

Government contracts and the fettering of discretion – a question of validity

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1 Introduction

Government contracts have many special features that distinguish them from ordinary private law contracts. They differ from ordinary contracts with regard to the policies they aim to achieve; the importance, from a public interest point of view, of their subject matter; their need for flexibility and control; and simply the large amounts of public money involved.¹ Unlike in the French system which has developed a ‘public law’ of contract or a special category of ‘administrative contracts’,² government contracts in South Africa (also in the United Kingdom, Canada, Australia and New Zealand) are *primarily* governed

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¹For literature on the subject of government contracts in South Africa see: Burns ‘Government contracts and the public/private divide’ (1998) *SAPR/PL* 13 at 234; Cockrell ‘Can you paradigm? – another perspective on the public law/private law divide’ (1993) *Acta Juridica* 227 at 236-238; Baxter *Administrative Law* (1984) 419-424; Hoexter *The new constitutional and administrative law*, Volume II (2002) 166-168; Wiechers *Administrative law* (1985) 116-121; Labuschagne ‘Staatskontrakte ter verkryging van goedere, dienste en werke’ LLD thesis Unisa (1985); Floyd *Die owerheidsooreenkoms – ’n administratiefregtelike ondersoek* LLD thesis Unisa (1994) 326; Floyd ‘Die gebruik van die owerheidsooreenkoms ter aanvulling, bepaling of vervanging van die administratiewe beskikking’ (1996) *SAPR/PL* 69. For the UK, see Hogg and Monahan *Liability of the crown* (2000) ch 9; Arrowsmith *Civil liability and public authorities* (1992); Mitchell *The contracts of public authorities* (1954); Turpin *Government contracts* (1972); Turpin *Government procurement and contracts* (1989). For Australia, see Seddon *Government contracts* (1995); Aronson and Whitmore *Public torts and contracts* (1982) ch 5-9; Rose ‘The government and contract’ in Finn (ed) *Essays on contract* (1987) ch 9. For Canada, see Waddams *The law of contracts* (1993) ch 17; Dussault and Borgeat *Administrative law* (1985) Vol I, part 2, ch 3; Arrowsmith *Government procurement and judicial review* (1988). The United States boasts a flood of publications and even has a specialist journal: ‘The Public Contract Law Journal’.

²For literature on the French system see Labuschagne (n 1) 24-28; Mitchell (n 1) ch 4; Aronson and Whitmore (n 1) 178-181; Brown and Bell *French administrative law* (1998) ch 8, Street *Governmental liability* (1975) ch 3; Mewett ‘The theory of government contracts’ (1959) 5 *McGill LJ* 222.

by the ‘private law’ of contract.³ This creates an interesting tension,⁴ because certain special administrative law rules apply to the contractual capacity of public bodies that do not apply to private individuals.⁵ One such rule is that a public body cannot commit itself in advance, whether expressly or impliedly, to exercise discretionary powers in a certain way. The reasoning behind this rule is that if public bodies ‘commit themselves in advance to acting in certain ways, this may prevent them from acting in the public interest in future’.⁶ Discretionary powers should always be exercised for the public good and should not be unduly limited or fettered.⁷ Public policy therefore demands that contracts that fetter the future exercise of discretion be declared invalid.⁸ Problems arise where there is a clash between a discretionary power and a contractual obligation entered into by the state with a private contracting party. Because contracts are by definition legally binding commitments, they often fetter freedom of action in some way. To what extent can a public body therefore commit itself for the future? In case of a clash between a discretionary power and a contractual obligation, will the latter be declared invalid and, if so, is the private individual entitled to compensation?

These are the questions this article will attempt to answer. The few South African cases that deal with the subject seem to follow the English law approach.⁹ The article will therefore start off with a discussion of the application of the no-fettering-by-contract doctrine in English law. The way in which the English courts determine the validity of public contracts will first be examined. Thereafter the application of the doctrine in South Africa and the way in which the South African courts determine validity will be examined. Difficulties with the test used to determine validity will be pointed out and suggestions will be made to combat such difficulties. Finally, the effects of the no-fettering doctrine on the private contracting party will be enquired into and suggestions will be made regarding remedies to combat possible hardships suffered.

³See Wiechers (n 1) 117; Burns (n 1) 236-237; Floyd (1994) (n 1) 251, 362; See also Hogg and Monahan (n 1) 210; Arrowsmith (1992) (n 1) 43; Turpin (1989) (n 1); Cane *An introduction to administrative law* (1996) 13; Seddon (n 1) 3.

⁴See Floyd (1996) (n 1) 77 who notes that tension arises between on the one hand ‘kontrakteervryheid, konsensualisme en die verbindende krag van ’n kontrak’ and on the other hand ‘die algemene belang, die gebondenheid van owerheidshandelinge en die administratiewe en demokratiese kontrole van owerheidshandelinge’.

⁵For examples of such rules, see Arrowsmith (1992) (n 3) 43-44.

⁶See Hoexter (n 1) 166.

⁷There are also other ways in which a public body can unlawfully fetter its exercise of discretion. This includes rigid adherence to policy guidelines or precedent and through promises and assurances; see Baxter (n 1) 415-419, 424-426; Hoexter (n 1) 165-168; Burns (n 1) 248-249.

⁸See also Floyd (1996) (n 1) 69.

⁹See Baxter (n 1) 419-423; Landman ‘Advance income tax rulings’ 1982 *MB* 94 at 96. For possible explanations on the limited number of court cases, see Labuschagne (n 1) 51-52; Cane (n 3) 265-266; Turpin (1989) (n 1) 221-226; Aronson and Whitmore (n 1) 177.

2 The development of the no-fettering-by-contract doctrine in English law¹⁰

A famous case in English law and the case which is usually cited in support of the no-fettering doctrine is *Rederiaktiebolaget 'Amphitrite' v The King*.¹¹ The British Government had given written assurance to a Swedish company that a ship owned by it, the *Amphitrite*, would be allowed to leave British ports once her cargo was offloaded. The ship was subsequently detained as a wartime measure. The company then sued for breach of contract but the claim was unsuccessful. Rowlatt J held that the assurance given by the government was no more than an expression of intention. The assurance could not constitute a contract, because, although the Crown could enter into binding commercial contracts –

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.¹²

The judgment of Rowlatt J has been analysed and criticised exhaustively. The most important points that have been made regarding this judgment can be summarised as follows:

- (1) Rowlatt J found that on the facts of the case there was no intention to contract. It can be argued that this is indicative of the special rules that apply to government contracts.¹³ The fact that the one party was a public authority affected the way in which Rowlatt J determined the intention of the parties in deciding whether a contract had come into being and in construing its terms. Had the parties involved been private individuals, he would in all likelihood have found an intention to be legally bound.¹⁴
- (2) Rowlatt J accepts that it is possible for the Crown to be bound by 'commercial' contracts although he does not define such contracts. He seems to hold the view that commercial contracts are unlikely to affect the welfare of the state. However, as pointed out by Mitchell,¹⁵ commercial contracts entered into by the state, by reason of their size alone, could arguably affect the

¹⁰See generally Craig *Administrative law* (1999) 526-534, Wade and Forsyth *Administrative law* (2000) 335-340; Harlow and Rawlings *Law and administration* (1997) 227-232; Floyd (1994) (n 1) 280-290, (n 4) 90-99.

¹¹1921 3 KB 500.

¹²*Id* 503. See also Beatson and Mathews *Administrative law cases and materials* (1989) 615-619.

¹³See Arrowsmith (1992) (n 1) 43; Seddon (n 1) 68-78.

¹⁴See Hogg and Monahan (n 1) 215 where the authors argue that the courts should apply the same test that they apply in the law of contracts generally: 'would a reasonable person infer from the conduct of the parties and the surrounding circumstances an intention to enter into a legally binding agreement?' See also Waddams (n 1) paras 106-107 who argues that '... governments, like other persons, intend to obtain as much as they can for the smallest possible commitment. But, if [governments] so conduct themselves as to induce reasonable reliance, they should be held liable'.

¹⁵Mitchell 'Limitations on the contractual liability of public authorities' (1950) 13 *MLR* 318 at 319.

- welfare of the state, just as in *Amphitrite*, the availability of shipping to the government during the 1914-1918 war concerned the welfare of the state.¹⁶
- (3) Rowlatt J makes no mention of the application of his doctrine to statutory authorities. Because the doctrine enunciated by him is a rule of public policy, it should apply in the same way to the Crown as to other statutory authorities. There is no need for a distinction to be drawn between the Crown and other statutory bodies because it can be presumed that the exercise of *all* state powers is to be ‘determined by the needs of the community’ and should therefore not be contractually limited in relation to matters ‘which concern the welfare of the State’.¹⁷
 - (4) Rowlatt J found that a contract that purports to fetter the Crown’s freedom of executive action is invalid. If by this he meant that any contract that in any way fetters any executive power is invalid or is not a contract at all, it is absurd, to say the least, because *all* contracts fetter discretion to some extent. It would mean that the government to a large extent would be unable to enter into contracts, especially those involving the disposal of government property.¹⁸

As can be seen from the above, the scope of the *Amphitrite* doctrine is not clear,¹⁹ especially regarding the type of contract it applies to and the circumstances in which it can be said that a (statutory) power is being fettered by such contract. This requires further discussion.

2.1 Scope of the no-fettering doctrine

Common sense tells us that the doctrine cannot enjoy wide or unlimited application in the sense that any contract that in any way fetters administrative action is invalid *or* that the moment a contract and a statutory power touch upon the same subject matter, the contract is invalid. To say so would mean that public bodies would be unable to enter into contracts because *all* contracts fetter administrative action to some extent.²⁰ There are cases with *dicta*, which

¹⁶See also Foulkes *Administrative Law* (6th ed) 360. Dussault and Borgeat (n 1) 544 assert that the principle has no application to commercial contracts but see Arrowsmith (1988) (n 1) 128-129. Also in *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth of Australia* 1977 17 ALR 513 at 562 Aickin J remarked that the distinction sought to be drawn between ‘discretionary powers of the Crown to be exercised for the public good’ and the exercise by the Crown of its executive power to enter into ‘commercial contracts’ is ‘not one which leaps to the eye’. See also Holdsworth (1929) 45 *LQR* 166.

¹⁷See *Commissioners of Crown Lands v Page* 1960 2 All ER 726 where the court said that no distinction is made in respect of the principle applied by the court, which rests upon the same considerations of policy as that considered in the text, between the Crown and other public authorities. See also Arrowsmith (1992) (n 1) 74.

¹⁸See Turpin (1972) (n 1) 20.

¹⁹See also Floyd (1996) (n 1) 95.

²⁰See also *Ansett Transport Industries* (n 16) 530 where Mason J said the following: ‘Public confidence in Government dealings and contracts would be greatly disturbed if all contracts which affect public welfare or fetter future executive action were held not to be binding on the

appear to indicate that the no-fettering doctrine is of unlimited application, but these need to be understood with reference to the context within which they were decided. A classic example is the case of *Ayr Harbour Trustees v Oswald*.²¹ In this case, the trustees had statutory powers to acquire land to be used, as need might arise, for the construction of harbour works. They wished to acquire part of Oswald's land, subject to an undertaking that they would not use the land acquired in such a manner as to interfere with Oswald's access to the harbour from his remaining land. This undertaking was intended to justify a lower sum being paid to Oswald as compensation. Oswald argued that the proposed acquisition of his land was *ultra vires* the trustees and that the purchase should be made without the undertaking and against payment of the larger sum. The House of Lords agreed and held that the contract was void, because it was not competent for the trustees to dispense with the future exercise of their powers. Lord Blackburn said the following:

Where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good ... A contract purporting to bind [the trustees] and their successors not to use those powers is void.²²

Authors like Craig²³ and Harlow and Rawlings²⁴ are of the view that the language used in this case is suggestive of a *strict test* to the effect that whenever a contract and a statutory power touch upon the same subject matter, the contract is inevitably void. However, the *dictum*, read in its context suggests a different interpretation. The harbour trustees were empowered to acquire certain land compulsorily and use it for the purposes of the Ayr Harbour Improvement Act. The object of this Act was the modernization of the layout of the Ayr harbour and an improvement in its facilities. Yet, even before the trustees got down to planning the operation, they were prepared to bind themselves not to alter the layout of the harbour so radically as to interfere with a particular access to it from neighbouring land. Since such an undertaking would frustrate the whole object of the Act, the court rightfully held that the trustees had no statutory power to enter into an agreement of such a nature.

It is therefore suggested that, even though some authors and cases after *Ayr Harbour*²⁵ interpret the *dictum* in *Ayr Harbour* as freeing public bodies from all contractual obligations that touch upon the same subject matter as statutory powers, the *Ayr Harbour* case was decided on exactly the same basis as the earlier

Government or on public authorities. And it would be detrimental to the public interest to deny to the Government or a public authority power to enter a valid contract merely because the contract affects the public welfare'.

²¹1883 8 App Cas 623; See also *South Eastern Railway Company and Wiffin's Contract* 1907 2 Ch 366 and *York Corporation v H Leatham and Sons Ltd* 1924 1 Ch 557.

²²*Id* at 634.

²³(N 10) 527; 534.

²⁴(N 10) 227-228.

²⁵See (n 21).

case of *R v Inhabitants of Leake*.²⁶ In *Leake*, the court had to decide whether land vested in commissioners responsible for drainage could be said to belong to the public for use as a highway, it having been so used for 25 years. Park J expounded a test based upon *incompatibility* and said that if the objects prescribed by the commissioner's empowering statute were incompatible with the land being dedicated as a highway, then the commissioners could not in law do such a thing. However, if such use by the public was not incompatible with the statutory purposes, then the dedication could take place. On the facts of the case, no incompatibility was found to exist. The agreement in *Ayr Harbour* can thus be said to have been *incompatible* with the purposes of the powers conferred on the trustees and for that reason invalid. The House of Lords in *Ayr Harbour* did not establish a *new* test for the determination of validity.

In *Birkdale Electricity Supply Co. Ltd v Southport Corporation*²⁷ the court also applied the *incompatibility test* introduced in *Leake*. The Birkdale Urban Council was the electricity undertaker in Birkdale and transferred the undertaking to an electricity company (the plaintiffs) who agreed not to charge higher prices than those charged in the adjoining borough of Southport. Later, the Birkdale District and the contractual rights and obligations of the Birkdale Council were transferred to Southport Corporation. The company remained the electricity undertakers in the Birkdale area. Because the company now charged higher prices for electricity than the Southport Corporation, the latter brought an action to restrain the company from committing breach of contract. The company contended that the agreement was *ultra vires*. Lord Sumner disagreed and refused to hold the agreement by the company that it would not charge higher prices for electricity than that charged by Southport Corporation *ultra vires*. He held that the contract was not *incompatible* with the statutory power of the company to charge what it wished up to a certain maximum.

Lord Sumner distinguished the *Ayr Harbour* case²⁸ as one where the trustees 'renounced a part of their statutory birthright' by offering 'to sterilize part of their acquisition, so far as the statutory purpose of their undertaking was concerned'.²⁹ They agreed *never* to use part of the land they acquired for the statutory purpose for which they had acquired it.³⁰ The electricity company on the other hand, Lord Sumner said, should have commercial liberty as part of

²⁶1833 5 B and Ad 469.

²⁷1926 AC 355. This case is usually referred to as reaffirming the existence of the incompatibility test in English law. See Craig (n 10) 527.

²⁸(N 21).

²⁹(N 27) 371-372.

³⁰*Ibid.* Lord Sumner also said the following: 'If the Ayr Trustees had reduced the acquisition price by covenanting with the respondent for a perpetual right to moor his barges, free of tolls, at any wharf they might construct on the waterfront of the land acquired, the decision might, and I think would, have been different'. See also Rogerson 'On the Fettering of Public Powers' (1971) 45 *ALJ* 288 at 291 who argues that a similar covenant in *Ayr Harbour* might have been upheld if it were made *after* the main lines of the development had been set.

its statutory birthright of selling electricity, and that liberty should include the power to make binding contracts. It would be absurd, he said if the existence of statutory powers invalidated ‘mere contracts restricting the undertakers’ future freedom of action in respect of the business management of their undertaking’.³¹ Lord Sumner’s reference to ‘mere contracts’ could be interpreted to mean that only contracts creating property rights will be incompatible with statutory powers (as was the case in *Ayr Harbour*) and not contracts concerned with trading profit. However, as pointed out by Craig,³² ‘while the possibility of incompatibility is increased if the right is proprietary rather than contractual, it is doubtful whether the distinction should be taken any further than that’. Contracts concerned with trading profits can also result in incompatibility with statutory powers.

Thus, aside from the seemingly wide application that was afforded the no-fettering doctrine by Rowlatt J in the *Amphitrite*,³³ there seems to be a general attempt by the courts to narrow the application of the doctrine.³⁴ It is recognised that *all* contracts fetter discretion to some extent but that this does not mean that a public body *cannot* bind itself by contract or that it can use the existence of statutory powers to *escape* from inconvenient contractual obligations.³⁵ A contract will only be invalid if it is *incompatible* with the purpose of the power that it fetters. Only contracts that are incompatible with the very purpose for which the power has been conferred are regarded as void. In other words, as pointed out by Mitchell,³⁶ the contract must conflict with powers *fundamental* to the purposes and existence of the authority in question in order to be declared invalid.³⁷

³¹(N 27) 371-372. See also *Stourcliffe Estates Co Ltd v Corporation of Bournemouth* 1910 2 Ch 12 for the application of the incompatibility test. The court held that *Ayr Harbour* had no application because the statutory power available to the Corporation merely meant that if the Corporation wished to spend money on providing lavatories, they could do so, but there was no reason why they could not agree *not* to do so. See also *British Transport Commission v Westmoreland County Council* 1958 AC 126 for the application of the incompatibility test.

³²(N 10) 529.

³³(N 11).

³⁴In *Robertson v Minister of Pensions* 1949 1 KB 227, Denning J made an attempt to limit the scope of the doctrine though his view has been criticised. See Turpin (1996) (n 1) 21-22; Mitchell (n 15) 321; Baxter (n 1) 421; Rogerson (n 30) 288; Dussault and Borgeat (n 1) 542-543. See also the Australian case of *Northern Territory of Australia v Skywest Pty Ltd* 1987 48 NTR 20 at 47 where Kearney J suggests that the doctrine be confined to matters of ‘overriding public interest, such as the exigencies of war’ but see Seddon (n 1) 152 who points out difficulties with distinguishing between an *overriding* public interest and a lesser level of public interest for application of the doctrine.

³⁵See *Commissioners of Crown Lands* (n 17) 736 where Devlin LJ said the following: ‘It does not mean that the Crown can escape from any contract that it finds disadvantageous by saying that it never promised to act otherwise than for the public good ... [it is not the case that] the Crown can never bind itself in the dealings with the subject in case it might turn out that the fulfilment of the contract was not advantageous’.

³⁶(N 15) 461

³⁷See also Baxter (n 1) 422-423.

However, the question *how* to determine incompatibility is unclear. Authors who have written on the subject do not shed much light. Craig³⁸ suggests that compatibility is to be judged by a test of reasonable foresight. However, as pointed out by Turpin,³⁹ a contract can either certainly or as a matter of probability prevent a public body from discharging its public duty.⁴⁰ In other words, it is not always necessary to look to the future to see what it holds. Also, even if a conflict *is* reasonably foreseeable, it does not automatically amount to an unlawful fetter of discretion.⁴¹ In *Birkdale*⁴² for example, it can be argued that even though a conflict (a desire to change the pricing policy) was reasonably foreseeable, the contract was nevertheless upheld. According to Wade and Forsythe,⁴³ the important question is ‘whether there is incompatibility between the purposes of the statutory powers and the purposes for which the contract is made’. This is in essence what the incompatibility test entails. However, an analysis of English cases shows that the application of the incompatibility test entails *more* than simply comparing the purpose(s) of the statutory power with the contract. A variety of other factors also come into play.

2.2 Analysis of English cases: factors determining validity

In *Ayr Harbour*,⁴⁴ the court found that the contract was invalid because the trustees, by entering into the contract, agreed *never* to use part of the land they acquired for the statutory *purpose* for which they acquired it.⁴⁵ Apart from the purpose of the statutory power, the *nature or subject matter* of the contract⁴⁶ and the *degree* of fettering played an important role in determining the validity of the contract.⁴⁷ The court in *Birkdale*,⁴⁸ found that the contract was valid because the electricity company had commercial liberty to charge for electricity whatever it wished up to a certain maximum. Doing so, the court said, forms part of managing

³⁸(N 10) 527-528.

³⁹(1972) (n 1) 23.

⁴⁰See also Baxter (n 1) 422.

⁴¹See Arrowsmith (1993) (n 1) 73.

⁴²(N 27).

⁴³(N 10) 335.

⁴⁴(N 21).

⁴⁵*Id* at 634.

⁴⁶Where the contract is of a commercial nature, it is more likely to be held compatible with the statutory power. See Wade and Forsythe (n 10) 335 where he points out that non-commercial contracts that restrict a public body’s freedom to act for the public good are readily condemned by the English courts. See *Ramson and Luck Ltd v Surbiton Borough Council* 1949 Ch 180 at 202 (promise not to revoke planning permission in future unlawful); *Stringer v Minister of Housing and Local Government* 1970 1 WLR 1281 at 1289B-F (agreement intended to bind local authority to disregard, in relation to individual planning applications, considerations which authority obliged to have regard to unlawful).

⁴⁷See also *York Corporation* (n 21) where very similar factors determined the validity of the contracts. For criticism on *York*, see Lords Birkenhead and Sumner in *Birkdale* (n 27).

⁴⁸(N 27).

its business.⁴⁹ At least two factors determined the validity of the contract: the *nature of the bearer of the power* (the bearer was a *trading company*) and whether the *scope and nature of the statutory power (or function)* is such that it allows for the exercise of the power by way of contract (the statutory power *in casu* impliedly allowed for the conclusion of the contract as a means of exercising the statutory power to charge for electricity).⁵⁰

Another case that gives an indication of the factors to be considered in this regard is *British Transport Commission v Westmoreland County Council*.⁵¹ In this case, the predecessors of the Transport Commission had constructed a footbridge across their railway in order to provide a crossing for the benefit of the owners of land on either side of the railway line. For more than 20 years, members of the public had used the footbridge and the question was whether the footbridge could be regarded as a public road. It was argued for the Transport Commission that it could not be regarded as a public road because, while the public's use of the bridge was not yet a hindrance to the Commission in carrying out its statutory powers of managing the railway, at some future time it might become so and that possible eventuality satisfied the test of incompatibility. The House of Lords rejected this argument and held that there was incompatibility with statutory powers only if there was a likelihood or probability that the exercise of the alleged right would interfere with the performance of the statutory duty.⁵² The House of Lords found that there was no likelihood or probability that the continued existence of the footbridge would endanger the running of the trains or the operation of the railway. The footbridge could be regarded as a public road. The main reason for the court's decision was the *remoteness of the likelihood or probability* that the footbridge would interfere with the Transport Commission's powers to operate the railway. The determining factor for validity was thus the *likelihood or probability of fettering*.⁵³

Rowlatt J in the *Amphitrite*⁵⁴ seems to have attached much importance to the fact that the alleged contract purported to fetter the Crown's discharge of its function of national defence and therefore found the 'contract' to be invalid.

⁴⁹(N 27) 371-375.

⁵⁰See also Seddon (n 1) 154; 160-161 who points out that 'a contract may simply be a way of implementing a policy or exercising discretion ... in other words the relevant discretion is exercised (through contract)'.

⁵¹See (n 31).

⁵²*Id* at 135, 144.

⁵³See also *Leake* (n 26) where it was held that the *remoteness of the possibility* that the grant of a right of way would fetter the actual exercise of the power rendered it valid. See also the Australian cases of *Director of Posts and Telegraphs v Abbott* 1974 2 ALR 625 at 636 (unsuccessfully argued that executive necessity would justify breaking a contract in order to avoid strike action which *may* have affected a large number of services); *Commonwealth v Hooper* 1992 2 CCH Contract Reporter paras 90-100 (not sufficient that contract *might* act as inhibitor on future executive or legislative action).

⁵⁴(N 11).

The *nature of the function* being performed seems to have played an important role in the determination of validity.⁵⁵ It can also be argued that Rowlatt J excluded ‘commercial’ contracts from the operation of the no-fettering doctrine because he might have reasoned that such contracts are not *likely* to affect the welfare of the state. Thus, the *remoteness of the possibility* that fettering might occur was possibly also a factor that influenced his decision.⁵⁶

In *Cory (William) and Son v London Corporation*,⁵⁷ the corporation, acting as sanitary authority under the Public Health Act of 1936, contracted with barge-owners for the removal by water of large quantities of refuse. The corporation, also being the port health authority, then made new by-laws imposing more stringent requirements on barges, which would have added to the firm’s losses. The firm then claimed that the contracts for refuse collecting contained an implied term that the corporation would *not* alter its by-laws to the firm’s disadvantage. The court disagreed and held that the term that the claimants contended, whether express or implied, was *ultra vires* the corporation because the statutory duty to make by-laws for the disposal of refuse stipulated in section 84(1)(a) of the Public Health Act of 1936 was *mandatory*.⁵⁸ A number of factors can be said to have determined the validity of the contract: the *nature and importance of the statutory power being fettered* (the corporation had a mandatory statutory duty to make by-laws and inherent in such duty was the ability to change by-laws); the *degree of fettering* (a legislative power to make by-laws was being restricted);⁵⁹ *voluntary assumption of the risk* (on the part of the firm) that the contracts might subsequently become invalid considering the nature of the corporation’s powers as port health authority (in making the by-law, the corporation was exercising its essential public health functions).⁶⁰

⁵⁵See also *Commissioners of Crown Lands* (n 17) where the court seems clearly to have been influenced by the consideration that the implied term for quiet enjoyment under the lease agreement fettered the Crown’s discharge of its *function* of national defence.

⁵⁶However, the consideration of this factor in *Amphitrite* does not hold much water, because, as already pointed out, commercial contracts, by their size alone, are likely to affect the welfare of the state just as the availability of shipping to the government during the 1914-1918 war concerned the welfare of the state.

⁵⁷1951 2 KB 476.

⁵⁸*Id* at 484-485.

⁵⁹See also the Canadian case of *Pacific National Investments Ltd v Victoria (City)* 2000 2 SCR 919 where the majority of the court refused to imply a contractual term that the municipality would not rezone land before the expiration of a reasonable period.

⁶⁰See also *Commissioners of Crown Lands* (n 17) 736 where *voluntary assumption of the risk* by a tenant of the Crown was a determining factor for validity. Devlin LJ refused to imply a term for quiet enjoyment in a lease agreement with the Crown and said the following: ‘When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation. No one can imagine, for example, that when the Crown makes a contract which could not be fulfilled in time of war, it is pledging itself not to declare war for so long as the contract lasts. Even if therefore there was an express covenant for quiet enjoyment, or an express promise by the Crown that it

In certain instances it is necessary to compare not only the contract with the statutory power in question, but also one statutory power (by virtue of which a contract was concluded) with another statutory power (which appears to be fettered by such contract). As appears from the two cases discussed below the validity of the contract would have to be determined with reference to which of the two statutory powers should receive preference. Ultimately, this is a question of statutory interpretation. In *Dowty Boulton Paul Ltd v Wolverhampton Corporation*⁶¹ a municipal corporation entered into an agreement with an aircraft company (by virtue of the municipal corporation's ownership of the land and in terms of unidentified statutory powers) in terms of which the company obtained the right to use a municipally owned airfield for 99 years. Years later the airfield was rarely used and the corporation wanted to exercise a power to reacquire the land for development on the ground that the land was no longer required for use as an airfield. The company argued that it had a lease of 99 years but the corporation argued that the lease was *ultra vires* because it fettered their statutory powers to develop the land and provide housing. Pennyquick VC disagreed and said the following:

Where a power is exercised in such a manner as to create a right extending over a term of years, the existence of that right *pro tanto* excludes the exercise of other statutory powers in respect of the same subject matter, but there is no authority and I can see no principle upon which that sort of exercise could be held to be invalid as a fetter upon the future exercise of powers.⁶²

Craig⁶³ points out that the dictum in *Dowty Boulton* should not be interpreted to mean that it is impossible for a *later* power to render incompatible what was validly done under an earlier power.⁶⁴ Devlin LJ in *Blake v Hendon Corporation*⁶⁵ made it clear that an initially valid and binding contract *could* subsequently become invalid if it conflicts with a later *overriding* power.⁶⁶ In this case, the local authority had statutory powers to dedicate a park to the public and did exactly this.

would not do any act which might hinder the other party to the contract in the performance of his obligations, the covenant or promise must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown takes for the public good'.

⁶¹1971 1 WLR 204.

⁶²*Id* 210; See also *Stourcliffe Estates* (n 31) 18 and *The Power Co Ltd v Gore District Council* 1997 1 NZLR 537 at 548 where the New Zealand Court of Appeal noted that 'public bodies will often need to enter into contracts, sometimes long-term contracts', and that the existence of such agreements may well 'prevent the exercise of ... statutory powers in respect of the same subject matter'. However, the court continued and said that the fact that the future exercise of statutory powers might be fettered by the valid execution of a contract was no reason to hold the contract to be unenforceable or void.

⁶³(N 10) 529-530.

⁶⁴See also *Seddon* (n 1) 169-170.

⁶⁵1962 1 QB 283.

⁶⁶See also *R v Hammersmith and Fullham London Borough Council, ex p Beddowes* 1987 QB 1050; *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* 1948 77 CLR 1 (legislation, which nullified the Commonwealth's undertaking that Commonwealth bonds would not attract tax liability on interest paid held to be valid).

However, the local authority also had the power to let any land that it may possess. The rating authority therefore challenged the claim of the local authority that the park belonged to the public because the local authority could still let the land. Devlin LJ found that the park belonged to the public because the power of the local authority to let – in section 164 of the 1933 Act – was a *narrow power* and was *subordinate* to the main power in section 164 of the 1875 Act to dedicate land to the public. The power to let in section 164 of the 1933 Act could only be validly exercised if it was compatible with the full use of the land by the public as a park.⁶⁷ Thus, the determination of validity was a question of *statutory interpretation* – the two statutory powers had to be construed and a decision had to be made whether the later power rendered incompatible what was done under the earlier power.

3 The no-fettering-by-contract doctrine in South Africa⁶⁸

The no-fettering doctrine seems to have been approved in *Sachs v Donges*⁶⁹ and subsequently in *Fellner v Minister of the Interior*.⁷⁰ In *Fellner*, the applicant had been granted a passport in September 1945. The passport included an ‘Extract from Passport Regulations’ which *inter alia* read that ‘[p]assports are valid for five years from date of issue, unless otherwise endorsed, and are renewable for any period of from one to five years. A passport is not valid beyond ten years from the original date of issue. The fee for renewal is 2s per year. A form of renewal must be completed. If there be no further space for visas, a new passport must be obtained’. In September 1952 the appellant applied for a renewal of her passport and paid the required amount. Her application was however refused and her money was refunded. The applicant claimed that upon payment of the required fee, the respondent ‘had’ to renew her passport. Centlivres CJ however held that it was obvious that the so-called ‘Passport Regulations’ were incorporated into the passport purely for purposes of information and not for the purpose of prescribing the conditions of a contract. The regulations meant that instead of applying for a new passport, the holder of a passport might apply for a renewal of it. According to Centlivres CJ, the granting of the renewal of a passport was an executive act on the part of the Crown:

Even if the Crown had professed to fetter its future executive action by entering into a contract with the holder of a passport and agreed that the holder should

⁶⁷(N 65) 301-302.

⁶⁸See generally Baxter (n 1) 419-426; Wiechers (n 1) 130-131; Hoexter (n 1) 166-168; Cockrell (n 1) 236-238; Burns (n 1) 248-249; Labuschagne (n 1) 40-54; Floyd (1194) (n 1) 381-388, (1996) (n 1) 99-109.

⁶⁹1950 2 SA 265 (A).

⁷⁰1954 4 SA 523 (A). See also *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal Departement van Handel en Nywerheid* 1992 4 SA (A) 21G-22B.

have the right to require the Crown to renew his passport, such agreement would not be binding on the Crown.⁷¹

As in English law, application of the doctrine in South Africa is problematic. Contracts are used to staff and equip the public administration and to ensure the implementation of public policies. Section 1 of the State Liability Act⁷² also provides that the state shall be bound by its contractual obligations.⁷³ As pointed out before, many contracts entered into by public bodies are capable of fettering administrative action in some way but this does not mean that public bodies *cannot* bind themselves by contract or use the existence of statutory powers to *escape* from inconvenient contractual obligations. As in English law,⁷⁴ an initially valid and binding contract can only subsequently become invalid if it *does* conflict with a subsequent overriding power.⁷⁵ South African authors on the subject have not attempted to establish the test that is used by the (South African) courts to establish the validity of a contract allegedly fettering the exercise of a statutory power, but generally propose that the English *incompatibility test* be adopted in South Africa.⁷⁶

3.1 Factors determining validity

As in English law, the South African courts use the *incompatibility test* to determine the validity of public contracts,⁷⁷ but as in English law, in addition to the purpose(s) of the statutory power, other factors also appear to play a role. From the analysis that follows, it will be seen that these are very similar to those taken account of by the English courts. In *Mercian Investments (Pty) Ltd v Johannesburg City Council*,⁷⁸ the company sold property belonging to it but could not effect transfer of the property to the purchaser because the municipality refused to issue clearance certificates. The reason for the refusal was that the company still owed money dating back to a time when it was placed in liquidation in respect of the property now in issue. The company argued that the outstanding amounts had been compromised by the municipality in terms of a scheme of arrangement proposed under section 311 of the Companies Act 61 of 1973 that had been sanctioned by the court. Thus,

⁷¹*Id* at 536. For an analysis of the effects of the judgment in *Fellner*, see Hahlo and Khan *The South African legal system and its background* (1968) 274-275; EK 'Ratio decidendi and divided courts – the passport case *reagitatus*' (1955) 72 *SALJ* 6.

⁷²20 of 1957.

⁷³Based on the well-known principle of *pacta sunt servanda*.

⁷⁴See *Dowty Boulton* (n 61) and *Blake* (n 65).

⁷⁵See *Gordon v Pietermaritzburg-Msunduzi Transitional Local Council* 2001 4 SA 972 (discussed in detail below – see text accompanying (n 96 and 97)); *Pietermaritzburg Corporation v Union Government* 1935 NPD 36 at 50-51.

⁷⁶Hoexter (n 1) 167; Baxter (n 1) 422-423; Cockrell (n 1) 236; Burns (n 1) 248.

⁷⁷See especially *Southern Metropolitan Substructure v Thompson* 1997 1 All SA 571 (W), *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA (CC) and *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd* 1997 4 All SA 500 (A), all discussed below – text accompanying (n 81-95).

⁷⁸1990 1 SA 560 (W).

as far as the company was concerned, the ‘outstanding’ charges and levies had been paid to the municipality. The court held that a local authority’s revenue was in the nature of trust money and that as a statutory body, the municipality was obliged to recover such money and apply it in accordance with its statutory powers and duties. It could not renounce a *peremptory statutory obligation* imposed by the legislature for the conservation of public moneys. The court also said that even though section 311 of the Companies Act 61 of 1973 provides a procedure for the creation of a contract comprising a compromise or arrangement between the parties concerned, the effect of the court sanctioning such arrangement was not intended by the Legislature to serve as a statutory mechanism to clad the municipality with a capacity to contract in defiance of its relevant right and in violation of its duty to collect revenues due to it.⁷⁹ The court can be said to have been guided by certain factors: the peremptory nature of the statutory powers ie the *nature and importance of the municipality’s power* to collect revenue;⁸⁰ and the *nature of the scheme* and the effect it had on the powers of the municipality to collect revenue.

The court in *Southern Metropolitan Substructure v Thompson*⁸¹ was also guided by certain factors that ultimately determined validity. In this case, the council made an application for the eviction of illegal occupants of council-owned houses. The occupants claimed that the council had waived its right to evict because the council had placed an indefinite moratorium on evictions. The court disagreed and held that even if an indefinite moratorium had been placed upon the eviction of illegal occupiers, such undertaking would not have been enforceable because the local authority had a *duty* to provide and allocate council housing to all *eligible* persons. The court said the following:

Such a contract would clearly be incompatible with the proper exercise of the applicant’s statutory powers to allocate housing to those who qualify or have already qualified for it. Such a contract would be an unreasonable and incompetent fetter on its powers and duties.⁸²

As in *Mercian Investments*,⁸³ the court emphasized the *nature and importance of the council’s powers* to allocate housing and the *extent/degree* to which such powers of allocation were fettered.⁸⁴ Housing was to be allocated only to those who qualify or have already qualified for it.

⁷⁹*Id* at 573.

⁸⁰See also the earlier cases of *Collector of Customs v Cape Central Railways* 1888 SC 402 at 406; *Commissioner for Inland Revenue v Delfos* 1933 AD 242 at 248 and *Steenkamp v Union Government* 1947 1 SA 449 (C) 459 (*obiter*), where the *nature and importance* of the power to collect revenues was emphasised.

⁸¹(N 77).

⁸²*Id* at 576.

⁸³(N 78).

⁸⁴See also the earlier case of *Kimberley Water Works Co v Kimberley Borough Council* 1902 SC 404 at 411-412 where the *nature and importance of the municipality’s power* to supply water and the *extent* to which such power was fettered played a role.

In *Rapholo v State President*,⁸⁵ it can be argued that the *nature of the powers* exercised by the President was an important factor in the determination of validity. Section 2(1) of the Indemnity Act 35 of 1990 conferred on the President discretionary powers to grant indemnity. The applicant applied for indemnity and was granted indemnity for certain offences but not for others. The applicant then claimed that, in deciding whether to grant indemnity to a person, the President was bound by an agreement between the government and the ANC, setting out guidelines to be followed in applications for indemnity. The argument of the applicant was that the acts for which he did not receive indemnity, fell within the guidelines agreed to between the government and the ANC. The court however held that the discretion of the President to grant indemnity in terms of section 2(1) of the Indemnity Act could not be curtailed by agreement between the government and the ANC. Such agreement had no legislative effect and was entered into after promulgation of the Act. The same applied to the guidelines for defining political offences published in the Government Notice R2625 of 7 November 1990. The guidelines had no legal effect and were merely published as general information setting out the procedure to be followed in applications for indemnity and indicating what the general approach of the President would be. The President did not fetter his discretion thereby, nor could he, because his powers were determined by the Act and could not be limited except by the legislature.⁸⁶

Similarly, in *President of the Republic of South Africa v South African Rugby Football Union*⁸⁷ the *nature of the powers conferred* was arguably an important factor in determining whether a contract had come into being between the Minister of Sport and Recreation and SARFU. In this case, the President was accused by SARFU of irrevocably abdicating his responsibility for appointing a commission of enquiry into the affairs of SARFU to the Minister of Sport and Recreation. SARFU claimed that the Minister had entered into a legally binding contract with it, which precluded the Minister from approaching the President for the appointment of a commission of enquiry. SARFU claimed that it had a legitimate expectation to be heard before the commission was appointed. The question was therefore whether a contract had come into being between the Minister and SARFU. The court said the following:

Although there is some uncertainty as to the precise ambit of the principle that a public authority cannot, by contract, fetter the exercise of its own discretion, there is little doubt that a public authority cannot enter into a contract which is wholly incompatible with the discretion conferred upon it. More conclusively, one member of the Cabinet cannot of his or her own accord enter into a contract with a third party which would preclude or constrain the President from exercising powers conferred upon him or her directly by the Constitution ... Any arrangement made by the Minister with SARFU concerning the task team's investigation could, as a matter of law, have been no more than an undertaking

⁸⁵1993 1 SA 680 (T).

⁸⁶*Id* 693.

⁸⁷(N 77).

by the Minister to discharge his executive powers in a particular way. If that proved not to be a satisfactory arrangement, the undertaking could not fetter the Minister's power to pursue a different course and request the President to appoint a commission and certainly not that of the President to appoint a commission whether requested to do so by the Minister or not.⁸⁸

In *Government of the Province of the Eastern Cape v Frontier Safaris (Pty) Ltd*⁸⁹ the question before the court did not concern the fettering of powers but a number of factors influenced the court in determining the validity of the contract in issue. In 1987, the Government of the Republic of Ciskei entered into a contract with a corporation in terms of which the corporation would manage nature reserves created under the Nature Conservation Act 10 of 1987. In 1993, the new government claimed that the contract was void and wished to cancel the contract. The contract was subsequently cancelled but the corporation instituted action against the government for damages. The government argued that the previous government had not been competent to conclude a contract that divested it of powers and duties entrusted to it for public purposes and the contract was therefore void *ab initio*.⁹⁰ The court first examined the object of the establishment of nature reserves by the Nature Conservation Act and found that in terms of the Act, the government was entitled to conclude contracts affecting the control, maintenance, development and management of the reserves. The court found that the specific powers mentioned in this regard in section 25(2) of the Act were of a permissive and not a directory nature. The government was expressly authorised to carry out any of the activities mentioned in the subsection by engaging outside bodies or corporations to do so. The court then examined the nature and purpose of the contract and found that the overall effect of the contract was that it imposed on the parties a series of reciprocal obligations all of which were consonant with the objects of the Act.⁹¹ The factors determining the validity of the contract were the *object/purpose of the statutory power* for establishing reserves;⁹² the fact that the *statutory power expressly allowed for the conclusion of the contract as a means of*

⁸⁸*Id* paras 198, 199. See also the Rhodesian case of *Waterfalls Town Management Board v Minister of Housing* 1957 1 SA 336 (SR) 342E-F (Minister not bound by promise not to erect buildings in particular place); the Australian cases of *Logan Downs v Commissioner for Railways* 1960 QdR 191 SC (promise by Queensland government to allow rebate on freight charges on stock railed by graziers to replace drought losses not contractual obligation); *Australian Woollen Mills v Cth* 1954 92 CLR 424 HC; 1955 93 CLR 546 PC (promise by Commonwealth Government to pay subsidy on wool purchased and used for local manufacture not contractual obligation). See also the Canadian case of *The King v Dom of Canada Postage Stamp Vending Company Ltd* 1930 4 DLR 241 (SCC) 244.

⁸⁹(N 77).

⁹⁰See *Durban (Ningizuma) Community Council v Minister of Cooperation and Development* 1984 2 SA 222 (D) 228, 1985 3 SA 667 (A) 676 (public body cannot by agreement delegate or divest itself of its statutory powers).

⁹¹(N 77) 508.

⁹²See also *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 3 498 (C) 505 where the court emphasised the *object/purpose of the power* of the municipality to consider building plans relating to certain properties; it could not agree not to exercise such power.

exercising the statutory power,⁹³ and the *nature and purpose of the contract*.⁹⁴

In *Gordon v Pietermaritzburg-Msunduzi Transitional Local Council*,⁹⁵ a contract was concluded with a private valuator to determine the value of property in a certain municipal area according to criteria laid down in regulations. With the advent of South Africa's new constitutional dispensation the area was incorporated into another municipality and the regulations (based on racial discrimination) were repealed. The contract was held to be impossible to perform.⁹⁶ The determination of validity was therefore a question of *statutory interpretation*. The powers in question were construed and a decision was made whether the later powers rendered incompatible what was done under the earlier power. The determination of supervening impossibility of performance was therefore subject to the rules of statutory interpretation. Only if the later power *did* render incompatible what was done under the earlier power could the contract be invalid. This was found to be the case *in casu*.

4 The contextual approach to determine incompatibility and thus validity

Having analysed the English and South African cases it is evident that the courts take account of a number of factors in determining the validity of a contract allegedly fettering the exercise of a statutory power. In all cases, the court is required to make a value judgment. It must balance the public and private interests involved and in the end decide which deserves more weight.⁹⁷ It is important to strike a balance between the need for public bodies to contract, ensuring fair treatment of those who contract with public bodies and ensuring that contracts so made do not unduly fetter discretionary powers.⁹⁸ This implies weighing up the

⁹³See also Seddon (n 1) 154, 160-161.

⁹⁴As in English law, where the contract is of a commercial nature, it is more likely to be held compatible with the statutory power. See *Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 at 268 where Nestadt JA distinguished the case before him from that of *Fellner* (n 70) and said the following: 'I am satisfied that *in casu* the relationship between the parties was essentially contractual. Unlike *Fellner* ... we have a transaction which is a commercial one'.

⁹⁵(N 75).

⁹⁶*Id* 977. See also *Pietermaritzburg Corporation* (n 75); Baxter (n 1) 423; Grotius in *De Jure Belli ac Pacis*, Book II, Ch. XIV, *Of Promises, Contracts and Oaths*, xii 4 (Trans F W Kelsey, 1925) where he says that 'if by any chance a contract should begin to lead not merely to some loss but to the ruin of the State so that the contract if carried to conclusion would have to be considered unjust and illegal from the beginning, it is possible, not exactly to revoke it, but rather to declare that it has no further binding force as if made under a condition without which it could not have been justly made'. See also *Reilly v R* 1934 AC 176 PC 180 (barrister who had contract of employment with Government of Canada not allowed to recover damages for breach of contract when office abolished by statute; decision based on the following principle: 'If further performance of a contract becomes impossible by legislation having that effect the contract is discharged').

⁹⁷See also Cane (n 3) 148-149.

⁹⁸See Craig (n 10) 527.

public and private interests at stake. It is submitted that this cannot be achieved by simply comparing the purpose of the statutory power and the (purpose of the) contract. It is necessary in each case to take account of all relevant factors to determine such validity. This of course includes (and will to a large extent be determined by) the interpretation of the statute(s) in question. Only if the statute later *indeed* renders the contract incompatible should the contract be declared invalid in the light of supervening impossibility of performance. To determine this, the wording and purpose of the statute and the particular statutory provision will play an important role, specifically whether an implied or express power is given for the exercise of the power by contract. The nature and importance of the powers and functions of the statutory authority that are allegedly being fettered will similarly be of significance. Insofar as the contract is concerned, its subject matter or nature is an important consideration as well as the effect of the contract on the statutory power, the degree of the fetter and the likelihood or possibility of fettering occurring. Public policy considerations also come into play: the fact that a person entering into a contract with a public authority voluntarily assumes the risk of the contract being declared invalid must also be taken account of.⁹⁹

My argument is in other words for the use of a *contextual approach* to determine incompatibility and thus the validity of public contracts. Doing so will answer the question of *how* to determine incompatibility between a contract and a statutory power and will to a large degree *alleviate* the difficulty of determining when fettering will render a contract invalid. The factors listed above do not constitute a closed list. All the factors will also not always find application in a particular case but a *balancing* of these factors will ultimately serve the purpose of determining validity. Whether a court has to determine the initial validity of a public contract or its continuing force due to the passing of new legislation conferring new powers, the contextual approach is ideally suited to provide an answer.

5 Remedies available to the private contracting party

As necessary as it may sometimes be for a court to declare a public contract invalid in the interests of the public, a finding of invalidity has the potential of great hardship for the private contracting party.¹⁰⁰ Baxter¹⁰¹ expresses the view that, if the contract is incompatible from the outset (void *ab initio*), the injustice is not so great. Whether the contract is invalid from the outset, is terminated due to supervening impossibility of performance in the light of new legislation conferring new powers¹⁰² or is terminated due to changing circumstances, the

⁹⁹See also Floyd (1996) (n 1) 107-109 who points out policy considerations to be considered.

¹⁰⁰Floyd (1996) (n 1) 70 notes that a 'legitimate expectation' is created which must be protected.

¹⁰¹(N 1) 423.

¹⁰²Later invalidity could possibly be regarded as a form of expropriation which in turn could be argued to be in conflict with the South African Bill of Rights.

potential for hardship exists.¹⁰³ In *all* three instances, a number of issues arise: (a) restitution of money or property, which already passed hands under the contract;¹⁰⁴ (b) entitlement to compensation for irrecoverable expenses incurred in the performance of the contract; (c) loss suffered in the form of expected profits that now will not be realised.¹⁰⁵

The situation is not adequately accommodated for in South Africa. In the United Kingdom most contracts contain ‘break clauses’¹⁰⁶ that allow the government to terminate at any time subject to the payment of compensation.¹⁰⁷ Such clauses are not provided for in the South African State Tender Board’s *General Conditions and Procedures* in regard to tenders, contracts and orders.¹⁰⁸ The conditions and procedures laid down instead acknowledge the overriding rights of the state as a contractor, because protective mechanisms exist only for the state.¹⁰⁹ No provision is made for the possibility that a contract may have to be terminated in the public interest.¹¹⁰

The general rule in South Africa is that if a party is unable to perform in terms of a contract due to *vis maior* or *casus fortuitus* (acts of nature, death, illness, acts of state, war, strike) the contract is extinguished and the party is discharged from liability.¹¹¹ Van der Merwe *et al* authors¹¹² note that supervening impossibility of performance includes instances where ‘performance remains physically possible, but cannot reasonably be expected to be rendered’. The enactment of later legislation resulting in the invalidity of a public contract would therefore amount to supervening impossibility of performance.¹¹³ Where the impossibility of performance is self-created, breach of contract *will* ensue and the usual remedies for breach will apply, because this in effect amounts to prevention of

¹⁰³See also Seddon (n 1) 156-157.

¹⁰⁴Rose (n 1) 252-255 argues that in certain instances, where subsequent legislation has the effect of destroying a contractual right, compensation should be paid for the taking of ‘property’.

¹⁰⁵Cane (n 3) 271 argues that expecting the victim of the no-fettering doctrine to bear *actual* losses for the sake of the public interest could be regarded as unfair, but allowing him to make a *profit* at the expense of the public interest is even more so.

¹⁰⁶Also referred to as ‘termination for convenience clauses’.

¹⁰⁷Seddon (n 1) 168 suggests that such clauses be limited to instances where the government must for policy reasons terminate the contract and not when it is ‘convenient’ to do so. See also Turpin (1998) (n 1) 243-246 and *Torncello v United States* 681 F 2d 756 1982 where the Court of Claims held that the clause could be used only when there had been changed circumstances.

¹⁰⁸ST 36: 2003.

¹⁰⁹See para 45 on failure to comply with conditions and delayed execution; para 48 on remedies available to the state in case of death, sequestration, liquidation or judicial management; para 49 on the contractor’s liability towards the state in the event of cancellation of the contract.

¹¹⁰See Floyd (1994) (n 1) 399 who notes that ‘’n beding kom in staatsboukontrakte voor wat voorsiening maak vir die wysiging van die kontrak deur die ingenieur’. See also Labuschagne (n 1) 216-217.

¹¹¹*Peters, Flamman and Co v Kokstad Municipality* 1919 AD 427; *Bailey v Harwood* 1954 3 SA 498 (A).

¹¹²Van der Merwe *et al Contract: General Principles* (2003) 511.

¹¹³Floyd (1994) (n 1) 400; Baxter (n 1) 423.

performance.¹¹⁴ Difficulties arise where the impossibility arises due to an unexpected need for the state to use overriding powers or legislation is enacted which renders the contract incompatible. In such instances the contract is extinguished, leaving the private contracting party without any remedy.¹¹⁵ A number of arguments have evolved to protect the victims in such instances.

5.1 Damages under the ordinary laws of contract

Hogg and Monahan¹¹⁶ argue that *damages under the ordinary laws of contract* should be awarded in the United Kingdom. Harlow and Rawlings¹¹⁷ support this view, based on the principle of equality before the law: the general law of contract should also apply to the Crown.¹¹⁸ They point out that government contracts in the United Kingdom in any event contain ‘break clauses’ permitting the government to terminate at any time. For this reason, government contracts fettering discretion should be treated as valid in order to allow an action for damages, but specific performance or an injunction should not be granted because these would no doubt amount to fettering.¹¹⁹ Hogg and Monahan¹²⁰ also stress that holding the government bound by their contractual undertakings will not fetter future executive action ‘as long as the only remedy for breach is an award of damages’.

The argument *against* an award of damages is that damages can only be awarded where there has in fact been a breach. One party must have failed to do something, which she promised to do.¹²¹ This is difficult to establish in the case of public bodies, because the loss suffered by the private contracting party is a result or consequence of the valid exercise of powers possessed by the public body. A public body cannot promise *not* to exercise powers or to exercise powers in a *certain* way.¹²² Mitchell¹²³ argues that damages should not be awarded because the public authority’s power is ‘a lawful power’ which is

¹¹⁴*Gordon* (n 75) 977-978. See also *Unibank Savings and Loans Ltd v Absa Bank Ltd* 2000 4 SA 191 (W) para 9.3.1 where the court emphasised that a change in commercial circumstances does not amount to supervening impossibility of performance; such is foreseeable in the business world.

¹¹⁵See (n 102); Baxter (n 1) 423.

¹¹⁶(N 1) 210-216, 228-233. See also Hogg ‘The doctrine of executive necessity in the law of contract’ (1970) 44 *ALJ* 154.

¹¹⁷(N 10) 232. See also Harlow C “‘Public’ and ‘private’ law: Definition without distinction” (1980) 43 *MLR* 241 at 248-249.

¹¹⁸See also Garner’s *Administrative law*, BL Jones and K Thompson (1996) 335 where it is argued: ‘Any policy considerations that may justify the Crown in choosing not to perform its contractual obligations do not also require it to be excused the obligation to pay *damages*’.

¹¹⁹Craig (n 10) 533 agrees that ‘break clauses’ assist victims of the no-fettering doctrine but argues that they should be recognised with regard to public contracts in general and be enshrined in legal doctrine.

¹²⁰(N 1) 230.

¹²¹Campbell ‘Agreements about the exercise of statutory powers’ (1971) 45 *ALJ* 338-340; Craig (n 10) 530.

¹²²Hoexter (n 1) 167; Floyd (1994) (n 1) 306.

¹²³(N 1) 79.

‘something different from the normal ability of any contractor to break his contract and pay damages’. Campbell¹²⁴ also argues that an award of damages under these circumstances could result in public authorities being hesitant to enter into contracts. She argues that the statutory body would then always have to take account of the price it would have to pay for terminating the contract.¹²⁵

5.2 Frustration

It has been suggested in the United Kingdom that the doctrine of frustration¹²⁶ be applied where a public contract is declared invalid based on public interest.¹²⁷ The contract is terminated due to frustration and compensation is payable in terms of the Law Reform (Frustrated Contracts) Act 1943. The difficulty with this suggestion is that a requirement for the operation of the doctrine is that frustration of the contract must not be self-induced. If it is, the party responsible for the frustration will still be liable to perform in terms of the contract or pay damages for the breach. As pointed out by Craig,¹²⁸ public bodies have no freedom in this sense. A public body ‘has either exercised a statutory duty with which the contract is incompatible, or it has decided *intra vires* to exercise its statutory powers in a particular way with the same result.’ The action of the public body, unlike that of a private individual, takes place under legal constraints. It performs a public role and must always act in the public interest. It cannot be said that the frustration of the contract is self-induced by the public body, giving rise to breach of contract.

5.3 A specialised remedy

Some authors¹²⁹ suggest that consequences be attached *ex lege* to a change in the contractual circumstances and the fact that the reasonable expectations of the one or both contracting parties may not materialise. They argue that the courts could read into contracts a general rule that the conclusion of the contract takes place on the assumption that circumstances will in principle stay the same. It is doubtful whether the courts will read into a contract a term to the effect that a public body will not subsequently use its discretionary powers in the public interest.¹³⁰ Doing so would be against public policy.¹³¹ It has also

¹²⁴(N 121) 340.

¹²⁵See Rose (n 1) 243 who argues that ‘break clauses’ would deter the exercise of statutory powers just as much as damages would.

¹²⁶For a full discussion on the doctrine of frustration see Treitel *The law of contract* (1999) ch 20.

¹²⁷Cane (n 3) 270. See also *Commissioners of Crown Lands* (n 17) and *William Cory* (n 57) but see Craig (n 10) 530 who argues that *William Cory* is an instance of *commercial frustration*.

¹²⁸(N 10) 531.

¹²⁹Van der Merwe *et al* (n 112) 510-515.

¹³⁰See *Munisipaliteit van Paarl v Le Roux* 1982 1 SA 263 (C) (no room for implication in s 146 of Ordinance 19 of 1951 that municipality can bind itself to cooperate in obtaining lease). See also the English cases of *William Cory* (n 57) and *Commissioners of Crown Lands* (n 17).

¹³¹See also Floyd (1996) (n 1) 108.

been suggested that the rules of administrative law be viewed as part of the principle of ‘good faith’ in respect of the conclusion and performance of contracts.¹³² However, there is no *direct* provision in South African law requiring contracting parties to act in good faith.¹³³ It is also unlikely that the courts will develop such a duty in future.¹³⁴

Other authors¹³⁵ suggest that the French system¹³⁶ be used as a guideline and that the private contracting party be entitled to compensation.¹³⁷ The French recognise that in certain circumstances a public body may in its public role be required to take action which is detrimental to the other contracting party. However, specialised remedies exist to combat possible hardship suffered. The remedy of *improvision* is premised upon the continuity of the relationship and applies when circumstances (unconnected with the administration) upset the economic substance of the contract rendering performance more difficult than contemplated. Performance could then be continued but at a revised rate. *Supervision* allows for the modification of the terms of the contract in the public interest subject to the possible payment of an indemnity. The remedy of *fait du prince* provides for unforeseeable loss to be shared between the parties as well as indemnity to the contractor for increased costs. The remedy usually takes effect where something is done by the public body that renders the bargain less profitable for the contractor but will not apply where the loss is caused by legislation affecting all citizens equally.¹³⁸ The remedy constitutes either an indemnity for the private party or serves as an authorisation to increase the charge. The remedy is very similar to ‘act of state’ in the English law of tort; as one party to the *contrat administratif* is an administrative agency, it may carry out some governmental act (unconnected with its rights under the contract) which may affect the other party to the contract.

It is suggested that unless a public contract makes express provision for changing circumstances, a remedy of compensation akin to the doctrine of *fait du prince* in French law be used as a guideline in South African law to protect victims of the no-fettering doctrine. Where performance becomes impossible due to the passing of new legislation conferring new powers, the contract should be

¹³²Floyd (1996) (n 1) 106-107; Van der Merwe *et al* (n 112) 514; Van Huysteen and Van der Merwe ‘Good faith in contract: Proper behaviour amidst changing circumstances’ 1990 *Stell LR* 244.

¹³³See Floyd (1996) (n 1) 107 who points out subtle ways in which the courts give effect to the principle of good faith.

¹³⁴Van der Walt ‘Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontrakbedinge’ (1986) *SALJ* 646 at 659.

¹³⁵Baxter (n 1) 424; Hoexter (n 1) 167-168; Craig (n 10) 530-533; Mitchell (n 1) 76-80; Street (n 2); Aronson and Whitmore (n 1) 179; Mewett (n 2). See also Mitchell ‘A general theory of public contracts’ (1951) 63 *Jur Rev* 60 at 81-88; Cane (n 3) 268.

¹³⁶See (n 2).

¹³⁷Rogerson (n 30) 300 notes that compensation should not be automatic because this would unfairly favour those who contract with public authorities while others, who are just as much affected by the consequences of the exercise of discretionary powers, would have to bear their own losses.

¹³⁸The concern of Rogerson (n 30) described in (n 140) would be addressed with this remedy.

terminated (as a result of supervening impossibility of performance) but a remedy akin to the doctrine of *fait du prince* should be afforded to the private contracting party. The same applies where a contract is terminated in the public interest due to changing circumstances after the conclusion of the contract. Where a contract is declared void *ab initio* the possibility of hardship *also* exists particularly in respect of (a) restitution of money or property, which already passed under the contract;¹³⁹ (b) entitlement to compensation for expenses already incurred; (c) loss suffered in the form of expected profits.¹⁴⁰ Here too a remedy akin to the doctrine of *fait du prince* could be of assistance. As noted by Craig,¹⁴¹ the normal contractual remedies for breach are not appropriate where a public body performs a 'public' role as well as a 'private' one. Awarding damages is not an option and neither is specific performance. The court's discretion to refuse or allow specific performance 'must be exercised in accordance with public policy and in such a manner that it does not bring about an unjust result'.¹⁴² An award of specific performance against the public body would amount to the fettering of powers which is against public policy.

Where a victim of the no-fettering doctrine is required to suffer in the public interest, it seems only fair that public funds should compensate her for her loss.¹⁴³ Even in Roman-Dutch law there appears to have been a strong moral duty to pay compensation in the event of interference with contractual rights by the sovereign.¹⁴⁴ A remedy for compensation could possibly be read into the Promotion of Administrative Justice Act¹⁴⁵ because section 8(1) allows the courts to grant 'any order that is just and equitable' and section 8(1)(a) directs an administrator 'to act in the manner that the court or tribunal requires'.¹⁴⁶ Whether section 8 finds application will of course depend upon whether the conclusion of the contract or its termination (whichever is in issue) qualifies as 'administrative action' in terms of section 1 of the Act. If it does not, the courts should insist on compensation where public policy requires the termination of a contract, unless legislation expressly excludes the payment of compensation.¹⁴⁷

¹³⁹See Rose (n 1) 252-255 who argues that in certain instances, where subsequent legislation has the effect of destroying a contractual right, compensation should be paid for the taking of 'property'.

¹⁴⁰See Cane (n 3 and 109) 271 who argues that, expecting the victim of the no-fettering doctrine to bear *actual* losses for the sake of the public interest could be regarded as unfair, but allowing him to make a *profit* at the expense of the public interest is even more so.

¹⁴¹(N 10) 532.

¹⁴²Van der Merwe *et al* (n 112) 355.

¹⁴³In the words of Lord Moulton in *Att Gen v De Keyser's Royal Hotel* 1920 AC 508, 'it [is] equitable that the burdens born for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals'.

¹⁴⁴See Baxter (n 1) 424; Grotius *De Jure Belli ac Pacis* 2.14.7-8; 3.19.7; Voet 1.4.7; Bynkershoek 2.15; Huber 2.2.8-9; 4.8.25-7.

¹⁴⁵3 of 2000.

¹⁴⁶Hoexter (n 1) 167-168.

¹⁴⁷Baxter (n 1) 424.

6 Conclusion

The South African government enters into thousands of contracts every year, ranging from simple purchases to massive public works contracts and research and development contracts. It may sometimes be necessary for a public authority to terminate a contract in the public interest. However, the detrimental effects this may have on the private contracting party should be acknowledged. Whether the contract is void *ab initio* or only subsequently becomes invalid due to supervening impossibility of performance, the potential for hardship exists. Care must be taken before a court declares a public contract invalid. In all cases, the court must make a value judgment. It must balance the public and private interests involved and in the end decide which deserves to be given preference. This in turn requires taking account of a number of factors. A *contextual approach* should in other words be adopted where taking account of different factors determines incompatibility and thus validity. If the court finds that the interests of the public do outweigh the interests of the private contractor, the latter should be entitled to compensation akin to the doctrine of *fait du prince* in French law. Where a private contractor is required to suffer in the ‘interests’ of the public, the public should not be allowed to show ‘disinterest’ in her loss.