8
Private Law Controls on the Delegate

8.1 Introduction

In the preceding two chapters it has been argued that the applicability of human rights and administrative law obligations should apply to private delegates of governmental power—either through using Meroni-like reasoning or through a ‘public function’ analysis. It is also necessary to consider the role of private law in responding to the challenges of private delegation outlined in Chapter Three. In particular, given that, as was seen in the previous two chapters, human rights obligations and administrative law obligations are, in practice, rarely extended to private delegates, the extent to which private law can provide an appropriate substitute for these obligations must be assessed. It is not the aim of this discussion to deal with all areas of private law in this discussion and, after a few general comments, the focus will be on contract and tort. Given that contract is one of the primary mechanisms through which private delegation is achieved, commentators, and particularly those writing from an economic perspective, have often embraced contract law as ‘a critical source of accountability’,¹ while tort law requires consideration as it is an area of private law that is frequently modified to accommodate governmental concerns.²

8.2 General Comments

The extent to which, if at all, the values of administrative law are distinct from those protected by private law, is often an issue of discussion.³ Oliver points to duties

² Below 8.4.2.
of rational decision-making in private law that mirror those of administrative law—such as the duties imposed by equity in respect of exercises of discretion by trustees and company directors, and the common law duties of procedural fairness imposed on the committees of membership associations such as trade unions and sporting bodies, universities, and on decisions taken in restraint of trade.\(^4\)

She argues that public law is not unique and that, in reality, both public and private law protect the same five values: autonomy, dignity, respect, status, and security.\(^5\) Such an argument would support the suggestion that, in the absence of human rights or administrative law controls, private law may be adequate to respond to the challenge of private delegation.

Four brief points will be made in response to this. First, while public and private law may ultimately protect the same higher values, such as dignity or security, this does not mean that the specific manifestation of these values will be the same in any given concrete situation. Indeed, if operating at a high level of abstraction, all law can be unified and considered to serve the same values.\(^6\)

Furthermore, in the situations where private law has a similar effect to public law, the impact of this on private delegation may be uncertain. Thus, it is true, as Oliver points out and as was discussed in Chapter Seven,\(^7\) that, on occasion, the courts have exercised a supervisory jurisdiction in contract law akin to that exercised in administrative law, and that in both the US and England courts have implied duties to comply with procedural fairness,\(^8\) duties not to act arbitrarily and capriciously,\(^9\) and even duties to act proportionately,\(^10\) into contractual relationships. The courts’ primary motivation for intervening has been to protect individuals’ rights, such as in the case of Edwards v SOGAT, where the aim was to prevent an ‘unwarranted encroachment on a man’s right to work’.\(^11\) As was also noted in Chapter Seven, in the employment context, English courts have suggested that professionals could refuse to comply with employers’ directions that were not ‘reasonable’\(^12\) or were ‘unlawful’ and have proposed, although not decided, that the administrative law test of Wednesbury unreasonableness could set the standard of unlawfulness.\(^13\) Moreover, as was discussed in Chapter Seven,


\(^4\) Oliver, ‘Public Law Procedures’ (n 3) 96–7.
\(^5\) Oliver, Common Values (n 3) 60–69.
\(^6\) See, eg, H Kelsen (M Knight, trans), The Pure Theory of Law (2nd edn, Peter Smith, Massachusetts 1967) (law as command backed by sanction).
\(^7\) Above 7.4.2.1.
\(^8\) Edwards v SOGAT [1971] Ch 354 (CA) 377; Hendryx v People’s United Church of Spokane 84 P 1123, 1126 (Wash 1906).
\(^11\) Above (n 8) 377.
\(^12\) Sim v Rotherham Council [1987] 1 Ch 216 (Ch) 248–9.
\(^13\) Ibid 249. See also Cotran v Rollins Hudig Hall International Inc 948 P2d 412, 422 (Cal 1998).
this supervisory jurisdiction has been exercised by the courts even in the absence of contract where review is sought of decisions of domestic tribunals\(^{14}\) or, in the alternative formulation, where review is sought of the ‘lawfulness of disciplinary decisions of certain bodies that do not exercise a public function’ and where the importance of the challenged decision justifies intervention.\(^{15}\) These cases provide clear support for the thesis that the substantive values of administrative law sometimes mirror those found in private law, and, in particular, in contract law.

However, although the importance of this case law is increasing, especially in England, again, as was stated in Chapter Seven, it will not always be relevant to private delegation. Insofar as these cases pre-suppose the existence of a contract-like arrangement between the power-holding association and its member, they will have limited application to private delegation, as in the private delegation context there is often no agreement at all between the private delegate service-provider and the recipient of the service. It will often be difficult to find a contract-like arrangement to which duties of natural justice or not to act arbitrarily and capriciously could attach. Alternatively, insofar as this supervisory jurisdiction applies to ‘domestic tribunals’ or bodies which do not exercise a public function, its scope of application is entirely uncertain and, to date, it has been exercised primarily in the context of sporting associations: it is not at all clear that it would extend to a private company administering a social welfare scheme. Setting aside these reservations, though, if a general supervisory jurisdiction is developed, public law principles will become available outside the public law context—and this would be useful for controlling private delegates.

Second, and following directly from this, one specific crucial difference between private and public law is the beneficiary of the duty. Governing bodies of private delegates are often under fiduciary duties of rational decision-making—but these are owed ‘only to the association itself’\(^{16}\) and not to the public, as in the administrative law context. With companies, the beneficiary is the company,\(^{17}\) and only directors or shareholders are entitled to bring a derivative suit against a wrong-doing director.\(^{18}\) With trusts, only clearly identifiable beneficiaries are able to sue for relief and, as Brody has put it, ‘the more an entity looks like a real charity, having an unidentifiable and broad class of beneficiaries, the less likely that its beneficiaries can sue for relief’.\(^{19}\)

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\(^{14}\) *Bradley v Jockey Club* [2004] EWHC 2164 (QB) [35].

\(^{15}\) *Mullins v McFarlane* [2006] EWHC 986 (QB) [17].


\(^{18}\) Ibid 444, 458–63.

Third, the content of many fiduciary duties is not coterminous with administrative law duties, and they tend to be ‘concerned narrowly with standards of care and conflicts of interest and [do] not substitute for the supervisory jurisdiction of the court.’²⁰ Indeed, applicants often prefer to use administrative law because the scope of obligations imposed upon the defendant body exceeds those which might be imposed in any private law cause of action.²¹ Fourth, aside from the values protected by administrative law, the actual remedies it provides may be more desirable than those available in private law. While a private action in contract law may award damages to the applicant who has been dismissed unfairly, certiorari ‘will quash the dismissal and leave the applicant in “possession” of the job’.²² Overall, therefore, while accepting that public law and private law may, at a fundamental level, protect similar values, this does not mean that private law will, in any particular situation, respond to private delegation as effectively as public law might.

8.3 Contract

Much hope has been expressed regarding the ability of the law of contract to ‘provide the language needed to translate between public and private status, while maintaining the distinction between the two’.²³ As was noted in Chapter Six,²⁴ Lord Woolf has also suggested that recipients of welfare housing request a human rights compliance condition in contracts between local authorities and housing associations: ‘[i]then not only could the local authority rely on the contract, but possibly the resident could do so also as a person for whose benefit the contract was made’.²⁵ Unfortunately, though, Lord Woolf’s dictum indicates that he was somewhat hesitant about the actual usefulness of contract as a mechanism for holding private delegates accountable for human rights violations—and he was probably right in this respect. It seems that while contract law has the potential to address some of the challenges of private delegation, there are difficulties with resorting to it, at least in its current form, as a satisfactory alternative to traditional public law mechanisms. At the heart of these difficulties are two factors: first, contract design, and second, contract enforceability, and these will be considered in turn.

²⁰ Alder (n 16) 166.
²² Ibid 805.
²⁴ Above 6.3.2.1.
Structurally, the contract discussion requires less jurisdictional focus than has been required up to now. This is partly due to the fact that in the EU context, while particular rules of EU law may govern particular contracts and, in particular, the competence of EU institutions to enter into contracts,²⁶ there is, as yet, no such thing as ‘EU contract law’.²⁷ It is also partly due to the fact that the issues discussed here are universal, and do not pertain particularly to any one jurisdiction. As will be seen though, in both England and the US, government contracts are generally governed by the same contract law which applies to contracts between private actors, unlike the situation in France, for example, where government contracts are designated as contrats administratifs and are subject to a distinct body of law applied by special administrative courts.²⁸ This parity of treatment can exacerbate the difficulties of contract design and contract enforceability, as proper account is not always taken of the unique characteristics of government contracts.²⁹

8.3.1 Contract design

Economic and organizational studies teach us that ‘[g]ood contract management involves significant skills in program design, program planning, communications and evaluation’.³⁰ Contracts may promote efficiency, accountability, democracy, and human rights if contractors are held to the terms to which they have assented but, obviously, this will only work if meaningful contract terms furthering these goals are drafted and if there is adequate oversight to verify compliance.³¹ In short, as Vincent-Jones has noted, ‘[e]ven if the potential exists for the efficient and effective operation of economic contracts, whether this result


is achieved in practice depends on the details of contract design, award, monitoring and enforcement.³²

With contract design, there are many competing tensions to be accommodated, and it must be remembered that:

While most individual breakdowns of the procurement system seem remediable, every remedy, each incremental safeguard, refinement, or level of oversight in the contracting process comes at a cost, and fixing one problem is apt to exacerbate others.³³

In short, fail-safe contract drafting is difficult, if not impossible to achieve³⁴—and, in the end, everything will hinge on the particular context and the particular power being delegated. In theory, the contractual model which generally appears to respond most effectively to the challenge of private delegation is what Davies has described as a ‘hard’—as opposed to a ‘soft’—model of contract.³⁵ The ‘hard’ model of contract exhibits features such as a low-trust relationship between the parties, standard-setting through adversarial negotiations, comprehensive and precisely drafted standards, monitoring through ‘policing’, and enforcement through sanctions, such as exit. This is to be contrasted with a ‘soft’ model, which involves a high-trust relationship, standard-setting through collaboration, broadly drafted standards and unwritten assumptions, monitoring through shared information and trust, and enforcement through persuasion.³⁶ In practice, however, as was noted in Chapter Three,³⁷ empirical studies are actually quite inconclusive on the question of which of these two models is most effective and efficient, and this is clearly an issue which would merit further empirical study. Moreover, as Vincent-Jones has suggested, ‘arm’s-length’ contracting may be more suited to low-risk situations, where there are many suppliers and the cost of switching suppliers would be low, while a form of ‘partnering’ will be more important where requirements are changing, the market is continually evolving, and where there is potential for exploiting spare capacity.³⁸ Finally, of course, as will be discussed, contracts can be drafted to combine elements of both models, as has been done in the PFI context in England.³⁹

³⁶ Ibid.
³⁷ Above 3.2.3.
³⁸ Vincent-Jones (n 32) 195–6.
³⁹ Below 8.3.1.2.
8.3.1.1 The challenges

Generally, there seem to be four inter-related challenges in contract-drafting: first, the complexity of the outsourced tasks, which is in turn intensified by, second, the judicial interpretation to which the contractual terms will be subject if litigated; third, the problems associated with any principal-agent relationship; and, fourth, the heightened potential for conflicts of interest in this context, which in turn exacerbates principal-agent problems. Delegated functions are frequently very complex in nature, and it is frequently difficult to devise contracts that adequately reflect the complexities.⁴⁰ Indeed, if government is acting properly it will have ‘many valued outputs, including a reputation for integrity, the confidence of the people, and the support of important interest groups’ as well as service delivery.⁴¹ Relationships between private contractors and citizens can be intensely interpersonal: for example, welfare assessments will be ‘largely unobservable and difficult to evaluate’.⁴² Quite simply, ‘[n]o matter how careful the drafter,’ tasks such as ‘quality health care’ or ‘safe’ prisons are very difficult to specify.⁴³ In this regard, Sossin has criticized contracts outsourcing homeless shelter provision in New York city, which list the number of beds required and how many staff need be present, but do not even address the desired interaction between staff and shelter residents.⁴⁴ For some, the sheer complexity of certain governmental tasks should be taken into account and weigh against outsourcing in the first instance.⁴⁵

The difficulty of specifying governmental tasks will then be exacerbated by an oft-overlooked factor—the method of contractual interpretation adopted by the courts. Regularly, legislation delegating power to administrative or executive actors delegates discretion through the use of ambiguous linguistic devices such as ‘substantial’, ‘good faith’, or ‘reasonable’.⁴⁶ If such terms are ever disputed before the courts, their meaning will be interpreted within the context of the statutory scheme, and bearing in mind the purpose of the statute.⁴⁷ If such terms

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⁴⁵ Donahue (n 33) 45.
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appear in a contract, however, the ambiguity will not be construed in light of the overall purpose of the relevant public programme but, rather, interpretation will be ‘intentionalist’: the courts are expected to read the contract as the parties intended it to be understood.⁴⁸ To illustrate through the type of housing example that arose in the Leonard Cheshire and YL cases⁴⁹: the contract performed by the housing association was being performed in fulfilment of the local authority’s duty under section 21(1) of the National Assistance Act 1948 to provide ‘adequate’ accommodation to those eligible. Where the local authority performs the task itself, the term ‘adequate’ will be construed in the context of the Act and in light of, for instance, the Act’s Preamble which sets out its purpose as being, inter alia, ‘to provide... for the assistance of persons in need’.⁵⁰ If the term ‘adequate’ appears in the contract, however, unless expressly integrated, the surrounding welfare context will be absent, and the term ‘adequate’ will be construed in light of the parties’ intentions—as derived from surrounding contractual clauses dealing with, for example, remuneration. While there is no reason to assume that the local authority intends ‘adequate’ to mean anything other than the legislature does, there is reason to assume that a housing association, with its fiduciary duties to the corporate entity or a concern to preserve charitable funds, may intend an understanding of ‘adequate’ which treats the provision of accommodation as a purely financial exercise. Thus, imprecision functions differently in contract, and is probably more likely to operate to the disadvantage of the public purposes of the task being outsourced.

Many of the difficulties that prevail in public contracting are due to a phenomenon that is certainly not unique to this context—namely, the principal-agent problem. This problem arises from the relationship between the principal—the governmental delegator—and the agent private delegate, and, as was explained in Chapter Three, it derives from an assumption that each party to the relationship is attempting to maximize its own individual good.⁵¹ This in itself is not necessarily problematic, if all the features of the behaviour of the principal and the agent, which are relevant to the relationship, are observable by the other party. However, if the distribution of information between the principal and agent is asymmetric, the ‘classic’ principal-agent problem arises, creating what economists term ‘moral hazard’ and ‘adverse selection’. Moral hazard results from the inability of the principal to monitor an agent’s actions, while adverse selection corresponds to the inability of observing an agent’s private information.⁵² As a consequence, the agent may be over-rewarded as variations in the agent’s output

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⁴⁹ Leonard Cheshire (n 25) [11]–[16]. See above (6.3.2.1 and 6.3.2.4 (YL)) for discussion.
⁵⁰ National Assistance Act 1948 (c 29).
⁵¹ See also above 3.4.
cannot be accurately ascribed to effort variables, and the agent has no incentive to share information with the principal that would prevent such ‘excessive’ compensation.⁵³ This raises the spectre of opportunistic contractors who are better informed than the government about options, costs, and performance, and who will try to cut corners where the probability of detection is slight or where penalties are insignificant.⁵⁴ The challenge facing the government, then, is how to monitor the private delegate, and how best to motivate the private delegate to perform as the government would prefer.⁵⁵

The principal-agent problem is exacerbated in governmental contracting by conflicts of interest: private corporations have a fiduciary duty to their shareholders to maximize profits and non-profit organizations have a desire to promote their special interest, which often conflicts with their duties to the public in exercising delegated power. This problem is difficult to obviate since most contractual arrangements ‘create perverse financial motivations for the private contractor’.⁵⁶ For example, as Stevenson explains, where private actors are charged with administering social welfare schemes, if contracts are made paying a fee per case handled, there will be a motivation to deny the application the first time, or to categorize it as ‘undetermined’ in anticipation of a second review and, of course, second fee. The problems for those on welfare are obvious: there will be delays in receiving benefits, or worthy applicants may even give up after their first denial and ‘fall through the cracks’.⁵⁷

An alternative, the flat-fee contract, is equally problematic. Here, the incentive is ‘to collect higher profits for fewer labor-hours’,⁵⁸ with private actors encouraged to review applications as quickly and cursorily as possible. Stevenson notes that, during the bidding process for these contracts, the contractor must estimate the number of applicants for the particular programme. Having committed itself to a certain ‘size’ of project, by choice of premises and number of staff, once the contractor reaches the maximum number of applicants it will probably engage in ‘dumping’ of incoming files or cases, or ‘churning’ in which applicants are handled selectively depending on their resource requirements and expected payoffs. The ‘dumped’ applications are lost, delayed indefinitely, or denied automatically; while ‘churning’ results in the most self-sufficient applicants getting

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⁵⁴ Prager (n 34) 107. See also: B Holmstrom and P Milgrom, ‘Multi-Task Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design’ (1991) 7 J of L Economics and Organization 24 (Special Issue); DK Whynes, ‘Can Performance Monitoring Solve the Public Services Principal-Agent Problem?’ (1993) 40 Scottish J of Political Economy 434.
⁵⁶ Stevenson (n 47) 104.
⁵⁷ Ibid 106.
the most attention, excluding the neediest.⁵⁹ Meanwhile, where there is limited ‘observability’ of output, as Vincent-Jones has noted, identification of inputs or ‘throughput’ standards in contracts is problematic since it adds to the length of the contract-specification process, increasing transaction costs and often being likely to reduce the number of bidders.⁶⁰ This method of contract design also has the disadvantage of inhibiting improvements in quality and impeding innovation in methods of service delivery.⁶¹

In response to these problems, unsurprisingly, performance contracts have become more commonplace,⁶² the aim of such contracts being to reward the contractor according to how effectively the contractual goal is achieved or the social problem at issue is alleviated.⁶³ However, even here, there is scope for conflict of interest. Again, drawing from the welfare context, if performance entails returning welfare recipients to work, there will be an incentive to deny even meritorious claims for welfare support, and place applicants in jobs quickly, regardless of how long they are likely to last in the job.⁶⁴ Applicants who are considered ‘hard to place’ will simply be deemed ineligible for the programme; or, if accepted, they will be more likely to be penalized by claims that they violated some rule, such as refusing to accept a job or missing an interview.⁶⁵ An even more serious concern has been raised in the privatized prison context, relating to the temptation on the part of private prison wardens to revoke ‘good conduct’ privileges in order to prolong an inmate’s sentence, and thereby increase profit.⁶⁶

8.3.1.2 Responding to the challenges

In responding to the challenges of contract design, the aim is to ‘create a system that either prohibits or makes unprofitable activities that are contrary to public interest’.⁶⁷ The most important options include, first, effective oversight of the

⁶⁰ Vincent-Jones (n 32) 194.
⁶¹ Ibid.
⁶⁴ Ibid. See also Diller (n 58) 1181.
⁶⁷ Stevenson (n 47) 108.
private delegate, second, the encouragement of competition, and, third, the elimination, insofar as possible, of conflicts of interest.

(a) Oversight
Given the difficulties created by the principal-agent relationship, usually the government will benefit from supervising the delegate’s effort—but structuring an effective monitoring system is tricky, from a number of perspectives. The level of oversight required, and, in turn, oversight costs, will clearly depend on what is being monitored: ‘[t]he more complex the service, the more costly it is likely to be to monitor the contract’. Logically, therefore, monitoring costs should be considered at the point of the decision to contract out, as such costs are more quantifiable than other contracting-out costs and permit more definitive conclusions as to the efficiency of contracting-out: if contracting-out appears inefficient due to monitoring costs, then the contracting-out option should really be rejected without investigating other transaction costs. In practice, though, as was seen in Chapter Five, cost benefit analyses in contracting-out decision-making do not usually incorporate assessment of potential monitoring costs, while in all three jurisdictions no effort is even made to ensure that prior to contracting out a service, there is a body of governmental actors with the expertise and experience required to properly perform the complex oversight task.

In designing oversight mechanisms, both the US and England have opted for performance monitoring, requiring outputs rather than inputs. In designing performance contracts care must be taken, however, in deciding what exactly to monitor, because performance monitoring ‘only works when based on relevant and quantifiable performance measures’. It is essential not to waste monitoring resources on indicators that do not actually correlate with desired outcomes. This in turn requires a clear understanding of the contractual goal, which, as already noted, can be difficult given the complexity of the tasks being delegated. Moreover, evaluating success and failure is a task that government staff may not be well-equipped to do, as it requires ‘public managers . . . to understand competitive markets, know how to value assets, make cost comparisons, manage

69 Prager (n 34) 88.
70 Ibid.
71 Above 5.2, 5.3.1, and 5.4.
72 Ibid.
73 See, eg, 48 CFR § 37.601 (‘Performance-based contracts for services shall include (1) A performance work statement (PWS); (2) Measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and the method of assessing contractor performance against performance standards; (3) Performance incentives where appropriate’).
74 McCormick (n 62) 9.
a competitive bid and manage contracts in place’.⁷⁶ As Gilman notes, ‘[t]he irony of privatization is that it relies on the very entities deemed unfit to deliver social services to undertake the complex mission of performance contracting’.⁷⁷

So, for example, in US welfare-to-work schemes, it is important to understand that the goal is a reduction in welfare dependency. Consequently, the primary indicator should be job retention as this is a true measure of the programme’s success. Using the wrong indicator, such as a job placement indicator, would only encourage contractors to place applicants in any job, even if unsuitable, just to increase the job placement score, and even though applicants may leave such jobs shortly after starting them and become welfare-dependent again.⁷⁸ Positive examples of performance contract drafting have also emerged from UK Home Office practice, which has been contrasted with American correctional agency practice, and lauded for applying relatively prescriptive, output-based contracts to its private prisons, demanding that they provide more rehabilitative and vocational programming than public prisons and setting measurable expectations for escape, suicide, and assault rates as well as a variety of health and nutrition outcomes.⁷⁹

Following on from the use of indicators, it also seems sensible, as a general rule, to structure payments to coincide with proof of performance or progress, in accordance with the chosen indicators. In private business, the requirement that progress reports, audits, and invoices be presented before payments are made is commonplace. A similar requirement is also found frequently in government research and development contracts.⁸⁰ Incremental and periodic payment is central to ensuring that contractual aims are met. In more complex contracts, other factors may have to be considered and there have been interesting innovations in contract design in the English PFI context. For example, where the private contractor benefits from re-financing, provision is made for any refinancing gain to be shared with the government on a consistent and equitable basis. So, for PFI contracts signed before 30 September 2002, there is a voluntary code of conduct which encourages private partners to share re-financing gain⁸¹; while all contracts signed after this date should include clauses which grant governmental

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⁷⁷ Gilman (n 63) 850.


departments the right to approve or refuse consent to re-financing and to share
the gains of such re-financing with the private sector.⁸²

The next issue to address is, if monitoring is taking place, and assuming the
correct indicators have been applied, how successes should be rewarded and fail-
ures penalized. A central concern in organizational analysis of principal-agent
relationships is the appropriate structure of incentives that the principal should
offer to the agent to ensure that the agent is motivated to achieve the outcomes
required by the principal.⁸³ Much depends on the unique circumstances of the
particular contract and the relationship between the contracting parties, but a
few general observations are worth making. One problem with penalty clauses,
for instance, is that they are often not enforced by government. Peeters puts it
as follows:

In governmental organizations the line of responsibilities is often so vague that effective
control is hindered. Political and other external influences can come from a large number
of sources and have an impact on the governmental top management. In such an envi-
ronment, the effectiveness of penalty clauses is very limited. In fact, even in obvious cases,
they are rarely applied. Hyperinflation and cost overruns in government projects are
often the result of such lack of control.⁸⁴

Governments are also often reluctant to enforce penalties, because, with com-
plex services, they may not have easy access to an alternative provider.⁸⁵ Another
problem with penalties is that the monitoring required to render them operative
diverts resources from the government programme itself.⁸⁶ Incentives or bonuses
have a similarly undesirable effect on the programme budget. One possible com-
promise that has been suggested is to set penalties sufficiently high so that, even if
there is only a remote chance of detection, the high penalty nonetheless has deter-
rent effect.⁸⁷ In this way, perhaps welfare reviewers under fee-per-case contracts,
required to pay huge payback fees for inaccurate determinations, would be less
inclined to categorize incorrectly the first time in the hope of a second review fee.

One last comment to be made in respect of monitoring relates to the risks
of excessive monitoring. There is a growing body of theoretical and empirical
analysis suggesting that monitoring can actually lead to sub-optimal outcomes
for the principal. Economists point to the strain that excessive monitoring may
place on the delegator-delegate relationship. Walker has suggested that intensive
monitoring can undermine the agent’s motivation because, according to Walker,

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⁸² HM Treasury, Standardization of PFI Contracts [35.3.1.1], [35.3.1.2] and generally ch 35
<http://www.hm-treasury.gov.uk/media/1A8/42/pfi_sopc_ver3_chaps31-35_apr04.pdf> accessed
⁸⁴ WA Peeters, ‘Incentives in Government Procurement Contracts’ (1993) 2 Public Procurement
L Rev 197, 198.
⁸⁵ ED Sclar, You Don’t Always Get What you Pay For: The Economics of Privatization (Cornell
⁸⁶ Stevenson (n 47) 124.
⁸⁷ Ibid.
such monitoring results in adversarial and transactional modes of contracting, which contrasts with relational interactions. Economists also cite the phenomenon of horizontal monitoring, which may be undermined by excessive oversight. In situations where output depends on group effort, horizontal monitoring, in the form of peer group or intra-team sanctions, can eliminate the need for hierarchical or external monitoring. These concerns are important, although, to an extent, their force is diminished in the particular context of governmental contracting. First, in private sector contracts, familiar relational interactions between principal and agent may enhance contractual performance, but in the public context, although good relations are important, the danger with familiar interactions is that they may lead to prioritization of the contracting parties’ interests over the public interest. Second, the conditions in which horizontal monitoring flourishes do not seem to really arise in the context of government contracting. These conditions have been identified as being, inter alia, where the relationship between the principal and agent has previously been personal rather than impersonal or relational rather than transactional, or where there is a high-trust organizational environment. While such conditions are likely to arise in a work setting between an employer and employee, they are probably less likely to arise in the relationship between a local authority and a housing association, for instance.

(b) Encouraging competition
With regard to the second proposal for effective contractual drafting, competition, often, even though there is competition at the bidding stage, its positive benefits can be defeated, with the winner of the contract exercising a long-term monopoly over the provision of the relevant service. Keeping contracts limited in scope and of short duration can be crucial in ensuring the competition required for effective contracting-out, and even the US Supreme Court has noted that a private prison contractor’s ‘performance is disciplined . . . by pressure from potentially competing firms who can try to take its place’. When the contract term ends, the government should also be cautious about using the same contractor for the next contract term, to avoid an ‘automatic renewal’ scenario. This prevents one or two giant corporations from developing dominance in one particular area of service-delivery, as Lockheed Martin and Maximus have done in US social welfare.

88 Walker (n 53) 540–46.
92 Donahue (n 33) 80.
93 Richardson v McKnight 521 US 399, 410 (1997).
94 Hansen (n 78) 2489.
95 Stevenson (n 47) 129.
Unfortunately, though, shorter contracts are not without disadvantages: they create higher transaction costs and, by discounting future payoffs, may act as a disincentive to the delegate to perform effectively. Longer or repeated contracts may also lead to improvements in the agent’s performance, as it approximates ever more closely with the principal’s requests. Although there is obviously no clear answer to, and insufficient empirical data regarding, these competing claims for short contracts, it is suggested that the incentive of having a contract renewed may be equal to, if not outweigh, any disincentive created by not having a guaranteed renewal. The added advantage of increased competition associated with shorter contracts, however, provides strong justification for government actors to give serious consideration to duration when designing contracts. Again, there have been some innovative developments in the English PFI context. Given that PFI contracts tend to be extremely long in duration, governmental authorities are required to make provision for value-for-money testing of the performance of the services aspect (although not the construction aspect) of the contract at various points during the lifetime of the contract—to ensure that the services cannot be performed more effectively by an alternative private provider. To some extent, this type of contractual mechanism represents a sensible compromise between the ‘hard’ and ‘soft’ contractual models noted above, enabling a relationship of trust to develop between the governmental authority and the primary PFI contractor, and thereby deriving benefit from the long-term relationship, but also injecting competition and requiring the PFI contractor to demonstrate that it is the most cost-effective option throughout the period of contractual performance.

(c) Avoiding conflicts of interest
With regard to avoidance of conflicts of interest, if possible, where contracts relate to the exercise of discretionary powers in the management of government programmes, they should be drafted so as to avoid incorporating provisions that create a financial interest on the part of the contractor in the outcome of the case—such as where the contractor will be paid again if the applicant reappears or requests a second review. Indeed, if possible, contracts should be structured with a bias in favour of the intended beneficiary of the programme. For example, if welfare providers could only receive payment once for reviewing any applications from the same individual, this may eliminate any incentive to deny meritorious cases. Another way to try to ensure that private contractors realize...
that they must act in the public interest is to give the contracts a truly ‘public’ stamp, by incorporating the relevant statutes, regulations, and internal policies of the relevant governmental actors.¹⁰¹ Certain NHS contracts, for example, assign the same interpretations to contract terms as are given to the terms by particular statutory provisions,¹⁰² which, aside from helping to avoid conflicts of interest, would also go a long way toward avoiding the difficulties outlined earlier in relation to contract interpretation.

8.3.1.3 The special case of human rights

A very particular question of contract design, requiring separate consideration, concerns Lord Woolf’s Leonard Cheshire suggestion—that government contracts include human rights compliance conditions. The normative arguments in favour of obliging government contractors to abide by human rights obligations have already been presented in Chapter Six.¹⁰³ From the perspective of public procurement regulation, a human rights compliance clause would be accepted as legitimate—but this is not completely obvious. After all, as was discussed in Chapter Five, one of the oft-cited principles of international procurement regulation regimes, such as the new EU Procurement Directive (‘the 2004 Procurement Directive’)¹⁰⁴ and the Agreement on Government Procurement 1994 is the so-called ‘purity principle’, which seeks to reduce the incorporation of non-economic criteria into the procurement decision.¹⁰⁵ However, Article 26 of the 2004 Procurement Directive indicates that contracting authorities:

may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications.¹⁰⁶ The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

This would appear to attempt to clarify previous ECJ jurisprudence on the matter,¹⁰⁶ which has on occasion, although not always with consistency or clarity, permitted contracting authorities to take account of such factors as the ability of a contractor to employ unemployed persons¹⁰⁷ or to promote

¹⁰³ Above 6.2.1–6.2.2.
¹⁰⁶ Arrowsmith (n 28) 1280 [19.49].
¹⁰⁷ Case 31/87 Beentjes BV v Netherlands [1988] ECR 4635 [20], [28]–[30]; Case C-225/98 Commission v France [2000] ECR I-7445 [50]–[52]. See also above 5.2.1.1 and 5.4.1.1(b).
environmental considerations.¹⁰⁸ The ECJ has held that such criteria can be used provided that:

they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.¹⁰⁹

Under the Agreement on Government Procurement, which binds the EU, the US, and England, the position is more contested, but the general consensus again seems to be that, provided the human rights compliance condition is properly publicized when invitations to tender are made, it would be acceptable.¹¹⁰

A human rights contract condition would apply uniformly and without discrimination. It would also be unlikely to favour national entities over foreign entities, since it is not the case that national entities are already complying with human rights protections.

Of course, from the perspective of human rights protection, inclusion of a contractual condition will be less effective than permitting direct human rights actions against private contractors.¹¹¹ First, in the contracting-out process, itself, provision is rarely, if ever, made for citizen participation. Contracting out generally involves a bipartite relationship between the public authority and the private contractor: with publication of contract requirements, bidding, contractor qualification criteria, and negotiation between the private contractor and the governmental actor.¹¹² The emptiness of Lord Woolf’s suggestion, that recipients of welfare housing require human rights protections in local authority contracts, becomes apparent: there is actually no scope in most government contracting schemes to allow for input from welfare recipients like Ms Heather, who took the action against Leonard Cheshire. Provisions considered important by citizens, therefore, such as a human rights protection clause, will not necessarily be included in outsourcing contracts, because such provisions will not be given the same weight by the negotiating parties. Moreover, where a contract exists directly between the private contractor and the service-recipient—as occurs occasionally in the residential care context¹¹³—it seems obvious that individuals relying on government to provide housing or other benefits will be in a position of some desperation, and are more likely to accept anything offered, than to demand

¹⁰⁸ Case C-513/99 Concordia Bus Finland Oy Ab v Helsingin Kaupunki [2002] ECR I-7213 [64].
¹⁰⁹ Ibid; Commission v France (n 107) [51]; Beentjes (n 107) [36]–[37].
¹¹⁰ McCrudden (n 105) 30–32. It should be noted that, strictly speaking, it is only the EC, the first pillar of the EU, which is bound by the Agreement on Government Procurement: see above 2.2.3.
¹¹¹ See, generally, CM Donnelly, ‘Leonard Cheshire Again and Beyond: Private Contractors, Contract and S 6(3)(b) of the Human Rights Act’ [2005] PL 785. Much of the ensuing discussion (including the discussion at 8.3.2) is reproduced from that article.
¹¹² See, generally, Ch Five above.
protective contractual clauses that may hinder their very chances of being granted the governmental benefit in the first instance.¹¹⁴

Second, and more fundamentally, there is no underlying constitutional or administrative law delegation doctrine in English or US law which would compel a public authority to include human rights obligations in its contracts with service providers.¹¹⁵ Once again, interestingly, the significance of the EU’s Meroni delegation doctrine comes to the fore.¹¹⁶ If complying with Meroni, EU delegators should be required to include human rights compliance provisions in any contracts completed with private delegates. Arguments could perhaps be made that the English HRA also requires inclusion of human rights provisions in outsourcing contracts. Under section 6(1) of the HRA, all governmental bodies, as ‘public authorities’, are under a duty to act compatibly with the ECHR. By failing to require that those who perform a public authority’s tasks comply with human rights obligations, a public authority is surely failing in its own duty to comply with human rights obligations, because it is facilitating the performance of its tasks without human rights safeguards. Thus, where a statute provides, as in the example which arose in Leonard Cheshire, that a local authority must ‘make arrangements for providing’ residential accommodation,¹¹⁷ and includes the option of making arrangements with private contractors,¹¹⁸ the local authority’s section 6(1) obligation to comply with human rights also applies to the act of making arrangements with private contractors¹¹⁹—and could be relied on to require local authorities to incorporate human rights compliance provisions into their contracts.

However, the judiciary may be reluctant to endorse this approach. If a governmental authority had a section 6(1) obligation to include human rights provisions in its contracts, in turn, this would mean that private actors contracting with the government would be bound by human rights obligations for the purposes of their contracts, which achieves the result of holding all private contractors subject to HRA obligations—regardless of whether or not they are performing ‘functions of a public nature’ within the meaning of section 6(3)(b). Of course, under the Meroni principle discussed in Chapter Four, this result is not anomalous, since under section 6(1), if performing the duty itself, the public authority would be subject to human rights obligations (regardless of whether the function is ‘of a public nature’). Further, as will be discussed below,¹²⁰ there are many differences in the effect of a contractual human rights obligation and a section 6(3)(b) obligation. Nonetheless, the doctrine would involve a court-developed mandatory rule,

¹¹⁵ JCHR, First Report (n 113) [118].
¹¹⁷ National Assistance Act 1948 (c 29) s 21.
¹¹⁸ Section 26(1).
¹¹⁹ I am grateful to Dr Anne Davies for this point.
¹²⁰ Below 8.3.2.
albeit more indirect than the section 6(3)(b) route, that all private contractors comply with human rights protections—which would arguably go beyond the requirements of the HRA. Unfortunately, it may be the case that, while the judiciary might be happy to sanction recipients of welfare services using ‘self-help’ measures and demanding human rights protections from private contractors (in the knowledge of the unlikelihood of this ever happening), they will, however, stop short of using their own powers to achieve that end.

Furthermore, and deriving from the voluntary nature of the contractual option, even assuming that private contractors and governmental authorities decided—in the absence of a mandatory obligation—to include human rights obligations or third party beneficiary rights in their contracts, this still leads to an unsatisfactory solution. Each governmental contract is negotiated individually. The result may be that different public authorities will negotiate different levels of human rights protection, depending on their financial constraints, the willingness of contractors to comply with human rights obligations, and the number of contractors capable of providing the required service.¹²¹ This would lead to inequalities between the recipients of different contractors’ services. In addition, the enforceability difficulties surrounding government contracts, which are discussed below, are pertinent to the issue of enforcing human rights through contractual techniques.¹²²

The guidance issued recently by the Office of the Deputy Prime Minister in England, *Guidance on Contracting for Services in the Light of the Human Rights Act 1998* (‘the ODPM Guidance’) is to be noted. This document rejects the option of including a human rights compliance provision in contracts,¹²³ but advocates careful and precise drafting of contract specifications which takes account of human rights concerns¹²⁴ and sign-off procedures which specify that human rights obligations have been considered.¹²⁵ The ODPM Guidance also encourages the involvement of service recipients in the drafting of the contract.¹²⁶ This mechanism is not as direct as a human rights compliance clause, which was rejected because of concerns about private contractor resistance and cost uncertainties.¹²⁷ In theory, an approach to contractual design focusing on carefully drafted specifications, which are informed by precise human rights concerns, could possibly operate as effectively as a general human rights compliance clause. However, this basic assumption is debatable, since human rights questions can arise in a variety

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¹²¹ JCHR, First Report (n 113) [118].
¹²² Below 8.3.2.
¹²⁴ Ibid 5.
¹²⁶ Ibid 5.
¹²⁷ Ibid 4. See Ch Six (6.2.2) for a response to these concerns.
of unexpected circumstances, and it is unlikely that, even with the most meticulous contractual drafting, every potential situation could be pre-empted.\textsuperscript{128} Even if the underlying assumption of the ODPM Guidance is accepted, however, there are a number of problems with the Guidance in its current form. First, it is not entirely clear how service recipients or their representatives are to be included in the process of contract drafting.\textsuperscript{129} Second, it is unlikely that a specification approach will be comprehensive in its human rights coverage or that it will alleviate concerns about lack of uniformity. Third, no model contracts or model processes are described and there is a very strong emphasis on ensuring flexibility in the procurement process rather than prioritizing human rights protection.\textsuperscript{130} Fourth, the ODPM Guidance has suffered from lack of accessibility and publicity.\textsuperscript{131} Fifth, there do not appear to be any monitoring mechanisms in place to determine how carefully the Guidance is being followed in practice.\textsuperscript{132} Thus although, in its conception, the approach of the ODPM Guidance represents a positive attempt to use contract in an innovative way to mitigate concerns about diminution of human rights protection created by contracting-out, in practice, this Guidance is unlikely to be very effective.

8.3.2 Enforceability

Even if a contract is well-designed and includes a human rights compliance condition, its effectiveness will then depend significantly on its enforceability. This question includes enforceability of the contract against the contractor and, a point that can be overlooked, enforceability of the contract against the government. Enforceability of the contract against the contractor is important for delivering accountability and it will be recalled from Chapter Three that, when considering accountability, it is necessary to consider the question of to whom the private delegate may be accountable.\textsuperscript{133} This question arises directly here, and it is useful to distinguish between enforceability of the contract by the governmental delegator and enforceability of the contract by individual citizens. In a privatized system, contracts, and not administrative rules, serve as the governing source of rights and responsibilities, thereby creating a contractual system of administration [that] relies on judicial enforcement of private contract law at the behest of the supervising agency rather than judicial enforcement of administrative law principles at the behest of private citizens.\textsuperscript{134}

\begin{itemize}
  \item \textsuperscript{129} Guidance (n 123) 5.
  \item \textsuperscript{130} JCHR, Second Report (n 128) [44]–[46], [59], [119], [121]; also [6]–[11].
  \item \textsuperscript{131} Ibid [48]–[52], [120].
  \item \textsuperscript{132} Ibid [53].
  \item \textsuperscript{133} Above 3.4.
\end{itemize}
One way of changing this situation is to extend enforceability rights to private citizens by creating third party beneficiary rights in contracts between government and private delegates. Unfortunately, though, neither enforceability by government, nor enforceability by citizens, is particularly satisfactory from the perspective of responding to the accountability challenge of private delegation. Conversely, problems also arise where courts permit governments to escape contractual obligations for ultra vires reasons, in a way which can generate significant uncertainty for private contractors and possibly even dissuade effective contractors from engaging in business with government.

8.3.2.1 Enforceability by government
As was suggested in the context of penalty clauses above,¹³⁵ the problem with relying on the governmental delegator to enforce the contract is, quite simply, that the delegator is often not willing to enforce the contract. McCrudden, for example, makes the point that using contract conditions to achieve policy goals such as human rights protection gives too much power to government administrators, allowing them to determine whether a contract condition has been breached, with the likelihood that they will prefer not to find a breach because of the complications such a finding would generate.¹³⁶ One of the greatest potential complications is the risk to the continued availability of a service provider. As noted above, given the complexity of many public services currently being outsourced, often the government will only have a few potential contractors available to it.¹³⁷ Governments may also be wary of being penalized for wrongful termination.¹³⁸ Consequently, the suspension or debarment of a major contractor will simply not be a viable option.¹³⁹ The result is that there is no contract-enforcer at all.

Alternatively, and as increasingly occurs, in drafting contracts, governmental delegators devise a system of financial penalties for breach, varying according to the seriousness of the breach.¹⁴⁰ Thus, in England, if, for example, compliance with the ECHR was a contractual obligation, the penalty for breach may involve a reduction in the fee being paid to the private delegate for provision of the service. Not only is the financial valuation of human rights violations a complex and arbitrary task, it would also not seem to provide much of an incentive to the private contractor to comply with human rights. Aside from the courts’

¹³⁵ Above 8.3.1.2(a).
¹³⁶ McCrudden (n 105) 32; see also C Reeder, ‘Regulation by Contractors: Delegation of Legislative Power to Private Entities in Texas’ (2004) 5 Texas Tech J of Texas Administrative L 192, 221; Dolovich (n 31) 497–500 (documenting the reluctance of correctional agencies to terminate prison contracts, unless there is public outcry).
¹³⁷ Above 8.3.1.1, 8.3.1.2(a), and see also 3.2.1.
¹⁴⁰ McCormick (n 62).
potential reluctance to enforce a penalty clause,¹⁴¹ a contractor, knowing the penalty to be imposed by the government, may prefer to proceed with a human rights violation and pay the penalty, rather than not violate the right. This is a choice that would not necessarily be open to the contractor if the individual affected were able to enforce the human rights compliance term directly against the private contractor: the individual citizen may be able to claim a remedy of specific performance against the private contractor to compel the contractor’s compliance with the human rights obligation.¹⁴² It is also an option that would be foreclosed if the ECHR applied directly to the private delegate.

8.3.2.2 Enforceability by citizens
For citizens to be able to enforce the contract, it is necessary to grant third party beneficiary rights. Such third party rights could be used to enforce a human rights compliance term and thereby extend human rights protection, or to enforce accountability mechanisms within the contract. Less obviously, they could also be used to achieve democratic ends, through the use of the litigation process as a method of citizen participation and empowerment.¹⁴³ Often, those harmed by inefficient government contracting are taxpayers and the harm is distributed widely and diffusely. However, with contracts involving service provision, such as social welfare and incarceration, an ineffective government contract will actually afflict the most vulnerable members of society. In these circumstances, the harm becomes very individualized—experienced by each individual welfare recipient.¹⁴⁴ Granting third-party beneficiary rights in relation to government contracts may help to re-empower these vulnerable citizens.

(a) Third-party beneficiary rights in England
In England, the issue of third-party beneficiary rights in contract has traditionally been problematic, due to the doctrine of privity of contract.¹⁴⁵ It was firmly established in the mid-nineteenth century case of Tweddle v Atkinson that ‘no stranger to the consideration can take advantage of a contract, although made for his benefit’.¹⁴⁶ The result was that, even if the parties clearly intended the contract

¹⁴¹ Davies (n 35) 63, 202.
¹⁴² See, generally, GH Treitel, The Law of Contract (11th edn, Sweet and Maxwell, London 2003) 1019–40. Even then, though, the remedy of specific performance is discretionary, and may be refused in cases of, for example, severe hardship to the defendant, or due to the conduct of the claimant—factors which would not be relevant if the HRA were applied directly: ibid 1026–8.
¹⁴⁴ Stevenson (n 47) 118.
¹⁴⁵ Chitty on Contracts (n 48) 1073 [18–001].
¹⁴⁶ (1861) 1 B & S 393, 398. See also Dunlop v Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (HL); Scruttons Ltd v Midland Silicones Ltd [1962] AC 446 (HL); Beswick v Beswick [1968] AC 58 (HL).
to confer a right on a third party, they could not succeed in doing so.¹⁴⁷ This common law anomaly has now been overtaken by the Contracts (Rights of Third Parties) Act 1999 (‘the 1999 Act’) which, according to the Law Commission, creates ‘a general and wide-ranging exception to’ the doctrine of privity.¹⁴⁸ However, although the Law Commission may consider the Act to be ‘general and wide-ranging’, there are still a number of limitations which, perhaps not striking in a private context, take on a peculiar importance in government contracting.

In brief, the 1999 Act enables a third party to acquire enforceable rights under a contract if, and to the extent that, the parties to the contract so intend, and it is assumed that the parties so intend in two situations: first, under subsection 1(1)(a) where ‘the contract expressly provides that [the third party] may’; and second, under subsection 1(1)(b), where the third party may enforce a term of the contract if ‘the term purports to confer a benefit on him’, unless it appears, according to subsection 1(2), that, as a matter of construction, ‘the parties’ did not intend the third party to have an enforceable right. This subsection 1(2) qualification of the ‘purport to benefit’ test is designed to preserve the autonomy of the contracting parties, creating what the Law Commission considered to be a ‘modified dual intention’ test, which requires both an intention to benefit the third party by the proposed performance and an intention to create a legal obligation enforceable by the third party.¹⁴⁹ The test is a ‘modified dual intention’ test, because, once it is established that there is an intention to ‘confer a benefit’, an intention to confer an enforceable benefit will be presumed, unless there is a clear indication to the contrary.¹⁵⁰ In other words, it does not seem to be necessary to demonstrate two segregated intentions. Thus, in the first case decided under the Act, Nisshin Shipping Co Ltd v Cleaves & Company Ltd,¹⁵¹ having established that a charter-party sought to confer the benefit of a commission on a third-party broker,¹⁵² Judge Colman reasoned that because the charter-party was ‘neutral’ in not expressing any intention contrary to enforceability,¹⁵³ the commission clause must be enforceable by the third party.¹⁵⁴ The sections create a rebuttable presumption in respect of the intention of all the parties to the contract; and it will not suffice to demonstrate that one party did not intend to benefit the third party. Rather, to rebut the presumption, it will be necessary to demonstrate that ‘the parties’ to the contract did not intend to benefit the third party.¹⁵⁵

¹⁴⁷ The rule was subject to a number of exceptions which are not relevant for present purposes: see, generally, Chitty on Contracts (n 48) 1125–31 [18-073]–[18-083], ch 19 and Vol II ch 31.
¹⁴⁹ Law Commission Report (n 148) [7.1]–[7.6], [74]–[76]. There are a number of exceptions to the general rule in s 6 of the Act which do not appear to be of relevance to the contracting-out situation.
¹⁵¹ [2003] EWHC 2602 (Comm), [2004] 1 All ER (Comm) 481 [2].
¹⁵² Ibid [13]–[14].
¹⁵³ Ibid [24].
¹⁵⁴ Ibid [33].
¹⁵⁵ Chitty on Contracts (n 48) 1134 [18-087]; see also Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) (No 2) [2005] EWCA Civ 519, [2005] 1 Lloyd’s Rep 632.
With subsection 1(1)(a), a new drafting device has been granted to enable contracting parties to achieve enforcement rights for third parties in a way that was impossible before the Act. The use of this device in public contracting will be dependent on the will of public authorities, who, as will be seen, will not necessarily be attracted by the idea. For example, the ODPM Guidance, discussed above, suggests that contractors would be resistant to using the 1999 Act to confer rights on service recipients as this could ‘result in the creation of a very large and practically, if not theoretically, uncertain class of beneficiary’ and increase contractor risk unacceptably. The more likely route for citizens to enforce public contracts therefore, if at all, will probably be through subsection 1(1)(b), the usefulness of which will hinge on the interpretation given to the term ‘purports to confer a benefit’. Certainly, recipients of public services will be better off if the private contractor acts in compliance with its contractual obligations: the question is whether something more than this general benefit is required, as has been suggested by a number of commentators. Arguably, a term requiring compliance with human rights norms would seem, on a commonsense construction, to purport to confer a benefit. Admittedly, it is different from the types of benefit traditionally envisaged, such as the rendering of a service, payment of money, or a transfer of property. However, such a term can only have been incorporated with the benefit of third-party citizens in mind, since such a term is probably of little benefit in itself to either of the contracting parties. A more general term relating to performance standards, or accountability mechanisms, would also be of huge benefit to recipients of public services. Yet in this case, given that such provisions are also for the benefit of the government, an intention to ‘confer a benefit’ on the general public may be more difficult to show.

As for an intention to confer enforceable rights, as noted, the Nisshin case suggests that this will exist if there is an intention to ‘confer a benefit’ and the contract does not expressly exclude enforceability. This may be the appropriate legal conclusion but, in government contracting, courts could be reluctant to reach it on policy grounds. On the one hand, Lord Woolf suggested that a court would be willing to enforce a human rights provision, and, traditionally, with extremely liberal standing requirements, English courts have never really adopted the position that access to litigation should be restricted in the interests of not disturbing the administration. On the other hand, a term requiring that a service be of

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156 ODPM Guidance (n 123) 4.
158 See, eg, M Furmston, Cheshire, Fifoot and Furmston’s Law of Contract (15th edn, Butterworths London 2007) 513; Chitty on Contracts (n 48) 1133 [18-098] (‘The term must, moreover, purport to confer the benefit on C, so that it is not enough for C to show that he would happen to benefit from its performance.’).
159 Chitty on Contracts (n 48) 1133 [18-087].
160 See, eg, R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees Mogg [1994] QB 552 (DC) 562. See also above 5.4.4.
a particular standard, while benefiting the public, could, if enforceable by the public, create enormous difficulties for governmental authorities. Courts could also be dissuaded from finding third-party beneficiary rights by the fact that the rights ‘crystallize’ after either acceptance or reliance on the part of the third party beneficiary,¹⁶¹ which means that the contracting parties cannot rescind the contract or vary it so as to ‘extinguish or alter’ the third party’s entitlement.¹⁶² This has the potential to create difficulties—with particularly aware members of society who communicate their assent, and with citizens who act in reliance in a situation where their reliance is foreseeable.¹⁶²

Of course, to exclude the 1999 Act all that seems to be required is a provision stating that it does not apply.¹⁶³ Even without an explicit exclusion, it remains to be seen whether the courts will assume an intention for it to apply, as Judge Coleman did, or if they will look at the surrounding circumstances to find reasons to exclude its application. Although the primary interpretive method of contract is to consider the words in the document itself, ‘[i]n the modern law, the courts will, in principle, look at all the circumstances surrounding the making of the contract’ to ascertain its meaning.¹⁶⁴ If considering ‘all the circumstances’, there is huge scope for the benefit test to be manipulated to the detriment of service recipients.

(b) Third-party beneficiary rights in the US

Writing in 1985, Professor Anthony Waters asserted of US contract law that:

The broad, modern ‘intended beneficiary’ rule is now poised on the fringes of public law and is perfectly suited to reversing the trend whereby intended beneficiaries of public programs have increasingly been denied access to the courts.¹⁶⁵

Unfortunately, it seems that this assertion was somewhat optimistic. It is true that around the time the third-party beneficiary doctrine was being rejected by the English courts in *Tweddle v Atkinson* it was receiving a welcoming reception in US jurisprudence. The landmark case was decided by the New York Court of Appeals in 1859, *Lawrence v Fox*,¹⁶⁶ and although there was some discussion of trusts and agency in the decision, ultimately, it was the reasoning of Judge Gray, that the third party could recover because it was in the interests of ‘manifest justice’ that he should,¹⁶⁷ that became the overriding principle.¹⁶⁸

¹⁶¹ Contracts (Rights of Third Parties) Act 1999 s 2(1).
¹⁶² Ibid s 2(1)(c).
¹⁶⁴ Chitty on Contracts (n 48) 604 [12-043].
¹⁶⁷ Above (n 166) 275.
However, despite this more general acceptance of the notion of third-party beneficiary rights, it remains the case, in the specific context of government contracting, that these rights have only been recognized with caution and restriction. Essentially, whether or not a court will recognize third-party beneficiary rights in the context of government contracting seems to depend largely on the discreteness of the class of third-party beneficiaries:

As the beneficiaries who assert rights under a contract become more remote from the contracting parties, as their number increases and their identity becomes less certain, and as the interests asserted by them become more complex, the greater is the probability that the courts will not sustain suits in their behalf.¹⁶⁹

Nonetheless, claims involving third-party beneficiary rights in the governmental context are brought relatively frequently—and it is an often-attempted, and sometimes successful, method of citizen involvement in private delegation. Interestingly, too, some of the successes have involved third-party beneficiaries enforcing contract terms relating to aspects of the private contractor’s performance obligations.

The general rule that has evolved in the US, at both state and federal level, is that third parties can enforce contracts that are ‘intended’ to benefit them, and the Second Restatement of 1981 uses a twofold distinction between an ‘intended beneficiary’, who can enforce the contract, and an ‘incidental beneficiary’,¹⁷⁰ who cannot. To qualify as an intended beneficiary, the third party must show, first, that recognition of a right to performance in the beneficiary ‘is appropriate to effectuate the intention of the parties’ and, second, that ‘the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary’ or that ‘the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance’.¹⁷¹ If these conditions are not fulfilled, the party will only be an incidental beneficiary and will not be entitled to enforce the contract.¹⁷²

The Second Restatement also applies a qualified version of these rules to government contracts.¹⁷³ Similarly to the 1999 Act, the Restatement introduces a dual intention requirement to both benefit and to grant an enforceable right—although without the presumption that benefit means enforcement—and it

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¹⁷¹ Restatement (n 170) § 302(2).


¹⁷³ Restatement (n 170) § 313(1). For discussion, see Alvino (n 170) 916–17.
Private Law Controls on the Delegate

excludes liability for consequential damages for a private contractor, unless the terms of the contract provide for such liability or the citizen enjoys an alternative direct right of action against the contractor.¹⁷⁴ Some states have gone even further than dual intention and have applied a presumption that, in government contracts, there is no intention to grant an enforceable right to those who benefit, unless one is clearly manifested.¹⁷⁵ The Restatement also lists a number of factors that would render the granting of third-party beneficiary rights inappropriate:

arrangements for governmental control over the litigation and settlement of claims, the likelihood of impairment of service or of excessive financial burden, and the availability of alternatives such as insurance.¹⁷⁶

It should be stressed, though, that the restriction in the Restatement is on awarding consequential damages for breach: an action for an injunction would be allowable; or, as will be shown in some of the cases, perhaps an action for restitution for money paid in excess of contractual conditions.¹⁷⁷

It is probably fair to say that the ‘intent to benefit’ test has achieved little in the way of consistent results, particularly in the public service contract context.¹⁷⁸ However, there have been some noteworthy successes for third party beneficiaries. In particular, third party beneficiaries have had some success in the context of so-called ‘contracts of assurance’. A contract of assurance is created when a statute authorizes federal funding for a specific purpose, in exchange for the recipient’s promise to further that purpose in some way.¹⁷⁹ Such contracts often arise where, as was discussed in Chapter Two, the federal government avoids the anti-commandeering doctrine by offering states financial incentives to implement federal government programmes. It was mentioned above in respect of contract design that, ideally, public service contracts should incorporate the background

¹⁷⁵ See, eg, Doe v Adkins 674 NE2d 731, 737 (Ohio Ct App 1996); Restatement (n 170) § 313 Comment a; Kremen v Cohen 337 F3d 1024, 1029 (9th Cir 2003).
¹⁷⁶ Restatement (n 170) § 313 Comment a.
Delegation of Governmental Power to Private Parties

regulations or legislation governing the relevant public programme.¹⁸⁰ In *Fuzie v Manor Care, Inc*¹⁸¹ the incorporation of such regulations contributed to finding third-party beneficiary rights. A resident in a nursing home, owned and operated by the defendant Manor Care, was held to be entitled to enforce certain regulations of the Medicaid programme, as a third-party beneficiary of the ‘provider’s agreement’ between Manor Care and the State of Ohio. Manor Care had agreed to abide by Ohio’s federally approved ‘state plan’, promulgated by the state as a condition of receiving federal funds, and incorporating regulations intended to benefit Medicaid patients.¹⁸² Manor Care’s obligations under the ‘state plan’ were therefore ‘contractual’¹⁸³ and because Ohio law had long recognized third-party beneficiary rights,¹⁸⁴ the third-party beneficiary action was sustained. A similar case is that of *Zigas v Superior Court*,¹⁸⁵ in which the builders of a San Francisco apartment house agreed to abide by a maximum rent schedule in return for construction financing from the federal Department of Housing and Urban Development (‘HUD’). The plaintiff tenants alleged that they had been charged rents in excess of those permitted by the builder’s agreement with HUD, and their restitution claim was successful on a third-party beneficiary analysis.¹⁸⁶

Likewise, in the case of *Bossier Parish School Board v Lemon*, the Fifth Circuit Court of Appeals held that where a school board had agreed to abide by the Civil Rights Act 1964 and admit African-American and white children on equal terms, in exchange for receiving federal funding, the African-American children could rely on the agreement.¹⁸⁷ Meanwhile, in the case of *Lau v Nichols*, the Supreme Court held that a school district, which had contractually agreed to comply with standards promulgated by the Department of Health, Education and Welfare (‘DHEW’) was required to take ‘affirmative steps’ to rectify language difficulties for approximately two thousand non-English-speaking children of Chinese ancestry enrolled in the San Francisco public schools, as required by DHEW regulations and guidelines.¹⁸⁸

Finally, in one very noteworthy case, *Holbrook v Pitt*,¹⁸⁹ the plaintiffs were tenants in a housing project whose owner, under contract with HUD, received rent subsidy payments on behalf of eligible tenants. The subsidies were paid under section 8 of the Housing Act 1937, which has the aim of ‘aiding low-income families in obtaining a decent place to live and of promoting economically mixed

According to the contract, the housing project owner was obliged to determine the eligibility of applicants for housing subsidies and to compute the amount of the subsidy for each family. The plaintiffs alleged that the owner was in breach of the contract for failure to certify the plaintiffs as eligible within a reasonable time, and the Seventh Circuit upheld the claim, concluding that the plaintiffs were entitled to recover the amount they had lost because of the owner’s failure to certify them in a timely fashion.

It is worth considering the Court’s reasoning in a little detail. Section 8 was designed to achieve its goals by providing rent subsidies to lower-income families living in housing owned primarily by private developers. HUD made housing assistance payments to owners on behalf of tenants in accordance with the provisions of the contract. The purpose of the contract was clearly to benefit the tenants, and indeed, as the Court noted:

If the tenants are not the primary beneficiaries of a program designed to provide housing assistance payments to low income families, the legitimacy of the multi-billion dollar Section 8 program is placed in grave doubt.

The Court rejected HUD’s argument that the aim of the contracts was to assist financially troubled housing projects, rather than low-income families, by noting, inter alia, that the contracts provided that section 8 funds should be allocated according to the financial needs of the tenants. HUD also argued that section 8 had the purpose of minimizing claims on its insurance funds, a purpose described by the Court as ‘subsidiary’ and not defeating the primary purpose of benefiting needy tenants. By implying into the contract a term that certification should occur within a reasonable time, the Court then found the owner to be in breach of the contract for failing to make the certification within a reasonable time, and HUD to have breached its obligation to properly administer the contracts by accepting deficient computations from the owners. Interestingly, as Waters has noted, the court did not emphasize the tenants’ relationship to one contracting party rather than the other, but referred to the tenants’ relationship to the promise itself.

It should be noted, however, that Holbrook has not been followed very often, and many courts have found tenants not to be third-party beneficiaries of such contracts. Courts have also been hesitant to find third-party rights where the class of intended beneficiaries may become too numerous. In housing cases, actual tenants have had greater success in pursuing a third-party beneficiary

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¹⁹⁰ 42 USC § 1437f(a).
¹⁹¹ Above (n 189) 1268 n 13.
¹⁹² Ibid 1272–5.
¹⁹³ Ibid 1267.
¹⁹⁴ Ibid 1269.
¹⁹⁵ Ibid 1271.
¹⁹⁶ Ibid 1271–2.
¹⁹⁷ Ibid 1273.
¹⁹⁸ Ibid 1274.
¹⁹⁹ Ibid 1276.
²⁰⁰ Waters (n 165) 1189.
²⁰¹ See, eg, 5th Bedford Pines Apartments Ltd v Brandon 262 FSupp2d 1369, 1378–9 (ND Ga 2003).
theory than applicants for housing, as to hold otherwise would ‘make almost every lower-income person in the United States a potential plaintiff’.²⁰² Likewise, in the case of HR Moch Co v Rensselaer Water Co,²⁰³ the defendant promised the City of Rensselaer to supply water at fire hydrants at a specified pressure. When the plaintiff’s building caught fire and was destroyed because of the breach of the defendant’s promise, the defendant was not liable because he could have been destroyed financially, if for instance, the entire city had been destroyed by the fire. In other words, if the plaintiff were permitted to recover, the defendant’s ‘field of obligation would be expanded beyond reasonable limits’.²⁰⁴

(c) Third-party beneficiary rights in the EU
As noted above, contracts agreed in the EU context will tend to have choice of law clauses, which refer the contract to the law of a particular jurisdiction.²⁰⁵ The legal systems of most Member States of the EU allow third parties to enforce contracts, as long as it accords with the parties’ intention.²⁰⁶ In France, for example, the general principle that contracts have effect only between the parties to them²⁰⁷ is qualified by Article 1121 of the Code Civil which permits a stipulation for the benefit of a third party as a condition of a stipulation made for oneself or of a gift made to another.²⁰⁸ In Germany, contractual rights for third parties are created by Article 328 of the Burgerliches Gesetzbuch.²⁰⁹ Other European countries also recognize third-party beneficiary rights.²¹⁰

8.3.2.3 Enforceability by the contractor
The converse problem of securing enforceability of the contract against the government, noted above, has arisen occasionally in both the US and England, and arises where governmental actors seek to avoid contractual obligations on the basis that the contract is ultra vires. As Davies has observed, the ultra vires doctrine has a twofold effect on government contracts. First, it enables courts to control the purposes to which government contracts are put and, second, the non-fettering aspect of the doctrine, which prevents public authorities from fettering their discretion, enables the courts to ensure that contracts do not act as an undue constraint on a governmental body’s exercise of discretion in the performance of

²⁰² Price (n 178) 1121.
²⁰³ 159 NE 896 (NY 1928).
²⁰⁴ Ibid 897.
²⁰⁵ Above 8.3, n 27.
²⁰⁷ Code Civil Art 1165.
²⁰⁹ Law Commission Consultation Paper (n 208) Appendix [28]–[29].
²¹⁰ See Law Commission Report (n 148) [3.8].
its duties.²¹¹ From the perspective, as set out in the introduction to this book, of enabling private delegation to be used positively and effectively, the application of the doctrine can be problematic, both because the tests used by the courts to determine the ultra vires of contracts are uncertain and because the consequence of a finding of ultra vires is to nullify the contract.²¹² Davies notes that these two inadequacies in the ultra vires doctrine can result in private contractors being hesitant to take on governmental activities.²¹³

In both English and US law problems have been created by the courts’ preference for legality over legal certainty. The two best-known ‘disasters’²¹⁴ in England are found in the Hammersmith²¹⁵ and Crédit Suisse²¹⁶ cases. In the Hammersmith case, Hammersmith and Fulham London Borough Council entered into interest swap transactions and when it became apparent that it was going to lose money on the transactions, the auditor sought a declaration to determine the legality of the contract. The House of Lords ruled that the contracts were ultra vires.²¹⁷ Similarly, in Crédit Suisse v Allerdale BC, Allerdale Borough Council, being unable to finance a project to build a swimming pool for its local population without exceeding its borrowing limits, set up a company to carry out the project and to build time-share units (the sale of which was intended to defray the cost of the project), and guaranteed a loan to the company. The sale of the units was unsuccessful, the company went into liquidation, and when the bank sought to enforce the loan guarantee, it was held that the loan guarantee was ultra vires and, consequently, unenforceable.²¹⁸ The loan guarantee at issue here was unlawful on its face, but Neill LJ rejected the suggestion that ‘the ultra vires decisions of local authorities can be classified into categories of invalidity’,²¹⁹ which means that even contracts which are not obviously ultra vires would be unenforceable—a view which appears to have been accepted subsequently.²²⁰

As for the non-fettering rule, where there is a concluded contract the courts generally tend to prioritize the freedom of action of the governmental body,²²¹ although they may uphold the contract in circumstances where they are not persuaded that there is an overriding public interest in favour of exercising the

²¹² Ibid.
²¹³ Ibid 99; Arrowsmith (n 28) 44–5 [2.32]; see also 52 [2.39].
²²⁰ See also Arrowsmith (n 28) 46–7 [2.34], noting Morgan Grenfell v Sutton LBC, The Times 23 March 1995 (Clarke J); Hinckley and Bosworth BC v Shaw [2000] 9 BLGR 9 (QB); Bedfordshire CC v Fitzpatrick Contractors Ltd [2001] BLGR 397 (QB); Eastbourne BC v James Foster (No 1) [2001] EWCA Civ 1091, [2001] BLGR 529 R (Foster) v Eastbourne BC [2004] EWCA Civ 36 [20], [31]–[33]. See also Chitty on Contracts (n 48) 670 [10-014].
²²¹ Chitty on Contracts (n 48) 675 [10-023].
statutory discretion and frustrating the contract,²²² or where it is not clearly
proved that the contract is incompatible with the statutory power.²²³ Meanwhile,
if the question is whether entering into a concluded contract would fetter
discretion, the courts consider whether the government is likely to exercise the
discretion in question in the future²²⁴ and sometimes rank the importance of the
competing powers.

As Davies notes, the remedy of nullification for an ultra vires contract vindi-
cates the principle of legality in an unequivocal way, but creates difficulties by
leading to disruption in public services and insufficient compensation being paid
to contractors for loss of the contract.²²⁵ While actions in restitution or quantum
meruit will ensure that the private contractor does not suffer detriment in respect
of money paid to the government or services performed, it will not be able to
secure its expected profits from the complete performance of the transaction and
may incur legal fees when the contract is unravelled. Moreover, often the result
of the nullification of the contract is that the performance of the governmental
function will be abandoned by the private contractor.

In the US, legality is also generally prioritized by the courts and, indeed, con-
tractors will not even necessarily be entitled to restitution in respect of work
performed pursuant to an illegal contract. At the state level, in California, ‘if a
public contract is declared void, a contractor may not be paid for work performed
under that contract’ since persons ‘dealing with the public agency are presumed
to know the law with respect to the requirement of competitive bidding and act at
their peril’.²²⁶ Similarly, much has been written of the Washington Public Power
Supply System Bond Default,²²⁷ where the Washington Supreme Court found
that the issuing of revenue bonds was beyond the authority of the Washington
Public Power Supply System, with the result that the issue of bonds was invalidated
and the private companies involved were unable to recover.²²⁸ Across the states,
in fact, the general position appears to be that ultra vires contracts are ‘wholly
void, and of no legal effect’.²²⁹ Redress for contractors is consequently limited.

²²² Davies (n 211) 110–11, noting Dowty Boulton Paul Ltd v Wolverhampton Corporation [1971]
1 WLR 204 (Ch).
²²³ Chitty on Contracts (n 48) 674 [10-022]; Birkdale District Electric Supply Co v Southport
Corporation [1926] AC 355 (HL).
²²⁴ Davies (n 211) 107; British Transport Commission v Westmorland CC [1958] AC 126 (HL);
²²⁵ Davies (n 211) 113–14.
²²⁶ Amelco Electric v City of Thousand Oaks 38 P3d 1120, 1123 (Cal 2002).
²²⁷ See, eg, TJ Sawicki, ‘Comment, The Washington Public Power Supply System Bond Default:
Expanding the Preventive Role of the Indenture Trustee’ (1985) 34 Emory LJ 157.
²²⁸ Chemical Bank v Washington Public Power Supply System 666 P2d 329, 331 (Wash 1983);
D Fischer, ‘WPSS and Hammersmith: Increased Credit Risk Protection Resulting from Unprecedented
²²⁹ St Charles County v ‘A Joint Board or Commission’ 184 SW3d 161, 166 (Mo Ct App 2006). See
also: Enviro Pro Inc v Emanuel County 593 SE2d 673, 676–7 (Ga Ct App 2004); Schivarelli v Chicago
Transit Authority 823 NE2d 158, 166 (Ill App Ct 2005); State Commission on Human Relations v
Baltimore City Department of Recreation and Parks 887 A2d 64, 69–70 (Md Ct Spec App 2005);
Where government action is not substantially ultra vires or manifestly against public policy, certain states permit a good faith private party to recover for losses on a void contract under the principle of quantum meruit, while in Tennessee a public authority may be estopped from asserting the ultra vires nature of an act if the aggrieved contractor can show that the ultra vires contract is partially or fully executed. However, many states simply refuse to recognize an estoppel argument against the state government where the contract is ultra vires.

At the federal level, the case law is limited. As a general matter, the federal government is entitled to claim four ‘special’ defences to enforcement of any contractual obligations: the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms; the rule that an agent’s authority to make such surrenders must be delegated in express terms; the doctrine that a government may not, in any event, contract to surrender certain reserved powers; and, finally, the principle that a Government’s sovereign acts do not give rise to a claim for breach of contract. Where any of these defences is applicable, the government will not be fettered by the contract. However, the approach of the Supreme Court has not resulted in easy access by the government to these defences and it has been noted that the principle that emerges unquestionably from the leading case, *Winstar*, is that ‘the Government must honor its contractual obligations’. Thus, the government cannot simply avoid its contractual obligations ‘by passing any “regulatory statute”’.

However, with respect to contracts entered into by the federal government where it does not have the power to do so, the estoppel argument which operates in some states, although it has not been entirely ruled out, is strongly

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**Notes:**

230 Failor’s Pharmacy v Department of Social and Health Services 886 P2d 147, 153 (Wash 1994).
231 FR Harris Inc v Metropolitan Government of Nashville and Davidson County 1999 WL 159725, 5* (Tenn Ct App 1999); Far Tower Sites LLC v Knox County 126 SW3d 52, 67 (Tenn Ct App 2003).
232 Comley, ex rel Fitzroy v Board of Trustees of Firemen’s Relief Fund of City of Bridgeport 191 A 729, 733 (Conn 1937); Burnside Land Co v Connelly and Lee 291 SW 409, 411 (Ky Ct App 1927); Spieker v Board of Rapid Transit Commissioners of City of Cincinnati 174 NE 15, 17 (Ohio Ct App 1930); State, ex rel City of Jasper v Gulf States Utilities Co 189 SW2d 693, 698 (Tex 1945).
236 Home Telephone & Telegraph Co v Los Angeles 211 US 265, 273 (1908).
240 *Winstar* (n 234) 895.
disfavoured.²⁴² Generally, the Supreme Court’s position is that a person entering into an arrangement with the federal government ‘takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority’.²⁴³ In short, ‘Men must turn square corners when they deal with the Government’.²⁴⁴ The only exceptions that may arise are where the government is operating in a ‘proprietary’ as opposed to a ‘sovereign’ context or there is evidence of affirmative misconduct on the part of the government.²⁴⁵

To some extent, England has started to address the difficulty created by lack of enforceability of contracts against the government. Section 2 of the Local Government Act 2000 confers a power on local authorities to do ‘anything which they consider is likely to achieve’ promotion or development of the economic, social and/or environmental well-being of their area,²⁴⁶ and specifically confers the power to ‘enter into arrangements or agreements with any person’ and to ‘co-operate with, or facilitate or co-ordinate the activities of’ any person.²⁴⁷ Similarly, although the Deregulation and Contracting Out Act 1994 states that any authorization for contracting-out may be rescinded at any time by the public authority by whom the authorization is given,²⁴⁸ section 73(2) protects the private contractor by providing that where the contract is rescinded by the public authority, or the Minister revokes the order authorizing the function to be contracted out, the authority is to be treated as repudiating the contract. Thus, the private contractor will still be entitled to sue for damages for non-performance of the contract by the public body.²⁴⁹

Furthermore, the Local Government (Contracts) Act 1997 (‘the 1997 Act’) now provides for a system of ‘certified contracts’²⁵⁰ under which contracting parties will have legal remedies even if the contract proves to be ultra vires. The Act is generally directed at PFI contracts and applies: first, to contracts of five years duration or longer, which are entered into ‘for the provision or making available of services (whether or not together with assets or goods) for the purposes of, or


²⁴³ Merrill (n 242) 384.

²⁴⁴ Ibid 385.


²⁴⁶ Local Government Act 2000 s 2(1).

²⁴⁷ Ibid s 2(4).

²⁴⁸ Deregulation and Contracting Out Act 1994 ss 69(5)(b) and 70(4).

²⁴⁹ See Arrowsmith (n 28) 61–2 [2.48].

²⁵⁰ Local Government (Contracts) Act 1997 s 2(2).
in connection with, the discharge by the local authority of any of its functions; and second, to contracts entered into in connection with the first type of contract with a person providing a loan or other form of finance to the party contracting with the local authority under a section 4(3) contract or with an insurer or trustee of that party. The contract must be certified by the local authority within six weeks of entering into it, with the certificate stating the purpose of the contract and its intended period of operation. The certificate should cite the statutory authority, state that a copy of the certificate is being given to the contracting parties and the authority’s monitoring officer and auditor, and indicate that the detailed requirements of applicable regulations have been satisfied. Where a contract is certified, the usual rules governing the effect of unlawful contracts are suspended, and the contract will have effect as if the local authority had had power to enter into it and had done so properly. Section 4(1) of the Act states that a certificate complying with the relevant requirements shall have effect and be deemed always to have had effect as if the authority had power to issue it and had acted lawfully in issuing it, while the certificate is not invalidated by any inaccuracies in it. Thus, the effect of section 2(1) cannot be avoided by challenging the validity of the certification on which section 2(1) depends. However, if the legality of any of these steps is disputed on judicial review or under audit procedures challenging expenditure, by section 5(1), the provision as to validity is suspended.

If the court deems the contract to be ultra vires, it may exercise its discretion, pursuant to section 5(3), to permit the contract to continue ‘having regard in particular to the likely consequences for the financial position of the local authority, and for the provision of services to the public’. If the contract provides for ‘discharge terms’ in the case of legal challenge, those terms remain effective even where the contract is invalid. In the absence of such terms, section 7(2) provides that the contractor is entitled to whatever payments would have been due up to the date of the court’s order and in addition to damages as for a repudiatory breach by the local authority. As Arrowsmith notes, this default provision is very unfavourable to the authority and could potentially result in the authority making significant payments to the provider for lost profits. These provisions ‘preserve the parties’ freedom to make their own arrangements in case of a finding of ultra vires, while enhancing the contractor’s bargaining power’: if the local authority offers ungenerous terms, the contractor can simply refuse to agree any such terms and instead rely on section 7 for compensation.

While accepting it as a ‘useful starting point’, Davies has identified a number of weaknesses in the 1997 Act. For example, first, it is directed only towards

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251 Ibid s 4(3).
252 Ibid s 4(4).
253 Ibid s 2(5).
254 Ibid s 3(2).
255 Ibid.
256 Ibid s 2(1).
257 Ibid s 6(4).
258 Arrowsmith (n 28) 52 [2.38].
259 Davies (n 211) 117.
PFI contracts, rather than government contracting generally. Second, in section 3(2)(d), the certificate is required to state the power under which the authority is acting without any requirement to consider the possibility of conflicting powers and corresponding fettering claims. Third, the certification process is open to abuse since it is unclear whether there is an obligation on the local authority to take proper advice before issuing the certificate. This is all accepted. Nonetheless, as Wade and Forsyth note, the 1997 Act is at least to be praised for attempting ‘a compromise between validating unlawful contracts, which is objectionable on public policy grounds, and doing justice to contractors who are entitled to expect that local authorities will act lawfully and properly’.²⁶¹

8.3.3 The limits of contract

If a proper balance is drawn between the ultra vires principle and legal certainty, the interests of private contractors will not be overlooked in situations where public authorities seek to make cynical use of the legality principle to evade contractual obligations. Moreover, as is evidenced by some of the US cases, if third-party beneficiary rights are recognized, contract can constitute quite an effective mechanism for protecting human rights or holding private contractors to account. The practical result of these cases is ‘the creation of a private right to enforce a public program’.²⁶² In the end, though, there are a number of limitations to the usefulness of third-party beneficiary theory to protect the rights of beneficiaries of governmental contracting.

First, even if a contract is enforceable by third parties, it will not necessarily provide any rights third parties would wish to enforce. This problem highlights the close inter-action between contract design and contract enforceability, and also the inadequacies of the delegation process discussed above in Chapter Five. In none of the jurisdictions are mandatory provisions made for democratic citizen participation in the contracting-out decision, albeit that such participation is now encouraged by the ODPM Guidance in England. In the *Leonard Cheshire* situation, as noted above,²⁶³ there is difficulty with Lord Woolf’s suggestion that recipients of welfare housing require human rights protections in local authority contracts, since there is no scope in the local authority contracting scheme to require input from welfare recipients like Ms Heather, who took the action against Leonard Cheshire. The position is the same in the US, and, indeed, the purpose of public contract notice requirements is not stated to be for the public benefit but rather ‘to permit potential bidders to prepare and submit their bids in a timely manner’.²⁶⁴ Provisions considered important by citizens may not be

²⁶¹ Wade and Forsyth (n 214) 796–7.
²⁶² Waters (n 165) 1188.
²⁶³ Above 8.3.1.3.
²⁶⁴ Model Procurement Code for Local and State Governments § 3-202(3) comment.
included in government contracts because such provisions will not be prioritized by the negotiating parties. And, as Gilman puts it, ‘[w]ithout meaningful, substantive terms to enforce, being a third-party beneficiary is a hollow victory indeed’.\(^{265}\) Second, the same principles which could limit a party’s remedies in a two-party case also apply to an action brought by a third party.\(^{266}\) In the government contracting context, principles of remoteness and mitigation will clearly have a very different impact from that which they have in the two-party situation. So, for instance, the remoteness issue will be whether the third-party citizen’s loss ought reasonably to have been contemplated by the promisor, the private contractor\(^{267}\)—and it is easy to imagine many cases where it will not have been.

Third, and most obviously perhaps, it is always open to the contracting parties to expressly deny any third-party enforcement rights, and thereby eliminate this method of control. Exclusion of an enforcement right is an option that is available in both England and the US, and although governments may be interested in allowing for third-party enforcement of contracts because it provides a ‘free’ method of monitoring contract performance\(^{268}\)—if third-party beneficiaries litigate to enforce contract terms, to some degree, this alleviates a governmental enforcement burden—the reality is that the stronger impulse is for governments to exclude third-party beneficiary rights completely. Both government and private contractors have persuasive financial incentives to limit the scope of their liability.\(^{269}\) Often, particular private contractors and public authorities will be in repeat and prolonged relationships with each other, in which they would not wish third-party citizens to become involved. Seidenfeld aptly describes the situation:

Government often has a continuing relationship with its providers and values their continuing cooperation to take advantage of future opportunities for contracting. Government might even wish to exploit efficiencies that might result from modification of the very contract on which the beneficiaries would sue. The beneficiaries, however, often do not have an incentive to maintain a cooperative relationship with the provider; they may be uniquely affected by the current contract and therefore prone to forfeiting their benefits for the greater good of other beneficiaries of future contracts. Thus, allowing particularly identified beneficiaries to enforce government contracts is likely to chill cooperation between the government and the contractor that might be essential for the government’s overall program.\(^{270}\)

In particular, it should be remembered that one of the primary incentives for public authorities to use contracting is precisely because contracts are not enforceable by the general public; their non-enforceability by the public is thought to add to their efficiency value.\(^{271}\)

\(^{265}\) Gilman (n 63) 846.  
\(^{266}\) Contracts (Rights of Third Parties Act) 1999 s 1(5).  
\(^{267}\) Chitty on Contracts (n 48) 1137 [18-090].  
\(^{268}\) Gilman (n 63) 846.  
\(^{269}\) Ibid.  
\(^{271}\) Note (n 1) 1485.
Freeman cautions against cynicism about the motives of public authorities and private contractors, and it is important to take this caution on board. However, in practice, government contracts often explicitly exclude third-party beneficiary rights. Contracts under a welfare housing scheme in the US require private contractors to provide ‘substantial opportunities’²⁷² for public housing residents to participate in planning for demolition and redevelopment,²⁷³ and in a wide range of other circumstances.²⁷⁴ Yet by explicitly stating that these provisions are not enforceable by residents,²⁷⁵ both government and private contractor can enjoy the political benefits of a stated commitment to protecting residents’ rights, without having to deal with the consequences of making those rights meaningful.²⁷⁶ Similarly, in England, the Office of Government Commerce has issued model contract conditions for agreements between government and private contractors, which expressly exhort exclusion of the 1999 Act,²⁷⁷ while even the ODPM Guidance eschews the creation of third-party beneficiary rights.²⁷⁸ Moreover, in terms of incentives, it is difficult to be convinced that public authorities or contractors would undertake to benefit citizens as third parties. For example, a review by the Audit Commission in England indicated that the prevailing attitude of local authorities to general human rights concerns entails a ““wait and see what happens” or “lets defend a challenge”” position.²⁷⁹ Moreover, given the state action doctrine in the US, and the English Leonard Cheshire jurisprudence, this is probably the most convenient position for public authorities to adopt.

Ultimately, though, the problem probably rests with the underlying basis of contract law, as the law of ‘voluntary obligations’.²⁸⁰ Traditionally, the theoretical emphasis of contractual doctrine has been on the will or intention of the parties.²⁸¹ The ‘orthodox’ approach is that contracts are ‘self-imposed obligations’.²⁸² It would, of course, be over-simplistic to assume that any overarching principle can explain every aspect of contract law doctrine,²⁸³ and there are many alternative

²⁷³ Ibid Art XIII(A)(1).
²⁷⁴ Ibid Art XIII(B)(2)–(3); Art XIII(C).
²⁷⁵ Ibid Art XIII(E).
²⁷⁶ Note (n 1) 1486.
²⁷⁸ ODPM Guidance (n 123) 4.
²⁷⁹ Audit Commission (n 25) [6].
normative contractual theories, including reliance, transfer, and property theories. Further, as indicated above in the general comments on private law, it would also be over-simplistic to assume that the courts will never interfere with the contracting parties’ choices. However, insofar as the third party beneficiary doctrine is concerned, in both the US and England, it is primarily ‘parasitic’ on the parties’ intention, and thereby rests firmly on the orthodox ‘will’ account of contract: if the contracting parties are unwilling to provide for third-party rights in their contracts, the courts are unwilling to force them to do so.

8.4 Tort Law

When considering the ability of tort law to respond to the challenge of private delegation, two, quite distinct, questions arise: the first relates to the extent to which tort law can constitute a relevant control of private delegates, while the second question relates to the extent to which private delegates, where they take the place of government, should be entitled to enjoy immunities or privileges enjoyed by government. In considering both questions, it is important to distinguish between two very different categories of tort: the first, common law tort, involves such familiar causes of action as negligence, trespass, and nuisance; the second, ‘constitutional tort’, is based on violation of a constitutional or statutory human right and provides a damages remedy. Examples of constitutional torts include the section 8 damages remedy provided by the HRA in England, and the § 1983 and Bivens damages actions for a federal constitutional violation in the US. The second form of ‘tort’ does not, strictly speaking, belong to ‘private law’ but is appropriately considered here, since it raises similar issues, from the private delegation perspective, to those raised in common law tort.

The EU will be discussed separately, since, in the EU, there is one non-contractual damages remedy against Community institutions, provided in Article 288 EC, and one damages remedy against Member States, derived from

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286 Smith (n 282) 107.
the *Francovich* case.²⁹⁰ Thus, the distinction between common law tort and constitutional tort does not exist—although, in substance, both the Article 288 and *Francovich* remedies are more akin to constitutional torts, in the sense that they provide a damages remedy linked to illegality or maladministration, rather than on the basis of common law tort principles, such as the duty of care in negligence.²⁹¹

### 8.4.1 Tort law as control

#### 8.4.1.1 Common law tort

With respect to common law tort, it seems that it only responds to a limited degree to the challenges presented by private delegation. Oliver has argued, persuasively, that the development of tort law has involved the courts ‘developing duties of considerate and responsible altruism where activity may have detrimental effects on individuals’.²⁹² However, ‘altruism’ is a nebulous concept and, as has already been stated,²⁹³ while the values protected by public and private law may correlate, the specific legal manifestation of these values in public and private law differs greatly, with meaningful consequences. Although tort law, when it applies to private delegates, provides a mechanism of legal accountability, it is not a mechanism which addresses the uniqueness of the private delegate’s position as possessor of governmental power. For instance, avoidance of liability in negligence may encourage effective, and perhaps even efficient, performance of a delegated duty, but it is not likely to be particularly satisfactory, for two reasons: first, where private actors are providing public services to large numbers of citizens, it may be difficult to establish a duty of care to any individual claimant; and second, avoidance of negligence sets a standard which is both very specific and also, in some cases, relatively low. It is perfectly possible to perform a contract in an inefficient and ineffective manner, while avoiding liability in negligence.

There may also be a limited overlap between human rights and tortious obligations—but, again, the correlation is imperfect. Rights to autonomy, dignity, and privacy are protected by the torts of nuisance and trespass to land, false imprisonment, assault and battery, negligence resulting in personal injury, and defamation. Indeed, liability for false imprisonment arises regardless of fault, ‘thus emphasising the primacy of the interest of the individual in freedom of movement’.²⁹⁴ Property rights are, of course, protected through the torts of trespass to land and nuisance. However, all of these rights may be violated by many forms of conduct that do not amount to torts. Moreover, tortious remedies may be inadequate to vindicate the right. As a post-deprivation remedy, a tort action

²⁹⁰ Cases 6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357 [31]–[40].
²⁹¹ See also *Anufrijeva* (n 289) [49].
²⁹² Oliver, *Common Values* (n 3) 168.
²⁹³ Above 8.2.
²⁹⁴ Oliver, *Common Values* (n 3) 172.
is unable to provide notice and an opportunity to be heard before the injury occurs, and therefore cannot substitute for an administrative procedural fairness or a constitutional due process claim. Sklansky gives the striking example of illegally obtained evidence in the context of increasing privatization of policing functions in the US: evidence obtained by private investigators in violation of constitutional rights, such as through entering property without a warrant, is not excluded from criminal trials, since the constitutional prohibition on illegal evidence gathering and the accompanying inadmissibility rule only operate against governmental actors. A tortious damages remedy after the fact does little to vindicate the right if an individual is convicted on the basis of the illegally obtained evidence.

One tort that may potentially be useful in controlling private delegates is that of misfeasance in public office, which is found in English, although, surprisingly perhaps, not US, law. The tort imposes liability, including even punitive damages, for the exercise of ‘public power’ in a manner that is knowingly unlawful or malicious and is based on the principle that public power “may be exercised only for the public good” and not for ulterior and improper purposes. Even though the tort generally only encompasses fairly egregious behaviour—either targeted malice, whereby the action is intended to injure a person or persons, or untargeted malice, where the public officer acts in the knowledge of, or with reckless indifference to, the illegality of his or her act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the claimant—if such a tort were actionable against private delegates, it would provide a useful means of reminding delegates of the important public purpose they

297 The origin of the tort is attributed by English courts to the case of Ashby v White (1703) 2 Ld Raym 938 (see, eg, Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 (HL) 190). In US courts, however, this case has been cited for the more general proposition that a right without a remedy is a mere abstraction (Ashby 953): see, eg, WR Grace & Co v State Department of Revenue 973 P2d 1011, 1030 fn 17 (Wash 1999). For an overview of the tort, see M Andenas and D Fairgrieve, ‘Misfeasance in Public Office, Governmental Liability, and European Influences’ in D Fairgrieve, M Andenas and J Bell (eds), Tort Liability of Public Authorities in Comparative Perspective (British Institute of International and Comparative Law, London 2002) 184; A Arora, ‘The Statutory System of the Bank Supervision and the Failure of BCCI’ [2006] J of Business L 487; A Zuckerman, ‘A Colossal Wreck—The BCCI—Three Rivers Litigation’ (2006) 25 Civil J Q 287.
301 Three Rivers (n 297) 191–3; see also WVH Rogers, Winfield and Jolowicz on Tort (17th edn, Sweet and Maxwell, London 2006) 359–60 [7-20].
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should be serving. On principle, application of this tort to private delegates seems clearly justifiable too: if the underlying rationale of the tort is to ensure that public power is used ‘for the public good’, this should apply to require private delegates exercising public power to exercise it ‘for the public good’.

In its current form, however, the tort does not seem to extend this far. To date, it has only been applied to self-evidently public bodies, such as a local authority, a government department, the Bank of England, the police, and prison guards. The governing body of Lloyd’s has been held not to fulfil the requirement of ‘public office’, the court being persuaded by the fact that Lloyd’s had previously been found to be not amenable to judicial review. Moreover, in articulating the requirements of the tort, the House of Lords has listed the existence of public office and the exercise of public power, as two distinct and sequential conditions. Indeed, of the public office requirement, Lord Steyn has gone so far as to say, that ‘[i]t is the office in a relatively wide sense on which everything depends’. When a public office is found, the courts have been willing to impose quite a wide liability, which extends to ‘[a]ll powers possessed by a public authority, whether conferred by statute or contract’—yet there is no indication that they would extend the tort in the absence of a public office. One possibility would be to develop this tort along the model of liability provided by the HRA, involving a dichotomy between those in public office, who are liable in respect of all their powers, as occurs at present, and delegates of governmental power, who are liable to the extent of their exercise of public power. This option was not pursued in Lloyd’s, however, and in its current form the tort does not provide much hope of controlling private delegates.

Finally, on the issue of common law tort, it should be pointed out that even the tort of breach of statutory duty is unlikely to be useful in holding private delegates to account. Unless the statute is addressed directly to the private delegate, the primary duty will rest with the governmental actor to which the statute is addressed. In this respect, in England, it has been held that a governmental actor may not assert as a defence to a breach of statutory duty claim that it has delegated the duty. Moreover, many of the statutory schemes underpinning

302 See also Arrowsmith (n 28) 33 [2.21].
303 See also Arrowsmith (n 299) 231.
304 Jones (n 300).
305 Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716 (CA) 775–6.
306 Three Rivers (n 297) 191.
307 Darker v Chief Constable of the West Midlands [2001] 1 AC 435 (HL) 446.
310 Three Rivers (n 297) 191; see also D Fairgrieve, State Liability in Tort: A Comparative Law Study (OUP, Oxford 2003) 89.
311 Jones (n 300) 85.
312 HRA s 6(3)(b). Above 6.3.2.
313 Ginty v Belmont Building Supplies Ltd [1959] 1 All ER 414 (QB) 423–4; McMath v Rimmer Bros Ltd [1962] 1 WLR 1 (CA) 6.
outsourcing by governmental actors may involve functions which have not been considered by the courts to be capable of underpinning a breach of statutory duty claim.\textsuperscript{314} So, for instance, the House of Lords has rejected claims based on child protection legislation,\textsuperscript{315} a duty to house homeless persons under the Housing Act 1985,\textsuperscript{316} and a duty to provide sufficient and appropriate education under Education Acts.\textsuperscript{317}

\textbf{8.4.1.2 Constitutional torts}

With regard to constitutional torts, to the extent that private delegates are held liable for human rights violations at all, which, as was explored in Chapter Six, is limited at present,\textsuperscript{318} a damages remedy awarded against the private delegate may serve as an additional deterrent to the private delegate to refrain from human rights violations. Of course, as long as private delegates evade human rights liability, unfortunately, any potential deterrent effect will not be triggered.

\textbf{8.4.2 Extending governmental immunities to private delegates}

Even accepting the limited ability of tort law to respond to the particular challenge of private delegation, it is still necessary to consider whether the scope of tort law to control private delegation should, nonetheless, be restricted even further. In other words, tort law undoubtedly provides a mechanism of legal accountability, but if courts or legislatures have decided that there are justifications for protecting governmental actors from this form of legal accountability, should these justifications apply to protect private delegates from liability too? It seems that the question has not yet arisen in the English courts, and in the US courts the response has generally been negative.

\textbf{8.4.2.1 United States}

\textbf{(a) Federal law}

There are three mechanisms available at the US federal level, by which tort actions can be taken against governmental agencies and their employees.\textsuperscript{319} The first, which relates to common law tort actions, is the Federal Tort Claims Act (‘FTCA’),\textsuperscript{320} and it authorizes a district court or the Claims Court to entertain

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{314} Winfield and Jolowicz on Tort (n 301) 342–3 [7-5].
\item \textsuperscript{315} \textit{X v Bedfordshire CC} [1995] 2 AC 633 (HL) 747–8.
\item \textsuperscript{316} \textit{O’Rourke v Camden LBC} [1998] AC 188 (HL) 193.
\item \textsuperscript{317} \textit{Phelps v Hillingdon LBC} [2001] 2 AC 619 (HL) 668.
\item \textsuperscript{318} Above 6.3.1 and 6.3.2.
\item \textsuperscript{319} KC Davis and RJ Pierce Jr, \textit{Administrative Law: Treatise} (4th edn, Aspen Law, Boston 2001) V.1 III, 1429–90.
\item \textsuperscript{320} 28 USC §§ 1346, 2671–80. The statute provides a generally available mechanism to bring a tort action against the government and is supplemented by a number of other statutory provisions dealing with specific areas of law. See, generally, D Yoo, ‘Immune Response’ (2007) 29 Los Angeles Lawyer 24.
\end{itemize}
\end{footnotesize}
a tort action against the US based on the conduct of its agencies as if the government were a private party. The second two mechanisms are concerned with constitutional torts: in *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*\(^{321}\) the Court created a tort action against federal employees who injure an individual by violating the Constitution; and § 1983 of the Civil Rights Act 1871\(^{322}\) creates a tort action against ‘every person’\(^{323}\) who violates a citizen’s constitutional rights while acting ‘under color of state law’. The FTCA imposes liability on government, while the *Bivens* and § 1983 actions expose government employees to potential tort liability, and all three systems provide immunity in certain circumstances, with immunity for *Bivens* and § 1983 being more or less identical.\(^{324}\)

(i) Common law tort: The *Federal Tort Claims Act* Under the FTCA, a number of exceptions from liability are provided,\(^{325}\) the most important of which protects discretionary functions or duties.\(^{326}\) With one exception, these immunities have not, however, been shared with private contractors. The exception arose in the case of *Boyle v United Technologies Co*,\(^{327}\) in the limited context of product liability, and even then only applies where the government itself has approved reasonably precise specifications, the equipment has conformed to those specifications, and the supplier has warned the government about the dangers of the equipment that were known to the supplier but not the government.\(^{328}\) In other words, it only applies to situations where the discretionary choice can be attributed directly to government, rather than to the private delegate. The rationale for the *Boyle* decision was largely policy-based, Justice Scalia noting that imposition of liability on the private contractor would ‘directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government; or it will raise its price’.\(^{329}\) The defence has occasionally been applied by lower courts in the context of service performance contracts also.\(^{330}\) Generally, though, the defence is limited to situations where the state tort suit creates a ‘significant conflict’ with the duties imposed under a federal contract,\(^{331}\) and, as Cass has noted, even in an area where courts have generally been ‘solicitous’ of government decision-making—military matters—‘that solicitude has not translated into broad protections for military contractors’.\(^{332}\)

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322 42 USC § 1983.  
323 It is used primarily against state and local officials: *Monell v Department of Social Services of the City of New York* 436 US 658, 690 (1978).  
325 28 USC §§ 2680.  
326 § 2680(a).  
328 Ibid 512.  
329 Ibid 507.  
331 *In re Joint Eastern and Southern District New York Asbestos Litigation* 897 F2d 626, 628 (2d Cir 1990).  
(ii) Constitutional torts: Bivens and § 1983 actions  Immunity for employees from Bivens or § 1983 actions may be absolute or qualified.³³³ Absolute immunity is granted for discretionary, judicial, prosecutorial, and legislative functions,³³⁴ while qualified immunity is granted for non-discretionary tasks or ministerial tasks,³³⁵ and protects conduct which ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known’.³³⁶ Of course, whether or not private delegates might enjoy these immunities from Bivens or § 1983 suits depends on whether or not they are subject to such suits in the first instance. As has already been discussed in Chapter Six, liability under § 1983 depends on whether the delegate can be found to have been acting ‘under color of state law’—which is equivalent to the ‘state actor’ test of the Fourteenth Amendment.³³⁷ Meanwhile, the scope of a Bivens action is generally restricted to federal employees and its applicability even to state officers, never mind private delegates acting under colour of federal law or in concert with federal employees, is limited.³³⁸ Bivens actions have also been held not to apply to private corporations operating correctional facilities.³³⁹ Given the difficulty of overcoming the ‘under color of state law’ hurdle under § 1983, and the narrow scope of Bivens, exposure of private delegates to this type of tort liability will probably not arise very often.

In the few cases where it has arisen, though, the Supreme Court has indicated a reluctance to extend immunity to private delegates.³⁴⁰ Even functional equivalency between the private delegate and the governmental actor has not persuaded the Court to grant immunity. In Richardson v McKnight³⁴¹ it was held, in a five-to-four decision, that employees of a privatized prison were not to be granted the qualified immunity from suit available to governmental officials, although the Court left open the possibility of a ‘good faith’ defence being available to such employees.³⁴² Rather than relying on the functional equivalency between the private and governmental prison guards, the Court based its decision on the policy underpinnings of the immunity, to determine if similar policy considerations

³³³ Davis and Pierce (n 319) 1398.
³³⁴ Ibid 1398, 1398–1410.
³³⁵ Ibid 1411.
³³⁷ The requirement of acting ‘under color of state law’ in § 1983 is given the same meaning as ‘state action’ in the Court’s Fourteenth Amendment jurisprudence: Rendell-Baker v Kohn 457 US 830, 838 (1982).
³⁴² Ibid 413.
applied to private contractors. It was reasoned that immunity was granted to governmental employees, who were working ‘within constitutional limits’ to ensure that they did not act with ‘unwarranted timidity’ in their fulfilment of governmental functions. Such a precaution was considered unnecessary for private actors, however, given the competitive environment in which they operated. The competitive environment meant:

not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement.

This analysis is problematic on a number of grounds. First, and most obviously, the Court was very quick to assume that the market provided the optimum level of incentive to prison guards to perform their tasks effectively—such that an added legal incentive, in the form of immunity, would be superfluous. As Morris has noted, though, ‘market pressures are unlikely to ensure vigorous job performance by individual prison guards who are subject to personal liability for constitutional violations’. The defendant in a § 1983 action is the individual employee—who is much less likely to be aware of market competition than her employer. Second, as noted above in Chapter Six, the Court in Richardson left open the question of whether private prison guards should even be considered to be ‘state actors’. Yet, clearly, this analysis presumes that they should not be, since it distinguishes them from state prison guards, who operate ‘within constitutional limits’. It is thought that private prison guards will not act with ‘unwarranted timidity’ since they do not have to worry about observing constitutional boundaries. Third, if, on the other hand, private prison guards are found to be state actors, the Court’s decision creates an inequality between governmental and private providers, by imposing a heavier burden on private providers, even though they possess powers and duties ‘indistinguishable’ from those of governmental counterparts. Fourth, and leading on from this, in principle, it would surely be preferable to seek equivalence in the treatment of private delegates and governmental actors in each area of the law, rather than trying to compensate for the inadequacies of one area, in this case, constitutional human rights protection, by distorting another, tort law immunities.

³⁴³ Ibid 410.
³⁴⁴ Ibid 408.
³⁴⁵ Ibid.
³⁴⁶ Ibid.
³⁴⁸ Ibid.
³⁴⁹ Above 6.3.1.1(c).
³⁵⁰ Although Richardson has subsequently been interpreted by lower federal courts to preclude this possibility: see, eg, Holly (n 340) 293.
³⁵¹ Richardson (n 341) 422 (Scalia J dissenting).
(b) State law
As a general matter, tortious liability of state governments and employees, and
the corresponding immunities, mirror their federal counterparts. Sabatino, for
instance, notes that more than half of the states have tort claim statutes that
expressly exclude independent contractors from the definition of public employ-
ees protected by statutory immunities—although the limited Boyle exception
has appeared in state law. Similarly, constitutional torts for violation of
’self-executing’ state constitutional provisions are available against state
employees, with only a few states refusing to recognize such a cause of action on
the basis of separation of powers concerns.

While, occasionally, principles of respondeat superior have been applied,
more commonly state governments are only held liable for constitutional viola-
tions undertaken pursuant to official policy, custom or practice and it is the state
employee who will be liable. Most states have developed a qualified immunity
doctrine in this context, similar to that available at the federal level under § 1983
or Bivens. Whether states provide immunity to private contractors for state
constitutional violations seems uncertain—in part, because many cases are
brought under the federal Constitution and § 1983, to which Richardson now
applies. In general, though, in this context, state law seems to follow federal law.

8.4.2.2 England
(a) Common law tort
In contrast with the US federal FTCA, in England, there are only a few, very
specific and limited immunities for governmental actors from suit in tort. As
a general matter, since 1765, governmental actors have been exposed to tortious
actions in the same way as private actors. Moreover, modifications of the sub-
stantive law to account for the governmental actor have all but been abandoned.
In negligence, for instance, distinctions between ‘planning’ and ‘operational’
decisions, with liability excluded for the former, or limitations to liability on
policy grounds,³⁶³ are no longer applied. The current state of the law seems to be that the exercise of a statutory discretionary power by a governmental actor will not preclude the existence of a duty of care in negligence, unless the court considers the issues involved in the exercise of discretion to be non-justiciable.³⁶⁴ The exercise of discretion will only be relevant in determining whether or not there has been a breach of the duty of care.³⁶⁵ Meanwhile, for nuisance claims, there is a defence of statutory or prerogative authority, which has been extended to protect not only the named party and her servants, but also her independent contractors³⁶⁶—although, even then, the governmental actor will be liable for any negligence caused by the independent contractor in pursuance of the authorized activity.³⁶⁷

There do not seem to have been any cases where the issue has arisen of whether government contractors should benefit in a negligence claim from the non-justiciability consideration or the accounting for exercise of discretion in determination of breach. First, given that the benefit seems only to extend to statutory discretionary power, it is unlikely to prove very relevant to private delegates: discretionary power is only sometimes granted directly by statute to private delegates, and any discretionary power granted through contract or grant will probably, at least in the light of the judicial review and administrative law jurisprudence discussed in Chapter Seven, be considered not to have a ‘statutory’ source.³⁶⁸ Second, in theory at least, one might hope that a situation where a private contractor would wish to benefit from the non-justiciability consideration would rarely arise—as, otherwise, the distinction between policy-making and policy-implementation, on which the legitimacy of private delegation often hinges, would have collapsed. This is because the non-justiciability consideration implies more than the mere exercise of discretion—but policy considerations the judges feel unsuited to evaluate.³⁶⁹

Third, setting aside the ‘statutory’ hurdle, if a private contractor were to benefit from having the discretionary aspect of the task considered in the determination of whether there was breach of a duty of care, it may be debatable whether the contractor should be permitted to claim limited financial resources as a justification for its particular discretionary choice, where it created the problem of limited financial resources itself, by tendering an unreasonably low bid for the contract. It would seem unfair to permit the contractor to reap the advantage of its own unreasonably low bid. Yet, on the other hand, determining whether the bid is so unreasonably low as to justify precluding the private contractor from making

³⁶⁴ Barrett v Enfield LBC [2001] 2 AC 550 (HL) 583.
³⁶⁶ Arrowsmith (n 299) 145.
³⁶⁷ Darling v AG [1950] 2 All ER 793 (Assizes) 797.
³⁶⁸ Above 7.4.3.1.
³⁶⁹ Barrett (n 364) 585.
its limited resources argument may involve the courts in the complicated task of determining whether the bid appeared reasonable at the outset—a question which they are clearly not well-placed to answer.

(b) Constitutional torts
Although this claim is not undisputed, arguably the English equivalent to the US § 1983 and Bivens actions is the new damages remedy available under section 8 of the HRA. There does not seem to be any question of immunities arising in this context, given that the aim of the section is to introduce a new basis for damages liability against the government. Moreover, unlike with the US § 1983 and Bivens actions, the defendant is the public authority or governmental actor—not the individual employee—and, consequently, the justification for an immunity jurisprudence is less pressing. Finally, as with the US actions, whether or not a private delegate can be liable for damages depends on its being found capable of violating human rights in the first instance.

8.4.3 European Union
As with human rights and administrative law obligations, damages liability in the EU scheme depends on whether the private delegate is a delegate of an EU institution or of a Member State. Article 288 provides that:

the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Traditionally, a distinction was drawn in the jurisprudence between administrative acts and legislative acts. With the former, the actor was liable if there was a ‘sufficiently flagrant violation of a superior rule of law for the protection of the individual’, causation, and damage; for administrative acts, all that was required was the existence of illegality, causation, and damage. Now, however, the Court has revised its case law such that the Francovich criteria, considered below, apply to Community damages liability. This means that the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach and the damage sustained.

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370 Above n 289. Given that the award of damages is discretionary (s 8, HRA), it has also been described as more akin to an equitable remedy: Oliver, ‘The Human Rights Act’ (n 3) 349.
371 Above 6.3.2.
It is clear from the wording of the Article that damages liability only applies against EU institutions and their servants. Thus a damages action may be taken against the Commission for selecting a private delegate in violation of the Financial Regulation. The principle of vicarious liability is very narrow and only applies to acts of servants which ‘are the necessary extension of the tasks entrusted to the institutions’. It would probably be even more difficult to find the Community liable in damages for the act of an independent contractor—although Hartley has suggested that the Community may be liable for acts delegated to third parties. In the case of *Worms v High Authority* at issue was the liability in damages of the Office Commun des Consommateurs de Feraille (‘OCCF’), a Belgian company, to which had been delegated contract negotiation duties in the context of the ferrous scrap equalization scheme. On the facts, it was held that because the OCCF’s duties did not ‘have the character of a public duty’ and were ‘exclusively commercial’, they could not give rise to liability on the part of the High Authority. However, the principle that the High Authority could be liable for the OCCF’s actions had they involved the functioning of the equalization scheme was clearly accepted. In other words, EU institutions may be held liable in damages for acts of delegates which have ‘the character of a public duty’.

If the Financial Regulation is carefully followed, and only ancillary or technical tasks are delegated to private delegates, the requirements of *Worms* may rarely be satisfied, in which case it would be preferable to rely on the Meroni doctrine to attach liability to the private delegate. The same reasoning would apply here as applies in the human rights and administrative law context: if the power of the Community institution is subject to damages liability, then the power of the private delegate should also be subject to damages liability. This is further justified by a need for uniformity of liability. For instance, if a private delegate was required to perform tasks in relation to the Lifelong Learning Programme in four different countries, and in each country its actions caused loss to citizens, if national law determined the issue, the delegate would be subject to varying liability in the different jurisdictions, even though the loss derived from the same source—performance of EU functions.

Where the delegate is a delegate of the Member State, acting in furtherance of EU objectives, it may be argued that its liability should be governed by the [380] .
Francovich principles, which mirror those for the damages liability of Community institutions. It is not clear whether a private delegate could be considered to be an arm of the state here—and the reasoning discussed in Chapter Six regarding the ECJ’s functional understandings of the ‘Member State’ and public authorities in other contexts is relevant.³⁸⁴ The Francovich obligation of reparation has been extended to autonomous bodies distinct from the state, to which legislative or administrative tasks have been delegated.³⁸⁵ However, it should be stressed that the ECJ only requires that the individual receive reparation: it is not concerned with and does not dictate which body should pay reparation.³⁸⁶ Thus, while it may find that damages liability should lie for the action of a private delegate if it considers the delegate to be part of the state, it will leave it up to the national institutions to determine whether the government or the private delegate actually makes the payment.

The Court has also held, in the case of Courage v Crehan, that damages may be available for private action in violation of EU competition law, and where an anti-competitive agreement caused loss it was reasoned that the effectiveness of the competition regime ‘would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition’.³⁸⁷ Whether the Courage principle will be extended beyond the competition sphere remains to be seen. In reaching its conclusion in Courage, the Court emphasized both the importance of competition law in achieving the goals of the internal market³⁸⁸ and the fact that the competition provisions were directly effective and created rights for individuals.³⁸⁹ The ECJ has also noted elsewhere that ‘the right to reparation is the necessary corollary of the direct effect of a Community provision whose breach caused the damage sustained’.³⁹⁰ Thus, for the private delegate of a Member State, it seems that damages liability for breach of EU law may also lie for violation of a directly effective EU provision.

8.5 Private Law Controls on the Delegate: An Overview

As far as contract law is concerned, the aim of this discussion has not been to undermine the potential for contract to replace, at least to some degree, public law mechanisms for control of private contractors, and it was hoped to avoid displaying a trait, that Freeman associates strongly with public law lawyers, of

³⁸⁴ Above 6.3.3.2 and 6.3.3.3(b).
³⁸⁶ Case C-302/97 Konle v Austria [1999] ECR I-3099 [63]–[64].
³⁸⁸ Ibid [20]. ³⁸⁹ Ibid [23].
³⁹⁰ Case C-46/93 Brasserie du Pêcheur SA v Germany [1996] ECR I-1029 [22]; see Craig and de Búrca (n 377) 263.
cynicism about the possibility of, what she describes as, ‘publicization’—or the extension of public values to private actors—through contract.⁵³ However, perhaps, in perpetuation of the lawyer-economist dichotomy, that may be this chapter’s conclusion. The reality is that use of contract to promote accountability, human rights, and democracy is a challenging task that is fraught with pitfalls. Contract design, in furtherance of accountability and efficiency, requires incredibly sensitive and accurate attention to detail, while human rights and democracy can only be furthered through the incorporation of meaningful third-party beneficiary rights. The goals of effectiveness and efficiency are often undermined by rigid application of the ultra vires rule, which can be disruptive of public services and off-putting for private contractors, although, in the English context, there is an increasing awareness of the need to address this problem. Complying with accountability, human rights, and democracy requirements is also demanding and costly, for both the government delegators and their private delegates. Given the voluntarism which underpins much of contract law, it seems very difficult to use contract to impose good contract design on government delegators, or human rights compliance on delegates. It would require a sincere willingness to serve the public, and self-discipline rarely witnessed, for private contractors to undertake such challenges voluntarily. With a limited capacity to coerce, it is submitted that contract law offers an unlikely candidate to breach the chasm left by traditional public law mechanisms in the context of delegation of governmental power to private actors.

Turning to tort law and the two questions raised—whether tort law provides a meaningful response to private delegation and whether private delegates should enjoy any immunities enjoyed by government—with regard to the first question, as a general observation, while accepting that the underlying values of tort law correlate with those underlying public law, it seems doubtful whether the specific remedies of tort law can provide an adequate substitute to holding private delegates subject to administrative law or human rights constraints. Consequently, it would be preferable to hold private delegates subject to public law, rather than relying on tort law to encourage accountability or human rights protection. That said, it would be a welcome development if the tort of misfeasance in public office were extended to reach private delegates, as this could provide a useful additional mechanism of accountability over private delegates.

As for the second question, in principle, it seems that private delegates should be entitled to equivalent treatment in tort actions to their governmental counterparts. One of the central rationales, underlying the immunity jurisprudence in the US, and the modification of the substantive law in England, is the risk of inhibiting governmental actors.⁵² As Judge Learned Hand put it, exposure to

⁵³ Freeman (n 178) 1318–22.
liability might ‘dampen the ardor of all but the most resolute, or the most irrespons-ible, in the unflinching discharge of their duties’.³⁹³ It is just as important to motivate private delegates to act in the ‘unflinching discharge of their duties’ as it is to motivate governmental delegates.

Furthermore, failure to extend governmental immunities or privileges to private delegates results in the recipients of services being treated unequally. This was a problem raised already in Chapter Six, in the human rights context; except here, the benefit falls to the recipient of the private delegate’s services, rather than the governmental recipient. The former enjoys a cause of action which the latter does not. As has been repeated often throughout this book, functional equivalency should suffice for equality of treatment between the private delegate and the governmental actor. While, mostly, that principle has been invoked to justify the application of new obligations to private delegates, in the form of human rights and administrative law obligations, in this context the principle would entail relieving private delegates of some of their burdens. Furthermore, while it may be tempting to argue that, given the frequently visible reluctance of the courts to extend public law obligations to private delegates, tort liability would be better than no liability—such an approach would only lead us to the unsatisfactory solution already identified in the US Richardson case.

³⁹³ Gregoire v Biddle 177 F2d 579, 581 (2d Cir 1949).