the action in the High Court" (at [75]–[77]). In the light of this the Chancellor of the High Court entreated that the circumstances required urgent investigation and action by the Minister. Such statements demonstrate the potential for damages actions to spur political accountability.

The Court affirmed the quantum of exemplary damages, recalling Lord Devlin's dicta in *Rookes* that a restrained approach should be taken, with attention paid to the means of the defendant. In this respect the Court recorded that £27,000 "is miniscule in the context of the Home Office budget" (at [84]). In general a court should be slow to deny or reduce awards on the basis of a department's means in the serious case of an abuse of public power and violation of basic rights. In response to the concern that exemplary awards drain public funds, common law judges have maintained that, "the proceeds of taxation represent the price paid for maintaining respect by public officials for the observance of the rule of law, to the benefit of taxpayers and society as a whole" (*New South Wales* v. *Ibbett* (2006) 229 C.L.R. 638, [48]).

JASON N.E. VARUHAS

TAKING A (TAXI) STAND ON LEGITIMATE EXPECTATIONS

THE doctrine of substantive legitimate expectations is still in its infancy. Despite having been generally accepted by the courts, some important questions remain unanswered. In *Paponette and Others* v. *The Attorney General of Trinidad and Tobago* [2010] UKPC 32, the Privy Council (Sir John Dyson S.C.J. giving the leading judgment, Lord Brown dissenting) gave some guidance on what a public authority must do in order to justify frustrating a legitimate expectation.

The appellants were an association of operators of "maxi-taxis" (a form of commercial transportation) in Trinidad. In 1995, new regulations compelled them to move their stand to an area owned by the Public Transport Service Corporation ("PTSC"), which the appellants viewed as a commercial rival. The appellants were given an assurance by the Minister for Works and Transport that PTSC would not be given management control over them. However, this is what happened in 1998, and by 2001, PTSC was charging members of the Association to pass through exit barriers.

In August 2004, the appellants brought proceedings in the High Court, claiming a breach of their constitutional right to property. It was argued that PTSC's management of the appellants' business constituted an interference with their property rights, and this interference had not been subject to law, due to breach of their legitimate

expectations. The applicants also claimed breach of the constitutional right to equal treatment. Ibrahim J. found for the appellants on both counts at first instance. This judgment was reversed by the Court of Appeal of Trinidad and Tobago, on both points.

The Privy Council reversed the decision of the Court of Appeal, finding for the appellants on both issues. Lord Brown, in his dissent, expressed dissatisfaction with the state of the law on legitimate expectations, and looked at the facts in the round, applying a broad abuse of power test. The majority found that there had been an interference with the appellants' property rights. The questions were therefore whether this interference was "by due process of law", and what would be the impact of any breach of legitimate expectations on the legality of the interference. The following discussion will focus on the topic of legitimate expectations.

The majority of the Board accepted the Association's argument that they had a legitimate expectation that they would not fall under the control of PTSC. The respondent sought to argue that frustration of this expectation was justified in the public interest. However, no evidence was provided to support this contention. Rather, the suggestion was that it could be inferred from the actions of the Trinidad government that there must have been a convincing policy reason for overriding the legitimate expectation. The fact that the government had so acted was, it was argued, itself sufficient to show that frustrating the expectation was justified.

This argument did not convince the majority of the Board. Dyson S.C.J. held at para. [42], "unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation". His Lordship did suggest an exception to this rule, in situations where "it is possible to identify the relevant overriding public interest from the terms of the decision which is inconsistent with an earlier promise and the context in which it is made" (para. [43]). This would however be "rare".

This approach must surely be correct. If an authority was able to justify trampling over an individual's legitimate expectation without adducing any evidence of a need to do so, then the doctrine of legitimate expectations would be without application. Dyson S.C.J.'s argument reinforces the central purpose of administrative law, to properly scrutinise decisions of the executive, and to ensure that decisions are made in line with the rule of law (see *R. (on the application of Alconbury Developments)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295, *per* Lord Hoffmann at para. [72]).

Dyson S.C.J. gave some hints as to the rationale for protecting legitimate expectations. His Lordship held that "[t]he breach of a representation or promise on which an applicant has relied…is a serious matter" (para. [42]). His Lordship went on to hold that "[f]airness, as well as the principle of good administration, demands that [an interference] needs to be justified" (ibid.). This hints at a broadly "dignitarian" concern as a motivating force behind the judgment in *Paponette*: interferences with individuals' expectations should, as a matter of fairness, be justified to them. Dyson S.C.J. did repeatedly mention reliance on the part of the appellants, but this does not appear to have been an essential element of a legitimate expectation action, but rather a means to "reinforce" such a claim (para. [37]).

One issue which was not finally resolved by the Privy Council was the standard which must be reached to show that it was lawful to frustrate a legitimate expectation. In *R.* v. *North and East Devon Health Authority, ex p. Coughlan* [2001] Q.B. 213 (para. [57]), Lord Woolf MR held that the test is whether the actions of the authority are "so unfair… [as] to amount to an abuse of power". What will constitute an abuse of power is not altogether clear. In *R. (on the application of Nadarajah)* v. *Secretary of State for the Home Department* [2005] EWCA Civ 1363, Laws L.J. held that the test is one of proportionality. By contrast, in *R. (on the application of Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] A.C. 453, Lord Mance stated, at para. [53], "I prefer to reserve for another case my opinion as to whether it is helpful or appropriate to rationalise the situations in which a departure from a prior decision is justified in terms of proportionality".

The judgment of Dyson S.C.J. does not deal with this issue in detail. His Lordship quoted with approval the passage from *Nadarajah* in which Laws L.J. recommended a proportionality approach, but the point that Dyson S.C.J. drew from this quotation was one relating to burden rather than standard of proof: that an individual does not need to prove that the action of the authority was not in the public interest. Conclusive resolution of this question would bring considerable clarity to this area of the law.

ALISTAIR MILLS

CAN PROSCRIBED DRUGS BE THE SUBJECT OF THEFT?

IF you had asked any criminal lawyer whether an individual's proprietary interest in proscribed drugs was protected by the law of theft before the decision of the Court of Appeal (Criminal Division) in