable of being contracted out of or waived. See for example *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855.
36 *R v Bertrand* (1867) LR 1 PC 520; *Parkgate Iron Co Ltd v Coates* (1870) LR 5 CP 634; *Westmore v Paine* [1891] 1 QB 482.

ADMINISTRATION AND ENFORCEMENT

Section 9.7: Exercise of ministerial powers etc by officials (the Carltona principle)

9.7 The *Carltona* principle:

(1) Powers conferred on a minister may be exercised by an official authorised to act on behalf of the minister, unless the contrary intention appears in an enactment.

(2) Similar principles may apply in relation to powers conferred on a statutory office holder. Whether they do apply depends on the terms of the statutory provisions creating the office in question.

Comment

The principle

The Carltona principle gets its name from the landmark case, *Carltona Ltd v Commissioner of Works*,[1] in which it was said:

'In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them . . . The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.'

The principle is regarded as a common law constitutional power, as the following passage in *R v Secretary of State for the Home Department ex p Oladehinde*[2] indicates:

'Woolf LJ held . . . that the Carltona principle should be regarded "as an implication which is read into a statute in the absence of any clear contrary indication by Parliament that the implication is not to apply". In this we think that he must be mistaken, because it applies equally where the minister's powers are derived otherwise than from a statute: e g from prerogative powers. We think that the better view is that this is a common law constitutional power, but one which is capable of being negatived or confined by express statutory provisions, as has been achieved . . . by the use of the words 'and not by a person acting under his authority' or by clearly necessary implication.'

The principle applies in relation to the devolved administrations as it applies in relation to the government of the United Kingdom.[3] As regards the Welsh devolved administration, the principle is supplemented by the Government of Wales Act 2006, s 52(9) (which provides that the Welsh Ministers, the First Minister or the Counsel General may authorise the staff of the Welsh Government to carry out any function on their behalf).

The principle applies to the making of delegated legislation as to other decisions. So, for example, the courts have approved reliance on the Carltona principle in cases where officials had signed stopping up orders[4] and traffic restriction orders[5] on behalf of minsters.

Express or implied exclusion of the principle

The *Carltona* principle may be excluded expressly or impliedly (see the quote from *R v Secretary of State for the Home Department ex p Oladehinde* set out above).[6] The wording of the enactment and the legislative framework will need to be considered carefully in order to ascertain whether they prevent or confine the ability of a minister to authorise others to act on behalf of the minister. The importance of the subject-matter (that is, the gravity of the consequences flowing from the exercise of the power) is also relevant to ascertaining the legislative intention in this regard.[7]

EXAMPLE

The Investigatory Powers Act 2016, s 30(1), provides that a decision to issue a warrant under certain provisions of that Act must be taken 'personally' by the Secretary of State (or 'personally' by a member of the

Scottish Government, in the case of a warrant to be issued by the Scottish Ministers). This clearly displaces the *Carltona* principle.

EXAMPLE

The Extradition Act 2003, s 101, provides that certain orders must be made under the hand of certain ministers or a 'senior official' (a defined term). This provision, which proceeds on the assumption that the *Carltona* principle applies except to the extent that it is disapplied, limits the application of the principle.

EXAMPLE

The Detention of Terrorists (Northern Ireland) Order 1972, art 4(2), provided 'An interim custody order of the Secretary of State shall be signed by a Secretary of State, Minister of State or Under Secretary of State.' In *R v Adams*[8] it was held that that provision authorised a Minister of State or Under Secretary of State to *sign* an order, but not to *make* it. This conclusion, based on the wording of the provision, was fortified by the fact that the power invested in the Secretary of State was 'a momentous one' and by the fact that at the time the 1972 Order was made it would not have been expected that requiring the Secretary of State to take decisions personally would place an impossible burden on the Secretary of State.[9]

The presence of an express power to delegate will not necessarily exclude the operation of the *Carltona* principle.

EXAMPLE

In *R (on the application of Forsey) v Northern Derbyshire Magistrates' Court*[10] the issue was whether the Trade Union and Labour Relations (Consolidation) Act 1992, s 194(2), precluded reliance on the Carltona principle. Section 194(2) states: 'Proceedings in England or Wales for such an offence shall be instituted only by or with the consent of the Secretary of State or by an officer authorised for that purpose by special or general directions of the Secretary of State.' The proceedings in question had been commenced by a lawyer employed by the Secretary of State, who had not been authorised by the Secretary of State. It was alleged that the statutory provision, by creating a method of authorising officers to take decisions on behalf of the Secretary of State, impliedly excluded reliance on the Carltona principle.

Held The application would be dismissed as the wording provided an alternative to the Carltona principle rather than preventing reliance on it. Treacy J said:

'50 . . . "only by or with the consent of the Secretary of State" . . . It seems to me that concentrating on those words alone, the Carltona principle applies, permitting both a personal decision by the Secretary of State, by an appropriate official, or by some other person who has the specific consent of the Secretary of State. It does not seem to me that the final words of the subsection "or by an officer authorised for that purpose by special directions of the Secretary of State" have the effect of excluding the Carltona principle. All these additional words do is to describe an additional class of person, who may institute proceedings by the mechanism of a direction of the Secretary of State. Whilst on one reading this further category of person might include Mr Whittaker [the lawyer in question], it would be also apt to cover others outside the Department who could not act as the minister's alter ego. The fact that Mr

Whittaker might on one reading fall within that further category does not preclude him from coming within the Carltona principle by reference to the earlier part of the subsection.'

The decision maker

Constitutional position of decision maker

In *Carltona Ltd v Commissioner of Works*[11] the court was concerned with the decision of a senior civil servant. As mentioned in the quote set out above, the decision of the official in that case was constitutionally the decision of the minister. Other officials may be in a different position.

EXAMPLE

In *R (Bourgass) v Secretary of State for Justice (on appeal from R (King) v Secretary of State for Justice)*[12] prison rules conferred certain powers on the governor and other powers on the Secretary of State. The Secretary of State had purported to authorise certain prison officials to exercise a power on behalf of the Secretary of State.

Held Prison governors and their officers were not to be equated with departmental officials. Accordingly, the Carltona principle did not apply and the authorisation was unlawful. Lord Reed said:

> '50. An official in a government department is in a different constitutional position from the holder of a statutory office. The official is a servant of the Crown in a department of state established under the prerogative powers of the Crown, for which the political head of the department is constitutionally responsible. The holder of a statutory office, on the other hand, is an independent office-holder exercising powers vested in him personally by virtue of his office. He is himself constitutionally responsible for the manner in which he discharges his office. The Carltona principle cannot therefore apply to him when he is acting in that capacity.
>
> 51. It is possible that a departmental official may also be assigned specific statutory duties. In that situation, it was accepted in *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254 that the official remained able to exercise the powers of the Secretary of State in accordance with the Carltona principle.'

Qualifications and experience of decision maker

As to the qualifications and experience of those taking decisions on behalf of a minister, in *R v Secretary of State for the Home Department ex p Oladehinde*,[13] Lord Griffiths said:

> 'The immigration service is comprised of Home Office civil servants for whom the Secretary of State is responsible and I can for myself see no reason why he should not authorise members of that service to take decisions under the Carltona principle providing they do not conflict with or embarrass them in the discharge of their specific statutory duties under the Act and *that the decisions are suitable to their grading and experience*.' (emphasis added)

However, in *Director of Public Prosecutions v Haw*[14] the Divisional Court treated this issue as open, saying that it seemed to them that there was scope for 'further refinement of the *Carltona* principle. There is a case for saying . . . that the devolution of a minister's powers should be subject to a requirement that the seniority of the official exercising a power should be of an appropriate level having regard to the nature of the power in question.'[15] More recent case law has again mentioned this additional refinement. Whether the law is definitively refined in this way is unlikely to make much

of a difference in practice as an inappropriate authorisation is liable to be impugned on public law grounds in any event.[16]

Statutory office-holders

Officers who are creatures of statute may be entitled to authorise others to act on their behalf in the same way that ministers are entitled to. The legal analysis here depends on the interpretation of the statutory provisions creating the office-holder.

In *Director of Public Prosecutions v Haw*,[17] which concerned the powers and duties of the Commissioner of Police of the Metropolis, the position was put as follows:

> 'Where powers are conferred on a minister by statute, the Carltona principle will apply to those powers unless the statute, expressly or by implication, provides to the contrary. Where a statutory power is conferred on an officer who is himself the creature of statute, whether that officer has the power to delegate must depend upon the interpretation of the relevant statute or statutes. Where the responsibilities of the office created by statute are such that delegation is inevitable, there will be an implied power to delegate. In such circumstances there will be a presumption, where additional statutory powers and duties are conferred, that there is a power to delegate unless the statute conferring them, expressly or by implication, provides to the contrary. Such a situation is, in practice, indistinguishable from one in which the Carltona principle applies . . . .'

In that case, the powers and duties in question were held to be capable of being exercised by an officer authorised by the Commissioner. This was the case even though certain provisions of the Police Act 1996 gave the Commissioner power to delegate to the Deputy Commissioner of Police of the Metropolis and to an Assistant Commissioner of Police of the Metropolis – it was held that the statutory power to delegate applied in circumstances where there would not be an implicit power to delegate, and that this did not prevent the Commissioner in other circumstances from authorising persons to exercise other powers.[18]

1 [1943] 2 All ER 560 at 563.

2 [1991] 1 AC 254 at 282.

3 The application of the principle in relation to the Scottish Ministers was confirmed by the Inner House of the Court of Session in *Somerville v The Scottish Ministers* 2007 SC 140 at [102] to [105].

4 *Scott v Secretary of State for Transport* [2012] EWHC 567 (Admin) at [23].

5 *Castle v Wakefield and Pontefract Magistrates' Court* [2014] EWHC 587 (Admin), [2014] 1 WLR 4279, [2014] RTR 268 at [25]–[32].

6 In *R v Adams* [2020] UKSC 19 at [26] Lord Kerr set out a 'provisional view' that the question for the court is whether the *Carltona* principle arises in a particular case. However, it is suggested that these obiter comments are in conflict with authority (such as *Oladehinde*) indicating that the principle is a common law constitutional power that applies unless expressly or impliedly displaced. For a helpful discussion of the case, see Daly, 'Escape from Carltona? R v Adams' available at www.administrativelawmatters.com/blog/2020/05/14/escape-from-carltona-r-v-adams-2020-uksc-19/.

7 *R v Adams* [2020] UKSC 19 at [26].

8 *R v Adams* [2020] UKSC 19.

9 At [38]-[39]. It has been suggested that the division between making and signing is misplaced, and that art 4(2) was intended simply to limit the application of the *Carltona* principle to the ministers mentioned there: see Ekins and Laws, 'Mishandling the Law', available at policyexchange.org.uk/publication/mishandling-the-law/.

10 [2017] EWHC 1152 (Admin), 167 NLJ 7748, [2017] All ER (D) 121 (May).

11 [1943] 2 All ER 560 at 563.

12 [2015] UKSC 54.

13 [1991] 1 AC 254 at 303.

14 [2007] EWHC 1931 (Admin) at [29].

15 In *R (Hamill) v Chelmsford Magistrates' Court* [2014] EWHC 2799 (Admin), [2015] 1 WLR 1798, 178 JP 401, at [64], a case concerned with the delegation of statutory powers, Aikens LJ said: 'To recast Lord Phillips CJ's remarks in relation to the Carltona principle in *Haw's case* [2008] 1 WLR 379, para 29, the degree of delegation of the chief constable's duty must be subject to a requirement that the seniority of the police officer exercising this duty should be of an appropriate level having regard to the nature of the duty itself.' In *Castle v DPP* [2014] EWHC 587 at [28], Pitchford LJ said: 'It would, in my judgment, be completely unrealistic to think that the Secretary of State could give his personal attention to the traffic speed restriction orders needed to keep traffic on the motorways of England and Wales working as they need. *Of course he must devolve the duty to make those orders to those properly qualified to make the judgment.* (emphasis added)'

16 See *R v Secretary of State for the Home Department ex p Oladehinde* [1991] 1 AC 254 at 282, where reference was made to challenging the authorisation of an official on the grounds of *Wednesbury* unreasonableness combined, as appropriate, with a submission that it contravened the rules of natural justice or of fairness. See also *R (TM (Kenya)) v Secretary of State for the Home Department* [2019] EWCA Civ 784 at [67].

17 [2007] EWHC 1931 (Admin) at [33].

18 At [34]. See also *R (Hamill) v Chelmsford Justices* [2014] EWHC 2799 (Admin); *Noon v Matthews* [2014] EWHC 4330; *McKee and others v Charity Commission for Northern Ireland* [2020] NICA 13.

Section 9.8: Presumption of regularity

9.8 The presumption of regularity applies to legislation and to official acts done under it.

Comment

According to a common law maxim, all things are presumed to be done correctly until the contrary is proved.[1] The presumption of regularity was described by Viscount Simonds LC as 'one of the fundamental maxims of the law'.[2]

Validity of legislation

One application of the presumption is the presumption that an Act is properly passed and that delegated legislation is correctly made.[3]

Things done under legislation

A further application of the presumption is that official acts purportedly done under an enactment are presumed to have been done in accordance with the enactment.[4]

EXAMPLE

In *R (Fisher) v English Nature*[5] Lightman J said: ' . . . I am fully satisfied that, in the absence of evidence to the contrary, I should assume that in accordance with their duty the members familiarised themselves with the guidelines.'

EXAMPLE

In *Trevelyan v Secretary of State for the Environment, Transport and the Regions*[6] in relation to a highway shown on a definitive map under the National Parks and Access to the Countryside Act 1949, s 27, Lord Phillips of Worth Matravers MR said:

> 'Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed . . . the standard of proof required to justify a finding that a right of way exists is no more than a balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists.'

Criminal offences

The presumption of regularity cannot be relied on exclusively in proving the existence of a necessary element in the commission of an offence. In *Scott v Baker*[7] Lord Parker CJ said, 'I think for myself that one ought to take very great care in a criminal case as to the length one goes in applying that presumption'.

Appointment to public office

The presumption of regularity applies to any question of whether a person was duly appointed to a public office.[8]

1 This is sometimes expressed in the maxims *omnia praesumuntur rite et solemniter esse acta* or, more fully, *omnia praesumuntur legitime facta donec probetur in contrarium*, which are found in Coke: Co Litt 6, 232. See also Jenk Cent 185.

2 *Morris v Kanssen* [1946] AC 459 at 475.

3 *Akar v A-G of Sierra Leone* [1970] AC 853. For the presumption of validity of delegated legislation, see Code s 3.20.

4 The presumption of regularity has also been applied in relation to judicial functions – see for example *R (Rossminster Ltd) v Inland Revenue Commissioners* [1980] AC 952 (presumption that the circuit judge had satisfied himself as to the matters up which he needed to be satisfied in order to issue a search warrant under the Taxes Management Act 1970, s 20C(1)). For a discussion of the *Rossminster* case and subsequent authorities considering the application of the presumption in judicial review cases where the decision maker withholds access to material on public interest grounds, see *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1 at [47]–[52].

5 [2003] EWHC 1599 (Admin), [2003] 4 All ER 366 at [24].

6 [2001] EWCA Civ 266, [2001] 3 All ER 166 at [38].

7 [1969] 1 QB 659 at 672. See also *Dillon v R* [1982] AC 484; *R v Dadson* [1983] Crim LR 540.

8 *Berryman v Wise* (1791) 4 Term Rep 366; *R v Borrett* (1833) 6 C & P 124; *Campbell v Wallsend Slipway and Engineering Co Ltd* [1977] Crim LR 351.

Section 9.9: Enforcement of statutory obligations

9.9 The remedies, if any, available for a breach of a statutory obligation depend on the legislative intention. The intention may be that there should be a special remedy provided for in the enactment creating the obligation or a related enactment, or that a general remedy should apply, or both. An applicable special or general remedy may be criminal or civil. The legislative intention may be that there should be no legal remedy.

Comment

It is of the essence of a legal command that there should be a sanction or remedy for disobedience to it. However, this is not necessarily provided.

There is a presumption that a legislative command carries a sanction or remedy, in accordance with the maxim *ubi jus ibi remedium* (where there is