Deference in the Control of Contractual Powers

Joe Garry

A dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws (Honours) at the University of Otago – Te Whare Wānanga o Ōtākou.

October 2021

ACKNOWLEDGEMENTS

Thank you to Professor Nicola Wheen for your positivity, weekly meetings, clarity in ideas, and time spent helping me work through this project over the year.

Thanks to Mackenzie, Georgie and Dushanka for reading through this dissertation and providing helpful comments.

Finally, thank you to my friends and family for all of the support and shared experiences during my time at Otago.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS **2**

INTRODUCTION **5**

CHAPTER 1: DEFERENCE IN ADMINISTRATIVE LAW **8**

I INTRODUCTION 8

II DEFINING DEFERENCE IN ADMINISTRATIVE LAW 8

III THE APPROPRIATE LEVEL OF DEFERENCE 12

A Theoretical Perspectives *13*

B The Importance of Context *15*

C Conclusion *17*

IV THE CALIBRATION OF DEFERENCE THROUGH LEGAL DOCTRINE 17

A Doctrinal Deference *18*

B Implicit or Non-Doctrinal Deference *22*

V CONCLUSION 25

CHAPTER 2: RECOGNISING DEFERENCE IN CONTRACT **26**

I INTRODUCTION 26

II IMPLICIT VARIABLE DEFERENCE 28

A Orthodox Controls *29*

B The Default Rule *34*

C Good Faith *42*

D Conclusion *45*

III TOWARDS DOCTRINAL DEFERENCE 46

A Variable Reasonableness *46*

B Intensity of Good Faith *48*

IV CONCLUSION 50

CHAPTER 3: STRUCTURING CONTRACTUAL DEFERENCE 51

I INTRODUCTION 51

II UNRESOLVED ISSUES WITH DOCTRINAL DEFERENCE 51

A Effect of Different Intensities 52

B Reasons for Deference 54

C Relationship with Alternative Controls 57

III PLAUSIBILITY OF A DOCTRINAL DEFERENCE METHODOLOGY 59

A Balancing "Fairness and Certainty in Adjudication" 59

B Transparency 61

C The Boundaries of Public and Private Law 63

IV CONCLUSION 65

CONCLUSION 66

BIBLIOGRAPHY 67

INTRODUCTION

Contractual powers are pervasive.[1] Contrary to the "conventional image of a contract that fixes by agreement a set of precise rights and obligations," contractual powers are typical in most contracts.[2] The rationale for the inclusion of a contractual power is well explored in contract scholarship.[3] They serve as a "governance mechanism", allowing the parties to respond to future circumstances that were unforeseeable or difficult to prescribe at the time of formation.[4] The effect of the exercise of a contractual power is to alter the obligations within the contract, without requiring the variation of the terms of the agreement.[5]

There is a risk that such powers will be abused. An employer may fire someone without cause. The interest rate in a loan agreement may be set absurdly high. A trade unionist may be removed, and have their ability to work revoked, without fair process. This is particularly so where there are no express fetters in the terms of the power.[6] In response, the law has fashioned controls over the exercise of contractual powers. The imposition of fiduciary obligations, legislative interventions over consumer, employment, and tenancy agreements, as well as natural justice obligations on powers exercised by decision-makers in voluntary associations, serve as examples of such controls. Recent years have even seen the rise of judicial doctrines which control the exercise of contractual powers that are not confined to specific classes of contracts. Instead, there has been a growing adoption of

[1] See Stephen Kós "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17 at 19.

[2] Hugh Collins "Discretionary powers in contracts" in David Campbell, Hugh Collins and John Wightman (eds) *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing Ltd, Oxford, 2003) 219 at 219.

[3] See David Goddard "Long-Term Contracts: A Law and Economics Perspective" [1997] NZ Law Rev 423 at 426.

[4] Collins "Discretionary powers in contracts", above n 2, at 229.

[5] The exercise of a power could alter the obligations of the power-holder or the obligations owed by the other parties. See Collins "Discretionary powers in contracts", above n 2, at 229.

[6] Many powers will include express controls on their exercise. For example, a power may include a requirement it is exercised "reasonably". These express fetters enable the parties to expressly provide for *how* and *when* a power may be exercised.

general rules governing the exercise of many contractual discretions. However, these rules have generated significant uncertainty. The adoption of doctrines from administrative law such as *Wednesbury* unreasonableness, variable reasonableness, proper purpose, relevancy review, as well as developments in the various manifestations of good faith have provided little clarity as to the constraints on a contractual decision-maker.

This dissertation will examine the control of powers in the law of contract in light of the experiences of administrative law. Administrative law has a "structural relationship with power", with well-developed theories and curial techniques in relation to the supervision of decision-making.[7] An important concept developed in recent years has been the growing recognition of deference. This dissertation will identify that underpinning the control of powers in contract law is a similar need to determine the appropriate deference afforded to a contractual decision-maker. The curial techniques that control the exercise of powers in contract law involve a similar allocation of power between the courts and the primary decision-maker. Finally, it will comment on the growing recognition of doctrinal deference techniques in contract. It notes that, while there are significant issues with current approaches, doctrinal deference may provide a plausible model for the control of contractual powers.

Chapter 1 will survey the concept of deference in administrative law. Chapter 2 will subsequently demonstrate the manifestation of deference in contract. It draws on Dean Knight's work to demonstrate that, as in administrative law, deference is calibrated implicitly, through existing curial techniques, and explicitly through a growing movement towards techniques functionally equivalent to doctrinal deference. Chapter 3, in noting this trend towards doctrinal techniques, will suggest that doctrinal deference is a plausible model for the control of contractual powers, albeit with significant residual uncertainty regarding the specifics of any model to be adopted.

---

[7] Kit Barker "The Dynamics of Private Law and Power" in Kit Barker, Simone Degeling, Karen Fairweather and Ross Grantham (eds) *Private Law and Power* (Hart Publishing, Oxford, 2017) 3 at 3.

CHAPTER 1: DEFERENCE IN ADMINISTRATIVE LAW

I Introduction

This dissertation will explore how concepts of deference manifest in the control of contractual powers. It will draw on the scholarship from administrative law to suggest similar structural and theoretical techniques are involved in the control of powers in both fields.

It is necessary before examining the manifestation of deference in relation to contractual powers to survey concepts of deference in administrative law. In doing so, this chapter has three aims. First, to establish a definition of deference. Second, to establish the normative tensions influencing the degree of deference afforded to a decision-maker. Third, to examine the legal techniques used to structure the calibration of the degree of deference.

II Defining Deference in Administrative Law

It is difficult to establish a comprehensive definition of deference. The term is capable of various shades of meaning, and the terminological picture can become confusing.[8] There are various references to deference such as "epistemic", "doctrinal", "curial", and "due" within academic literature.[9] However, for these purposes, it is sufficient to understand deference in a broad sense. It is

[8] See Mark Elliott and Hanna Wilberg "Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature" in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 19 at 36; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Brookers Ltd, Wellington, 2021) at 960. See also Philip A Joseph "False Dichotomies is Administrative Law: From There to Here" (Presented to the Centre for Public Law, University of Cambridge, 21 November 2013) at 24.

[9] Lord Steyn "Deference: a Tangled Story" [2005] PL 346 at 350. Lord Steyn emphasised arguments about labels ought not to "fetter our substantive thinking". See generally Paul Daly *A Theory of Deference in Administrative Law: Basis Application and Scope* (Cambridge University Press, Cambridge, 2012); David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 279; Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337.

the legal phenomenon in which the court allocates decision-making power between itself and the primary decision-maker.[10] In supervising the exercise of powers, the court must calibrate the appropriate degree of control or supervision it is willing to exert over the donee of the power. This is often described as the degree of deference, or depth of scrutiny.[11]

Therefore, the *degree* of deference refers to the level of control exercised by the court over the holder of a power. This can be seen in the distinction between review of the process and merits of a decision. In relation to the process underpinning a decision, the courts generally defer far less than in relation to the substance of a decision. This is captured in the orthodox grounds of review, which are often recognised as providing an "off the shelf" intensity of review.[12] For instance, when interpretating the meaning of a statutory power, courts in most Common Law jurisdictions do not defer. They instead apply a correctness standard.[13] Taggart notes "the court decides what is the correct interpretation of statutory language or the state of the common law and imposes that on the inferior decision-maker."[14] It does not matter if the decision-maker had a different view of the meaning of the power. However, on other issues the court will defer to a decision-maker. In relation to the substance of a decision, a high level of deference is given to the decision made by the primary

---

[10] Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 101.

[11] Dean Knight has used different terminology to refer to this concept. He has recently employed the term "depth of scrutiny" to refer to levels of judicial control in Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018). See also Dean Knight "Mapping the Rainbow of Review" (2010) NZ Law Rev 393; Dean Knight "Judicial Review: Practical Lessons, Insights and Forecasts" (2010) VUW-NZCPL002.

[12] Knight "Mapping the Rainbow of Review", above n 11, at 413.

[13] North American courts will often defer on errors of law. See generally Paul Daly "The Struggle for Deference in Canada" in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 297; Antonin Scalia "Judicial Deference to Administrative Interpretations of Law" (1989) 3 Duke LJ at 511; *Chevron USA Inc v Natural Resources Defense Council* 467 US 837 (1984).

[14] Michael Taggart "Proportionality, Deference, *Wednesbury*" (2008)(3) NZ L Rev 423 at 451. Taggart expressed support for deference concepts in interpretation in Michael Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays in Honour of Lord Cooke of Thorndon* (Wellington, Butterworths, 1997) 189.

decision-maker.[15] The courts would traditionally require that the decision meets the high threshold of *Wednesbury* unreasonable before intervening.[16]

However, the deference afforded to a decision-maker may be calibrated expressly, or doctrinally, in the supervisory process.[17] This is often referred to as *doctrinal* deference.[18] This technique is evident through the development of variable intensities of unreasonableness review, which allows the threshold for judicial intervention to be varied depending on the circumstances.[19] However, deference as a *legal phenomenon* is not necessarily structured through doctrinal deference. In most Anglo-Commonwealth jurisdictions, deference manifests *implicitly* through existing judicial rules and principles.[20] Taggart notes "[i]f you look at what judges did, as well as at what they said they were doing, there was a good deal of deference."[21] Within the "variegated administrative landscape, accommodations of various sorts are made and ad hoc deference in this process was commonplace."[22] There have been various attempts to articulate the different levels of deference available to the court. Taggart's "rainbow of review" involved "two polar-opposite end points".[23] He suggested:[24]

> At one end lies full correctness review on fact and law (the right, correct, or preferable decision), and, at the other, lies no review at all on the ground of non-justiciability in the narrow sense of something that the court cannot (rather than will not) resolve by the application of legal norms. Both ends are off limits on judicial review for different reasons. In between,

---

[15] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 436; Mark Elliott and Hanna Wilberg "Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature", above n 8, at 36.

[16] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1947] 2 All ER 680 [*Wednesbury*].

[17] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 147 describes intensity of review as "the explicit calibration of the depth of review as a preliminary step in the supervisory process."

[18] Much of the literature distinguishes between deference as a doctrine and deference in a broader sense as a legal phenomenon. See Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 455.

[19] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 147.

[20] Knight "Mapping the Rainbow of Review", above n 11, at 413. Knight uses the language of "covert" variable intensity of review to refer to this idea.

[21] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 454.

[22] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 454.

[23] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 451.

[24] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 451.

> there is a continuum or spectrum of possible standards of review or intensities of review. I prefer to think of this as a "rainbow" (without the pot of gold at one end or the other!). As one moves along the rainbow - either towards greater or more intensive judicial review or away from it - the standards or intensities of review imperceptibly blur or merge into one another.

As noted, much of the time the deference is determined implicitly. The above example of the orthodox grounds of review reflects the implicit selection of the degree of deference afforded to a decision-maker through common law legal doctrine.[25] However, recent years have seen a growth of doctrines which allow the court to explicitly calibrate the level of deference afforded to a decision-maker in the circumstances.

Beginning with a recognition that deference exists as a broader legal phenomenon through the control of powers in administrative law, two issues can be identified. First, there is the normative question of the appropriate level or degree of deference. Second, there is the structural question of how the level of deference should be found or calibrated through curial techniques. These are distinct issues, as it is possible to agree on the *manner* of how deference should be determined while disagreeing on the appropriate degree of deference which should be afforded in the circumstances.[26] These issues will be the focus of the remainder of this chapter.

---

[25] Knight "Mapping the Rainbow of Review", above n 11, at 413.

[26] Knight emphasises this distinction in Knight Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 1. The focus of his book is the latter issue of the *manner* of determining the appropriate degree of judicial restraint. An example of this distinction can be drawn through contrasting the commentary of Elias CJ and Forsyth. Elias CJ, extrajudicially, has emphasised the value of unstructured judicial reasoning, while arguing for judicial vigilance against the abuse of power. In contrast, Forsyth has argued in favour of legal formalism in administrative law, while still supporting judicial vigilance, describing himself as a "red-light theorist". See generally Sian Elias "Administrative Law for 'Living People'" (2009) 68 CLJ 47; William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2004) at 6; Christopher Forsyth "Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law" (2007) 66 CLJ 325.

III The Appropriate Level of Deference

In some cases, the court will defer to a decision-maker. In others it will not. The issue of when a court should defer, and to what degree, is a question of when judicial control over the exercise of public power is normatively appropriate.[27] The corollary of this is determining when the court should practice restraint.

The judicial review of administrative action is secondary in nature.[28] The courts' role is to supervise the decision, without usurping the role of the decision-maker itself.[29] This principle was encapsulated by Lord Brightman, "[j]udicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made".[30] The calibration of the appropriate deference to afford to a decision-maker typically reflects this underlying theory. The court will generally defer, to an extent, on the merits of a decision, but not its process.

This distinction may be straightforward. In some cases, the supervisory process is as simple as determining the plain meaning of a statutory power against a decision made. However, difficulties arise in relation to wide discretionary powers.[31] Modern legislative drafting regularly provides decision-makers with powers constructed as widely as possible.[32] Nonetheless, it is well recognised

---

[27] Mark Elliott and Hanna Wilberg "Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature" above n 8, at 23.

[28] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 101.

[29] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 8.

[30] *Chief Constable for North Wales v Evans* [1982] 1 WLR 1155 at 1174, [1982] 3 All ER 141 at 155 (HL) as cited in Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 8.

[31] Wade and Forsyth *Administrative Law*, above n 26, at 286 designates a chapter to the abuse of discretion.

[32] Wade and Forsyth *Administrative Law*, above n 26, notes "[p]arliamentary draftsmen strive to find new forms of words which will make discretion even wider, and Parliament all too readily enacts them."

that the common law will control the exercise of such powers, reflecting the general principle that a statutory power is not left unfettered.[33]

It is the control of such discretionary powers where many of the primary normative tensions in administrative law around deference arise. The court must appropriately balance the desire to exercise control over such decisions, without usurping the role of the primary decision-maker.[34] The determination of whether, and to what extent, deference should be afforded is primarily driven by two factors. First, a theoretical attitude towards judicial intervention. This involves calibrating whether deference is appropriate, in general, and relates towards a broader theory of the purpose of judicial review. Second, the circumstances of the case before the court. The circumstances of the issue will naturally shape the basis for intervention.[35]

A Theoretical Perspectives

A theoretical perspective of the purpose of judicial review will shape when intervention by the courts is viewed as appropriate.[36] There have been extensive accounts of the competing normative tensions underpinning judicial review within academic literature.

Murray Hunt describes "radically opposed narratives of democratic positivism (rooted in the sovereignty of Parliament) and liberal constitutionalism (rooted in the sovereignty of the individual

---

[33] See Wade and Forsyth *Administrative Law*, above n 26, at 296-297; *Tower Hamlets London Borough Council v Chetnik Developments Ltd* [1988] 1 All ER 961 at 965-967.

[34] Henry Woolf, Jeffery Jowell, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review of Administrative Action* (8th ed, Sweet & Maxwell Ltd, London, 2018) at 593-597.

[35] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 643 framed two questions in relation to intensity of review: "To what extent should the courts allow a degree of latitude or leeway to the decision maker? And to what extent should it be uniform?"

[36] Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009) at 1 involves the famous quote "Behind every theory of administrative law lies a theory of the state."

and the courts' task in protecting that sphere)."[37] Democratic positivism sees excess judicial incursion as a threat to the collectivist aims of Parliament.[38] In contrast, liberal constitutionalism naturally emphasises the role of the courts in protecting the individual against democratic incursion.[39] The former points towards greater deference and a more limited role for the courts in the supervision of the exercise of public power. The famous traffic-light metaphor employed by Harlow and Rawlings epitomises the same tension.[40] A "red-light" theorist would advocate for greater intervention against the exercise of a discretionary power.[41] In contrast, a "green-light" theorist would advocate less intervention.[42] Similarly, Dean Knight adopts the language of "vigilance and restraint" to describe the competing themes within administrative law.[43] He suggests the "mediation of the balance between vigilance and restraint is a fundamental feature of judicial review of administrative action."[44] In Knight's view the theme of vigilance is:[45]

> […] driven by the desire to uphold the Rule of Law and to protect the rights, interests and expectations of citizens. The courts will strive to intervene and are more likely to substitute their view for the view of the decision-maker.

In contrast, the theme of restraint is:[46]

> […] based on the recognition of the separation of powers principle, and recognises the limits of judicial review. First, it acknowledges the constitutional allocation of power by the legislature to public bodies and officials. Courts are only charged with reviewing decisions, not making them (as Fordham describes it, "[t]he 'forbidden' method")." Secondly, it recognises the limits of the judicial function (public servants are often better equipped to grapple with certain questions than judges). Thirdly, it builds on the notion that judges are only but one of the many accountability mechanisms that control public

---

[37] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9, at 339; See also Dyzenhaus "The Politics of Deference: Judicial Review and Democracy", above n 9, at 280.

[38] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9.

[39] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9.

[40] Harlow and Rawlings *Law and Administration,* above n 36, at 1.

[41] Harlow and Rawlings *Law and Administration,* above n 36, at 23; See Wade and Forsyth *Administrative Law*, above n 26, at 4.

[42] Harlow and Rawlings *Law and Administration,* above n 36, at 31.

[43] Knight "Mapping the Rainbow of Review", above n 11, at 412. This language was adopted from Michael Fordham. See Michael Fordham *Judicial Review Handbook* (6th edn, Hart Publishing, 2012) at 270.

[44] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 257.

[45] Knight "Mapping the Rainbow of Review", above n 11, at 412.

[46] Knight "Mapping the Rainbow of Review", above n 11, at 412-413.

> power. These themes of restraint mean the courts will be cautious about intervening and give a reasonable amount of latitude (or deference) to the decision-maker's judgement.

There is, naturally, agreement that the court should exert some control over the supervision of powers in administrative review. However, there are differing theoretical perspectives towards the extent that courts should generally intervene in administrative decisions, and these drive the appropriateness of deference.[47]

B The Importance of Context

In addition to the general theoretical attitudes described above, it is well recognised that the appropriate deference or control exercised over a decision will vary depending on the circumstances. Knight describes how the theoretical tension between vigilance and restraint is "necessarily dynamic."[48] There are a variety of "actions, decision-makers and circumstances" that can arise which may warrant different levels of control.[49]

This is well illustrated in conventional administrative review doctrines. The requirements of natural justice will vary with the circumstances.[50] The proper openness of a decision-maker to persuasion under the rule against bias will vary depending on the situation.[51] In a broad sense, the need for discretion in the application of controls is well recognised in administrative law. Sir David Williams acknowledged "the application of the principles of administrative law can sensibly be considered only with the proper regard for the statutory, institutional and broader social or policy context of a

---

[47] In relation to theoretical attitudes in relation to the justiciability of government contracting decisions see Caleb O'Fee "A New Perspective on the Public-Private Divide? Justiciability of Government Contracting Decisions Following *Ririnui* and *Problem Gambling*" (2018) VUWLR 133 at 150-155.

[48] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 257.

[49] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 257.

[50] See generally Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 578; *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 141 (CA).

[51] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 611. At 634, Taylor notes the standard required of decision-makers in court-like environments different from decision-makers in bureaucratic or administration-like environments. The requirements for the former are much higher than the latter.

particular case."[52] The growth of statutory rights instruments has led to the recognition of a normative impetus for judicial control where rights have been interfered with. The unreasonable limitation of a right will now warrant judicial interference in most jurisdictions.

Furthermore, in recent years, there has been an increasing emphasis on institutional approaches to deference. [53] These approaches emphasise the relative institutional competence of the court assessing the decision in the circumstances.[54] Such approaches focus on the "comparative merits and drawbacks of the judicial process as an institutional mechanism for solving problems."[55] The normative value of judicial intervention is shaped by the institutional competence of the courts in the circumstance.[56] For example, Kavanagh identifies that a court may wish to defer where it is lacking "(a) institutional competence, (b) expertise or (c) institutional or democratic legitimacy."[57] Many decisions, such as those involving policy such as "decisions about the level of taxation or public expenditure", generally are not suited to high levels of judicial scrutiny.[58] In contrast, the interpretation of statutes is a field where the courts are relatively institutionally competent.

---

[52] DGT Williams "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in P Smith (ed) Criminal Law: Essays in Honour of JC Smith (London, 1987) 170 at 170 as cited in Sian Elias "Administrative Law for 'Living People'", above n 26, at 66.

[53] See Jeff A King "Institutional Approaches to Judicial Restraint" (2008) 28 OJLS 409.

[54] King "Institutional Approaches to Judicial Restraint", above n 53. King traces the origins of concepts of "relative institutional competence" at 422-423.

[55] King "Institutional Approaches to Judicial Restraint", above n 53, at 410.

[56] Many of these principles have been expressly developed and applied in relation to doctrinal deference techniques. However, for these purposes it is sufficient to recognise their value as indicating when intervention may be normatively appropriate.

[57] King "Institutional Approaches to Judicial Restraint", above n 53, at 424 citing Aileen Kavanagh "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in G Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, New York, 2008) at 190.

[58] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 593; See *Michalak v Wandsworth LBC* [2002] EWCA Civ 271; [2003] 1 WLR 617 at [41] per Brooke LJ "this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected Parliament, which has determined the manner in which public resources should be allocated for local authority housing."

There is significant commentary on where the judiciary is competent.[59] Such commentary naturally shapes the normative basis for judicial intervention and has become increasingly central to debates surrounding deference in administrative law in recent years.[60]

C Conclusion

This section has indicated the appropriate deference to a decision-maker in administrative law is generally shaped by two factors. First, a theoretical attitude towards the appropriate judicial role in undertaking review. Second, the context of the decision itself. These will naturally blur together somewhat. For instance, a general view of relative judicial competence will inevitably shape one's theoretical view of the appropriateness of judicial intervention.[61] However, the purpose of this section was to suggest that the normative impetus for deference will be shaped by both the broader theory, and the circumstances of the given case.

IV The Calibration of Deference through Legal Doctrine

The appropriate level of deference to be afforded to the exercise of an administrative power will be structured through judicial doctrine. Much of Knight's work has sought to map the "*manner"* in which the underlying normative balance is mediated through different judicial doctrines across the Anglo-Commonwealth.[62] Underpinning much of this work is a distinction between structures that

---

[59] See generally King "Institutional Approaches to Judicial Restraint", above n 53, at 410; Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 593-597; Daly *A Theory of Deference in Administrative Law: Basis Application and Scope,* above n 9; Hilary Biehler "Curial Deference in the Context of Judicial Review of Administrative Action Post-*Meadows"* (2013) 49 Ir Jur 29.

[60] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 257; King "Institutional Approaches to Judicial Restraint", above n 53.

[61] For instance, in King "Institutional Approaches to Judicial Restraint", above n 53, at 430-431, King describes "restrictive institutionalists" which favour general restriction "of courts whenever possible".

[62] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 1.

involve the explicit calibration of deference, or doctrinal deference, and those that involve the implicit determination of the level of deference to be afforded.[63]

A Doctrinal Deference

The doctrinal application of deference brings the issue of the degree of deference to the "foreground".[64] Knight describes how "the hallmark of this style of review is the explicit calibration of the depth of review as a preliminary step in the supervisory process".[65] Under such approaches, institutional factors are emphasised. In English-Welsh and New Zealand judicial review, doctrinal review has manifested itself in relation to substantive review. This is illustrated through unreasonableness review. The common law no longer requires a uniform standard of reasonableness.[66] Instead, the intensity of unreasonableness review may vary in the circumstances.

The conventional standard of unreasonableness followed the formulation by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* that the courts can only interfere if a decision "is so unreasonable that no reasonable authority that could ever come to it".[67] The formulation attempts "to convey the point that judges should not lightly interfere with official decisions on this ground."[68] It should be noted that reasonableness in *Wednesbury* may sometimes refer to relevancy review. Lord Greene's passage in *Wednesbury* includes two limbs:[69]

> [T]he court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters, which they ought not to take into account, or, conversely, have refused to take into account or neglected

[63] Knight distinguishes between "overt variable intensity of review" and "covert variable intensity of review". For these purposes intensity of review can be treated as akin to deference. See Knight "Mapping the Rainbow of Review", above n 11, at 413.

[64] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 147.

[65] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 147.

[66] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 646.

[67] *Wednesbury,* above n 16, at 683.

[68] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 598.

[69] *Wednesbury,* above n 16, at 685.

> to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.

The first limb focuses on the decision-making process.[70] The court reviews whether all relevant considerations have been taken into account and any irrelevant considerations have been discounted. The second limb focuses on the outcome of decision-making. Even if a proper decision-making process had been followed, the result may be so outrageous that no reasonable decision-maker could have reached it. The latter limb is often referred to as *Wednesbury* unreasonableness. For these purposes, references to *Wednesbury* unreasonableness refer to the latter limb or rationality review. References to the former limb will be described as "relevancy review".

The standard for *Wednesbury* unreasonableness was notoriously high. Lord Greene suggested intervention would require something "overwhelming".[71] He suggested the example of dismissing a teacher for their red hair as such an example.[72] However, this is no longer the sole standard. In English-Welsh law, there is now a "sliding scale of review".[73] The context of a decision will influence the standard of reasonableness which is applied. Typically, the court identifies relevant factors which may inform a greater or lesser intensity of review, and taking those factors into account, undertakes a balancing exercise to determine the appropriate standard of reasonableness.[74] If a "fundamental right or important interest" is interfered with, a higher level of review may be applied.[75] In such circumstances, courts in England and Wales have applied a "heightened scrutiny", lowering the

---

[70] See *Braganza v BP Shipping Ltd; The British Unity* [2015] UKSC 17 [*Braganza*] at [24] per Lady Hale.

[71] *Wednesbury,* above n 16, at 683.

[72] *Wednesbury,* above n 16, at 683. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 [*CCSU*] at 410, Lord Diplock preferred the label "irrational" describing the ground as requiring a decision "so outrageous in its defiance of logic or accepted moral standards that no sensible person could have arrived at it."; See also Richardson P's formulation in *Wellington City Council v Woolworths New Zealand Ltd* (No 2) [1996] 2 NZLR 537 (CA) at [13].

[73] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 646; See also Paul Craig "Judicial Review and Anxious Scrutiny" (2015) PL 60.

[74] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 184.

[75] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 646.

threshold for judicial intervention.[76] There is still some deference afforded to a decision-maker, but a greater level of justification is required in such cases.[77] Furthermore, even where there is a fundamental right or interest interfered with, countervailing factors may point against a higher level of review.[78]

At the other end of the spectrum, English-Welsh courts have recognised that some circumstances may require an even higher threshold for judicial intervention than *Wednesbury* unreasonableness.[79] This has been referred to as "light touch review".[80] In *Nottinghamshire City Council v Secretary of State for the Environment,* Lord Scarman said a funding formula was not "open to challenge on the grounds of irrationality short of the extremes of bad faith, improper purpose, or manifest absurdity."[81]

Other Anglo-Commonwealth jurisdictions have expressed differing levels of support for variable intensity of reasonableness review.[82] The application of variable unreasonableness is now commonplace in the High Court, albeit with less endorsement at higher levels.[83] In *Wolf v Minister of Immigration,* Wild J endorsed the concept of a sliding-scale of unreasonableness, stating "the time has come to state – or really to clarify that the tests for unreasonableness […] are not, or should no

[76] See *R (Bugdaycay) v Secretary of State for the Home Department* [1987] AC 514 at 531.

[77] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 647.

[78] *R (Smith) v Ministry of Defence* [1996] QB 517 at 556 where, despite the case concerning the right of gay and lesbian people to participate in the military, other factors in the circumstances pointed towards a relatively deferential approach.

[79] *Wednesbury,* above n 16.

[80] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 648.

[81] *Nottinghamshire City Council v Secretary of State for the Environment* [1986] AC 240 at 247.

[82] For a comparative perspective see Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 651-671. It should be noted Australia has a constitutionally entrenched separation of judicial power which has ensured considerable caution in the application of substantive review. See Michael Taggart "'Australian Exceptionalism' in Judicial Review" [2008] FedLawRw 1.

[83] See MB Rodriguez Ferrere "An Impasse in New Zealand Administrative Law: How did we get here?" (2017) 28 PLR 310.

longer be, the invariable or universal tests […] applied in New Zealand public law."[84] He suggested a multi-factorial approach to the determination of the intensity of review in the circumstances:[85]

> Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them. This is a rather long-winded way of saying, as Lord Steyn so succinctly did in *Daly*: "In administrative law context is everything."

Doctrinal deference techniques are not limited to reasonableness review. In Canada, the explicit calibration of intensity of review is available in relation to the substantive exercise of discretion, but also to error of law issues.[86] When undertaking an analysis of the proportionality of a rights limitation, courts will often incorporate doctrinal deference techniques into the review process. The United Kingdom has well developed jurisprudence regarding doctrinal deference.[87]

In *Hansen v R,* Tipping J recognised doctrinal deference techniques in New Zealand, suggesting "there is a spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other."[88] In cases, where a higher intensity is appropriate "the court's role will approach a simple substitution of its own view".[89] Tipping J's analysis mirrors a normative assessment of relative institutional competence, bringing it to the forefront of legal reasoning.[90]

---

[84] *Wolf v Minister of Immigration* [2004] NZAR 414, at [47].

[85] *Wolf v Minister of Immigration*, above n 84, at [47].

[86] See generally Daly "The Struggle for Deference in Canada", above n 13; Sian Elias "The Unity of Public Law?" in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law: Doctrinal, Theoretical and Comparative Perspectives* (Hart, Oxford, 2018) 15.

[87] See generally *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at paras [27]–[28]; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100; and the discussion in *R v Hansen* [2007] 3 NZLR 1 per Tipping J at [113]-[119].

[88] *R v Hansen,* above n 87, at [116].

[89] *R v Hansen,* above n 87, at [124].

[90] *R v Hansen,* above n 87, at [131], Tipping J expressly adopts the language of institutional competence when considering the appropriate level of deference in the circumstances.

B Implicit or Non-Doctrinal Deference

The deference afforded to a decision-maker need not be calibrated explicitly through doctrinal deference techniques. It is commonplace for deference to be calibrated implicitly through established curial techniques.[91] It was noted above that the orthodox grounds of review reflect "off the shelf" intensities of review, primarily reflecting the foundational distinction between the process and merits of a decision in administrative law.[92] The court will not defer on issues of legality or procedural impropriety. In relation to procedural impropriety, Knight suggests the courts:[93]

> …feel comfortable and empowered to address questions of process and are extremely vigilant to ensure that the hearing and deliberation processes are faithfully observed, particularly where the process in issue is similar to a court-like process. The courts are careful to ensure the decision-maker has provided a fair hearing and the decision is not tainted by bias.

In contrast, the orthodox standard of *Wednesbury* reasonableness review involves a high level of deference.[94] The concern is that the court "must not substitute itself for that authority."[95] Thus, the categorisation of a decision within the grounds of review implicitly calibrates the level of deference afforded to a decision-maker.

However, this distinction is not the only curial technique by which deference is structured.[96] Another technique which structurally calibrates the deference afforded is the categorisation of a decision as non-justiciable.[97] There may be factors which indicate a decision should not be reviewable at all. If a decision is not in substance public and without public consequences, without a sufficient legal

---

[91] Knight "Mapping the Rainbow of Review", above n 11, at 413.

[92] Knight "Mapping the Rainbow of Review", above n 11, at 413.

[93] Knight "Mapping the Rainbow of Review", above n 11, at 414.

[94] *Wednesbury,* above n 16.

[95] *Wednesbury,* above n 16, at 682.

[96] See Richard Rawlings "Modelling Judicial Review" (2008) 61 CLP 95.

[97] Knight "Mapping the Rainbow of Review", above n 11, at 424; Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 101, categorises non-justiciability as a type of "intensity of review"; Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 644.

yardstick, or too high in policy content, this may indicate review is inappropriate.[98] A finding of absolute non-justiciability reflects the highest possible level of deference in administrative law. There is no room for judicial control of that decision through judicial review in administrative law.

In some cases, rather than finding a decision is absolutely non-justiciable, the courts have applied "circumscribed" grounds of review.[99] In *Mercury Energy Ltd v Electricity Corporation of New Zealand* the Privy Council held decisions by State-Owned Enterprises were non-justiciable in the absence of "fraud, corruption or bad faith."[100] Circumscribed grounds of review, as well as forms of light-touch unreasonableness, maximise judicial deference or restraint without completely removing the possibility of judicial control.

Despite the lack of an express calibration of the deference to be afforded to a decision-maker in the circumstances, there is still room for variability. Knight has described how judicial discretion within orthodox curial doctrines enable the intensity of review to vary in the circumstances, describing it as "covert" variable intensity of review.[101] He suggests that an assessment of legality and procedural propriety, while applying a correctness standard, provides judicial discretion to vary the deference to the decision-maker in the circumstances.[102] When assessing whether a decision was made for proper purpose, the court has discretion whether to construe the purpose of an empowering provision broadly or narrowly.[103] Similarly, the court has discretion when determining if a consideration is

---

[98] See *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1; *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 at [12]; *Curtis v Minister of Defence* [2002] 2 NZLR 744 at [22] and [27].

[99] See Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 100.

[100] *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385, 391. See also *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 in relation to prosecutorial decisions.

[101] Knight "Mapping the Rainbow of Review", above n 11, at 413.

[102] Knight "Mapping the Rainbow of Review", above n 11.

[103] Knight "Mapping the Rainbow of Review", above n 11, at 417. Knight suggests "when divining the purpose of legislation, the courts face a choice. They can construe the purpose in broad or narrow terms. In practical terms, a broadly

mandatory, relevant, or irrelevant.[104] In doing so, the court can exercise greater or lesser control in how they define such considerations. Similarly, the deference afforded in relation to issues of natural justice will vary.[105] This reflects the inevitably contextual nature of a finding of improper process.[106]

The degree of variability in the deference afforded will depend on the judicial discretion afforded within the relevant doctrine. Many of the strict formal categories established in early administrative law have been abolished or are of weakening importance.[107] Others wish to go further.[108] They emphasise the contextual nature of the assessment of any judicial issue, which requires a necessarily discretionary response to the needs of the circumstances.[109] Many see structured reasoning, including types of doctrinal deference, as insufficiently flexible to respond to the context of a decision.[110] Similarly, TRS Allan suggests "[t]he only proper question for the court is simply whether or not the decision falls within the sphere of decision-making autonomy that the claimant's right, on its correct interpretation, allows."[111] However, others such as Taggart have suggested such an approach could collapse into correctness analysis, treating the courts as "independent scrutineer[s]".[112] Knight emphasises that such contextual techniques involve "covert" calibrations of the intensity of review, but without the express recognition of the underlying normative deference principles involved in a

---

defined purpose leads to more restrained review; a narrowly set purpose inevitably leads to greater, more vigilant scrutiny of a public body's or official's actions."

[104] See Hanna Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide" in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 263.

[105] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 578, begins the chapter on natural justice emphasising this point by suggesting "the stronger the factors pointing towards natural justice, the greater the content of natural justice is going to be."

[106] Knight "Mapping the Rainbow of Review", above n 11, at 418.

[107] See Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11.

[108] See Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) 55.

[109] Philip A Joseph "Exploratory Questions in Administrative Law" (2012) 2 NZULR 75 at 74.

[110] Philip A Joseph "Exploratory Questions in Administrative Law" (2012), above n 109, at 79.

[111] TRS Allan "Human Rights and Judicial Review: A Critique of "Due Deference"" (2006) 65 CLJ 671 at 269.

[112] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 456.

doctrinal deference calibration.[113] Taggart seemingly agreed, suggesting "in judicial review contextualism and deference mean much the same thing.[114] You really cannot have one without the other, and this is where some of the English judges are mistaken."[115]

V Conclusion

This chapter has examined the concept of deference in administrative law. An important distinction should be noted in the above analysis. The latter part of this chapter explored the judicial techniques which structure the appropriate deference to be afforded to a decision-maker. It noted the growing recognition of doctrinal deference within substantive review as a possible mechanism for structuring such an analysis. However, the first part of this chapter discussed the underlying normative tensions involved in the calibration of the appropriate deference. This involves a distinction between *how* the level of deference should be calibrated, and *what* level of deference is appropriate. One relates to the *structure* of the law, and the other to *theory* regarding when judicial intervention is appropriative. This distinction remains relevant for the examination of how deference is calibrated in the control of contractual powers, which will be the focus of the remainder of this dissertation.

[113] Knight "Mapping the Rainbow of Review", above n 11.

[114] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 454.

[115] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 454.

CHAPTER 2: RECOGNISING DEFERENCE IN CONTRACT

I Introduction

The aim of the previous chapter was to explore the administrative law scholarship surrounding deference, and its manifestation in the control of powers. It identified that deference is the legal phenomenon in which the court calibrates the appropriate level of control over a decision-maker in administrative law. It suggests underpinning an analysis of deference are two distinct issues. First, the normatively appropriate judicial role in the circumstances. This involves an assessment of the *degree* of deference, or depth of scrutiny, to afford to a decision-maker in the circumstances. Second, the curial techniques which determine the *manner* in which the appropriate level of deference is ascertained.[116] These techniques may include doctrinal deference techniques, but typically include other legal doctrines which involve an implicit determination of the level of control that the court should exercise.

The remainder of this dissertation will examine the control of powers in light of these ideas developed in administrative law. The extent and nature of controls placed on the exercise of contractual powers is uncertain. Recent years have seen an expansion in the supervisory role of the court in placing controls over the exercise of such powers. However, the appropriate manifestation, and extent of these controls are controversial. Orthodox techniques have given way to fashionable concepts of *Wednesbury* unreasonableness, good faith, and even movements towards doctrinal deference techniques. Underpinning this disagreement, as in administrative law, are two issues. First, the appropriate level of control over the exercise of powers in the wide range of circumstances that contractual relationships arise. Second, the appropriate curial techniques which structure the imposition of such controls.

[116] See Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 1.

These issues can clearly be placed in language familiar to administrative lawyers. Underpinning the control of powers in contract is the calibration of the appropriate level of deference to afford to a decision-maker. For these purposes, as in administrative law, deference refers to the legal phenomenon in which the courts calibrate the breadth of discretion afforded to a contractual decision-maker. It could alternatively be framed in the language of intensity of review, or depth of supervision, or level of control.[117] The courts' role when exercising control over the exercise of a power is to determine when it is appropriate to intervene. Naturally, in some cases, the court will not defer at all. The interpretation of a contract requires the court alone to ascertain its objective meaning.[118] In doing so, it applies a correctness standard. In other cases, it will be viewed as inappropriate to control the exercise of powers, and the court will defer completely. For instance, there may be valid reasons that a termination clause is left unfettered in many contractual relationships.[119] However, where a power has been exercised ostensibly within the express words of the power, the court must determine if any controls over the exercise of the power are necessary, and if so of what nature. In such cases, the court must inevitably determine whether it should defer to a decision-maker.

From this foundation, this chapter will map the development of contractual controls through the concept of deference. It will outline how deference is calibrated through mapping the various controls over contractual powers across the terrain of contract law. In doing so, it draws from

---

[117] See *Braganza*, above n 70, at [56], where Lord Hodge employed the language of "intensity".

[118] See *Investors Compensation Scheme Ltd v West Brunswick Building Society* [1998] 1 WLR 896 at 912-913, per Lord Hoffmann. See generally *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 at 133 per Cooke J, where, in the context of administrative law, Cooke J arguably suggests the interpretation of written texts is as a primary constitutional function of the judiciary:"[T]his is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity".

[119] See generally Collins "Discretionary powers in contracts", above n 2, at 231. Collins suggests an unfettered right of termination may be desirable for commercial parties. For an alternative perspective see Richard Hooley "Controlling Contractual Discretion" (2013) 72(1) CLJ 65.

Knight's work in the administrative law context to suggest there are two categories of judicial technique which can calibrate deference.[120] First, implicitly through the various doctrines in contract which place various levels of control over a decision-maker. It notes that the deference afforded to a decision-maker through such controls will vary in the circumstances, even if not expressly acknowledged. Second, approaches functionally analogous to doctrinal deference in administrative law, wherein the court explicitly determines the appropriate intensity of controls to place upon a decision-maker. It will suggest there is a growing trend towards the overt calibration of the deference which should be afforded to a decision-maker in contract. This may not be couched in in the language of deference, but there is a remarkable similarity between the functional effect of such techniques across the two fields of law. However, as Knight notes in the context of administrative review, this is not the only way in which deference manifests, and the predominant methodology for determining the degree of deference in contract is through an implicit approach. The manifestation of "variable intensity is not confined to the developments […] under the banner headline of variable intensity per se. The judicial methodology of variable intensity is more deeply imbedded in our system of judicial culture, albeit more covertly."[121] The same is true for contract. The purpose of this chapter is to outline a similar conceptual methodology within the control of contractual decision-makers.

II Implicit Variable Deference

The degree of deference afforded to a decision-maker is ordinarily determined implicitly through judicial doctrines which set the level of control in the circumstances. This section will explore these techniques which determine the level of deference without explicitly setting the level of control. In doing so, it will first examine the orthodox techniques for the control of powers in contract. It will then examine the modern techniques which have provided greater scope for judicial control.

[120] Knight "Mapping the Rainbow of Review", above n 11.

[121] Knight "Mapping the Rainbow of Review", above n 11, at 397.

A Orthodox Controls

The historical starting point in the law of contract was the general rule that the common law did not place fetters on the exercise of powers.[122] As Beatson explains, "[o]ne of the hallmarks of English common law is that it does not have a doctrine of abuse of rights: if one has a right to do an act then, one can, in general, do it for whatever reason one wishes."[123]

However, this is merely the starting point of the common law. Contract law has always imposed a variety of controls on the exercise of powers across the broad field of contractual relationships.[124] First, there are general construction techniques which place limits on the exercise of powers. In many cases, parties include requirements stating *how* and *when* a power may be exercised.[125] In others, terms may be implied in fact. Typically, terms implied in fact are there to cover situations where there is a gap that may risk undermining the functionality of a contract.[126] The orthodox criteria for the implication of a term in fact was set out by the Privy Council in *BP Refinery (Westernport) Proprietary Limited v The President, Councillors and Ratepayers of the Shire of Hastings* by Lord Simon:[127]

---

[122] *Allen v Flood* [1986] AC 1; *Bradford v Pickles* [1895] AC 587 (HL); *Chapman v Honig* [1963] 2 QB 502 at 552. In *Chapman v Honig,* Pearson LJ, at 552, suggested (compare Lord Denning MR's dissent) a "person who has a right under a contract or other instrument is entitled to exercise it and can effectively exercise it for a good reason or a bad reason or no reason at all."

[123] Jack Beatson "Public Law Influences in Contract Law" in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1997) 263 at 266-267; See also Michael Taggart *Private Property and the Abuse of Rights in Victorian England: The Story of Edward Pickles and Bradford Water Supply* (Oxford University Press, Oxford, 2002).

[124] See generally PS Atiyah *The Rise and Fall of Freedom of Contract* (1st ed, Oxford University Press, Oxford, 1979); Jack Beatson and Daniel Friedman "Introduction: From 'Classical' to Modern Contract Law" in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1997) 3; Michael Trebilcock *The Limits of Freedom of Contract* (HUP, Harvard, 1985).

[125] For a discussion of the different types of contractual powers see David Foxton "Controlling Contractual Discretions" (Address to the Attorney General's Chambers, Singapore, 9th January 2018).

[126] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 216.

[127] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at [40].

> for a term to be implied, the following conditions (which may overlap) must be satisfied:
>
> > 1) it must be reasonable and equitable;
> > 2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
> > 3) it must be so obvious that "it goes without saying";
> > 4) it must be capable of clear expression;
> > 5) it must not contradict any express term of the contract.

The test restated earlier common law articulations of the business efficacy and officious bystander test.[128] It requires a high threshold of "necessity" for the imposition of controls.[129] Nonetheless, there are many examples of the courts regularly imposing controls through terms implied in fact. For instance, many powers have been construed as subject to implied terms that they are exercised in a reasonable time,[130] or with reasonable cooperation and discussion.[131] However, the test reflects the premium placed on the express words of the agreement as an objective signal of the party's intention.[132] Naturally, "the most usual inference to be drawn from a gap is that nothing at all was intended."[133] Thus, the courts typically deferred to the power-holder exercising a power within the boundaries of a contract's express terms, unless there was obvious reason to suggest the parties would reasonably expect a term which imposed control over the power.

The second orthodox technique for judicial control was through a variety of obligations placed on decision-makers in certain classes of contractual agreements. These are widespread across many types of agreement, and derive from common law, statutory and equitable sources to impose controls over such contracts.

---

[128] See *The Moorcock* (1889) 14 PD 64 (CA); *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206; E W McKendrick "Implied Terms" in HG Beale (gen ed) *Chitty on Contracts: Volume 1: General Principles* (33rd ed, Sweet & Maxwell, London, 2018) at 1099.

[129] See McKendrick "Implied Terms", above n 128, at 1105; *Marks & Spencer v BNP Paribas* [2015] UKSC 72 at [23].

[130] *Hick v Raymond and Reid* [1893] AC 22 HL.

[131] *Mackay v Dick* (1881) 6 App Cas 251; *Devonport Borough Council v Robbins* [1979] 1 NZLR 1.

[132] *Ward Equipment Ltd v Preston* [2017] NZCA 444 at [90].

[133] *Ward Equipment Ltd v Preston*, above n 132, at [90] per Kós P paraphrasing Lord Hoffman in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 at [17].

In many contracts, the recognition of the relationship as imposing fiduciary obligations was an important control technique.[134] Equity has long imposed fiduciary obligations where one party has "has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."[135] Many powers, classified as fiduciary powers were granted for an "entrusted purpose".[136] There impose stringent duties and obligations, with the exercise of such powers heavily regulated.[137] Common examples of fiduciary duties supplementing the exercise of contractual powers include company directors, partners, solicitors, and those exercising many financial instruments. These duties generally include duties of loyalty, which may include a requirement not to profit, to get into a position where their interest and duty may conflict, though the scope or existence of such duties varies in the circumstances.[138]

In other cases, the exercise of power vested in members of voluntary associations is typically subject to significant judicial control in contract.[139] It is well settled that associations exercising disciplinary powers are required to comply with the principles of natural justice, even where the rules do not expressly provide for them.[140] In *Dawkins v Antrobus,* Lord Justice Brett determined the validity of an expulsion from a men's club "If a decision was come to depriving a gentleman of his position on such a charge as must be made out here in my opinion there would be a denial of natural justice if a

---

[134] See PD Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977); Beatson "Public Law Influences in Contract Law", above n 123, at 273.

[135] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at p 18 per Millett LJ; See also *Chirnside v Fay* [2006] NZSC 68.

[136] See Foxton "Controlling Contractual Discretions", above n 125, at 1.

[137] Geraint Thomas *Thomas on Powers* (2 ed, Oxford University Press, Oxford, 2012).

[138] Burrows, Finn and Todd *Law of Contract in New Zealand,* above n 126, at 26-27.

[139] Generally unincorporated societies constitute a contract between its members (*Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 149 (CA) at 177) and incorporated societies constitute a contract between the society and the members, rather than between the members themselves (*Peters v Collinge* [1993] 2 NZLR 554 at 557). See also *Tamaki v Māori Women's Welfare League Inc* [2011] NZAR 605 (HC) at [55]; See also BT Brooks "*Expulsion from Private Associations in New Zealand*" (LLM, University of Canterbury, 1968).

[140] *Henderson v Kane and the Pioneer Club* [1924] NZLR 1073 (SC) at 1076.

decision was come to without his having an opportunity of being heard."[141] The requirements of natural justice vary in the circumstances.[142] However, there is generally a "very strong assumption that in certain circumstances, and in the absence of clear indications to the contrary, it will be assumed that the parties intended that natural justice would apply."[143] Nonetheless, it is generally accepted the implication of such terms is done to reflect the social reality of such membership bodies.[144]

Furthermore, in *Tamaki v Māori Women's Welfare League Inc,* Kós J held that the Māori Women's Welfare League constitution was imbued with "values and customary practices that will not be written within the four corners of the document itself. Those values and practices are part of the tikanga of the League and are to be respected as much as the constitution is."[145] He held the exercise of a power to set up new branches was in breach of the tikanga of the league, despite being within the express words of the powers of the constitution.[146] In that case, the exercise of powers were controlled by the implied background of the agreement.

The above examples typically related to instances where a power was held in the interests of others.[147] The powers of a voluntary association are held in the interest of the members, and fiduciary powers are entrusted for a specific fiduciary purpose. However, powers were still imposed on classes

---

[141] *Peters v Collinge,* above n 139, at 566.

[142] *Peters v Collinge,* above n 139, at 567. Fisher J suggested "[e]xpulsion from an organisation essential to one's trade or livelihood, or a finding of unethical professional conduct, is not to be approached in the same light as a refusal to send a bridge club member to a regional bridge tournament."

[143] *Tamaki v Māori Women's Welfare League Inc,* above n 139.

[144] Brooks "*Expulsion from Private Associations in New Zealand*", above n 139, at 5.

[145] *Tamaki v Māori Women's Welfare League Inc,* above n 139, at [8].

[146] *Tamaki v Māori Women's Welfare League Inc,* above n 139, at [69]-[71]; See Simon Connell "Unwritten Constitutions of Incorporated Societies: A Critical Examination of the Treatment of Tikanga in *Tamaki v Māori Women's Welfare League Inc*" (2011) 12(3) Otago Law Review 605.

[147] Beatson "Public Law Influences in Contract Law", above n 123, at 274.

of relationships even where the powers were not held for others, but where the donee was entitled to exercise them in their self-interest.[148] These could be regulated through common law, statute, or equity, or a combination. Many relationships such as landlord-tenant,[149] employer-employee,[150] retailer-consumer,[151] are now subject to extensive mixes of controls.[152] In recent years, it has been suggested there has been a "conscious shift from a paradigm of contractual freedom to one concerned with redressing power imbalances, and sustaining economically and socially valuable relationships", particularly within the employment sphere, which is heavily regulated at common law and now through statute.[153] Many legislative regimes require contracting parties to act in good faith.[154] Similarly, credit regimes typically include mandatory terms which govern the exercise of powers. For instance, the Credit Contracts and Consumer Finance Act 2003 allows the court to alter the terms of credit contract if it intends to exercise a power in an "oppressive" manner.[155] Similar legislative implied terms fetter the exercise of contractual powers across most jurisdictions.[156]

The above discussion indicates the primary mechanism for the control of contractual powers was through the identification of a relationship as fitting into a specific category. In such cases the

---

[148] Beatson "Public Law Influences in Contract Law", above n 123, at 274.

[149] Residential Tenancies Act 1986; Property Law Act 2007, s 243.

[150] Employment Relations Act 2004. At common law see *Malik v BCCI* [1998] A.C. 20.

[151] Fair Trading Act 1986.

[152] See Hugh Beale "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts" in Jack Beatson and Daniel Friedman (eds.) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1997) 231.

[153] Jason NE Varuhas "The Socialisation of Private Law: Balancing Private Right and Public Good" (2021) 137 LQR 141 at 155.

[154] In New Zealand, there are good faith obligations implied by statute in all employment and insurance contracts. See Employment Relations Act 2004, s 4.

[155] Credit Contracts and Consumer Finance Act 2003, s 120. Section 120 allows the court to reopen a contract if "a party has exercised, or intends to exercise, a right or power conferred by the contract, lease, or transaction in an oppressive manner". See *Greenback New Zealand Ltd v Haas* [2003] 3 NZLR (CA), at [24] per Tipping J. Tipping J defined oppressive as something "in contravention of reasonable standards of commercial practice."

[156] See Hugh Beale "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts", above n 152; Consumer Credit Act 1974 (UK); the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (UK).

available controls could be extensive. However, if a relationship was not of a certain nature, requiring the implication of terms imposing controls, the default setting was absolute deference to the decision-maker where the power was exercised within its express terms. It was possible to imply terms in fact, but a claimant faced a difficult threshold to demonstrate the existence of a term imposing such controls. Thus, the deference afforded to a decision-maker can be described as primarily determined through the categorisation of the relationship itself.

B The Default Rule

A position of default judicial restraint where a contractual power is exercised no longer describes the common law. There has been a growing movement towards default controls over the exercise of contractual powers in a greater variety of contexts. These have primarily arisen through two overarching approaches. First, the common law has developed a default rule which governs the exercise of certain discretionary contractual powers.[157] Second, there is increasing recognition of a duty of good faith as an obligation upon contracting parties.

The first technique has been the development of the default rule at common law. The *locus classicus* statement of the "default rule" was articulated by Leggatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd* as follows:[158]

> For purposes of judicial review the Court is concerned to judge whether a decision-making body has exceeded its powers, and in this context whether a particular decision is so perverse that no reasonable body, properly directing itself to the applicable law, could have reached such a decision. But the exercise of judicial control of administrative action is an analogy which must be applied with caution to the assessment of whether a contractual discretion has been properly exercised. The

---

[157] Kós "Constraints on the Exercise of Contractual Powers", above n 1, refers to the rule as the "default rule". See in New Zealand, *Bos Internatonal (Australia) Ltd v Strategic Nominees Ltd (in receivership)* [2013] NZCA 643; *Todd Pohokura Ltd v Shell Exploration NZ Ltd* HC Wellington CIV-2006-485-1600, 13 July 2010; *Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd* HC Auckland CIV-2007-404-1428, 21 May 2007; *C & S Kelly Properties Ltd v Earthquake Commission* [2015] NZHC 1690; *KME Services NZ Pty Ltd v CPB Contractors Pty Ltd* [2021] NZHC 212.

[158] *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)* [1993] 1 Lloyd's Rep 397 (CA) [*Product Star*] at 404 per Leggatt LJ. Kós "Constraints on the Exercise of Contractual Powers", above n 1, at 21, referred to this articulation as the "*locus classicus* statement".

> essential question always is whether the relevant power has been abused. Where A and B contract with one another to confer a discretion on A, that does not render B subject to A's uninhibited whim.
>
> In my judgment, the authorities show that not only must the discretion be exercised *honestly* and in *good faith*, but, having regard to the provisions of the contract by which it must be conferred, it must not be exercised *arbitrarily, capriciously,* or *unreasonably*. That entails a proper consideration of the matter after making any necessary enquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application.

The obligations in the default rule have clearly expanded the role of the court in the supervision of contractual powers and provide clear jurisdiction for intervention in the exercise of powers that may have been previously treated as unfettered under orthodox construction principles. Terms subject to the rule are, by default, subject to some level of judicial control, albeit to a relatively deferential degree. However, there is much uncertainty regarding the application and scope of the default rule.

First, the powers which are subject to the default rule are uncertain. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)*, Jackson LJ distinguished between "absolute rights" and "contractual discretions".[159] He suggested absolute rights involve "a simple decision whether or not to exercise an absolute contractual right."[160] In contrast, discretionary powers subject to the rule "involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term."[161] The boundary between an absolute contractual right and contractual discretion is uncertain.[162] In *UBS v Rose Capital*, Chief Master Marsh suggested this distinction was a process of the construction of the term:[163]

---

[159] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200, [2013] BLR 265 at [83].

[160] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest),* above n 159, at [83].

[161] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest),* above n 159, at [83].

[162] See Foxton "Controlling Contractual Discretions", above n 125, at 2.

[163] *UBS v Rose Capital* [2018] EWHC 3137 (Ch) at [50]-[56]. Chief Master Marsh at [49] also suggested a distinction between "decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest" and those "with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause", also emphasising factors such as the "balance of power" between the parties.

> It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken. To say that a term provides for an absolute contractual right and therefore no term can be implied puts the matter the wrong way round.

Nonetheless, such a distinction is now well established, and the jurisdiction of the default rule requires a preliminary classification of the nature of the power as a "contractual discretion".[164]

Second, the requirements of the rule are uncertain. The rule derives from the amalgamation of various "common law principles" described by Mocatta J in *CVG Siderurgicia del Orinoco SA v London Steamship Owners Mutual Insurance Association Ltd (The "Vainqueur José").*[165] These principles were not solely derived from contract but from authority across the common law. These include fetters on powers in a variety of contractual relationships including shipping cases,[166] voluntary associations,[167] as well as rules governing the exercise of dispositive trust powers,[168] and the supervision of statutory powers in administrative law.[169] The case law applying the default rule has primarily focused on the requirement of reasonableness. Reasonableness under the default rule historically meant *Wednesbury*

---

[164] See *Bathurst Resource Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85 [*Bathurst*] at [278] and [224]; *TAQA Bratani Ltd v Rockrose* UKCS8 LLC [2020] EWHC 58 (Comm) at [44]; Foxton "Controlling Contractual Discretions", above n 125, at 2-3. A similar concern regarding the applicability of the where the parties have included express fetters, or expressly constructed the power broadly. In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest),* above n 159, at [83] Jackson LJ described the rule as "extremely difficult to exclude, although I would not say it is utterly impossible to do so."

[165] *CVG Siderurgicia del Orinoco SA v London Steamship Owners Mutual Insurance Association Ltd (The "Vainqueur José")* [1979] 1 Lloyd's Rep 557 [*The Vainqueur José*] at 575.

[166] *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385, 406 (Farwell LJ) (upheld [1908] AC 406); *Government of the Republic of Spain v North of England Steamship Company Ltd* (1938) 61 LlLRep 44.

[167] *Weinberger v Inglis* [1919] AC 606; *Nagle v Fielden* [1966] 1 All ER 689.

[168] *Tabor v Brooks* (1878) 10 Ch D 273 was cited with approval in *Government of the Republic of Spain v North of England Steamship Company Ltd.* The case concerned the exercise of a power of advancement in a trust which could be exercised by the trustees "in their uncontrolled and irresponsible discretion think proper". Malins CV suggested that the power, but for its extremely broad construction, would be subject to judicial supervision, requiring the decision-maker to act fairly, honestly, and not arbitrarily or unreasonably.

[169] *Wednesbury,* above n 16.

reasonableness.[170] This reflected, as in administrative law, a highly deferent standard.[171] In *Ludgate Insurance Company Ltd v Citibank NA,* Brooke LJ described it as "very well established that the circumstances in which a Court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited."[172] This approach limits the capacity for judicial intervention significantly.

Nonetheless, what is reasonable will change in the circumstances.[173] Some cases have emphasised the right for the donee of the power to act in their commercial interest, albeit not irrationally or maliciously.[174] In contrast, other powers appear to require greater consideration for the interests of the other parties.[175] It appears this primarily occurs in powers held in "mutual undertakings", wherein there is generally a greater shared interest between the parties.[176] However, the application of *Wednesbury* reasonableness in contract does typically allowed a self-interested exercises of power, albeit with some variation in the context.

The other requirements – that a decision-maker act honestly, in good faith and not arbitrarily or capriciously – have received comparatively little attention, with fewer attempts to articulate their content. In *Paragon Finance plc v Staunton; Paragon Finance plc v Nash,* Dyson LJ suggested "An example

---

[170] *Wednesbury,* above n 16. However, Mocatta J in *The Vainqueur José*, above n 165, at 574 emphasised that the distinction between a contractual and statutory discretion "must constantly be remembered", suggesting that a contractual decision-maker is not generally required to be consistent in their decision-making in the sense that a public official may have to be unless it was unfair, unreasonable or capricious to depart.

[171] See Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 451; Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104, at 265.

[172] *Ludgate Insurance Company Ltd v Citibank NA* [1998] Lloyd's Rep IR 221 (CA) at [35].

[173] *UBS v Rose Capital*, above n 163, at [49].

[174] *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355 at [169] the clause could only be exercised for "legitimate commercial aims, rather than […] maliciously"; See also *Lehman Brothers International (Europe) v. Exxonmobil Financial Services BV* [2016] EWHC 2699 (Comm) [*Lehman Brothers*].

[175] *Braganza*, above n 70, at [30]; *The Product Star,* above n 158. See also McKendrick, above n 128, at 1118.

[176] *Evangelou and others v McNicol (sued as a representative of all members of the Labour Party except the claimants)* [2016] EWCA Civ 817 at [48].

of a capricious reason would be where the lender decided to raise the rate of interest because its manager did not like the colour of the borrowers' hair."[177] However, the exercise of a power due to the colour of a person's hair is a foundational example of an unreasonable decision referenced in *Wednesbury*.[178] The underlying similarities in the various grounds may derive from the consolidation of various principles from different strands of the common law which may instrumentally be aimed at similar mischief. Nonetheless, there may be some value in distinguishing between objective and subjective factors.[179] There are good reasons to suggest a party could act objectively reasonably but not bona fide, and vice versa perhaps suggesting some necessary distinction between the elements.

In addition to the *locus classicus* articulation by Leggatt LJ, two further principles have developed within the default rule. First, a requirement that the decision-maker takes into account relevant considerations and discounts irrelevant considerations. Second, that a decision be exercised for proper purpose. These requirements have been applied in only some subsequent cases. Their adoption from administrative law has furthered the uncertainty in relation to the contents of the default rule.

In *Braganza,* Lady Hale held that both limbs of the reasonableness test articulated by Lord Greene in *Wednesbury* were available.[180] In addition to reasonableness review in its ordinary sense, the court would determine if the decision-maker had taken into account the "right matters […] in reaching the decision."[181] The decision-maker was required to take into "account considerations which are

---

[177] *Paragon Finance plc v Staunton; Paragon Finance plc v Nash* [2002] 2 All ER 248 [*Paragon Finance*] at 260.

[178] *Wednesbury,* above n 16, at 229; *Short v Poole Corporation* [1926] Ch 66, 90, at 91.

[179] See Ernest Lim and Cora Chan "Problems with *Wednesbury* Unreasonableness in Contract Law" (2019) 135 LQR 88 at 109-110; Hooley "Controlling Contractual Discretion", above n 119, at 74-79.

[180] *Braganza*, above n 70, at [30].

[181] *Braganza*, above n 70, at [24].

obviously relevant to the decision" and "exclude extraneous considerations".[182] The case concerned the disappearance of a ship worker aboard an oil tanker.[183] The defendant, BP Shipping Ltd, undertook an investigation and concluded that there had been a wilful death by suicide.[184] The finding entitled BP Shipping Ltd to deny compensation to the claimant, who was the wife of the worker.[185] Lady Hale held the decision was unreasonable in the sense that the view had been formed without taking relevant matters into account.[186] She considered "the investigation team's report and conclusion could not be sufficiently cogent evidence to justify Mr Sullivan, and hence BP, in forming the positive opinion that Mr Braganza had committed suicide."[187] However, it appears an assessment of the relevancy of considerations does not apply to all considerations. In *Lehman Brothers International (Europe) v Exxonmobil Financial Services BV*, Blair J, in rejecting the application of the relevancy limb of *Wednesbury* to the valuation of a securities in a commercial agreement, noted *Braganza* "expressly left open the question of the extent to which procedural judicial review objections could arise in commercial contracts".[188]

The other requirement, associated with much uncertainty, is that a power must be exercised for a proper purpose. In some cases, it has been suggested as an element of the default rule. In *Ludgate*

---

[182] *Braganza*, above n 70, at [29]. Lord Hodge agreed at [53], stating "I agree that, in reviewing at least some contractual discretionary decisions, the court should address both limbs of Lord Greene's test". Lord Neuberger (dissenting) at [103] said there was no inconsistency in regard to his approach and the approach of Lady Hale and Lord Hodge. Lady Hale at [30] expressed that she believed Lord Neuberger agreed on the test to be applied.

[183] *Braganza*, above n 70, at [1].

[184] *Braganza*, above n 70, at [1].

[185] *Braganza*, above n 70, at [1]. The clause read that compensation would be payable unless "in the opinion of the Company or its insurers, the death […] resulted from amongst other things, the Officer's wilful act, default or misconduct."

[186] *Braganza*, above n 70, at [42].

[187] *Braganza*, above n 70, at [42].

[188] *Lehman Brothers*, above n 174, at [286]. The case concerned a valuation of securities in an agreement with another commercial party on the wholesale financial market. Blair J at [287] emphasised the decision was one "which can be (and may need to be) taken without delay, and in which the non- Defaulting Party is entitled to have regard to its own commercial interests. In this kind of situation, I do not agree with LBIE that *Braganza* requires the kind of analysis of the decision-making process that would be appropriate in the public law context".

Insurance Co Ltd v Citibank NA, Brooke LJ articulated the default rule as including a requirement that "discretion is exercised honestly and in good faith for the purposes for which it was conferred."[189] This requirement has been intermittently included in articulations of the default rule in subsequent case law.[190] Others have suggested that proper purpose ought to be a standalone doctrine, perhaps replacing the default rule.[191] In *Equitable Life Assurance Society v Hyman,* Lord Cooke held a power to apportion profits, which was exercised to apportion no profits at all, was in breach of a requirement to be exercised for proper purpose.[192] Lord Cooke reasoned that Lord Steyn's approach of implying a term using ordinary principles was valid but suggested "the same conclusion may be reached by starting from the principle that no legal discretion, however widely worded […] can be exercised for purposes contrary to those of the instrument by which it is conferred."[193] Lord Sales has recently argued the default rule should be replaced with a general requirement that a power is exercised for proper purpose.[194] The New Zealand Supreme Court in *Bathurst,* while articulating the default rule, described it under a general requirement that a discretion is exercised for "proper purposes".[195]

As Lady Hale notes, there are signs the principles controlling discretions are "drawing closer and closer to the principles applicable in judicial review."[196] As in administrative law, the court is highly

---

[189] *Ludgate Insurance Co Ltd v Citibank NA,* above n 172, at [35].

[190] In *Paragon Finance,* above n 177, Dyson LJ included in his articulation of the default rule a requirement that a decision-maker act for proper purpose, suggesting an example "where the lender decided that the borrower was a nuisance (but had not been in breach of the terms of the agreement) and, wishing to get rid of him, raised the rate of interest to a level that it know he could not afford to pay." *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42 at [37]. In *Braganza*, above n 70, at [27] Lady Hale accepted consistency with the contractual purpose as a requirement of the default rule.

[191] Lord Sales "Use of Powers for Proper Purposes in Private Law" (2020) 136 LQR 384 at 396 suggests analogies to *Wednesbury* are "unhelpful".

[192] *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961 at 971.

[193] *Equitable Life Assurance Society v Hyman,* above n 192, at 971.

[194] Sales "Use of Powers for Proper Purposes in Private Law" above n 191, at 387 suggests contract should look instead of *Wednesbury* unreasonableness to the proper purpose doctrine in administrative law, and its equivalent equitable doctrine of "fraud on the power".

[195] *Bathurst*, above n 164, at [272] and [34].

[196] *Braganza*, above n 70, at [28].

deferent on the substantive merits of a decision, applying *Wednesbury* unreasonableness standard.[197] This incorporates the "built-in" deference implicit in the process-merits distinction from administrative law, reflecting the courts' role as the secondary decision-maker.[198] The role of the court is not "is not to re-write the bargain for them, still less to substitute themselves for the contractually agreed decision-maker."[199] However, unlike *Wednesbury* reasonableness, issues of relevancy and purpose are generally treated as a question of law, importing a correctness standard.[200] The court defines whether a consideration is mandatory or irrelevant, and what purposes are permitted. This prima facie reduces the deference afforded to a decision-maker and imposes greater judicial control. Finally, the distinction between an "absolute contractual right" and a "contractual discretion" is functionally analogous to non-justiciability in administrative law. It serves to implicitly defer to the decision-maker through the categorisation of the power as one subject to judicial control, ousting the jurisdiction of the court and ensuring the highest level of deference to the decision-maker.

However, as in administrative law there is significant scope for implicit variance in the deference afforded to a decision-maker within the default rule. First, *Wednesbury* reasonableness itself is open-textured, albeit from a deferent starting point.[201] There is significant scope for discretion in the application of its "tautological formulation", as is indicated by the varying responses to self-interest.[202] Second, the process of determining relevancy and purpose involves a significant degree of judicial discretion which allows the level of control to vary.[203] For instance, in the case of *Roberts v*

---

[197] *Wednesbury,* above n 16.

[198] Knight "Mapping the Rainbow of Review", above n 11, at 424.

[199] *Braganza*, above n 70, at [17] per Lady Hale.

[200] *Padfield v Minister of Agriculture Fisheries and Food* [1968] 1 All ER 694 at 1030. However, there is some conflicting taxonomy. Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104, at 267.

[201] Adam Tomkins "The Role of the Courts in the Political Constitution" 60 UTLJ 1 (2010); *Wednesbury,* above n 16.

[202] Woolf, Jowell, Donnelly and Hare *De Smith's Judicial Review of Administrative Action*, above n 34, at 592.

[203] Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104.

Hopwood, the House of Lords, when reviewing an authority's power to pay salaries "as it sees fit" held that "feminisation ambition to secure equality of the sexes" by paying women at the same rate of men was an irrelevant consideration.[204] The court exercised a moral judgement in the appropriateness of considerations under a broadly-constructed power.[205] In relation to proper purpose, Knight emphasises the courts "can construe the purpose in broad or narrow terms. In practical terms, a broadly defined purpose leads to more restrained review; a narrowly set purpose inevitably leads to greater, more vigilant scrutiny of a public body's or official's actions."[206] There is inevitable disagreement about the extent of the discretion under these doctrines. Nonetheless, it appears that proper purpose and relevancy formulations, especially in the context of contractual powers which, unlike legislation, would not typically specify expressly considerations or purposes, provide significant scope for the exercise of judicial discretion, which would inevitably lead to discretion over when and to what degree to defer to a decision-maker. Finally, there is the ability for the court to manipulate the categorisation of a contractual power as an "absolute contractual right" or a "contractual power" so as to exclude or include judicial control.[207]

C Good Faith

There is a growing body of case law suggesting many contracts will subject the parties to obligations of good faith. There are various articulations of good faith, and defining it is notoriously elusive.[208] However, it generally acts as an obligation in relation to performance broadly, rather than merely the exercise of powers. Nonetheless, in practice, obligations of good faith place duties on the manner in which powers can be exercised.

---

[204] *Roberts v Hopwood* [1925] AC 579 (HL) as cited in Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104, at 274.

[205] Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104, at 274.

[206] Knight "Mapping the Rainbow of Review", above n 11, at 417.

[207] Knight "Mapping the Rainbow of Review", above n 11, at 424.

[208] Mindy Chen-Wishart and Victoria Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach" in Paul B Miller and John Oberdiek (eds) *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press, Oxford, 2020) 187 at 197.

In the United Kingdom and Australia, good faith has been treated as an implied term within specific contracts classed as "relational" contracts.[209] Such contracts generally involve "not merely an exchange, but a relationship between the contracting parties."[210] Typically, the background of such contracts encompasses high expectations of loyalty, mutual trust and confidence, such as in "joint venture agreements, franchise agreements and long-term distributorship agreements."[211] In *Yam Seng*, a duty of good faith was implied in fact into a commercial distribution contract arising as a result of the relational nature of the contract.[212] The duty included a "core value of honesty".[213] However, it relied on a primary objective test asking whether, "in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people."[214] The foundation of the term is based upon the nature of the relationship, and the presumed intention of the parties.[215] The term is often included where the "spirits and objectives" of the agreement "may not be capable of being expressed exhaustively in a written contract".[216] Australian courts have similarly implied good faith terms into classes of contracts, such as franchise agreements.[217] New Zealand courts, while recognising duties of good faith in some contracts, have been comparatively cautious.[218]

---

[209] Simon Whittaker "Introductory" in HG Beale (gen ed) *Chitty on Contracts: Volume 1: General Principles* (33rd ed, Sweet & Maxwell, London, 2018) at 58.

[210] Melvin Eisenberg, "Relational Contracts" in Jack Beatson and Daniel Friedmann (eds.) *Good Faith and Fault in Contract Law* (Oxford University Press, Oxford, 1995) 291 at 296. However, see Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 219.

[211] *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 [*Yam Seng*] at [142].

[212] *Yam Seng,* above n 211, at [131].

[213] *Yam Seng,* above n 211, at [141].

[214] *Yam Seng,* above n 211, at [144].

[215] *Yam Seng,* above n 211, at [148].

[216] *Bates v Post Office* [2019] EWHC 606 (QB) at [725]; *Al Nehayan v Kent* [2018] EWHC 333 (Comm.) at [167].

[217] See *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187.

[218] Burrows, Finn and Todd *Law of Contract in New Zealand,* above n 126, at 213-216.

In Canada, the Supreme Court recognised that good faith exists as an "organizing principle of the common law which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance."[219] The duty was not intended to be "a free-standing rule" but instead a standard underpinning specific legal doctrines.[220] The Court recognised a duty of honest performance.[221] Notably, unlike English and Australian concepts of good faith, the Canadian duty did not need to find its "source in an implied term in the contract" based upon the parties intentions.[222]

The differing articulations of the content of good faith make it difficult to comprehensively describe the extent of judicial supervision. However, the existence and variability of deference are evident in good faith, despite its uncertain content. First, the contents of the *Yam Seng* duty of good faith appear to go further than the default rule.[223] Rather than imposing deliberately deferent standards on decision-makers through administrative law principles, good faith imposes an objective standard of conduct on the parties, which is for the court to determine according to a correctness standard. However, any articulation of good faith retains some latitude to the primary decision-maker. For instance, all good faith duties still allow decisions in a party's commercial self-interest.[224] Second, there is a high degree of judicial discretion to vary the control in the circumstances. Most articulations of the duty of good faith impose amorphous standards of conduct on decision-makers which are "resistant to structured formulation."[225] Implicit in this is significant scope for judicial discretion to shape the response to the control of powers according to the context of the decision. This is a nightmare to contractual formalists, but its development reflects a growing expectation that

---

[219] *Bhasin v Hyrnew* [2014] 3 SCR 495 at [33].

[220] *Bhasin v Hyrnew,* above n 219, at [64].

[221] *Bhasin v Hyrnew,* above n 219, at [33].

[222] *Bhasin v Hyrnew,* above n 219, at [74].

[223] *Yam Seng,* above n 211.

[224] *Bhasin v Hyrnew,* above n 219, at [70].

[225] Jane Stapleton "Good Faith in Private Law" 1991 (52) CLP 1 at 1.

contract responds to the "needs and expectations of the parties and the community generally".[226] However, the deference afforded is naturally variable. It is likely more so than the administrative law doctrines due to the truly open-textured nature of many good faith principles. Finally, the *Yam Seng* duty of good faith is restricted to "relational contracts".[227] It does not apply by default, so many contracting parties are not subject to the standard at all. This similarly operates to defer to parties in certain cases where control is deemed inappropriate.

D Conclusion

The degree of deference afforded to the decision-maker will be shaped by the judicial methodology applied in the circumstances. Knight emphasises the "mediation of the balance between vigilance and restraint is a fundamental feature of judicial review of administrative action. Modulation of the depth of scrutiny is ubiquitous in the system of judicial review but takes different shapes and forms."[228] The same is evident with the control of contractual powers. The varying doctrinal techniques provide a dynamic structure in which deference is varied in the context of the decision. However, most of the time, as in administrative law historically, this deference was varied implicitly. This would occur through "built-in" levels of deference, such as *Wednesbury* reasonableness, or through identifying certain classes of relationships as subject to greater controls, or through the application of broad open-textured judicial standards such as requirements of good faith, proper purpose, or relevancy review which enables response to the context of a decision, or some combination of these approaches.[229] This calibration could be confined or expanded through relatively formal or discretionary judicial doctrines which allows the level of deference afforded to a decision-maker to vary in the circumstances. The next section will explore the techniques which, in a functionally similar manner to administrative law, explicitly calibrate the level of deference in the circumstances.

---

[226] Justice Edward Thomas "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 NZBLQ 391 at 405.

[227] *Yam Seng,* above n 211.

[228] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 257.

[229] *Wednesbury,* above n 16.

III Towards Doctrinal Deference

As in administrative law, there has been a growing adoption of judicial techniques into the control of contractual powers which functionally operate as doctrinal deference techniques. Doctrinal deference generally involves the explicit calibration of the appropriate intensity of review to be applied in relation to a decision in the review process. There has been a growing adoption of techniques in contract analogous to administrative law articulations of doctrinal deference. This is most notable in two areas. The first, which is more familiar to administrative lawyers, is variable standards of reasonableness within the default rule. The second involves a suggested model of good faith which varies in intensity in the circumstances.

A Variable Reasonableness

The adoption of *Wednesbury* reasonableness into the law of contract largely preceded the developments of variable reasonableness review in administrative law.[230] However, in recent years there has been an increasing recognition contractual reasonableness may adopt the administrative law methodology of variable reasonableness.[231]

A higher standard of reasonableness in contract appears to have been applied by Lord Hodge in *Braganza*, with Lord Hodge recognising that the context of a decision will vary the intensity of scrutiny.[232] His description appears to indicate the intensity could be shaped by multiple factors. First, some relationships may warrant greater intensities of review. He suggested "The personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts."[233] Second, the

[230] *Wednesbury,* above n 16.

[231] See Ernest Lim and Cora Chan "Problems with *Wednesbury* Unreasonableness in Contract Law", above n 179.

[232] *Braganza*, above n 70, at [55].

[233] *Braganza*, above n 70, at [55].

nature of the decision itself may warrant a greater intensity of review. Lord Hodge drew a distinction between a power to make a factual finding and one to award a discretionary performance bonus with no specified criteria for evaluation.[234] He suggested in relation to the provision of a bonus "the employee is entitled to a bona fide and rational exercise by the employer of its discretion. The courts are charged with enforcing that entitlement but there is little scope for intensive scrutiny of the decision-making process."[235] In contrast, "the courts are in a much better position to review the good faith and rationality of the decision-making process where the issue is whether or not a state of fact existed."[236] In the circumstances of the finding of fact regarding the death of the employee, Lord Hodge clearly accepted a high intensity of review was appropriate:[237]

> I see no reason why an employer's decision-making should be subject to scrutiny that is any less intense than that which the court applies to the decision of a public authority which is charged with making a finding of fact. A large company such as BP is in a position to support its officials with legal and other advisory services and should be able to face such scrutiny.

Lady Hale's speech, while not framing scrutiny in terms of intensity of review explicitly, emphasised the nature of the employment relationship in the circumstances as heightening the rationale for supervision:[238]

> …the party who is charged with making decision which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.

As well as the possibility of heightened intensity, it appears lower intensity is possible. As noted, in *Lehman Brothers,* the court excluded the relevancy review due to the commercial nature of the

---

[234] *Braganza*, above n 70, at [57].

[235] *Braganza*, above n 70, at [57].

[236] *Braganza*, above n 70, at [57].

[237] *Braganza*, above n 70, at [57].

[238] *Braganza*, above n 70, at [18].

contract.[239] Similarly, in *UBS v Rose*, the exercise of a power by a bank to demand full repayment of a loan was held not subject to the duty required in *Braganza,* and instead only subject to the existing duties of good faith implied in the mortgage context.[240]

Even prior to the employment of intensity language in *Braganza*, the differing approaches to commercial self-interest under the default rule perhaps also reflects different standards of reasonableness in the circumstances. Similarly, the distinction drawn between contractual discretions and absolute contractual rights can be identified as a form of deference. If a power is an "absolute contractual right", the treatment by the courts is not to subject the decision-maker to the default rule at all. This is functionally akin to non-justiciability in administrative law, as it enables a decision-maker to avoid supervision. However, it reflects a policy choice that the courts should not supervise the exercise of certain discretionary contractual powers.

B Intensity of Good Faith

Lord Hodge's approach in *Braganza* clearly reflects the adoption of doctrinal deference into contract law. However, many articulations of good faith also appear to functionally mirror doctrinal deference. The developing recognition of obligations of good faith as a part of many contractual relationships has in some cases adopted similar techniques to that of doctrinal deference. The manifestation of good faith differs across circumstances and jurisdictions, but most allow the contents of a requirement to act in good faith to vary in the circumstances through the imposition of increasing obligations.[241]

---

[239] *Lehman Brothers,* above n 174, at [286].

[240] *UBS v Rose Capital*, above n 163, at [52]; *Braganza*, above n 70.

[241] *Bhasin v Hyrnew,* above n 219, at [70]; "the precise context of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine"; *Yam Seng,* above n 211, at [147].

Professor Chen-Wishart and Victoria Dixon have suggested a taxonomy of good faith built around a greater "intensity" of obligations depending on the nature of the contractual relationships.[242] They describe a duty of good faith as an "organising principle" which "merely reveals how many existing and apparently disparate rules of English contract law can be explained, organized, and justified as manifestations of the good faith requirement."[243] They suggest all contracts require automatic obligations of honesty, fair dealing, and fidelity to the contractual purpose.[244] However, "the nature of the contractual relationship calibrates the intensity of the good faith attitude".[245] Under their taxonomy, there is a spectrum of contractual relationships with differing intensities of obligations.[246] At one end, there are arm's length contracts, and at the other, fiduciary contracts.[247] In between, contracts of a symbiotic nature, and those with a party with a recognised vulnerability, attract increasing intensity of good faith duties.[248] This taxonomy is intended to suggest good faith operates "via the *already existing*" doctrines in contract law.[249]

The language and structure resemble doctrinal deference techniques in administrative law. The imposition of greater "intensity" of control functionally restricts the deference afforded to contractual decision-makers.[250] It appears that a preliminary step in the supervision of powers under such an approach would be the calibration of the appropriate intensity of good faith obligations depending on the nature of the contractual relationship. This would increase or decrease the

---

[242] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 189.

[243] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 203.

[244] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 212.

[245] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 212.

[246] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 206.

[247] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 212.

[248] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 212.

[249] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 212.

[249] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 188. Original emphasis.

[250] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 212.

appropriate deference afforded to a decision-maker in the circumstances, akin to forms of doctrinal deference in administrative law.

IV Conclusion

This chapter has outlined the manifestation of deference in the control of contractual powers. It identified that, as in administrative law, deference in contract was the legal phenomenon in which the court calibrated the appropriate level of control over a decision-maker. It demonstrated that the level of deference afforded to a decision-maker may be calibrated explicitly, through doctrinal techniques, or implicitly through the myriad of doctrines in contract. This implicit deference is most evident in relation to administrative law doctrines transplanted into contract. It can be identified that the doctrines provide "build-in" standards of review, with capacity for implicit variability of the level of deference in the circumstances through the exercise of judicial discretion. However, it also noted a shift towards doctrinal deference techniques, which bring the calibration of deference to the "foreground" of legal reasoning.[251]

[251] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 147.

CHAPTER 3: STRUCTURING CONTRACTUAL DEFERENCE

I Introduction

The aim of the previous chapter was to demonstrate the implicit and explicit manifestations of deference in the control of contractual powers. It emphasised that the various techniques which control powers involve a determination of the level of deference to afford to a decision-maker. However, despite the judicial control of the exercise of discretionary powers now being a key part of the contractual landscape, the juridical techniques for such control are contested. There are now a variety of doctrines available to courts, but little overarching consistency in the methodology to be applied.

This chapter will examine the possibility of doctrinal deference as a model for the control of contractual powers. The structuring of deference through a doctrinal calibration in the review process is controversial in administrative law. It is likely to be so too in contract. Nonetheless, the scholarship regarding the comparative merits of doctrinal deference techniques may provide a value basis for consideration, in light of the recent developments in the law of contract. The first part of this chapter will examine unresolved issues with doctrinal deference. It will examine the difficulties with doctrinal deference in administrative law, and examine their relevance in the contractual context. The second part of this chapter will suggest, despite potential difficulties, that doctrinal deference is a plausible model for the control of contractual powers.

II Unresolved Issues with Doctrinal Deference

This section will highlight three unresolved issues with the adoption of doctrinal deference techniques in the law of contract. First, the effect of higher or lesser levels of control. Second, the

reasons or factors which determine the degree of deference. Finally, the relationship between doctrinal deference and other doctrinal controls in contract.

A Effect of Different Intensities

The effect of different levels of deference is naturally uncertain. The previous chapter noted two different doctrinal deference methodologies which encompass differing articulations of doctrinal deference. Naturally, it is not necessary that doctrinal deference, if adopted in contract, precisely mirrors the administrative law language. It is entirely possible that doctrinal deference could be phrased in a corollary sense; in terms of increasing "intensity" of positive obligations.[252] Chen-Wishart and Dixon's articulation of intensity of good faith duties frames doctrinal deference techniques in the language of positive duties, rather than restrictive scrutiny.[253] The distinction between these approaches may not be particularly meaningful as the effect for both is to reduce the discretion afforded to a decision-maker. For instance, an increasing intensity of fidelity to the contractual purpose would not appear meaningfully distinct from an increasing intensity of scrutiny applied to a decision-maker. They both reflect increasing degrees of judicial control or reducing deference to the primary decision-maker. However, whichever approach is applied, the *effect* of different degrees of deference requires articulation.

In administrative law, there are various articulations of the effect of differing degrees of deference. David Dyzenahus's distinction between "deference as submission" and "deference as respect" has

[252] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208.

[253] Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208.

been influential in defining the conventional approach to doctrinal deference in administrative law.[254] He suggests:[255]

> Deference as submission occurs when the court treats a decision or an aspect of it as nonjusticiable, and refuses to enter on a review of it because it considers it beyond its competence. Deference as respect occurs when the court gives some weight to a decision of a primary decision-maker for an articulated reason, as part of its overall review of the justifications for the decision.

The emphasis on the justifications provided ensures there is ongoing judicial scrutiny, without carved out areas of "non-justiciability".[256] In reasonableness review, higher intensities of review generally demand greater judicial scrutiny as to the justifications provided. At the extreme end, where human rights are concerned, the judicial approach may near a correctness standard.

It appears the approach in *Braganza,* particularly by Lord Hodge, was intended to transplant the intensity of review doctrine in reasonableness review into contract.[257] The reference to *scrutiny* mirrors the administrative law "deference as respect" methodology.[258] However, categorical distinctions between "absolute contractual rights" and "contractual discretions" appear to mirror elements of "deference as submission" in carving out distinct areas of non-reviewability.[259] This would be akin to non-justiciability and would preserve an unrestricted decision-making sphere over some contractual powers. Such an approach is not particularly surprising in the contractual context. It may be that scrutiny in the exercise of some contractual powers, such as in agreements between sophisticated commercial parties, may be viewed as normatively inappropriate.[260] Similarly, the high standards of reasonableness, such as those nearing correctness, may never be appropriate in the contract

---

[254] Dyzenhaus "The Politics of Deference: Judicial Review and Democracy", above n 9, at 286. See also Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference"', above n 9, at 347.

[255] Dyzenhaus "The Politics of Deference: Judicial Review and Democracy", above n 9, at 286.

[256] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference"', above n 9, at 347.

[257] *Braganza*, above n 70, at [55].

[258] See Dyzenhaus "The Politics of Deference: Judicial Review and Democracy", above n 9.

[259] See Dyzenhaus "The Politics of Deference: Judicial Review and Democracy", above n 9.

[260] See *Lehman Brothers,* above n 174, at [286].

context.[261] The articulation of the available intensities or standards would naturally have to develop to meet the normative demands of the contractual contract.

However, doctrinal deference may not be limited merely to scrutiny. In some cases, decision-makers may have to observe standards of procedural propriety. As has been noted, many decisions made by voluntary associations generally require observation of natural justice principles.[262] Some commercial decisions may require honest communication surrounding the exercise of powers because of the relational nature of their contractual agreement. However, this naturally is not the case for all decision-makers. In *The Vainqueur José,* Mocatta J recognised the default rule would not generally require the same procedural standards as public decision-makers.[263]

Ultimately, if contract law attempts to proceed down the path of increasing judicial control, a cohesive taxonomy, or map, of the duties on contractual decision-makers would be required.

B Reasons for Deference

The second issue concerns the reasons for which the court would defer. In administrative law, the contemporary methodology involves the court taking into account a variety of factors to ascertain the appropriate intensity of review in the circumstances. However, in the past there was significant emphasis on the subject matter of a decision as the primary factor determining the deference afforded. Murray Hunt draws a distinction between a "spatial" and "non-spatial" approach to describe this distinction.[264] A spatial approach primarily involves the calibration of deference

---

[261] *Braganza*, above n 70, at [31] per Lady Hale, "[i]t may very well be that the same high standards of decision-making ought not to be expected of most contractual decision-makers as are expected of the modern state."

[262] See *Peters v Collinge,* above n 139.

[263] *The Vainqueur José*, above n 165, at 577, "it would be a mistake to expect [of a lay body] the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a court of law."

[264] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9, at 338.

according to the subject-matter of the decision.[265] In contrast, a "non-spatial" approach is "multi-textured", involving a range of factors.[266] Hunt is critical of attempts to structure doctrinal deference according to the subject-matter of the decision, suggesting such an approach may undermine the efficacy of the process:[267]

> The spatial approach encourages courts to focus on a single factor which defines the nature of the context in which the decision-maker is operating and allows its approach to be determined by that factor. For example, a decision- maker who is taking decisions in the national security context is likely to be accorded a wide margin or area of discretionary judgment on that account alone, rather than have the court carefully examine the various possible reasons for why a degree of deference may be appropriate to certain aspects of the decision. The 'area' in which the decision-maker operates maps nicely onto a wide 'area' of discretion, to the exclusion of other factors which ought to be considered. In short, there is nothing in the spatial approach which encourages the articulation of the various factors which are relevant to the deference inquiry, and requires them to be rigorously related to the specific aspects of the decision to which they are relevant.

There are naturally multiple factors that may determine the relevant deference, including the circumstances of the decision, comparative expertise of the decision-maker, nature of the decision, and the impact on persons affected:[268]

> …there is no avoiding the multi-textured nature of the issues which fall to be adjudicated. Because rights and values are transcendent of context, cases cannot be neatly classified into categories according to the kind of subject matter they raise, and then a particular standard of review applied to them. This means that the relevant features which pull in different directions as far as the intensity of review is concerned are often present in the same case.

This is relevant to the control of contractual powers. It is possible to define the degree of control by the class of relationship which the contract falls into. Such an approach can be broadly identified in Chen-Wishart and Dixon's model which primarily focuses on the nature of the relationship itself in imposing obligations on decision-makers.[269] It is similar to the approach of terms implied in law as a result of the nature of the contract.

---

[265] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9, at 347.

[266] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9, at 347.

[267] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9, at 347.

[268] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'", above n 9, at 347.

[269]Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 210.

However, it is arguable the calibration of the appropriate level of control should not solely focus on the nature of the relationship to the exclusion of other factors. As noted by Hunt, consideration of a single factor may be limiting when undertaking the normative task of determining the appropriate judicial role.[270] For instance, a finding of fact made with improper process may warrant scrutiny even if it is in a commercial contract.[271] Similarly, while employment relationships may indicate greater intensity generally, the decision whether to give a bonus may not be an appropriate area for judicial supervision.[272] Lord Hodge appears to have preferred a multi-factorial inquiry when calibrating the intensity of reasonableness in *Braganza*.[273] He emphasised both the nature of the decision and the context of the employment relationship as being relevant.

However, there are difficulties with a multi-factorial approach. The multi-textured standard provides a significant degree of discretion to the court in the circumstances. Taggart described it as "the common lawyer's counsel of despair, everything depends on the facts of each case (fuelled, of course, by contextualization) and, so it might seem, the allocated individual judge(s)."[274] He cited Michael Beloff who suggested:[275]

> It is difficult, in many respects, to distil the jurisprudence on deference into a clear set of principles. Deference remains a highly impressionistic concept which is not open to scientific analysis. The only conclusion that can be drawn is an extremely broad one, namely that the degree of deference to be accorded to the executive and Parliament is entirely dependent upon the context of any given decision or measure, and will be informed by a complex set of considerations to each particular case. Judging is an art, not a science.

The uncertainty brought by multi-textured deference may be especially undesirable in a contractual context, where certainty holds particular value. It may be that a model involving only the nature of

---

[270] Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference"', above n 9, at 347.

[271] See *Braganza*, above n 70, at [57].

[272] *Braganza*, above n 70, at [57].

[273] *Braganza*, above n 70, at [57].

[274] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 459.

[275] Michael Beloff "The Concept of 'Deference in Public Law'" [2006] JR 213 at 223; Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 459.

the relationship could provide greater certainty. This could outweigh the value of greater judicial discretion in a multi-factorial model. Nonetheless, there are downsides in undermining the capacity for judicial flexibility. There may be instances where judicial control is excessive or too restrained because the nature of the decision itself is not taken into account. For instance, day to day administrative powers of a voluntary association may warrant less scrutiny than disciplinary decisions. This could lead to cases of manifest unfairness. The inevitable trade-off would be between judicial discretion and certainty. A multi-factorial assessment would require a clear articulation of the relevant factors. These issues have been acknowledged in administrative law. Taggart emphasised:[276]

> Progress will only be made if a deliberate and concerted effort is made to explain all the factors that influence the judges in characterizing a case as of a particular sort and positioning it appropriately on the rainbow of review.

Any techniques resembling doctrinal deference in contract would require significant jurisprudential development to ensure that decision-makers can understand and determine the nature of the controls they are subject to.

C Relationship with Alternative Controls

The third issue is the relationship between doctrinal deference techniques and alternative controls. As noted in the previous chapter, there are a variety of doctrinal responses to the improper exercise of powers in the common law, varying from good faith to the ordinary test for a term implied in fact. Many of these controls naturally overlap. Some applications of the default rule and good faith have directly applied the test for implication in fact.[277] However, others have suggested the basis for such controls is a term implied in law, or merely arising as a product of interpretation.[278] The juridical basis for many of these controls is uncertain.

---

[276] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 453-454.

[277] See *Socimer International Bank Ltd. v Standard Bank London Ltd* [2008] EWCA Civ 116 at [66]; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047 at [64]; *Lymington Marina Ltd. v MacNamara* [2007] EWCA Civ 151 at [42].

[278] See *The Product Star,* above n 158, at 404; *Aztrazeneca Ltd v Pharmaceutical Management Agency* HC Wellington CIV-2003-404-5056, 14 June 2005; *Braganza*, above n 70; Sales "Use of Powers for Proper Purposes in Private Law" above n 191.

It may be doctrinal deference methodologies could be structured through the test for implication in fact. The ascertainment of the appropriate degree of deference could begin from a starting point of no fetters unless a standard of necessary implication suggests otherwise. This would ensure significant judicial restraint in the control of the exercise of contractual powers. However, a necessity standard based upon the intention of the parties does not appear to reflect the actual approach of the courts in practice. The United Kingdom's Supreme Court's emphasis on the imbalance of power in the context of the employment agreement in *Braganza* suggests a model based on necessary implication deriving from the party's intentions does not have complete explanatory value.[279] Similarly, many of the models of good faith have expressly rejected the intention of the parties as determinative.[280]

Similarly, there is a danger that doctrinal controls be subsumed by other approaches. The recent adoption of the review for purpose and relevancy, in which a correctness standard would be implied, may signal the decreasing relevance of at least reasonableness review. As identified earlier, the open-textured nature of such standards, particularly where there are no prescribed purposes or considerations, can allow significant judicial discretion without recourse to the factors driving the appropriate control over the exercise of a power. Wilberg, reflecting upon this difficulty in administrative law, favours judicial restraint where the purpose of a power, nor the relevant factors to be considered, is not prescribed.[281] She suggests that substantive review, due to its deferent standard, would be appropriate where a statutory instrument is silent.[282]

---

[279] *Braganza*, above n 70, at [18].

[280] *Bhasin v Hyrnew,* above n 219, at [74]; See Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 189-190.

[281] Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104, at 276-277.

[282] Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide", above n 104, at 276-277.

III Plausibility of a Doctrinal Deference Methodology

Drawing on administrative law experiences, this section will outline three rationales for doctrinal deference. First, doctrinal deference represents a juridical compromise between formalism and unstructured judicial discretion. Second, it requires transparent analysis of the factors that shape the *degree* of deference. Third, it promotes consistency across the public-private divide.

A Balancing "Fairness and Certainty in Adjudication"[283]

Doctrinal deference arguably represents a methodological compromise between unstructured judicial discretion and strict categorical reasoning.

On one hand, doctrinal deference provides judicial flexibility to respond to the circumstances of a case. Unlike orthodox contractual controls, with the exception of implied terms, a doctrinal approach is theoretically more capable of providing for judicial discretion to allocate controls within the context of a decision. As Knight notes "the context of the case, broadly framed, determines the depth of scrutiny and thus whether judicial intervention is justified."[284] The vastness of the contractual landscape creates difficulties in crafting cohesive frameworks in which control can be imposed. As Treitel notes:[285]

> Under the general heading of 'contract', the law subsumes a variety of relationships which have the common feature of being based on agreement, but which are otherwise very different in nature. If one classified according to subject-matter, the law of contract could be described as being part commercial law, part property law, part consumer law, part even family law, and so forth.

The ability to vary the deference afforded to a decision-maker could allow a bespoke judicial response to the circumstances of the case. The relationship between bank and consumer, trade union

---

[283] See EW Thomas "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9 Otago LR 456.

[284] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 244.

[285] GH Treitel *Doctrine and discretion in the law of contract: an inaugural lecture delivered before the University of Oxford on 7 March 1980* (Clarendon Press, Oxford, 1981) at 2-3.

and member, spouse and spouse, naturally have different implicit expectations which shape the nature of judicial control over the exercise of powers. These problems are evident in the application of the default rule. The case law has indicated the difficulties in administering a fixed test which applies across the variety of decisions, made across different types of relationships.[286] Doctrinal techniques which vary the level of control could enable greater adaptability in such cases.

Furthermore, there may be factors independent of the nature of the relationship which may indicate that greater or lesser control is appropriate. For instance, the factors highlighted by Lord Hodge in *Braganza* reflect the appropriate contextual element of judicial control.[287] The need to examine the context of the decision may not be well served by orthodox techniques, which imply controls arising as a result of the category in which the contract falls.

On the other hand, doctrinal deference avoids the excesses of broad judicial discretion through the application of truly open-textured judicial standards. As Knight notes "scholars supporting intensity of review acknowledge that the demands of context cannot be met by strict doctrinal categories, but they remain unwilling to allow the supervisory task to dissolve into judicial judgement alone."[288] The application of intensity requires the court to identify conceptual factors of relevance to the judicial process, potentially providing some signposts for decision-makers. In contract, many articulations of good faith provide the court with an open judicial discretion to determine compliance with objective standards of conduct. There are unsurprising parallels with contextualism in administrative law. The risk with such open-ended judicial discretions is that the law will be "rather chaotic, unprincipled, and result-orientated."[289] Similar concerns can be identified in relation to purpose and relevancy review. As identified earlier, the open-textured nature of such standards, particularly where there are no

[286] See *Lehman Brothers,* above n 174, at [286].

[287] *Braganza*, above n 70, at [55].

[288] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 198.

[289] Taggart "Proportionality, Deference, *Wednesbury*", above n 14, at 453.

prescribed purposes or considerations, can allow significant judicial discretion without recourse to the factors driving the appropriate control over the exercise of a power.

B Transparency

Second, doctrinal deference brings deference principles to the "foreground" of judicial reasoning.[290] Many existing judicial techniques rely on fixed levels of deference, or open-textured application of judicial standards with little reference to conceptual factors. The employment of doctrinal deference could require explicit judicial recognition of the factors which normatively justify judicial control. This would require an assessment of the degree of deference appropriate. As in administrative law, there would be a theoretical starting point which would determine the appropriate level of control, but deference would be strongly driven by the context of the decision itself. There will inevitably be different attitudes regarding the appropriateness of judicial intervention. The concern that control will interfere with the autonomy of the parties and freedom of contract is well recognised.[291] The starting point in contract would likely be a position of significant deference, reflecting the instrumental values of certainty and party autonomy.[292] However, the context of a decision itself inevitably drives the variation in the extent judicial control, and doctrinal deference requires the clear identification of these conceptual factors which shape the basis for control.

There may be value in drawing on institutional approaches developed in administrative law jurisprudence.[293] Factors developed in administrative law such as relative institutional competence, the nature of the relationship, the expertise of the decision-maker relative to the court, and the impact on affected persons, may have normative validity in the contractual context.[294] Inevitably, the

---

[290] Knight *Vigilance and Restraint in the Common Law of Judicial Review,* above n 11, at 147.

[291] See Beatson and Friedman "Introduction: From 'Classical' to Modern Contract Law", above n 124.

[292] See Rex Adhar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39 at 40-43.

[293] See King "Institutional Approaches to Judicial Restraint", above n 53.

[294] For an analysis of the normative similarities between the control of powers in administrative and contract law see Dawn Oliver *Common Values and the Public-Private Divide* (Cambridge University Press, 1999). Oliver, at 29, suggests across the

nature of factors shaping deference, and the respective weight given to them, may differ from administrative law. However, ideas of relative competence are not unique to the relationship between the courts and the executive.[295] There will be decisions which the courts have greater competency to supervise than others, and the allocation of decision-maker power between the courts and a contractual party may require recognition of these factors.[296]

The obvious criticism of the judicial consideration of such factors is that it insufficiently accounts for the expectations of the parties. However, the reasonable expectation of the parties in such cases is almost always implicit and drawn from the context of the circumstances.[297] Instead, factors such as institutional competence, the nature of the relationship, the expertise of the decision-maker relative to the court, and the impact on the party subject to the power can *indicate* what the reasonable expectations may be. This is analogous to rationalisations of doctrinal deference based upon implicit parliamentary intention.[298] Nonetheless, as Lord Hodge indicates, it may be that external factors, such as an inequality of bargaining power, would be relevant to an assessment of judicial competency.[299] The recognition of an underlying normative methodology which shapes the degree of deference, as it appears Lord Hodge was suggesting in *Braganza*, surely provides a more transparent and sounder methodology than current approaches relying on implicit categorisations of powers or vague

---

public-private divide are common values of "individual dignity, autonomy, respect, status and security" which is protected through the control of power. She suggests, at 180, that in "practice, the courts are exercising a supervisory jurisdiction in some contract cases, thus controlling exercises of power that might interfere with the interest of weaker individuals." For a contrary view see Terrance Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68 MLR 554. See also Chris Himsworth "Transplanting Irrationality from Public to Private Law: *Braganza v BP Shipping Ltd*" (2019) Edinb Law Rev 1, at 2-5.

[295] King "Institutional Approaches to Judicial Restraint", above n 53, at 440.

[296] *Braganza*, above n 70, at [55].

[297] See the discussion in Chen-Wishart and Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach", above n 208, at 207-208. See also Johan Steyn "Fulfilling the reasonable expectations of honest men" (1997) 113 LQR 433.

[298] See Daly *A Theory of Deference in Administrative Law: Basis Application and Scope,* above n 9, at 37.

[299] *Braganza*, above n 70, at [55].

references to background context.[300] It is crucial to preserve stability in the contractual regime that there is explicit recognition of the contents of the calibrating factors.

A concern with many implicit techniques to control powers in contract is the significant degree of unreasoned judicial discretion. In many cases, the deference afforded may be calibrated through implicit judicial discretion, such as defining relevant or irrelevant considerations, or the scope of a power's purpose. The judicial process involves a value judgment regarding which factors are relevant and which are irrelevant. In such cases, it would be unlikely for the courts to attribute their description of such factors, or the scope of their constructed purpose, to the institutional factors which shape the normative basis for judicial intervention. A doctrinal methodology, expressly drawing on deference factors, may lead to sounder and more transparent results.

C The Boundaries of Public and Private Law

Finally, doctrinal deference has the potential to provide a more cohesive approach to the supervision of powers. In administrative law, the success of a judicial review may turn on its justiciability. If a decision is not sufficiently public, it is treated as non-justiciable.[301] This reflects a distinction that developed in the 20th century between private and public law, with distinct obligations for public decision-makers.[302] However, if it is recognised that the substantive obligations of a decision-maker across the public-private divide converge as the intensity of review is calibrated within both spheres to reflect the appropriate controls over decision-making in the context, the distinction becomes of less significance. For instance, decisions by a voluntary association are generally subject to controls on the exercise of their powers. Janet McLean has observed this convergence in relation to public

---

[300] *Braganza*, above n 70, at [55].

[301] See *Royal Australasian College of Surgeons v Phipps*, above n 98, at 11; *Hopper v North Shore Aero Club Inc,* above n 98, at [12].

[302] See Peter Cane "Accountability and the Public/Private Distinction"' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337 at 262.

contracting.[303] McLean highlights such a convergence may help exclude the difficulties with justiciability in administrative law:[304]

> They have the advantage of allowing us to avoid categorical answers to whether something is 'commercial' or 'public' at a time when the distinction has deliberately been blurred, and they offer rather more fine-grained and applicable standards for scrutinising modern governance than judicial review has been able so far to deliver.

That is not to say that an ordinary contractual power would be typically subject to the same obligations as a statutory power held by a public official. It is observable that greater deference is provided to decision-makers of a purely commercial nature than those who are exercising powers for others. The advantage of a recognition of doctrinal deference is it provides flexibility in the controls placed on a decision-maker to suit the reasonable expectations of the parties, as well as public policy concerns.

This may suggest an intensity of review could provide more consistency in the substantive obligations of decision-makers on the margins of administrative law. There would not be an arbitrary determination of duties based upon a categorical determination whether a decision is justiciable in administrative law. It may require reconsideration of the normative basis of non-justiciability in administrative law.[305] If the substantive obligations of a decision-maker are the same, other issue such as remedial distinctions may warrant greater bearing on the assessment of justiciability. Such issues are beyond the purpose of this dissertation. However, a recognition of variable deference throughout the law of contract may have something to offer administrative law as well.

---

[303] Janet McLean "Convergence in public and private law doctrines – The case of public contracts" (2016) NZ L Rev (1) 5-29.

[304] McLean "Convergence in public and private law doctrines – The case of public contracts", above n 303, at 29.

[305] Dean Knight "Privately Public" (2013) 24 PLR 103.

IV Conclusion

The judicial control of the exercise of discretionary contractual powers appears to be moving towards techniques functionally resembling doctrinal deference. This chapter aimed to demonstrated that while there may be issues with this approach, it may have plausible value.

Conclusion

This dissertation sought to demonstrate the applicability of deference concepts in administrative law to the control of contractual powers. First, it provided a brief account of the deference concepts developed in administrative law jurisprudence. Second, it sought to map the various controls on powers in contract law. In doing so, it demonstrated that deference to a contractual decision-maker may be calibrated either implicitly or explicitly. Finally, it provided some commentary on the development of doctrinal deference in the law of contract. It suggested that, while there are significant unresolved issues, doctrinal deference in some form may provide a plausible model for the control of contractual powers.

Bibliography

A Case Law

1 *New Zealand*

Aztrazeneca Ltd v Pharmaceutical Management Agency HC Wellington CIV-2003-404-5056, 14 June 2005.

Bathurst Resource Ltd v L&M Coal Holdings Ltd [2021] NZSC 85.

Bos Internatonal (Australia) Ltd v Strategic Nominees Ltd (in receivership) [2013] NZCA 643.

Bulk Gas Users Group v Attorney-General [1983] NZLR 129.

Chirnside v Fay [2006] NZSC 68.

Curtis v Minister of Defence [2002] 2 NZLR 744.

Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 141 (CA).

Devonport Borough Council v Robbins [1979] 1 NZLR 1.

Finnigan v New Zealand Rugby Football Union [1985] 2 NZLR 149 (CA).

Greenback New Zealand Ltd v Haas [2003] 3 NZLR (CA).

Henderson v Kane and the Pioneer Club [1924] NZLR 1073 (SC).

Hopper v North Shore Aero Club Inc [2007] NZAR 354.

Olsen Consulting Ltd v Goodman Fielder New Zealand Ltd HC Auckland CIV 2011-404-5622, 23 November 2011.

Osborne v Worksafe New Zealand [2017] NZSC 175, [2018] 1 NZLR 447.

Peters v Collinge [1993] 2 NZLR 554.

R v Hansen [2007] 3 NZLR 1.

Royal Australasian College of Surgeons v Phipps [1999] 3 NZLR 1.

Tamaki v Māori Women's Welfare League Inc [2011] NZAR 605 (HC).

Taylor v Attorney-General of New Zealand [2015] NZHC 1706.

Taylor v Chief Executive of Department of Corrections [2015] NZCA 477.

Todd Pohokura Ltd v Shell Exploration NZ Ltd HC Wellington CIV-2006-485-1600, 13 July 2010.

Unison Networks Ltd v Commerce Commission [2007] NZSC 74.

Ward Equipment Ltd v Preston [2017] NZCA 444.

Watson v Chief Executive of Department of Corrections [2015] NZHC 1227, [2015] NZAR 1049.

Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537 (CA).

Wolf v Minister of Immigration [2004] NZAR 414.

Ye v Minister of Immigration [2009] NZSC 76, 2010 NZLR 104.

2 *England and Wales*

Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2) [1993] 1 Lloyd's Rep 397 (CA).

Al Nehayan v Kent [2018] EWHC 333 (Comm.).

Allen v Flood [1986] AC 1.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1; [1947] 2 All ER 680.

Attorney-General of Belize v Belize Telecom Ltd [2009] UKPC 10; [2009] 1 WLR 1988.

Bates v Post Office [2019] EWHC 606 (QB).

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 16 ALR 363.

Bradford v Pickles [1895] AC 587 (HL).

Braganza v BP Shipping Ltd; The British Unity [2015] UKSC 17.

Bristol and West Building Society v Mothew [1998] Ch 1 (CA).

British Telecommunications Plc v Telefónica O2 UK Ltd [2014] UKSC 42.

Chapman v Honig [1963] 2 QB 502.

Chief Constable for North Wales v Evans [1982] 1 WLR 1155.

Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374.

CVG Siderurgicia del Orinoco SA v London Steamship Owners Mutual Insurance Association Ltd (The "Vainqueur José") [1979] 1 Lloyd's Rep 557.

Equitable Life Assurance Society v Hyman [2000] 3 All ER 961 at 971.

Evangelou and others v McNicol (sued as a representative of all members of the Labour Party except the claimants) [2016] EWCA Civ 817.

Government of the Republic of Spain v North of England Steamship Company Ltd (1938) 61 LlLRep 44.

Hick v Raymond and Reid [1893] AC 22 HL.

Investors Compensation Scheme Ltd v West Brunswick Building Society [1998] 1 WLR 896.

Lehman Bros International (Europe) (in administration) v ExxonMobil Financial Services BV [2016] EWHC 2699 (Comm).

Ludgate Insurance Company Ltd v Citibank NA [1998] Lloyd's Rep IR 221 (CA).

Lymington Marina Ltd. v MacNamara [2007] EWCA Civ 151.

Mackay v Dick (1881) 6 App Cas 251.

Malik v BCCI [1998] A.C. 20.

Marks & Spencer v BNP Paribas [2015] UKSC 72.

Michalak v Wandsworth LBC [2002] EWCA Civ 271.

Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest) [2013] EWCA Civ 200, [2013] BLR 265.

Nottinghamshire City Council v Secretary of State for the Environment [1986] AC 240.

Padfield v Minister of Agriculture Fisheries and Food [1968] 1 All ER 694.

Paragon Finance plc v Staunton; Paragon Finance plc v Nash [2002] 2 All ER 248.

Property Alliance Group Ltd v Royal Bank of Scotland Plc [2018] EWCA Civ 355.

R (Bugdaycay) v Secretary of State for the Home Department [1987] AC 514.

R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532.

R (SB) v Governors of Denbigh High School [2007] 1 AC 100.

R (Smith) v Ministry of Defence [1996] QB 517.

Roberts v Hopwood [1925] AC 579 (HL).

Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206.

Socimer International Bank Ltd. v Standard Bank London Ltd [2008] EWCA Civ 116.

Tabor v Brooks (1878) 10 Ch D 273.

TAQA Bratani Ltd v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm).

The Moorcock (1889) 14 PD 64 (CA).

Tillmanns & Co v SS Knutsford Ltd [1908] 2 KB 385, 406 (Farwell LJ) (upheld [1908] AC 406).

Tower Hamlets London Borough Council v Chetnik Developments Ltd [1988] 1 All ER 961.

UBS v Rose Capital [2018] EWHC 3137 (Ch).

Weinberger v Inglis [1919] AC 606; *Nagle v Fielden* [1966] 1 All ER 689.

Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] EWHC 111.

3 *Canada*

Bhasin v Hyrnew [2014] 3 SCR 495.

R v Oakes [1986] 1 SCR 103 (SCC).

3 *Australia*

Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187.

Vodaphone Pacific Ltd v Mobile Innovations Ltd (2004) NSWCA 15.

4 *United States of America*

Chevron USA Inc v Natural Resources Defense Council 467 US 837 (1984).

B Legislation

Consumer Credit Act 1974 (UK).

Credit Contracts and Consumer Finance Act 2003.

Employment Relations Act 2004.

Residential Tenancies Act 1986.

Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (UK).

C Books and Chapters in Books

Aileen Kavanagh "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in G Huscroft (ed.) *Expounding the Constitution: Essays in Constitutional Theory* (CUP, New York, 2008).

Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge, 2009).

David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 279.

Dawn Oliver *Common Values and the Public-Private Divide* (Cambridge University Press, 1999).

Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, Cambridge, 2018).

DGT Williams "Criminal Law and Administrative Law: Problems of Procedure and Reasonableness" in P Smith (ed) Criminal Law: Essays in Honour of JC Smith (London, 1987) 170.

E W McKendrick "Implied Terms" in HG Beale (gen ed) *Chitty on Contracts: Volume 1: General Principles* (33rd ed, Sweet & Maxwell, London, 2018).

Geraint Thomas *Thomas on Powers* (2 ed, Oxford University Press, Oxford, 2012).

Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018)

Hanna Wilberg "Deference on Relevance and Purpose? Wrestling with the Law/Discretion Divide" in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 263.

Henry Woolf, Jeffery Jowell, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review of Administrative Action* (8th ed, Sweet & Maxwell Ltd, London, 2018).

Hilary Biehler "Curial Deference in the Context of Judicial Review of Administrative Action Post-*Meadows"* (2013) 49 Ir Jur 29.

Hugh Collins "Discretionary powers in contracts" in David Campbell, Hugh Collins and John Wightman (eds) *Implicit Dimensions of Contract: Discrete, Relational, and Network Contracts* (Hart Publishing Ltd, Oxford, 2003) 219.

Jack Beatson "Public Law Influences in Contract Law" in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1997) 263.

Jack Beatson and Daniel Friedman "Introduction: From 'Classical' to Modern Contract Law" in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1997) 3.

John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018).

Kit Barker "The Dynamics of Private Law and Power" in Kit Barker, Simone Degeling, Karen Fairweather and Ross Grantham (eds) *Private Law and Power* (Hart Publishing, Oxford, 2017) 3.

Mark Elliott and Hanna Wilberg "Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature" in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 19.

Melvin Eisenberg, "Relational Contracts" in Jack Beatson and Daniel Friedmann (eds.) *Good Faith and Fault in Contract Law* (Oxford University Press, Oxford, 1995) 291.

Michael Fordham *Judicial Review Handbook* (6th edn, Hart Publishing, 2012.

Michael Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays in Honour of Lord Cooke of Thorndon* (Wellington, Butterworths, 1997) 189.

Michael Taggart *Private Property and the Abuse of Rights in Victorian England: The Story of Edward Pickles and Bradford Water Supply* (Oxford University Press, Oxford, 2002).

Michael Trebilcock *The Limits of Freedom of Contract* (HUP, Harvard, 1985).

Mindy Chen-Wishart and Victoria Dixon "Good Faith in English Contract Law: A Humble '3 by 4' Approach" in Paul B Miller and John Oberdiek (eds) *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press, Oxford, 2020) 187.

Murray Hunt "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference"' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337.

Paul Daly "The Struggle for Deference in Canada" in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, Oxford, 2015) 297.

Paul Daly *A Theory of Deference in Administrative Law: Basis Application and Scope* (Cambridge University Press, Cambridge, 2012).

PD Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977).

Peter Cane "Accountability and the Public/Private Distinction"' in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 337.

Philip A Joseph *Constitutional and Administrative Law in New Zealand* (5th ed, Brookers Ltd, Wellington, 2021).

PS Atiyah *The Rise and Fall of Freedom of Contract* (1st ed, Oxford University Press, Oxford, 1979).

Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) Judicial Review of Administrative Action in the 1980s – Problems and Prospects (Oxford University Press, Auckland, 1986) 1.

Sian Elias "The Unity of Public Law?" in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law: Doctrinal, Theoretical and Comparative Perspectives* (Hart, Oxford, 2018) 15.

Simon Whittaker "Introductory" in HG Beale (gen ed) *Chitty on Contracts: Volume 1: General Principles* (33rd ed, Sweet & Maxwell, London, 2018)

D Journal Articles

Adam Tomkins "The Role of the Courts in the Political Constitution" 60 UTLJ 1 (2010).

Antonin Scalia "Judicial Deference to Administrative Interpretations of Law" (1989) 3 Duke LJ at 511.

Caleb O'Fee "A New Perspective on the Public-Private Divide? Justiciability of Government Contracting Decisions Following *Ririnui* and *Problem Gambling*" (2018) VUWLR 133 at 150-155.

Chris Himsworth "Transplanting Irrationality from Public to Private Law: *Braganza v BP Shipping Ltd*" (2019) Edinb Law Rev 1.

Christopher Forsyth "Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law" (2007) 66 CLJ 325.

David Goddard "Long-Term Contracts: A Law and Economics Perspective" [1997] NZ Law Rev 423.

Dean Knight "Judicial Review: Practical Lessons, Insights and Forecasts" (2010) VUW-NZCPL002.

Dean Knight "Mapping the Rainbow of Review" (2010) NZ Law Rev 393.

Ernest Lim and Cora Chan "Problems with *Wednesbury* Unreasonableness in Contract Law" (2019) 135 LQR 88.

EW Thomas "Fairness and Certainty in Adjudication: Formalism v Substantialism" (1999) 9 Otago LR 456.

Jane Stapleton "Good Faith in Private Law" 1991 (52) CLP 1.

Janet McLean "Convergence in public and private law doctrines – The case of public contracts" (2016) NZ L Rev (1) 5-29.

Jason NE Varuhas "The Socialisation of Private Law: Balancing Private Right and Public Good" (2021) 137 LQR 141 at 155.

Jeff A King "Institutional Approaches to Judicial Restraint" (2008) 28 OJLS 409.

Johan Steyn "Fulfilling the reasonable expectations of honest men" (1997) 113 LQR 433.

Justice Edward Thomas "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 NZBLQ 391.

Lord Sales "Use of Powers for Proper Purposes in Private Law" (2020) 136 LQR 384.

Lord Steyn "Deference: a Tangled Story" [2005] PL 346.

MB Rodriguez Ferrere "An Impasse in New Zealand Administrative Law: How did we get here?" (2017) 28 PLR 310.

Michael Beloff "'The Concept of 'Deference in Public Law'" [2006] JR 213 at 223.

Michael Taggart "'Australian Exceptionalism' in Judicial Review" [2008] FedLawRw 1.

Michael Taggart "Proportionality, Deference, *Wednesbury*" (2008)(3) NZ L Rev 423.

Philip A Joseph "Exploratory Questions in Administrative Law" (2012) 2 NZULR 75.

Rex Adhar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39.

Richard Hooley "Controlling Contractual Discretion" (2013) 72(1) CLJ 65.

Richard Rawlings "Modelling Judicial Review" (2008) 61 CLP 95.

Sian Elias "Administrative Law for 'Living People'" (2009) 68 CLJ 47.

Simon Connell "Unwritten Constitutions of Incorporated Societies: A Critical Examination of the Treatment of Tikanga in *Tamaki v Maori Women's Welfare League Inc*" (2011) 12(3) Otago Law Review 605.

Stephen Kós "Constraints on the Exercise of Contractual Powers" (2011) 42 VUWLR 17.

Terrance Daintith, "Contractual Discretion and Administrative Discretion: A Unified Analysis" (2005) 68 MLR 554.

TRS Allan "Human Rights and Judicial Review: A Critique of "Due Deference"" (2006) 65 CLJ 671.

TRS Allan The Sovereignty of Law: Freedom Constitution and Common Law (Oxford University Press, Oxford, 2013).

E Speeches and Papers

Philip A Joseph "False Dichotomies is Administrative Law: From There to Here" (Presented to the Centre for Public Law, University of Cambridge, 21 November 2013).

David Foxton "Controlling Contractual Discretions" (Address to the Attorney General's Chambers, Singapore, 9th January 2018).

GH Treitel *Doctrine and discretion in the law of contract: an inaugural lecture delivered before the University of Oxford on 7 March 1980* (Clarendon Press, Oxford, 1981).

Sian Elias "Judicial Review and Constitutional Balance" (Address to the New Zealand Centre for Public Law held at Lecture Theatre 1 Victoria University of Wellington, 28 February 2019).

F University Work

BT Brooks "*Expulsion from Private Associations in New Zealand*" (LLM, University of Canterbury, 1968).

Edward Elvin "Good faith, or good fake? The role of good faith in the performance of commercial contracts" (LLB (Hons) Dissertation, University of Otago, 2013).

J Edward Bayley "A Doctrine of Good Faith In New Zealand Contractual Relationships" (LLM, University of Canterbury 2009).

MB Rodriguez Ferrere "Proportionality as a Distinct Head of Judicial Review in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2007).

Vicotria Smaill "How Discretionary are Contractual Discretions? A Critical Analysis of the Judicial Approach to Discretionary Powers in Commercial Contracts" (LLB (Hons) Dissertation, University of Otago, 2017).