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CASE AND COMMENT

THE SOVEREIGNTY OF PARLIAMENT, THE HUNTING BAN, AND THE PARLIAMENT ACTS

THE most immediate significance of *R. (Jackson)* v. *Attorney General* [2005] UKHL 56, [2005] 3 W.L.R. 733 is the nine-member Appellate Committee's unanimous conclusion that the Hunting Act 2004, which, with some exceptions, makes it an offence to hunt a wild mammal with a dog, is a valid Act of Parliament. However, the case also offers a fascinating insight into contemporary judicial perceptions of the nature and relevance of the doctrine of parliamentary sovereignty.

The Hunting Act was passed under the Parliament Act 1911, section 2(1) of which, in its original form, permitted "any Public Bill"—"other than a Money Bill" (for which separate provision is made in section 1) "or a Bill containing any provision to extend the maximum duration of Parliament beyond five years"—to "become an Act of Parliament" without the consent of the House of Lords, albeit that the upper chamber could delay enactment by two years. The Parliament Act 1949 amended the 1911 Act, reducing the Lords' delaying power to one year. The claimants in *Jackson* contended that the Hunting Act—which had been enacted in reliance upon the 1911 Act *as amended*—was invalid, since, they argued, the 1949 Act was of no legal effect, and the Hunting Act had clearly not been enacted in accordance with the 1911 Act's *unamended* terms. At the heart of the case lay the fact that the 1949 Act was itself enacted under the 1911 Act, raising the question whether the latter authorised its own amendment by the Commons, subject only to Royal Assent, thereby allowing the lower chamber

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unilaterally to manipulate the balance of parliamentary power to its own advantage.

Central to the claimants' argument were the propositions that the 1911 Act should be viewed as a delegation of legislative power by Parliament, and that the subordinate legislature thereby created could not, as it had purported to do in 1949, augment its own authority at the expense of the Lords'. This analysis, however, did not find favour with their Lordships. It was considered flatly inconsistent with the above-quoted language of the original Act, which made it clear that, as Lord Bingham put it, the change introduced in 1911 "lay not in authorising a new form of sub-primary legislation but in a new way of enacting primary legislation". Their Lordships held that the Commons had not, by enacting the 1949 Act, exceeded the scope of that authorisation, so that Act, and therefore the Hunting Act, were valid.

That conclusion sits uncomfortably with the account of sovereignty advanced by Wade in his seminal article in this journal ([1955] C.L.J. 172): he contended that the rule determining what counts as an Act of Parliament is a "political fact" which is "ultimate and unalterable by any *legal* authority" (original emphasis), yet their Lordships appeared to presuppose that it could readily be altered by legislation and adjudicated upon in the courts. To the extent that the reasoning yielding that conclusion transcends raw pragmatism (Lord Nicholls, for one, thought it significant that "[f]or the last half century legislative business has been conducted ... against a background of awareness that the 1911 Act procedure as amended in 1949 is available") it lends some credence to the so-called "manner and form" theory, with some of the judges explicitly invoking it as a doctrinal means by which to rationalise the Parliament Acts regime. Lord Steyn, for instance, opined that "Parliament acting as ordinarily constituted may functionally redistribute legislative power" by, say, requiring a two-thirds majority in certain circumstances—a "redefinition [of Parliament which] could not be disregarded". Similarly, Baroness Hale considered that "Parliament can do anything", including deciding to "redesign" itself and "allow[ing] its redesigned self further to modify the design". She considered that as well as redefining itself downwards, as in the 1911 Act, "it may very well be that it can redefine itself upwards, [for example] to require a particular parliamentary majority", thus allowing Acts of Parliament to be accorded at least a limited form of entrenchment; not all of her colleagues, however, were prepared to go this far.

Their Lordships' comments on two further issues cannot escape mention. The first concerned the extent of the Commons' powers.

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While a majority agreed that the prohibition in the 1911 Act on using the Parliament Acts to extend the duration of Parliament could not be removed unilaterally by the Commons, an otherwise unfettered power of unilateral enactment seems inconsistent with the spirit of bicameralism, and, as Baroness Hale noted, raises the question "[w]hether our system now has sufficient democratic checks upon the combined power of the elected House and the Government which commands [it]". The attempt of the Court of Appeal ([2005] EWCA Civ 126, [2005] Q.B. 579) to address such concerns—by reading the Parliament Acts as impliedly inapplicable to the enactment of fundamental constitutional changes—met with general disapproval before the Appellate Committee, several members of which pointed to the absence of any historical or textual basis for the Court of Appeal's view. Although their Lordships were not blind to the possibility of abusive resort to the Parliament Acts, some (including Lord Bingham and Baroness Hale) considered this a problem unsuited to judicial resolution, while others (notably Lords Brown and Carswell) did not rule out curial intervention in extreme circumstances.

Whereas such judicial control of the Commons' powers under the Parliament Acts could be conceptualised straightforwardly by the implication of appropriate terms, even if, in practice, identifying their content would be fraught with difficulty, restricting what may be done by Parliament itself would import altogether more fundamental considerations. And yet precisely such limits were explicitly countenanced by two of the judges in *Jackson* (albeit that others who addressed the issue were markedly more orthodox). Drawing upon recent political and legislative developments, including membership of the European Union, devolution and the incorporation of the European Convention on Human Rights, and upon norms derived from the rule of law and separation of powers, Lords Hope and Steyn explicitly denied the unqualified supremacy of Parliament. "Parliamentary sovereignty," said Lord Hope, "is no longer, if it ever was, absolute." Lord Steyn, meanwhile, indicated that this view is not merely of theoretical relevance, canvassing the possibility that Parliament may be incompetent to "abolish judicial review of flagrant abuse of power"—something (his Lordship delicately omitted to say) the Government sought to do, but ultimately stepped back from in the face of fierce opposition, when introducing new asylum legislation in 2004.

Although still the "*general* principle of our constitution" (original emphasis), parliamentary sovereignty, according to Lord Steyn, is "a construct of the common law" created—and potentially subject to revision—by the judges. Of course, not everyone will

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agree with this analysis. It is, for instance, simplistic to suggest that parliamentary sovereignty was straightforwardly judicially created in the same way as regular common law rules: indeed, Wade situated the rule establishing Parliament's supremacy in an extraordinary category, arguing that it could not be changed absent a "revolution" signifying judicial disobedience to the established constitutional order. Others, meanwhile, contend that Parliament has never been truly sovereign, and that, in circumstances such as those envisaged by Lords Steyn and Hope, judges would merely be exposing limits on legislative authority which are inherent in any liberal democracy founded upon the rule of law. Such debate has long engaged academic lawyers; but the fact that it is now being joined in our highest court surely marks a significant staging post in the development of our unwritten constitution.

MARK ELLIOTT

ABSOLUTELY RIGHT: PROVIDING ASYLUM SEEKERS WITH FOOD AND SHELTER UNDER ARTICLE 3

THE government's policy on supporting asylum seekers, enshrined in the Nationality, Immigration and Asylum Act 2002, has made several visits to the courts. The contentious issue is the interplay between the prohibition upon assisting "late" asylum seekers (those who do not make their claims "as soon as reasonably practicable") under section 55(1) and the discretion in section 55(5)(a), which allows (or rather, in the light of section 6 of the Human Rights Act 1998, compels) the Secretary of State to provide support "to the extent necessary for the purpose of avoiding a breach of a person's Convention rights". The question has now reached the House of Lords in *R. (Limbuela)* v. *Secretary of State for the Home Department* [2005] UKHL 66, [2005] 3 W.L.R. 1014. The case concerned the appeals of three asylum seekers whose applications were judged by the Home Secretary to be "late" and prohibited from receiving support. Two were reduced to sleeping rough and the third faced the imminent prospect of doing so. All were reliant on charity for food and their health was suffering. They successfully challenged the Secretary of State's judgment that no obligation under section 55(5)(a) arose. Although previous cases have established that failure to provide support to asylum seekers may constitute a breach of Article 3 of the European Convention on Human Rights (*R. (Q)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] Q.B. 36), uncertainty

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remained as to the circumstances in which a breach will occur and the obligation in section 55(5)(a) come into force. This was the issue before the House of Lords.

A preliminary question arose as to the proper scope and application of Article 3. Article 3 provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". The paradigm case at which Article 3 is directed is violence sanctioned by the State, but the ambit of the provision is wider than that. It is evident that Article 3 can impose positive obligations upon the State to protect individuals from harm at the hands of others (see, for example *A* v. *United Kingdom* (1998) 27 E.H.R.R. 611 and *Z* v. *United Kingdom* (2001) 34 E.H.R.R. 97). Moreover, Article 3 can be engaged by treatment other than violence: "[w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3" (*Pretty* v. *United Kingdom* (2002) 35 E.H.R.R. 1, at [52]).

In *Limbuela*, disagreement arose as to the application of Article 3. Counsel for the Secretary of State favoured the "spectrum analysis" proposed by Laws L.J. (and accepted by Carnwath and Jacob L.JJ.) in the Court of Appeal ([2004] EWCA Civ 540, [2004] Q.B. 1440). Although Article 3 is phrased in terms that appear absolute, Laws L.J. had suggested that the article only absolutely prohibits the State from authorising the use of unlawful violence. Acts or omissions of the State which expose persons to suffering other than violence are not categorically unjustifiable: such conduct may be justifiable if it arises in the administration or execution of lawful government policy, notwithstanding the suffering of the individual (at [68]).

However, the spectrum approach was firmly rejected by the House of Lords. Lord Hope observed that such an approach has no foundation either in the language of Article 3 or in the judgments of the European Court of Human Rights (at [53]). In particular, he rejected the suggestion that the test of whether Article 3 is breached is more exacting where the treatment in question results from legitimate government policy (at [55]). This must be correct, for surely the purpose of Article 3 is to place limits upon what may constitute "legitimate government policy": if government policy would result in inhuman or degrading treatment, then it cannot be legitimate.

Having determined that the prohibition in Article 3 is always an absolute one, the question remains as to how the prohibition

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operates in the context of section 55(5)(a). Two issues are in play here. First, what is the threshold for a breach of Article 3: in what condition and circumstances must an asylum seeker be before withholding of support constitutes a breach of Article 3? Second, must the State wait for the threshold of Article 3 to be crossed before the obligation in section 55(5)(a) arises or may preventative action be taken?

In *Q*, the Court of Appeal had declined to enunciate a precise test, referring only to the general guidance laid down in *Pretty* (above). While reluctance to prescribe the circumstances in which Article 3 will be breached is understandable, the consequences were unfortunate: the absence of guidance led to inconsistent decisions in the lower courts (contrast *R. (Tesema)* v. *Secretary of State for the Home Department* [2004] EWHC 295 (Admin) and *R. (Adam)* v. *Secretary of State for the Home Department* [2004] EWHC 354 (Admin)). Fortunately, the House of Lords in *Limbuela* has rectified the problem somewhat. Although declining to lay down any precise test, and emphasising that the question is a context-sensitive one (depending upon a variety of factors including age, gender and health), Lord Bingham (with whom Baroness Hale and Lord Brown agreed on this issue) stated that if an applicant "was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold [of Article 3] would, in the ordinary way, be crossed" (at [9]). It is hoped that this guidance will help bring some much needed consistency to the application of the law.

Moreover, the House of Lords rejected the suggestion that the Secretary of State is obliged to take a "wait and see" approach to Article 3. It is not necessary for an asylum seeker's conditions to have reached the state where they are in actual breach of Article 3 for the obligation under section 55(5)(a) to bite: an imminent prospect of a breach of Article 3 will suffice (at [62]). Again, this approach must surely be the correct one: as Lord Hope observed, the purpose of section 55(5)(a) is to enable the Secretary of State to "avoid" a breach of a person's Convention rights; it cannot be that an individual's living conditions must be such that they breach Article 3 before the obligation to give assistance takes effect.

ANNA HARDIMAN-MCCARTNEY

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THE ISRAELI SUPREME COURT IN SEARCH OF UNIVERSAL LEGITIMACY

THE Israeli government, faced with terrorist attacks waged from the West Bank of the River Jordan, territories which Israel captured in 1967 (the "Territories"), decided to construct a 475 mile barrier, separating the Territories from Israel (the "Barrier"). The Barrier, however, impinged on land beyond Israel's pre-June 1967 eastern border (the "Green Line"), thereby bringing Jewish settlements and Palestinian villages into the "Israeli" side of the Barrier.

In HCJ 7957/04 *Zaharan Yunis Muhammad Mara'abe et al.* v. *The Prime Minister of Israel et al.* (15 September 2005), the Supreme Court of Israel, sitting as the High Court of Justice, accepted a petition submitted by Palestinian residents against the legality of the construction of a segment of the Barrier which had created an enclave containing five Palestinian villages and the Israeli settlement of Alfei Menashe, all beyond the Green Line.

President Barak, in his judgment handed down on behalf of nine Justices, ruled that the *raison d'être* of the Barrier in general, and the Alfei Menashe segment in particular, was security-based (preventing infiltration by Palestinian terrorists into Israel and into Israeli settlements in the Territories), and not political (de facto annexation of parts of the Territories). Hence the construction of the particular segment fell within the authority of the Military Commander under humanitarian law.

The exercise of that authority was, however, held to be illegal, both under international law and under Israeli administrative law, as the choice of the particular segment was found to be disproportionate. The required effort had not been made, and the details of an alternative route had not been examined, in order to ensure security with a lesser degree of hardship to the Palestinian inhabitants. The Court thus directed the State to find alternative routes for the segment in question.

The judgment is similar to that of HCJ 2056/04 *Beit Sourik Village Council* v. *The Government of Israel* (30 June 2004) (2004) 43 I.L.M. 1099 (English); 58(5) P.D. 807 (Hebrew). Its importance lies in the fact that it constitutes the first Israeli ruling since the International Court of Justice ("ICJ")'s 2004 advisory opinion, in which it had opined that the construction of the Barrier beyond the Green Line had violated international law. (See *Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* (2004) 43 I.L.M 1009, noted by Gray, [2004] C.L.J. 527–532.) Thus, the later judgment provides a rare opportunity to examine the ways in which the highest Israeli

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judicial organ perceives international law in general, and the ICJ's jurisprudence in particular.

President Barak underlined the "common normative foundation" upon which the Jerusalem ruling and The Hague opinion were based: Israel is not sovereign in the Territories, she cannot annex them by force, her laws are not automatically applicable to them, the Territories are held in belligerent occupation, and hence the legal regime applicable there is the norms of international law regarding belligerent occupation, requiring the Military Commander to balance security-military considerations of the occupying forces against the humanitarian needs of the occupied population. In addition, both judicial organs concluded that the Barrier as a whole (the ICJ) or the segment in question (the Supreme Court) are illegal and hence should be dismantled.

Yet a careful reading of the two rulings reveals that the legal conclusions emanating from the Peace Palace were different from those of the Israeli Court. The ICJ held that any construction of the Barrier beyond the Green Line amounts, *ipso facto*, to a violation of international law, while the Supreme Court held that such construction is not illegal, as long as the proper balance is struck between security and humanitarian interests.

Such divergent legal conclusions were ascribed by President Barak to the difference in the factual basis upon which each court decided. He held that the ICJ had failed adequately to examine Israel's security-military needs. Full weight was thus placed on the violation of humanitarian rights, while inadequate weight was given to Israel's security-military needs. In contrast, in the two Israeli decisions, the Supreme Court, inspired by the maxim *ex facto ius oritur*, conducted an extensive factual examination of both security-military needs and humanitarian needs. The Israeli Court was thus able to decide that certain segments of the Barrier, but not others, violated international law.

The judgment vividly demonstrates that the Israeli judiciary finds itself walking a tightrope, having to balance its desire to ensure Israel's compliance with international law with the need to respect her security position. Within this framework, the Court is conducting a sensitive dialogue with the ICJ, the political and juridical international community, and the international public at large, as well as with the Israeli executive, military establishment, and most challengingly, with the Israeli public. Put differently, the Israeli Court is seeking universal legitimacy.

Such a search is reflected in the substance of the judgment. The Israeli Court was courageous enough to exercise its judicial control

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over a highly controversial issue, boldly intervening in relation to a segment of the Barrier that had already been built. However, it stopped short of ruling that the Fourth Geneva Convention of 1949 applies and that the settlement campaign is illegal. It also refused to accept the conventional wisdom that the route of the Barrier was influenced by political considerations, namely the future annexation of territories situated between the Green Line and the Barrier.

The search for universal legitimacy is also reflected in the judgment's narrative. President Barak correctly indicated that the ICJ's opinion was merely advisory, lacking any binding force, and not constituting *res judicata* (but compare the obligatory language chosen by the ICJ, *e.g.* para. 64 of the advisory opinion). Yet he was careful to pay lip service to the need to ascribe "the full adequate weight to norms of international law, as developed and construed" by "the highest judicial body in international law".

Furthermore, President Barak did subscribe to the ICJ's statement of the applicable law, while dismissing its conclusion on factual grounds. Such a choice is astute. The strong philippic directed at the ICJ's failure to address the factual situation was supported by numerous scholarly writings, by the concurring separate opinions in the ICJ of Judge Higgins, Judge Owada and Judge Kooijmans, and by the dissenting declaration of Judge Buergenthal. Moreover, it is certainly less confrontational to dismiss the advisory opinion on factual as opposed to normative grounds.

Yet President Barak's reference to the "common normative foundation", like the lip service paid to the need to grant "full respect" to the advisory opinion, cannot hide the true colours of the judgment.

The Supreme Court took issue with the ICJ on several important points. The ICJ held that since the settlements are illegal, the Barrier cannot be designed to protect the Jewish settlers, while the Supreme Court ruled that Israel is permitted to protect its citizens, whether or not they are "protected persons" under the Fourth Geneva Convention; the ICJ held that it "could not remain indifferent" to fears expressed that the Barrier may constitute "de facto" annexation, while the Supreme Court ruled that it amounts to a temporary security measure; the ICJ opined that Israel cannot rely on the grounds of self-defence (Article 51 of the UN Charter), as the attacks are launched against her by a non-State actor, operating from within territories under her control, while the Supreme Court found the ICJ approach "hard to come to terms with".

In addition, the ICJ ruled on certain central points, whereas the Supreme Court addressed them but avoided any conclusion. The

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ICJ opined that the Fourth Geneva Convention applies de jure to the Territories, while the Israeli Court decided not to rule on this issue, relying on Israel's de facto application of its humanitarian provisions; the ICJ ruled that the authority to seize property for military purposes under the Hague Convention exists only during hostilities, and therefore not in relation to the Barrier, while the Supreme Court left this issue undecided; the ICJ opined that the Jewish settlements are illegal, while the Supreme Court decided "not to express its opinion on that issue"; the ICJ ruled that conventions on human rights to which Israel is a party are applicable in the Territories, while the Supreme Court left this issue undecided.

Furthermore, the ICJ tackled other core themes, while the Supreme Court avoided them altogether. The ICJ extended its opinion to East Jerusalem and also held that the Palestinians are entitled to the *erga omnes* right of self-determination, and to the right of access to the Holy Places, while the Supreme Court avoided these issues.

The judgment constitutes a judicial acrobatic act, aimed at achieving universal legitimacy. Nonetheless, even such exercise in judicial pragmatism cannot conceal the wide legal and psychological gap that divides The Hague and Jerusalem.

GUY HARPAZ

PROTECTING THE PUBLIC FROM UNSAVOURY CHARACTERS

IN *R.* v. *Rimmington, R.* v. *Goldstein* [2005] UKHL 63, [2005] 3 W.L.R. 982, the House of Lords has clarified the law relating to criminal liability for public nuisance. The scope of application of the offence, if not its definition, has been uncertain for some time. The case is an example of the constant tension between the need to catch innovatively harmful behaviour and the principle of certainty in legal rules.

Rimmington sent over 500 individual parcels of racist and offensive material to numerous persons over a period of years. This was in order to cause "them" (*i.e.* ethnic minorities and anti-racists) psychological trauma after he had suffered physical harm at the hands of a black assailant. He was indicted on a single count of causing a public nuisance. Goldstein, an ultra-orthodox Jewish food supplier, sent his long-term friend and creditor a cheque. He included in the envelope a small quantity of salt: this was in part a reference to the age of the debt, *i.e.* an allusion to the method of

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preserving Kosher food, and in part a joke reference to the anthrax scare going on in the USA at the time and which the two had discussed. The envelope spilled some of its contents at the Wembley sorting office and 110 postal workers had to be evacuated while the substance was tested. The results were that the second delivery for that area was cancelled and Goldstein was convicted of causing a public nuisance. Rimmington appealed against a preliminary ruling that the offence was still known to the common law, was sufficiently certain and could be satisfied by his conduct; Goldstein appealed against his conviction. The Court of Appeal dismissed their appeals: [2003] EWCA Crim 3450, [2004] 1 W.L.R. 2878.

The House of Lords allowed their appeals, reversing both courts below. Lord Bingham, giving the leading speech, described the core of public nuisance as "the suffering of common injury by members of the public by interference with rights enjoyed by them as such" caused by the defendant (at [6]). There are two elements of this which are ambiguous. First, what role does the term "common" play in "common injury"? It might determine the number of people who must bear the injury. Alternatively, it might dictate that the same injury or type of injury must be borne by all, however many are concerned. It is possible that it refers to both, but there is little guidance in the case. Certainly the number of people affected is rightly held to be important, but it is uncertain which part of the test incorporates it. In any case, there should be no need for the same type of injury to be suffered. Second, what exactly is a right enjoyed as a member of the public? In the *Goldstein* case for instance, inconvenience to the wider public was held to be necessary to make out the offence in addition to the disturbance caused to the postal workers. Implicitly therefore there might be a public right to the timely receipt of mail. If that is so, the public right requirement can easily be satisfied.

Lord Bingham's test provides some clarification, but its application might still be problematic. It is slightly concerning that the House doubted certain cases that applied this test on very similar terms. (See *R.* v. *Norbury* [1978] Crim. L.R. 435 and *R.* v. *Johnson (Anthony)* [1997] 1 W.L.R. 367 in particular.) Indeed, the Law Lords themselves highlight the difficulty of this result-based approach. Lord Bingham seems to suggest that a phone call between two people cannot be a public nuisance. Lord Nicholls then notes that it might where, for instance, it is a hoax bomb threat by phone that the recipient then spreads, thereby causing common injury. The latter approach is surely right, as the phone call is a means, not a result. It should then be admitted that there

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is a (sensible) policy decision behind the general exclusion of phone conversations: where there is only one recipient of a call, no series of such calls will ever amount to a public nuisance.

The *Goldstein* appeal also dealt with the mental element of the offence. The House approved (at [39]) an objective test as in *Shorrock* [1994] Q.B. 279: "the defendant is responsible for a nuisance which he knew, or ought to have known (because the means of knowledge were available to him), would be the consequence of what he did or omitted to do". This was not the case here. At trial and on appeal the emphasis had been on a foreseeable consequence if there were an escape and not on the foreseeability of an unintended escape.

The second issue is whether the prosecution should charge public nuisance where there is also an applicable statutory offence, as was the case in both of these situations (*e.g.* the Malicious Communications Act 1988, section 1 and the Postal Services Act 2000, section 85(1) and (4)). Lord Bingham held that much of the ground of public nuisance is now covered by discrete statutory offences and where applicable these should be charged "unless there is a good reason for doing otherwise" ([28]–[31]). Lord Rodger favoured retaining the option of the common law charge unless Parliament had expressed itself on the matter with a statutory offence carrying a lower maximum sentence, or other limitation. These two approaches are not that different, since most of the parallel regulatory offences have a lower maximum sentence than the life imprisonment and unlimited fine of public nuisance. Nevertheless Lord Bingham's approach is to be preferred. It will avoid excessive subtleties in working out Parliament's meaning in imposing a maximum sentence or time bar in a parallel statutory offence.

The House was unanimous in thinking that its definition satisfied the requirement for certainty in the law under both the common law and the European Convention on Human Rights. This was because both allow some margin for an offence to develop to deal with new situations. The House's decision is not surprising, although their Lordships did honestly note that the certainty requirements in question are not very stringent. It remains to be seen how much certainty the refined test brings in practice.

The temptation to have a "back-up" charge is a persistent one in legal minds. While the House removed the slightly more vague offence of causing a public mischief in *D.P.P.* v. *Withers* [1975] A.C. 842, we now have Anti-Social Behaviour Orders to shadow-criminalise almost anything, even if not caught by criminal offences. While repeatedly approving his history and description of the offence, the Law Lords shied away from following J.R. Spencer's

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recommendation to abolish the offence altogether (''Public Nuisance—A Critical Examination'' [1989] C.L.J. 55), citing constitutional propriety. The majority's ruling that public nuisance should only be charged as an offence of last resort is to be welcomed. It is questionable whether a ''regulatory'' offence, with an objective mens rea, should have a potential punishment of life imprisonment. Perhaps by putting a cap on this sentencing allurement, prosecutors might be further steered towards the statutory offences.

MATTHEW DYSON

LIABILITY FOR PURELY ECONOMIC LOSS AGAIN: ''SMALL EARTHQUAKE IN CHILE, NOT MANY DEAD''?

As a result of a hospital's negligence, Mrs. J had a stroke which rendered her incapable of looking after herself. Eventually, the hospital financed a structured settlement which provided her with a specially adapted house where she was cared for by her daughter. But until that happened, the Borough of Islington provided her with residential care, under a statutory obligation imposed on them by the National Assistance Act 1948. This cost the citizens of Islington £81,000, a sum which the Borough sought to reclaim from the hospital by suing it in tort. The claim failed, both at first instance, and on appeal: *London Borough of Islington* v. *University College London Hospital NHS Trust* [2005] EWCA Civ 596, [2005] Lloyd's Rep. Med. 387.

At first sight this decision seems neither particularly important, nor very interesting. The Borough's claim was, of course, a tortious claim in negligence for purely economic loss, resulting from the personal injuries the defendant had inflicted on a third party. As such, it was almost bound to fail. Furthermore, it was a squabble between two pockets of the public purse—like those lawyer-enriching law-suits between parishes two hundred years ago, each arguing that the poor law imposed the duty to maintain the pauper on the other.

But in fact the case raises an important point of public policy.

In recent years, Parliament has passed a series of Acts enabling the social security system to reclaim what it has spent in looking after accident victims from the tortfeasors who made them incapable of looking after themselves. In 1972, it passed legislation enabling the NHS to reclaim from motorists some of the costs of medical treatment given to those injured in accidents resulting from

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their negligent driving. In 1989, it passed legislation requiring tortfeasors to reimburse the State for a range of social security payments made to accident victims: an obligation now to be found in the Social Security (Recovery of Payments) Act 1997. Then in 2003, Parliament passed the Health and Social Care (Community Health and Standards) Act, Part 3 of which requires tortfeasors of all types to reimburse the NHS for all the costs involved in hospital treatment for their victims. To ensure that tortfeasors pay up as legally required, a muscular organization, called the Compensation Recovery Unit, has been set up.

This statutory structure protects the parts of the social security system that are run centrally from Whitehall, but does nothing for the parts that are administered and financed locally: that is, the parts for which the Government is not directly responsible, and upon which it is therefore willing to impose duties without worrying too much about whether they have the funds necessary to fulfil them. Unsurprisingly, local authorities do not savour this discrimination: like Shylock, they say "If you prick us, do we not bleed?" It was against this background that Islington Borough Council tried "direct action" in the courts.

Since *Caparo* v. *Dickman* [1990] 2 A.C. 605, the claimant who seeks damages in negligence for purely economic loss in a new situation must satisfy a three-fold test: first, "reasonable foreseeability"; secondly, "proximity"; and thirdly, that the imposition of liability would be "fair, just and reasonable". And in applying these tests the courts are supposed to have respect for "incrementalism": the notion that the common law should move by little steps, like centipedes and corgis, not leaps and bounds, like kangaroos.

In the Court of Appeal, where Buxton L.J. gave the leading judgment, the claimant was held to have cleared the first hurdle, foreseeability. Buxton L.J. then wrestled manfully with the second test, "proximity", and with the concept of incrementalism. Like many commentators, and most law-students, Buxton L.J. found neither concept particularly meaningful, and suggested both were really different ways of asking "was the harm reasonably foreseeable?", or "is it fair, just and reasonable for liability to be imposed?" Having reached what he described as a "somewhat inconclusive outcome" on these issues, Buxton L.J. then turned his attention to the third limb of the *Caparo* test, and held that on this point the claimant clearly failed. In shorter judgments, Clarke L.J. and Ousely J. agreed.

In a broad sense, said Buxton L.J. and his brethren, it would be "fair, just and reasonable" to make the defendant pay. The

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defendant was at fault, and the loss was one for which the defendant would have had to compensate Mrs. J herself had she been richer, and hence able to pay for her temporary sheltered housing out of her own pocket, instead of having to ask Islington to provide it for her out of "public money". But the "fair, just and reasonable" test, they said, must be answered by looking at the bigger picture. This was an area in which Parliament has been active, creating specific statutory duties to reimburse against a legal background which it had evidently assumed to be the absence of any general liability in negligence. To upset a cart with so many legal apples balanced on it is not a matter to be undertaken lightly, wantonly or unadvisedly. Further reform in this area, they said, is a job for Parliament, and not the courts.

With this conclusion it is hard to disagree. But it is equally hard to disagree with Buxton L.J. when he also said that "Islington's basic case attracts a good deal of sympathy". If it is right that the NHS and the part of the social security system that operates from Whitehall should be able to recoup its money from the tortfeasor, there is no intelligible reason why local authorities should not be able to do the same. There are other supporters of the injured who are in a similar position, too: including employers, whom the law requires to give "statutory sick-pay" to employees if they are injured, even by third parties—for only part of which the State reimburses them, and none of which they can recover from the tortfeasor. This is, I believe, an area at which Parliament should look again. And next time, it should look beyond Whitehall when it does so.

J.R. SPENCER

TRUSTEE (IN)DISCRETION

WHEN should a court set aside action taken by trustees pursuant to their dispositive powers? And how should the court remedy action already taken? *Sieff* v. *Fox* [2005] EWHC 1312 (Ch), [2005] 3 All E.R. 693 goes some way to answering the first question, but not the second.

A major settlement, created in 1971 to benefit members of the Russell family, vested a power of appointment in its trustees. In 2001 the trustees executed a deed of appointment pursuant to the power. However, they did so in reliance on tax advice which was wrong, though they did not know that at the time. The deed, as it

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stood, would have resulted in a large charge to capital gains tax on the trustees. When they realised this, the trustees sought to set it aside under the principle in *Re Hastings-Bass* [1975] Ch. 25.

In *Sieff* v. *Fox*, Lloyd L.J. (sitting in the Chancery Division) summarised the principle as follows (at [119]).

> Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.

After a very thorough review of the authorities, the judge allowed the trustees' claim. The appointment was set aside because the trustees would not have made it had they considered its true capital gains tax consequences. This straightforward application of the principle left many interesting questions, however, which are "grist to the mill of the commentators", as the judge put it (at [118]).

The first is this. What are the factors which allow trustees or beneficiaries to invoke the principle in *Re Hastings-Bass*? Lloyd L.J. recognised that application of the principle does not turn on the question whether the trustees have exceeded their powers. It turns on the context within which they sought to exercise a power. It concerns action which was authorised, both in form and in substance, but was nevertheless taken on the basis of incorrect or inadequate considerations.

The next question is whether action that can be set aside under the principle in *Re Hastings-Bass* necessarily amounts to a breach of trust. Lloyd L.J. appeared to think not (at [119(iii)]), though Lightman J. opined to the contrary in *Abacus Trust Co. (Isle of Man) Ltd.* v. *Barr* [2003] EWHC 114 (Ch), [2003] Ch. 409, noted [2004] C.L.J. 283. With respect, Lloyd L.J.'s views are to be preferred. A trustee exercising a dispositive discretion must make a reasonable survey of the range of objects falling within the power, and he should consider whether it is appropriate to exercise the power in favour of a particular object (*Sieff* at [56] and *Re Hay's Settlement Trusts* [1982] 1 W.L.R. 202). These duties are not strict or absolute. In broad terms, they are duties of reasonable endeavour. Even if a trustee has fulfilled these duties, there is no reason why his ill-judged action should bind the beneficiaries and leave them without redress, unless a defence has intervened. Yet given the divergent authorities, the courts could still limit the

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applicability of *Hastings-Bass* to situations where a decision involved or entailed a breach of trust: the courts are well aware that *Hastings-Bass* should not be applied too widely.

The need to ensure that the principle in *Hastings-Bass* does not get out of hand is also reflected in Lloyd L.J.'s decision that the principle only applies to a merely permissive fiduciary power if the holder of the power (usually trustees) *would*—rather than *might*—have exercised the power differently but for the flaw in their decision. This limit prevents the holders of powers from being able to re-write history far too easily: regret alone does not and should not form a ground for relieving trustees of the consequences of their actions. *Sieff* v. *Fox* draws a distinction, however, between permissive fiduciary powers, where this test applies, and mandatory trusts involving some discretion, where the exercise of discretion can apparently be impugned if the trustees *might* have acted differently but for the relevant flaw in their decision. This distinction reconciles otherwise divergent cases, but it attributes importance to facts which did not figure prominently in those cases. There may be greater merit in a more policy-oriented approach, whereby the strength of the objects' rights to impugn action by trustees under the *Hastings-Bass* principle relates to the *quid pro quo*, if any, which they gave for those rights (see, *e.g.*, Hayton, [2005] Conv. 229).

Finally, the remedial consequences of the *Hastings-Bass* principle remain unclear, even after *Sieff* v. *Fox*. Where the principle applies, does it render an exercise of discretion by trustees (and any consequent action by them) void in equity or merely voidable? Nothing turned on the distinction for the purposes of the present case (at [82]). More generally, the authorities in point are in some disarray.

In principle, the distinction between "void" and "voidable" should turn on the reasons why trustees' action can be impugned. If the flaw in what has happened is that the trustees had no authority to act as they did, then the trustees' actions will be void in equity, though any consequent dealings by trustees with trust assets may well have effect at law, and a subsequent bona fide purchaser of a legal interest in the assets concerned for value without notice of the equities would take free of beneficiaries' claims (see, *e.g.*, *Cloutte* v. *Storey* [1911] 1 Ch. 18). If, by contrast, the trustees did have authority to do what they did, but they acted on the basis of a flawed decision, then their action should be voidable. The self-dealing rule is a clear example of this approach. If trustees have a sufficiently wide power of sale and use it to sell a trust asset to one of their number, then the sale is voidable at the

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instance of the beneficiaries, subject to any bar to rescission, not void. The sale was a real sale at law; and the trustees had power in equity to make that sale, but they sold in circumstances where the conflict between their duty and self-interest created such risks to the beneficiaries that the sale is voidable (see, *e.g.*, *Dover* v. *Buck* (1865) 5 Giff. 57 at p. 63, *per* Stuart V.-C.). The principle in *Hastings-Bass* concerns the flawed process by which the decision is reached, rather than a lack of authority for the trustees to act as they did (unless the two are deliberately conflated, which is certainly not necessary). The appropriate consequence of a decision successfully impugned on the basis of the principle should therefore be that the decision, and any action taken pursuant to it, are voidable in equity, rather than void.

However, the practical importance of this distinction should not be overstated. The protection of third parties concerned by the action impugned is often said to be the reason for preferring "voidable" over "void" (see, *e.g., Hunter* v. *Senate Support Services Ltd.* [2004] EWHC 1085 (Ch); [2005] 1 B.C.L.C. 175 at [179]). Certainly, third parties can be protected by the bars to rescission of voidable action. Still, even if action is void *in equity* there are at least three ways of protecting third parties (cf. Lightman J. in the *Abacus Trust* case, at [30]). First, the court does not have to grant a declaration that action is void, with consequential relief: remedies may be withheld on established equitable principles such as laches and lack of clean hands. Secondly, the court can grant relief on terms, where appropriate (see, *e.g.*, *Boardman* v. *Phipps* [1967] 2 A.C. 67). Thirdly, even if an act is void *in equity*, the *legal* consequences of the act remain unless and until reversed, and a third party may be able to prevent any reversal of those consequences, for example because he is a bona fide purchaser of a legal interest in the assets concerned for value without notice of the equities.

Richard Nolan
Matthew Conaglen

DISHONESTY IN THE CONTEXT OF ASSISTANCE—AGAIN

In *Twinsectra Ltd.* v. *Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 (noted [2002] C.L.J. 524) the House of Lords accepted, following the Privy Council's earlier advice in *Royal Brunei Airlines* v. *Tan* [1995] 2 A.C. 378 (noted [1995] C.L.J. 505), that a person (not himself a trustee) who assists in a breach of trust or fiduciary duty

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will not be liable to the beneficiaries unless he acted dishonestly. The majority of their Lordships in *Twinsectra* considered that dishonesty "is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people *and* that he himself realised that by those standards his conduct was dishonest" (at [27], emphasis added, *per* Lord Hutton). The Privy Council has now revisited this test in *Barlow Clowes International Ltd.* v. *Eurotrust International Ltd.* [2005] UKPC 37, [2006] 1 All E.R. 333 where, although claiming to be applying *Twinsectra*, it has effectively altered the test for dishonesty by removing the second limb.

Mr. Clowes ran an off-shore investment scheme through Barlow Clowes Ltd. and fraudulently dissipated most of the money invested in the scheme. Mr. Henson was a director of an Isle of Man company, ITC Ltd., through which Clowes had siphoned some of the funds. Barlow Clowes' liquidators sued Henson for dishonestly assisting Mr. Clowes' breaches of fiduciary duty. It was found that Henson had suspected that Mr. Clowes had been misappropriating funds in some of the transactions which passed through ITC but had consciously decided not to investigate for fear of discovering the truth. At trial in the Isle of Man, Henson was found to have acted dishonestly. That decision was reversed on appeal, on the basis that the evidence did not substantiate the finding. The liquidators appealed to the Privy Council, where Henson relied on the fact that no finding had been made as to whether he had realised that his conduct would be regarded as dishonest by reasonable and honest people. Notwithstanding the liquidators' apparent failure to establish the second limb of the *Twinsectra* test, the Privy Council reinstated the finding of liability. Several points emerge.

In *Twinsectra*, Lord Hoffmann, agreeing with Lord Hutton, had said that dishonesty "require[s] a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour" (at [20]). In *Eurotrust*, Lord Hoffmann purported to clarify this test by explaining that "ambiguity" in *Twinsectra* had encouraged academics to take this second limb as a separate requirement, whereas it was intended only "to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about what those standards were" (at [16]). If the supposedly confused academics were not in fact confused before (and there was no reason to be, as

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Twinsectra was not ambiguous), they could be justified in being confused now. However, the confusion should abate if it is recalled that Lord Hoffmann himself also stated in *Twinsectra* (at [20]) that dishonesty "require[s] *more than* knowledge of the facts which make the conduct wrongful" (emphasis added). In that light, the sleight of hand in *Eurotrust* is apparent: the test in *Twinsectra* was not ambiguous but has been changed in *Eurotrust* so as to exclude the second limb of Lord Hutton's formulation in *Twinsectra*.

While the Privy Council's justification and analysis can be criticised, the amendment to the test is welcome. The *Twinsectra* interpretation of dishonesty had been questioned, both academically (see, *e.g.*, [2002] C.L.J. 524, 525–526) and judicially (see, *e.g.*, *US International Marketing Ltd.* v. *National Bank of New Zealand Ltd.* [2004] 1 N.Z.L.R. 589 (C.A.)). Civil liability to compensate for loss does not normally depend upon consciousness of moral wrongdoing, as distinct from conscious action. The test of conscious dishonesty laid down in *R.* v. *Ghosh* [1982] Q.B. 1053, and largely adopted in *Twinsectra*, may be appropriate in establishing criminal culpability, but in *Tan* it was rightly treated as inappropriate when determining a defendant's civil liability. *Eurotrust* is a desirable move back to the concept of dishonesty elucidated in *Tan*. Subjective elements, such as "what a [defendant] actually knew at the time" (*Tan*, p. 389) and the defendant's "experience and intelligence" (*Tan*, p. 391), clearly are relevant in determining whether ordinary people would objectively consider the defendant's conduct dishonest. But this does not require that a defendant's civil liability to compensate for loss flowing from a breach of trust (or other fiduciary relationship) in which the defendant assisted should depend on whether he was conscious of the fact that others would regard his conduct with moral condemnation. Requiring consciousness of wrongdoing also risks the re-emergence of a *Baden*-like "scale" of knowledge ([1993] 1 W.L.R. 509), which was rightly rejected in *Tan* on the basis of the "tortuous convolutions" towards which it tended (*Tan*, pp. 391–392).

Insofar as *Eurotrust* alters *Twinsectra*, the question of its status as precedent in English law arises, given that it is merely Privy Council advice. In that capacity it joins several other high-profile Privy Council decisions which have been treated by courts in England as representing the law despite their inconsistency with earlier (and higher) English authority (see, *e.g.*, *Attorney General for Jersey* v. *Holley* [2005] UKPC 23, [2005] 2 A.C. 580 (noted [2005] C.L.J. 532), followed in *R.* v. *Mohammed* [2005] EWCA Crim 1880 notwithstanding *R.* v. *Smith (Morgan)* [2001] 1 A.C.

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146; *Attorney-General for Hong Kong* v. *Reid* [1994] 1 A.C. 324 (P.C.), followed in *Daraydan Holdings Ltd.* v. *Solland International Ltd.* [2004] EWHC 622 (Ch), [2005] Ch. 119 notwithstanding *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1 (C.A.)). As Nolan has pointed out, the practical significance of this phenomenon is reducing as the jurisdiction of the Privy Council dwindles ([2005] C.L.J. 554, 556–557), but it must nonetheless be faced in respect of *Eurotrust*. For the reasons given above, it is suggested that it would be preferable for English courts to follow *Eurotrust* rather than *Twinsectra*, notwithstanding the technical difficulty with precedent. Treacy J., sitting in the Queen's Bench Division, appears already to have so chosen: *Abou-Rahmah* v. *Abacha* [2005] EWHC 2662 (QB) at [40]–[52].

Eurotrust also clarifies whether the defendant must be aware of the trust in order to be liable for dishonestly assisting in its breach. In *Brinks Ltd.* v. *Abu-Saleh* (*The Times*, 23 October 1995), Rimer J. had opined, obiter, that such knowledge is necessary. On the other hand, Lord Millett later said that "[i]t is obviously not necessary that [the defendant] should know the details of the trust or the identity of the beneficiary. It is sufficient that he knows that the money is not at the free disposal of the principal" (*Twinsectra*, at [135]; see also *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265 at p. 295). In *Eurotrust*, Lord Hoffmann confirmed the latter view: "[s]omeone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means" (at [28]). This approach makes more sense in the context of a test of dishonesty which "means simply not acting as an honest person would in the circumstances" (*Tan*, p. 389).

MATTHEW CONAGLEN
AMY GOYMOUR

CROSS-BORDER SUPPLY OF GAMBLING SERVICES

THE decision of the WTO's Appellate Body ("AB") in *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R, adopted 20 April 2005) maintained the AB's reputation for subtle and even-handed decision-making, with both sides claiming victory after its decision was released. Antigua initiated dispute settlement proceedings against the United States, arguing that service providers operating from its territory were prevented from providing cross-border online gambling services to

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the US market by a combination of three US federal statutes. (Antigua's complaint in relation to a number of state laws was dismissed for technical reasons.) Antigua argued that this prohibition constituted a violation of the United States' market access obligations under Article XVI of the General Agreement on Trade in Services.

Article XVI obligations apply only to those service sectors which have been listed by each country in its "Schedule of Commitments". The first substantive issue for the AB was therefore whether or not, as a matter of interpretation, the US' reference to "other recreational services (except sporting)" in its Schedule included gambling and betting services. After a typically methodical and exhaustive application of the customary rules of treaty interpretation, the AB upheld the Panel's finding that "the United States' Schedule ... includes specific commitments on gambling and betting services" (para. 213). Two points are worthy of brief note. First, this decision would seem to support those who have criticised the GATS' sector classification system as confusing and unclear. As the Panel itself noted, it is quite conceivable that the United States' commitments on gambling services were made in error. There is a clear need to clarify the current system of classification, to preclude future uncertainty. Second, the AB's decision gives mixed signals on the importance of documents prepared by the WTO Secretariat as guides to interpretation. On the one hand, it explicitly rejects the status of such documents as "context" for the purposes of Article 31 of the Vienna Convention on the Law of Treaties 1969, and permits their consideration only as "supplementary means of interpretation" under Article 32. On the other, such documents clearly had an important (probably decisive) influence on the AB's decision (paras. 197–208). To the extent that this signals a more general willingness to accord significant weight to documents prepared in an administrative capacity by the Secretariat with only minimal direct governmental participation, this is a cause for some concern.

The result of the AB's decision on the interpretive issue was that the US had made full market access commitments with respect to internet gambling services. Antigua then argued that an effective prohibition on the cross-border supply of such services constituted a violation of GATS Articles XVI:2(a) and (c). The US countered that the US statutes in question were not covered by either of those subsections: the statutes contained neither a "limitation on the number of service suppliers *in the form of numerical quotas*" nor a "limitation on the total number of service operations ... *expressed in terms of numerical units*" (emphasis added). The AB rejected the US argument, suggesting that a zero quota is a numerical quota,

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and that the prohibitions in question were "equivalent to a zero quota", and thus caught by Article XVI (para. 237). While there is an undeniable logic to this decision, it may be criticised as potentially significantly expanding the scope of Article XVI, beyond the intention of the original negotiators. There is a strong argument that Article XVI:2 was deliberately drafted to refer to prohibited measures according to their *form* rather than their *effect*, by way of careful compromise between the goals of increasing market access and maintaining a high degree of regulatory flexibility for WTO Members. There is a very wide variety of different measures which may potentially be "equivalent to" a zero quota—from affirmative action programs favoring local disadvantaged groups, to a decision to bring an entire sector under public control. It is far from certain that the drafters of the GATS understood themselves to be establishing such far-reaching disciplines.

Having found a violation of Article XVI:2, the AB then turned to the general exceptions provisions in Article XIV. This was the first occasion that the AB has had occasion to interpret the important "public order" exception in Article XIV(a), and there is much to applaud in this aspect of the AB's judgment. It is entirely appropriate that the AB adopted the Panel's broad understanding of "public order" as referring to "the preservation of the fundamental interests of a society", explicitly including concerns pertaining to "money laundering, organized crime, fraud, underage gambling and pathological gambling" (para. 296). It is also entirely appropriate that the AB readily acknowledged, without enquiring closely, that the relevant US legislation was designed with these purposes in mind. As to whether the measures in question were "necessary" to achieve these objectives, the AB followed the approach it had outlined in *Korea—Beef* and *EC—Asbestos*. It emphasised the importance of the societal interests protected by the prohibition, and that strict controls may be needed to protect such interests. Importantly, it reversed the decision of the Panel, to the effect that the US had a duty to consult with Antigua before it imposed a restriction on trade. Consultations, the AB said, have by definition an indeterminate outcome, and thus cannot be considered a reasonably available alternative measure achieving the same objective as the measure at issue.

Finally, the AB turned to the *chapeau* of Article XIV, and its prohibition on "arbitrary and unjustifiable discrimination". The AB rejected Antigua's contention that the US enforced its laws prohibiting gambling more strictly against foreign suppliers than domestic suppliers, on the basis that Antigua had referred to only a small number of cases of enforcement, rather than producing

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evidence of overall patterns of enforcement. However, it ultimately found against the US on a very specific point: that the US Interstate Horseracing Act appeared, on its face, to permit *domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races. While there is little to object to in this decision as a matter of logic, it is noteworthy that the AB's chain of reasoning does little to alleviate the ongoing confusion concerning the precise difference between the test for discrimination in Article XVII, and that for "arbitrary and unjustifiable discrimination" in Article XIV.

US—Gambling has been a controversial case from its inception, and the recent decision of the AB has been eagerly awaited. While there are a number of specific points of concern, the AB has managed to produce a finely crafted and carefully balanced decision, which implicitly demonstrates an awareness of, and a degree of sensitivity to, the desires and concerns of a wide variety of stakeholders in the trade regime.

ANDREW LANG

REFUSAL TO DEAL AND OBJECTIVE JUSTIFICATION IN EC COMPETITION LAW

A CRUCIAL difference between Articles 81 and 82 EC is that certain anti-competitive agreements and concerted practices may be exempted under Article 81(3) EC while there is no provision for the exemption of abuses of dominant position under Article 82 EC. Academic writers have concluded that the Community judicature has, nevertheless, implicitly developed an analysis based on objective justification and proportionality in order to instil flexibility into Article 82 EC (see Case 395/87 *Ministère Public* v. *Tournier* [1989] E.C.R. 2521, at [38–46]). Refusals to supply customers and competitors by dominant companies featured prominently in their enquiry, not least because labelling such practices as automatically abusive would encroach on important legal principles such as contractual freedom (Case T-41/96 *Bayer* [2000] ECR II-3383, at [180]). There is general consensus that refusals to deal can be objectively justified where there is a shortage of a product (Case 77/77 *BP* v. *Commission* [1978] E.C.R. 1513, at [34]), but whether a dominant undertaking can invoke the protection of its commercial interests as a justification is more controversial. The ECJ seems to have accepted this defence nominally, but by applying a stringent proportionality test, has thus far prevented dominant companies from succeeding when they have

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invoked it against allegations of abuse (Case 26/76 *United Brands* v. *Commission* [1978] E.C.R. 207, at [189–192]).

A recent reference made by the Greek Competition Commission under Article 234 EC in *Synetairismos Farmakopoion Aitolias and Akarnanias (Syfait)* v. *Glaxosmithkline* (Case C-53/03, judgment of 31 May 2005, not yet reported) confronted the Court directly with this issue. The ruling was preceded by a compelling Opinion by Advocate General Jacobs. As a result of it, the judgment of the Court was eagerly awaited. Unfortunately, a full Court decided that it had no jurisdiction to answer the substantive questions referred by the Greek Commission, because the latter did not offer the guarantees of judicial independence proper of a "court or tribunal" within the meaning of Article 234 EC. This decision sits comfortably with some recent judgments, where the Court has scrutinised rigorously whether the conditions in Article 234 EC have been met (Case C-134/97 *Victoria Film* [1998] E.C.R. 1-7023, at [14]). However, the hunch that the Court might be using these conditions to avoid dealing with difficult cases like the present one cannot be discounted. More so, if other judgments of the Court concerning the interpretation of the notion of "court or tribunal" in Article 234 EC are considered (Case 246/80 *Broekmeulen* v. *Huisarts* [1981] E.C.R. 2311, at [17–18]).

The facts of *Syfait* were typical of a situation involving parallel importation of pharmaceuticals within the Community. Glaxosmithkline (GSK), a pharmaceutical company, distributed medicinal products in Greece by selling them to a network of Greek wholesalers. GSK discovered that substantial amounts of the supplies made available to these wholesalers were exported to other Member States where the prices for these products were substantially higher than in Greece. GSK then decided to reduce the volume of supplies to the Greek wholesalers and started supplying directly to Greek hospitals and pharmacies, alleging that the massive exportation of the products had created shortages on the Greek market. The wholesalers then complained to the Greek Competition Commission about GSK's refusal to meet their orders in full. After finding that GSK was dominant in the market of at least one of the products, the Greek authority made a reference to the European Court of Justice asking whether it was possible to justify objectively a restriction of supply by a dominant company. On the facts, it was clear that GSK had acted to limit parallel trade and in order to defend its commercial interests.

The essence of the Advocate General's Opinion was an examination of the circumstances that could justify a refusal to deal by a dominant company operating in the pharmaceutical sector.

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The European Commission had submitted that a refusal to supply to limit parallel trade, like the one at issue, was most likely to be abusive and could only be justified in narrowly defined circumstances. This was a powerful argument because restrictions in parallel trade generally act to the detriment of the consumer and are *per se* at variance with the ideal of market integration, one of the key objectives of EC Competition Law (Case 26/75 *General Motors* v. *Commission* [1975] E.C.R. at [12] and Commission Decision 2003/675/EC *Video Games/Nintendo*, O.J. [2003] L255/33). Advocate General Jacobs, however, convincingly argued that a number of factors specific to the pharmaceutical market rendered defensible GSK's interruption of supply. Firstly, it was clear that normal conditions of competition did not operate in that market. The price differentials between the Member States, which in turn created an opportunity for parallel trade, were purely the consequence of the intervention by national health authorities and were not the result of the suppliers' decisions. The market was intensely regulated and pharmaceutical suppliers were required to comply with legal requirements to maintain enough stocks in each Member State, which would have made an additional obligation to meet all export orders plainly excessive. Secondly, in a market where research and development were crucial, the imposition of an obligation to supply to parallel traders could operate as a disincentive for innovation. Finally, it appeared that consumers rarely benefited from parallel trade in pharmaceuticals because they made only a small flat-rate contribution to the price of medicines in the majority of Member States. It was mostly distributors that reaped the benefits of such activities. The Advocate General concluded that the market partitioning effect created by the restriction of supply was limited and that the supplier had been justified in taking reasonable steps to protect its commercial interests.

The Opinion in *Syfait* is highly significant. Essentially, it propels objective justification and proportionality to the core of the analysis of any potential abuse of dominant position. This reasoning is parallel to that underscoring the mandatory requirements in *Cassis de Dijon* (Case 120/78 [1979] E.C.R. 649, at [8]) or the objective justifications in the field of free movement of persons (Case C-237/94 *O'Flynn* v. *Adjudication Office* [1996] E.C.R. I-2617, at [18–19]) and mitigates the rigour of Treaty provisions that are drafted as absolute prohibitions. Furthermore, when considering whether the dominant undertaking could use its commercial interests as a justification, the Advocate General did not espouse blindly the ideal of market integration but pressed his enquiry on the *actual* harm

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that GKS's refusal to deal did to competition and free movement in the pharmaceutical market. Once satisfied that the damage was in fact minimal, he was prepared to find that the interruption of supply was proportionate. The proportionality test applied by Jacobs was not divided into the usual two-pronged analysis of suitability and necessity applied in the internal market cases, where justifications are based on the protection of the public interest. Rather, it emerged as a simpler and less demanding test that was satisfied primarily because the dominant company's actions contributed little to the distortion of competition in the Community or to the hindrance of intra-EC trade. This line of scrutiny, if pursued meticulously, is certain to yield very diverse results in different markets but provides a balanced way of applying Article 82 EC and is in tune with economic reality.

This is an area of EC Competition Law that requires a clear conceptual framework. The past few years have seen important substantive reforms in the context of Article 81 EC and mergers but Article 82 EC has been woefully neglected. Recent initiatives of the European Commission to provide guidelines for the application of Article 82 EC are therefore to be welcomed. Sadly, the potential of *Syfait* was never fulfilled. It is hoped, however, that in the not too distant future the Community judicature finds an opportunity to endorse the judicious approach suggested by its Advocate General.

ALBERTINA ALBORS-LLORENS

CHERRIES: ONE BITE OR TWO?

AT the turn of the last century the House of Lords ruled in *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488 that, where a servant is wrongfully dismissed, damages for the common law action of wrongful dismissal do not include compensation for (1) the manner in which the dismissal took place, (2) injured feelings of the servant, or (3) any loss he might sustain from the fact that his dismissal makes it more difficult to find employment (*per* Lord Loreburn L.C. at p. 491 as summarised by Lord Nicholls in *Malik* v. *BCCI* [1997] I.R.L.R. 462, but *cf.* Lord Steyn in *Johnson* v. *Unisys Ltd.* [2003] 1 A.C. 518 on the controversy surrounding the ratio of the case). By the end of the century there was considerable doubt as to whether *Addis* still applied to employment relations, which are now supposed to be based more on cooperation and less on concepts of hierarchy than they were in the days of master and

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servant when *Addis* was decided. This change in approach is illustrated by the development of the implied term of mutual trust and confidence which is now a "legal incident" of all employment relations.

This implied term was formally recognised by the House of Lords in *Malik* v. *BCCI*, where Lord Nicholls described it as a "portmanteau" obligation. Out of this portmanteau, much in the style of Mary Poppins' carpetbag, come specific duties (such as the duty on the employer to afford employees reasonable and prompt opportunity to obtain redress of grievances (*Goold (Pearmark) Ltd.* v. *McConnell* [1995] I.R.L.R. 516) and to provide difficult-to-acquire information about pension matters (*Scally* v. *Southern Health and Social Services Board* [1991] I.R.L.R. 522)), and more general duties such as the duty not to run a dishonest and corrupt business which was the issue in *Malik* itself. Since BCCI was running such a business, the House of Lords found that the implied term was breached and that, exceptionally, Malik was entitled to "stigma" damages (*i.e.* damages for the loss of reputation) for the (economic) loss he had suffered owing to the fact that BCCI's conduct had prejudicially affected his future employment prospects. *Malik* therefore did not follow the third limb of *Addis*, albeit in the context of a non-dismissal situation.

Subsequently, in *Gogay* v. *Hertfordshire County Council* [2000] I.R.L.R. 703, the Court of Appeal upheld an award of £26,000 in damages for the psychiatric injury suffered by Ms. Gogay, a residential care worker in a children's home, for breach of the implied term of mutual trust and confidence when the employer suspended her as a result of an unreliable allegation of sexual misconduct made by a vulnerable child in her care. *Gogay* therefore did not follow the second limb of *Addis*, albeit in respect of an established psychiatric injury arising out of a non-dismissal situation.

Both *Malik* and *Gogay* concerned breaches of the implied term of mutual trust and confidence which occurred *during* the employment relationship. This raises the question of whether the implied term now also applies at the moment of dismissal, particularly in respect of the manner in which the dismissal is carried out. If this is the case then damages would be available, thereby casting doubt on the first limb of *Addis*. This question is of great practical significance because, if there is a remedy at common law for breach of the implied term of mutual trust and confidence then, unlike the statutory claim for unfair dismissal, the action is not subject to a statutory cap on damages. Although Lord Nicholls suggested obiter in *Malik* that this was the case, the House of

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Lords in *Johnson* v. *Unisys* refused to go down this route. Lord Hoffmann, giving the leading speech for the majority on the point of law, said that the implied term of mutual trust and confidence is concerned with "preserving the continuing relationship" which should subsist between employer and employee. He continued: "So it does not seem altogether appropriate for use in connection with the way that the relationship is terminated".

Furthermore, he said that in light of the statutory right to compensation for unfair dismissal, it would be improper for the courts to develop a common law remedy for the manner in which an employee is dismissed based on the implied term of mutual trust and confidence. He then endorsed the County Court judge's view that Johnson could not have a second bite at the compensation cherry through the common law: "if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way?" Lord Millett also rejected the possibility of "the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals", since this would be "a recipe for chaos".

Therefore, the effect of the ruling in *Johnson* is that the implied term of mutual trust and confidence does not apply to the manner of dismissal, with the result that the first limb in *Addis* continues to apply to dismissal situations. This meant that Johnson had to be content with the £11,000 compensation for his statutory claim for unfair dismissal (the then statutory cap); he could not recover the £400,000 damages he sought at common law for the psychiatric injury he had suffered as a result of the manner in which he had been dismissed.

But does the so-called *Johnson* exclusion zone (*i.e.* the exclusion of the common law claim for breaches of the implied term of mutual trust and confidence that arise in circumstances attending the dismissal) also extend to breaches of the implied term of mutual trust and confidence during the dying stages of the employment relationship? This was the issue in the joined cases of *Eastwood* v. *Magnox Electric plc* and *McCabe* v. *Cornwall County Council* [2004] I.C.R. 1064.

Eastwood suffered at the hands of bad management, including a superior who had a long-standing grudge against him. Fellow employees were encouraged to give false statements which formed the basis of disciplinary proceedings against him. He was found guilty of misconduct and given a final warning for a trivial incident, although this sanction was largely overturned on appeal. A further enquiry then took place seeking evidence against Eastwood and another member of staff, Williams, who had refused

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to give evidence against Eastwood. A female employee was encouraged to make complaints against both men, who were suspended from work on the grounds of sexual harassment and then dismissed after a derisory disciplinary hearing. Although they were both successful in their claims for unfair dismissal, they also brought a County Court action for negligence and breach of contract, given that they now suffered psychiatric illnesses as a result of the employer's breach of the implied term of mutual trust and confidence.

Similarly, in *McCabe* a teacher who had been dismissed following allegations of inappropriate behaviour towards female students claimed that he had sustained psychiatric illness as a result of the employer's failure properly to investigate allegations against him or to conduct the disciplinary hearing properly. The House of Lords said that all three men did have a common law cause of action.

Lord Nicholls, giving the leading speech, explained that the statutory code provides remedies for infringement of the statutory right not to be *dismissed* unfairly. In the ordinary course, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss; the loss arises when the employee is dismissed and it arises by reason of his dismissal. In these circumstances the resultant claim for loss falls squarely within the *Johnson* exclusion area and the remedy is confined to the statutory claim. In contrast, a common law action lies if, before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise. This was the situation in *Malik*. However, Lord Nicholls continued that *exceptionally*, financial loss might also flow from an employer's failure to act fairly in the steps leading to dismissal. Financial loss, albeit for psychiatric harm, flowing from suspension is one instance (*Gogay*); financial loss from psychiatric or other illness caused by pre-dismissal unfair treatment is another (*Eastwood* and *McCabe*). He said that that (common law) cause of action, which precedes and is independent of the subsequent dismissal, remains unimpaired by the employee's subsequent unfair dismissal and the statutory rights that flow therefrom. In this case there will be a common law action in respect of the earlier breach before the ordinary courts. In respect of the subsequent dismissal, the employee may also present a claim to an employment tribunal. However, if he brings proceedings in both a court and a tribunal he cannot recover any overlapping heads of loss twice over.

The effect of *Eastwood* and *Johnson* is that the courts now have to draw a line between conduct by the employer in the course of

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the employment (including, exceptionally, during disciplinary matters) causing injury in breach of the implied term of mutual trust and confidence (which gives rise to a claim for breach of contract) and conduct by the employer as part of the dismissal process (for which there is no claim at common law and only a statutory claim for unfair dismissal subject to the statutory cap). This leads to three problems identified by Lord Nicholls. First, there will be a duplication of proceedings in court (for the common law action) and tribunal (for the statutory action).

Secondly, the existence of a boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. As he notes, this boundary line is particularly problematic in the case of constructive dismissal, where a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term (which might lead to damages for psychiatric injury) and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract (*e.g.* damages for the lost period of notice and lost bonus entitlement, as in *Horkulak* v. *Cantor Fitzgerald* [2005] I.C.R. 402). The loss flowing from the conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation.

Thirdly, the existence of a boundary line produces other strange results. An employer may be better off, in a situation such as that in *Gogay*, in dismissing an employee rather than suspending him, because an employee who is psychologically vulnerable is owed no duty of care in respect of his dismissal although, depending on the circumstances, he might be owed a duty of care in respect of his suspension.

The decision in *Johnson* also created a fourth problem. In what were probably obiter remarks, Lord Hoffmann suggested that, contrary to the Court of Appeal's well established decision in *Norton Tool Co. Ltd.* v. *Tewson* [1972] I.R.L.R. 86, it was possible to claim for non-economic loss (distress, humiliation, damage to reputation and to family life) under the Employment Rights Act ("ERA") 1996 section 123, as well as for economic loss. In this way, some of the effects of limiting the development of the common law remedy in respect of damages for the manner of the dismissal would be mitigated. However, this view was decisively rejected by the House of Lords in *Dunnachie* v. *Kingston upon Hull City Council* [2004] I.C.R. 1052. Dunnachie had worked for the Council for 15 years when he resigned in response to bullying by his

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manager. The Employment Tribunal accepted that he had been constructively dismissed on the grounds of breach of the implied term of mutual trust and confidence. It awarded compensation up to the statutory maximum including £10,000 injury to feelings.

Giving the only speech for the House (which included the (silent) Lord Hoffmann), Lord Steyn made it clear that the "plain meaning of the word loss in section 123 excludes non-economic loss". He noted that while the discrimination law statutes expressly provided that compensation could be awarded for injury to feelings, this was not the case with the dismissal statutes. Lord Steyn placed great emphasis on what was in the Parliamentary draftsman's mind when drafting (what became) the Industrial Relations Act ("IRA") 1971, but made no reference to the fact that the discrimination law statutes came after the IRA 1971, nor did he take into account either the development of the implied term of mutual trust and confidence, a development in which he had been so influential (see especially *Malik* and *Johnson*), or the advent of damages for psychiatric injury developed by the court in cases such as *Gogay* since 1971; nor did he recognise that employees can claim for economic loss which is a consequence of damage to health (Bowers and Lewis [2005] 34 I.L.J. 83).

One potential solution to these many and varied problems would be to remove the statutory cap on unfair dismissal compensation claims, as both Lord Nicholls and Lord Steyn advocated in *Eastwood*. But this is unlikely to happen in the near future. In its *Fairness at Work* White Paper 1998 (Cm 3968), the new Labour government did propose abolishing the cap altogether in order to ensure that individuals are "fully compensated for their loss" as well as encouraging employers to put "proper voluntary systems in place" to settle disputes (para 3.5). In fact, by the time the White Paper became law in the Employment Relations Act 1999, the statutory cap had been retained but increased from £12,000 to £50,000. Even if the cap were to be removed, it would represent only a partial solution: following *Dunnachie* section 123 ERA also needs amendment to ensure that compensation is available for non-economic, as well as economic, loss.

CATHERINE BARNARD

SHOULD THERE BE DEGREES IN PROHIBITED DEGREES?

IN *B and L* v. *United Kingdom* (Application No. 36536/02, [2005] 3 F.C.R. 353) the European Court of Human Rights on 13 September 2005 held that parts of the Marriage Act 1949 (as

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amended by the Marriage (Prohibited Degrees of Relationship) Act 1986) were in violation of Article 12 of the ECHR. This article secures the fundamental right of a man and a woman to marry and found a family.

The first applicant B had a son C from his first marriage. C was married to the second applicant L; from this marriage there was also a son, W. Therefore B was the grandfather of W. B and L had been cohabiting for a while and now wanted to marry. So the case concerned the intended marriage of father-in-law and daughter-in-law, *i.e.* a prohibited degree based on affinity, not consanguinity. According to Section 1(4),(5) and Part III Schedule 1 of the Marriage Act 1949 (as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986) such a marriage would only be permissible when both C and his mother, B's former wife, were deceased. Before the amendment of 1986, marriage in even these circumstances would not have been possible as the prohibition on such marriages had until then been absolute. However, parties falling within the prohibited degrees could seek a personal Act of Parliament to allow such a marriage. Such personal Acts (*e.g.* Valerie Mary Hill and Alan Monk (Marriage Enabling) Act 1985) have been passed several times in the past, but not since 1987. Finally and remarkably, marriages between brother-in-law and sister-in-law and between step-father and step-child (except where that step-child was a "child of the family") do not fall into the prohibited degrees categories, despite there being the same problems of affinity here.

Therefore, under English law, the applicants could not marry each other so long as the ex-spouses were still alive. The only option left to them was the costly way of pursuing a personal Act of Parliament. This the ECtHR held to be a violation of Article 12. Unlike many provisions in the ECHR Article 12 does not have a second paragraph giving the framework for limitations of the right, but contains an "according to the national laws governing the exercise of this right" condition. While this may possibly give the contracting States a wider discretion, there still are certain limits, as earlier cases make clear: the limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (*cf.* *Hamer* v. *UK* (1982) 4 E.H.R.R. 139; *Rees* v. *UK* (1987) 9 E.H.R.R. 56; *F* v. *Switzerland* (1988) 10 E.H.R.R. 411).

The Government justified the national law on the grounds that not only was such a limitation known in many contracting States but also there were also good reasons for having such a limitation, namely to prevent sexual rivalry in the family and to protect the children, for whom this situation might be confusing and

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disturbing. While all of the arguments presented by the Government were taken into account by the ECtHR, the Court nevertheless held (in a rather brief judgment) that the provisions prohibiting marriage breached Article 12. The court quoted from a report drawn up by a group appointed by the Archbishop of Canterbury in 1984, entitled *No Just Cause. Affinity: Suggestions for a Change*, that stated that "the prohibition is based simply on tradition and cannot now be justified on any logical, rational or practical ground". The Church and the Court are right: the marriage bar will not prevent the couple from living together nor will it prevent "sexual rivalry". The same goes for the protection of the child, who will be faced with the situation regardless of the availability of marriage. Moreover, as we have seen, the distinctions between different "categories" of affinity seem inexplicable.

So, unless the underlying factual relationship is prohibited, these concerns can hardly be entertained by the law. Of course the fact that this relationship falls within the prohibited degrees can be seen to send "a message", but it seems that this has little influence on the actual behaviour. Moreover, the "message" is far from clear and that is what rightly has been criticised by the court. The possibility of getting married once the ex-spouses are dead is one chink in the totality of the prohibition. The other is the possibility of a private Act of Parliament, a costly and burdensome (yet almost always successful) procedure. It has been argued that this serves to protect the interests involved, but there may be a more efficient procedure for doing so. In Denmark, for example, section 7 of the *Ægteskabslov* (Marriage Act) names prohibited degrees based on affinity, but allows for dispensation. In charge of this is an administrative body in the Ministry of Justice (the *Civilretsdirektorat*) that is bound especially to take into account the welfare of children involved. However, dispensations are almost always granted. In contrast, in Germany prohibited degrees based on affinity were abolished without controversy in 1998 when the provisions of the *Ehegesetz* (Marriage Act) were reintegrated into the BGB (Civil Code). It was simply stated that, since dispensation was almost always granted and there were no medical reasons for upholding such a prohibition, it served no function and should be abolished (*Bundestags-Drucksache* 13/4898, p. 13).

The current position on prohibited degrees based on affinity in this country is inconsistent. Therefore the ECtHR was right to find a breach of Article 12 ECHR. If the prohibited degree is to be upheld as a matter of principle (and even that seems doubtful), then simpler procedures like the Danish ones need to be implemented. In conclusion, it can be said that this topic is very much like many in

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family law (*e.g.* Deceased Wife's Sister's Marriage Act 1907): they receive a lot of attention at the time but some years later it becomes clear that it was much ado about nothing.

JENS M. SCHERPE

ILLEGAL OVERSTAYERS CAN ACQUIRE A DOMICILE OF CHOICE OR HABITUAL RESIDENCE IN ENGLAND

THE august work of *Dicey & Morris The Conflict of Laws* may have the reputation of being better authority than the Court of Appeal, but it can be wrong. So it turned out in *Mark* v. *Mark* [2005] UKHL 42, [2005] 3 W.L.R. 111. The House of Lords refused to follow obiter dicta in *Puttick* v. *Attorney General* [1980] Fam. 1 which had commended a statement in *Dicey & Morris* that "a domicile of choice cannot be acquired [in England] by illegal residence" (para. 6-037, 13th edition, 2001). It is a salutary and expensive lesson that this case had to be decided by the House of Lords in order to reject that pronouncement.

A Nigerian husband contested the jurisdiction of the English court which had been taken on the basis of the wife's habitual residence in England for the preceding 12 months, or alternatively on her domicile here (under section 5(2) of the Domicile and Matrimonial Proceedings Act 1973). He argued that she could not be either domiciled or resident here. The wife's presence in this country was unlawful as her leave to remain had expired some two years previously. The argument that unlawful presence prevents habitual residence or domicile in the UK is said to be justified by the public policy of the State but was shattered by Lord Hope of Craighead and Baroness Hale of Richmond.

Lord Hope relied on *Buckland's Textbook of Roman Law*, among other authorities, to hold that domicile is a choice of law rule relevant to private law matters and not the wider concept of *domicilium* which could encompass public law consequences. No public law was in issue here. For example, it was not a question of immigration to England on which many of the cases had turned. The illegality was only relevant to the factual question of the person's intention to reside in England.

Baroness Hale was not to be outdone by the erudition and enjoyed a discourse on the history of immigration controls. Turning to the issues in the case, she agreed with the chief authority on residence, *Ex p. Nilish Shah* [1983] 2 A.C. 309, to hold that ordinary residence was principally a question of fact. She also

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agreed with *Ikimi* v. *Ikimi* [2002] Fam. 72 that ordinary residence and habitual residence are interchangeable concepts. However, she held that the meaning of habitual residence is a matter of statutory construction which may depend on the purpose of the statute concerned. She disagreed with the Court of Appeal's decision that the issue was one of public policy. In some statutes lawful residence might be the proper statutory construction (*e.g.* those conferring entitlement to some benefit from the State). The meaning can also vary from statute to statute. The purpose of this statute was to provide a close connection between the members of the family and England, sufficient to justify the access to the English courts for matrimonial relief (see the Law Commission's Report No. 48 (1972)). It would not further that purpose to limit residence to lawful residence. However, the legality of the person's residence might be taken into account in determining the factual question of whether the residence is "habitual".

Unlike habitual residence, where one can have one or more or no habitual residence, one can have only one domicile at any point. The connecting factor for a choice of law rule must yield exclusively a single system of law. It is this straitjacket which has led to the more difficult domicile cases (*e.g.*, *Winans* v. *Attorney General* [1904] A.C. 287). A domicile of origin is acquired at birth, from one's parents. However, this can be replaced with a domicile of choice, acquired by the person residing in a country with the intention of remaining there permanently as a resident. Baroness Hale pointed out that domicile as part of a choice of law rule is neutral, it does not work to the advantage or disadvantage of the person affected and its object is to determine the system of law with which the person is most closely connected for matters of personal status (at [44]). The connection can be made despite the person's illegal residence without offending any general principle that someone cannot acquire a benefit from his or her own criminal conduct. Indeed, the State has no particular interest in this connection. This echoes Lord Hope's view of domicile as a private law concept. However, Baroness Hale considered that the legality of the wife's presence in England could be relevant to her intention to remain here permanently. She reiterated that, like residence, the requisite intention is a matter of fact. Therefore the precariousness of residence as an illegal overstayer might prevent the necessary permanence of intention to reside.

This wife had been living in England, albeit with homes in Nigeria and trips to the US, for seven years. She had become an illegal overstayer only in the last two. The decision of the House of Lords must be the right result. However, it is not without its

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consequences. In the common law area, clashes of jurisdiction and questions of inappropriate forum shopping (see *De Dampierre* v. *De Dampierre* [1988] A.C. 92) can be resolved by use of forum non conveniens. This is not available within the EU framework. Where someone has entered the country illegally and intends to reside here notwithstanding the precariousness of his or her position, he or she acquires a domicile of choice and maybe also a habitual residence. As a result, the English court has jurisdiction over questions of matrimonial matters and parental responsibility (Article 3(1) of Council Regulation (EC) No. 2201/2003) and has no discretion to stay its proceedings in favour of another Member State.

The concept of domicile has fallen somewhat out of fashion, but it still plays a critically relevant role in the conflict of laws. Domicile is the choice of law rule not only for capacity to marry but also for succession to movable property. The domicile of the deceased in the United Kingdom is the only ground on which the English court can give relief under the Inheritance (Provision for Family and Dependants) Act 1975 (see *Morgan* v. *Cilento* [2004] EWHC 188 (Ch) for a recent example). Domicile also has a role as a jurisdictional basis in many statutes, such as the one under consideration here, the Adoption Act 1976, and also some EU legislation. It is additionally used as a basis for taxation. However readers should not confuse this common law concept with the statutory rules of domicile of individuals for the Brussels 1 Regulation (EC No. 44/2001) or CPR Part 6. These are to be found in SI 2001/3929 and are unaffected by this case.

PIPPA ROGERSON

RENVOI AND THE PROOF OF FOREIGN LAW IN AUSTRALIA

IN *Neilson* v. *Overseas Projects Corporation of Victoria Ltd.* [2005] HCA 54, the High Court of Australia addressed some of the most enduring problems of private international law. The facts were deceptively simple. Mrs. Neilson, a resident of Western Australia, accompanied her husband to Wuhan in China, where they were accommodated in a flat provided by her husband's Australian employer, OPC. In 1991 Mrs. Neilson fell down stairs in the flat and was severely injured. In 1997 she initiated proceedings against OPC in the Supreme Court of Western Australia. The trial judge, McKechnie J., rejected a claim in contract, but found that OPC had breached a duty of care owed to Mrs. Neilson, and awarded agreed damages. The appeals, first to the Full Court of the

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Supreme Court of Western Australia (by OPC, successfully), and then by Mrs. Neilson to the High Court of Australia, which overturned the Full Court, focused on issues relating to the determination of the applicable law.

In all claims in tort in Australia, following the decision of *Regie Nationale des Usines Renault SA* v. *Zhang* (2002) 210 C.L.R. 491, the court must apply the law of the place of the tort, the *lex loci delicti*. It was reaffirmed in *Neilson* that the court has no discretion to depart from this rule, even in exceptional circumstances. This absence of flexibility distinguishes the Australian approach from that in the United Kingdom under section 12 of the Private International Law (Miscellaneous Provisions) Act 1995.

In *Neilson*, the law of the place of the tort was clearly Chinese law. McKechnie J. held that under the General Principles of Civil Law of the People's Republic of China, OPC had breached a duty owed to Mrs. Neilson. However, the General Principles contain a limitation period of one year for personal injury claims (Article 136), subject to extension only in special circumstances (Article 137), which would have defeated Mrs. Neilson's claim. McKechnie J. decided the case in her favour on two alternative grounds. First, special circumstances existed which justified the extension of the limitation period (under Chinese law) to allow the claim to proceed. This finding was, however, rejected by both the Full Court and High Court. Alternatively, McKechnie J. found that, even if the limitation period could not be extended, he had a "right", under the General Principles, to apply Australian law to the dispute, avoiding the application of the limitation period. This argument was the focus of the appeal.

Under Article 146 of the General Principles, the choice of law rule in tort in China also selects the *lex loci delicti*. However, unlike the Australian rule, Article 146 provides for an exception: "If both parties are nationals of the same country or domiciled in the same country, the law of their own country or of their place of domicile may also be applied." It appears to have been assumed that "may also" meant "may instead" in this context, although the text invites the intriguing possibility that a fusion of the legal systems is contemplated.

McKechnie J.'s characterisation of Article 146 as creating a "right" for him to apply Australian law was clearly misconceived. The Full Court and High Court affirmed that an Australian judge is not empowered by a foreign statute, but is merely required, as a matter of Australian law, to determine the way in which a foreign court would resolve the dispute. The job of the trial judge was not to exercise a discretion under Article 146, but to determine, as a

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matter of fact based on the evidence presented to him, how a Chinese court would exercise that discretion.

However, only three members of the High Court, Gleeson C.J. and Gummow and Hayne JJ., were satisfied that there was enough evidence before the court to decide this point. The court was therefore required to consider the relevance of what is sometimes described as a "presumption" of the common law—that foreign law, if it is not satisfactorily proven, may be assumed to be the same as forum law. Three members of the High Court (Gleeson C.J., and McHugh and Kirby JJ.) found that this controversial rule was at best incapable of application where an Australian court is attempting to determine how a foreign court would exercise a discretion which is unknown to Australian law. McHugh and Kirby JJ. suggested that it would undermine the burden of proof if such a presumption acted in favour of a party who had failed to prove foreign law. However, a majority of the High Court (Gummow and Hayne JJ., as an alternative to their finding that the evidence on this point was satisfactory, and Callinan and Heydon JJ.) held that the presumption enabled the court to find as a matter of fact that the Chinese court would exercise its discretion under Article 146 to apply Australian law.

This raised the spectre of renvoi. If the discretion would be exercised to select Australian law, would this mean Australian law including its choice of law rules? That could lead to an "infinite regression" or a "circle" of reference—Australian law selects Chinese law, which selects Australian law, which in turn selects Chinese law, etc.

The High Court divided on how to resolve this issue. McHugh J. decided that the Australian *lex loci delicti* rule requires an Australian court to apply Chinese substantive law, but not Chinese choice of law rules. The Full Court also adopted this "no renvoi" approach, pointing out that it has the virtues of simplicity and ease of application which the High Court has emphasised in previous cases. The problem with this approach, and the reason for its rejection by all other members of the High Court, is that it does not attempt to resolve the dispute in the way it would be resolved if the proceedings were brought in China. It sacrifices the goal of decisional harmony in private international law, and by doing so encourages forum-shopping.

An alternative would have been to adopt a "single renvoi" approach, by accepting that the Australian choice of law rule requires the application of Chinese choice of law rules, while denying that the Chinese choice of law rules allow the (re-) application of the choice of law rules of Australia. This might be

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explained as a rule of Australian law, on the basis that the Australian choice of law rules, having already been applied, are "exhausted". This approach, which still compromises decisional harmony, was adopted by Callinan J. Alternatively, it might be explained as a matter of fact relating to Chinese law—that in fact Article 146 would require a Chinese court to apply only Australian substantive law and not Australian private international law rules. Kirby J. held that there was insufficient evidence as to the attitude towards renvoi in Chinese law to justify this conclusion. However, the remaining four members of the High Court favoured this approach, finding, in favour of Mrs. Neilson, that only Australian substantive law would be applied by a Chinese court.

The majority of the High Court therefore strongly rejected the "no renvoi" approach (favoured by the Full Court and McHugh J.) as part of Australian law, but (perhaps curiously) decided that this approach was part of Chinese law—that the General Principles required only the application of foreign substantive law. No doubt it was an attractive feature of this approach that it enabled the majority to resolve the issue on the basis of a decision of fact (concerning Chinese law), and thus avoid the need to address directly the complex policy issues involved in the solution of renvoi problems. But it may be doubted whether this was justified by the evidence, and such a fact-dependent decision provides little guidance regarding the approach which should be adopted in future cases. The wisdom of the decision of the Australian High Court to reject a flexible exception to the *lex loci delicti* rule, supposedly in favour of legal certainty, may also be doubted. As the parties were Australian, such an exception might well have led to the application of Australian law, avoiding the problems associated with the application of Chinese law. This would have provided a far simpler mechanism to reflect the court's apparent determination that in *Neilson* the personal connecting factors outweighed the territorial.

ALEX MILLS

ALL THAT GLISTERS IS NOT GOLD: LAUNDERING THE UK MONEY LAUNDERING REGIME

THE UK anti-money laundering regime is commonly, and with some degree of pride, described as "gold plated". This is intended to reflect the fact that the primary statute, the Proceeds of Crime Act 2002 ("POCA"), is extraordinarily wide-ranging. It not only

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implements the provisions of the two European Union Council Directives dealing with money laundering (1991/308/EEC and 2001/97/EC) but creates onerous, supposedly auric, extensions to these provisions. The aim of this is clearly laudable—to "get tough" on financial activities parasitic on, and germane to, serious organized crime. But it does not work. To cite the most obvious symptoms, the extraordinarily wide definitions of "criminal conduct" and "criminal property" are dangerously overzealous. As a consequence, the concept of money laundering is much wider than might be supposed. The "gold plating" has, at best, an unfortunate Midas-like quality: the facts underlying *Bowman* v. *Fels* [2005] EWCA Civ 226 aptly illustrate some of the tarnish.

Bowman v. *Fels* started life in the Central London County Court as a routine piece of domestic property litigation. Jennifer Bowman claimed an interest arising under a constructive trust over a house in which she had previously lived with her former lover, William Fels—not perhaps the archetypal background in which a money laundering transaction might be expected to take place. During the course of the litigation, however, the claimant's solicitors formed a suspicion that some of the property subject to the substantive dispute was tainted by VAT fraud.

This was, prima facie, a trigger for POCA. The offences created by POCA operate in relation to the proceeds of all crimes, without qualitative or quantitative limitation. As Dame Elizabeth Butler-Sloss commented in *P* v. *P (Ancillary Relief: Proceeds of Crime)* [2004] Fam. 1, " ... an illegally-obtained sum of £10 is no less susceptible to the definition of 'criminal property' than a sum of £1 million". Quantity, here, has no quality of its own.

The claimant's lawyers were therefore concerned that their very involvement in the litigation would constitute the section 328 POCA offence of becoming concerned in an "arrangement" facilitating "the acquisition, retention, use or control of criminal property by or on behalf of another person". The only defence to the section 328 offence was to make an authorised disclosure: this was duly made, an adjournment sought, and the trial date for the litigation vacated.

The primary litigation (eventually) settled, but the abstract issue faced by the Court of Appeal was of such importance that, unusually, the Bar Council, Law Society and National Criminal Intelligence Service all intervened. The issue at the heart of the appeal was the extent to which section 328 is applicable where, during the course of legal proceedings, a lawyer receives information leading to knowledge or suspicion of money laundering. Such information is privileged, and such privilege

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embodies fundamental principles of access to justice through legal proceedings and the ability freely to obtain confidential legal advice.

Brooke, Mance and Dyson L.JJ., in a strong joint judgment, analysed the UK legislation, and its history, in detail. It was held that section 328 does not apply in the context of legal proceedings and that the claimant's legal advisers were free to continue with the conduct of proceedings notwithstanding their suspicions of money laundering. The reason for this was purposive: " ... in enacting section 328 Parliament evinced no intention to override very important principles of our law [*i.e.*, relating to privilege] without adverting to them at all".

Two serious issues are exposed by this welcome judgment. The first is of great concern to legal practitioners. The case provides obvious comfort for those involved in litigation, including alternative dispute resolution (subject to the qualification that sham litigation for the purposes of money laundering—not an entirely uncommon phenomenon—is unlikely to benefit from *Bowman*). But what of non-contentious lawyers? The judgment contains strong dicta supporting the view that legal professional privilege in non-contentious cases should be protected in the same way as privilege attaching to information obtained by professional advisers during litigation. This is certainly the preferable view, and the theoretical justifications for it are, if not the same, then very similar to those forming the ratio of *Bowman*. The point, however, is not certain, and transactional lawyers will continue to face unnecessary and complex dilemmas in the shadow of potential POCA liability. The Law Society has issued guidance, which is not particularly robust.

The second issue is more serious still, and of more general theoretical and systemic concern. POCA creates undesirable discrepancy and disparity between implementation of anti-money laundering policy at the domestic and trans-national (and, accordingly, international) levels.

This imbalance created by the "gold plating" is dangerous, not least because the international nature of modern, sophisticated money laundering demands a co-ordinated response across diverse legal systems. Substantive coherence, coupled with harmonised jurisdictional rules, is absolutely essential if the fight against international crime is to be taken seriously. The drafting of POCA is accordingly counterproductive. The detailed attention paid by the Court of Appeal to the European legislative background is extremely welcome, but POCA inevitably remains largely unscathed. The cluster of amendments set out in the Serious Organized Crime and Police Act 2005 are in part welcome, but constitute little more

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than tinkering; the shadow of the adoption of the Third Money Laundering Directive, incorporating various and serious deficiencies, looms. A careful analysis of the impact of the current legislation, followed by an overhaul, is essential. This, however, appears unlikely in this area of the law, where the policy still appears to be to legislate first and ask questions later.

As bad cases make bad law, so good cases make good law. *Bowman* v. *Fels* is a good case. It both patches up an embarrassing hole in the jacket, and serves as a salutary reminder that it is time to buy a new one. But most importantly of all, it illustrates some of the dangers associated with "gold plating". Great caution must be exercised in the future to ensure that the constantly evolving international initiatives dealing with money laundering are not hastily compromised by over-eager domestic legislation.

EDWARD POWLES

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DECIDING DEAD CASES

THIS important decision could not have been delivered had the Court of Appeal not been willing to adopt a small incremental expansion of its discretionary jurisdiction. The trouble was that the claimant and the defendant had settled their dispute before the hearing of the appeal, and, according to conventional wisdom, this meant that the court lacked jurisdiction to proceed: *Sun Life Assurance Co. of Canada* v. *Jervis* [1944] A.C. 111; *Ainsbury* v. *Millington (Note)* (H.L.) [1987] 1 W.L.R. 379. In the latter case, Lord Bridge of Harwich said, "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved" (at 381B.)

It has been clear for some time that the courts in judicial review cases are less concerned than in private law cases to ensure that the claimant has or retains a concrete interest in the outcome of litigation begun by him. This has been confirmed for cases where there is no surviving *lis* between the parties. In *R.* v. *Home Secretary, ex p. Salem* [1999] 1 A.C. 450, Lord Slynn of Hadley—with whom all those sitting with him agreed—accepted that the court has a discretion to decide "an issue involving a public authority as to a question of public law" even if there is no longer a *lis* between the parties. He held that *Ainsbury* must be read as

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limited to disputes concerning private law rights between the parties to the case.

In *Bowman* the original litigation concerned only the private law rights of the parties and no public authority was involved, but the question before the Court was one of public law. All three interveners were anxious that the Court should resolve the question and the Court considered that it would be both churlish and contrary to the overriding objective of the Civil Procedure Rules to send them away empty-handed [10].

In assuming jurisdiction the Court defined the circumstances allowing it to do so in narrow terms closely linked to the precise facts before it [15]. This suggests that the Court was anxious to depart no further than necessary from Lord Bridge's words in *Ainsbury*. Those words, however, start from the (unspoken) idea that the principal purpose of the civil litigation system is simply to resolve disputes. That idea harks back to the days when litigation's role in society was to provide the only plausible alternative to dispute settlement by force. That has long ceased to be tenable, and today there are many other methods available—usually described collectively as "Alternative Dispute Resolution" (ADR). The Civil Procedure Rules 1998 have strengthened the incentives to settle that existed before, and they explicitly recognise and promote ADR.

Litigation through the courts has become the least favoured of all the available methods of dispute resolution. Lord Woolf has said, "My approach to civil justice is that disputes should, whenever possible be resolved without litigation", and the Chief Justice of New South Wales has drawn attention to the variety of public purposes served by litigation and has stated that "a court is not simply a publicly funded dispute resolution centre" (Spigelman, "Judicial Accountability and Performance Indicators" (2002) 21 C.J.Q. 18, 26).

Needless to say, this does not mean that litigation will disappear. Though the number of litigated cases is falling and will probably continue to fall, there will always be disputes that can only be resolved through the courts for a variety of reasons, such as, for example, the recalcitrance of the parties or the complexity of the issues raised. The fact is, however, that litigation plays many roles other than dispute resolution, one of the most important of which, at least if a case reaches an appellate court, is to enable the clarification of the law and the authoritative interpretation of statute. However unsatisfactory litigation may be as a dispute resolution process, the legal system cannot do without it.

On this basis it follows not only that the Court in *Bowman* was right to decide the question of law involved, but also that it could

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usefully have restated the scope of its discretionary jurisdiction more widely. This might have happened if the Court had had the opportunity to see the speeches in the more recent House of Lords decision in *R. (Limbuela)* v. *Home Secretary* [2005] UKHL 66, [2005] 3 W.L.R. 1014 (refusal of asylum support for late asylum claimants). The claims for asylum of all three respondents had been finally disposed of before the appeal was heard so that none of them had a surviving claim for asylum support, but the House did not hesitate to deal with the important point of law involved. Indeed, only two of their Lordships even mentioned the absence of a live issue—Lord Hope of Craighead [63] and Lord Brown of Eaton-under-Heywood [81]. Lord Hope was content just to say that it was right for the House to dispose of the appeals, while Lord Brown did no more than emphasise their importance.

It may now be suggested that the older law has been overtaken by events and that an appellate court should not decline to decide a case on the ground that no issue between the parties remains alive, provided that the court is satisfied that (a) the point of law raised is of public importance; (b) the parties and any interveners wish the appeal to be heard and that there is no problem about the payment of costs; (c) the relevant facts have been fully determined by the court below; and (d) the question of law will be adequately argued.

J.A. Jolowicz

SUCCESS FEES AND FREEDOM OF SPEECH

Free speech lawyers have long voiced fierce criticism of the "jackpot justice" traditionally associated with the English law of libel. The prospect of paying enormous sums in damages to claimants in defamation actions has induced a reticence on the part of newspaper editors to pursue certain investigations, which runs contrary to the Strasbourg view of the press as a public watchdog expected to bark loudly at the first signs of misfeasance. Despite the ability of the appellate courts to replace excessive libel damages by more temperate awards, significant disincentives to investigative journalism remain—especially where wealthy celebrities are concerned. In this regard, the House of Lords has recently been called upon to pronounce on a further "chill factor" for media reporting, namely the imposition of hefty success fees on the part of the claimant's lawyers.

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Campbell v. *Mirror Group Newspapers Ltd. (No. 2.)* [2005] UKHL 61, [2005] 1 W.L.R. 3394 marks the final instalment in a protracted dispute that has engaged the courts (and, indeed, the pages of this journal—see Howarth, [2003] C.L.J. 17 and Moreham, [2004] C.L.J. 555) since early 2002. The facts of the case are by now well-known: supermodel Naomi Campbell had made a series of statements strongly eschewing the recreational narcotics culture permeating the fashion industry, before subsequently becoming embroiled in litigation with the respondent over a series of articles exposing the reality of her undertaking drug rehabilitation therapy. Campbell conceded that the press was entitled to publish stories rectifying duplicitous claims by celebrities and instead objected to the publication of details of her therapy programme. In a groundbreaking judgment ([2004] UKHL 22), the House of Lords unanimously declared that a right to privacy existed in English law, and awarded the claimant £3,500 in damages.

A further twist in this long-running tale occurred after this judgment was delivered, when the claimant's legal team presented their bill of costs, totalling nearly £1.1 million, to MGN. Understandably, MGN baulked at this figure (especially since they were also liable for their own costs), but reserved particular incredulity for the fees charged in relation to the appeal to the House of Lords. Although Campbell's lawyers had calculated their costs for the trial (£377,070.77) and appeal to the Court of Appeal (£114,755.40) under an ordinary retainer, the action in the House of Lords had been conducted pursuant to a Conditional Fee Agreement (CFA), allowing the solicitors and counsel to claim success fees of 95 per cent. and 100 per cent. respectively. With a combined success fee of nearly £280,000, the claimant's total legal costs amounted to some £1,086,995.47 (subject to taxation of costs).

MGN sought a ruling exempting them from paying the success fees, on the basis that the sums involved were so disproportionate as to infringe their freedom of speech. They considered the demand for such costs to be analogous to an award of exorbitant damages as in *Tolstoy Miloslavsky* v. *UK* (1995) 20 E.H.R.R. 442, whereby libel damages of £1.5 million were condemned by the European Court of Human Rights as constituting a violation of Article 10 ECHR. Furthermore, MGN considered that it was inappropriate for a claimant with immense personal wealth to bring an action on a CFA basis, especially since Campbell had chosen to fund the previous stages of litigation herself. By way of response, the claimant argued that the access to justice legislation did not disqualify wealthy litigants from using the system and, in any event, few individuals could command such vast personal resources as to

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remain ambivalent towards the prospect of funding the costs of both parties in an appeal to the House of Lords.

Lord Hoffmann, who delivered the leading speech, swiftly dispensed with MGN's argument on the proportionality of the litigation costs, noting that the concept of proportionality carried different meanings for the purposes of the Civil Procedure Rules (which concerned whether the expenditure claimed was indicative of the complexity of the case and interests of the parties) and Article 10 (whether the underlying policy of the CFA system was compatible with freedom of expression). He examined the rationale behind success fees, observing that such charges were designed to fund future *pro bono* work and to substitute for the loss of legal aid. Under the old rules, actions against the media were "the exclusive preserve of the rich"; however the new rules on legal funding allowed claimants of more modest means to defend and restore their reputations on the same footing as celebrities. In this regard, the development of success fees was compatible with Article 10.

Likewise, the argument that Campbell should have funded the litigation herself also received short shrift. The decision to proceed on a CFA basis is designed to assist the individual claimant, who owes no obligation of economic mercy to her opponent. Moreover, Lord Hoffmann observed that there was "nothing in the relevant legislation or practice directions which suggests that a solicitor, before entering into a CFA, must inquire into his client's means and satisfy himself that he could not fund the litigation himself". The practical issues involved render such an exercise absurd, and the difficulties inherent in zealous means-testing were abundantly demonstrated by the *ancien régime* of legal aid. Given the impracticality of means-testing, plus the shallow pool of claimants who could afford to dispense with such services in any event, Lord Hoffmann ruled that the general policy of success fees was one that Parliament was entitled to pursue and therefore did not infringe the Convention right to free speech.

Nevertheless, Lord Hoffmann expressed some words of concern over the abuse of CFAs in defamation cases, and the potential ramifications of these practices on free speech. A notorious example was the judgement in *Turcu* v. *News Group Newspapers Ltd.* [2005] EWHC 799 (QB), where a Romanian gangster initiated a defamation claim under a CFA before fleeing the jurisdiction, leaving the defendant liable for damages and costs if it lost the action, yet unable in practice to recoup its costs if it won. Lord Hoffmann noted that smaller publishers would probably have to yield to such financial ransom and settle claims of this nature

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outside court. Furthermore, he observed that unlike many other defendants in CFA actions, newspapers lacked the capability to spread losses incurred in adverse judgments and accordingly have greater reason to fear litigation and shy away from certain stories, which may also compromise free speech. Lord Hoffmann therefore called for a legislative solution to ensure that the CFA system operated in full compliance with Article 10. His thoughts were echoed by Lords Hope and Carswell, who outlined the alternatives offered in Scotland and Northern Ireland respectively.

The decision to uphold the success fee in *Campbell* is not entirely surprising, especially in a climate that extols the virtues of "responsible journalism" and penalises cavalier practices (*Reynolds* v. *Times Newspapers* [2001] 2 A.C. 127). Nevertheless, the wider implications of this judgment provide some concern, and will undoubtedly promote a greater use of CFAs by disgruntled celebrities. In the absence of some form of stringent cost-capping regime in defamation and privacy actions, the imposition of lucrative success fees will continue to run the gauntlet of Article 10. Either way, in entrenching a right to privacy and pioneering the use of success fees, Ms. Campbell's contribution to contemporary media law has been considerable indeed.

RICHARD CADDELL

TRANSPARENCY IN GETTING THE ACCUSED TO PLEAD GUILTY EARLY

IN *R.* v. *Goodyear (Practice Note)* [2005] EWCA Crim 888, [2005] 1 W.L.R. 2532, the Court of Appeal laid down guidelines for lawyers and judges in every Crown Court case where the accused wants to know what his sentence could be, should he plead guilty. They were necessitated by the cultural shift towards formalising the sentencing discount for an early guilty plea and bringing plea negotiations (partly) into open court.

Goodyear was given a suspended custodial sentence and appealed on the ground that the trial judge had failed to abide by his pre-trial indication that he would not impose a custodial sentence. A meeting had taken place in the judge's chambers. Goodyear's barrister told the judge his client was "eager" to avoid the scheduled trial and likely custody and asked for an "indication" of sentence, were he to plead guilty. After a discussion with the Crown, the judge assured him "I do take the view that this is not a custody case". The three defendants pleaded guilty to offences of corruption. Sentencing them later, the judge said he hoped his

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earlier remarks had not been misunderstood. The "custody threshold" had been passed in Goodyear's case so he would be imposing a prison sentence but it would be suspended.

The case was unremarkable but the Court, quashing Goodyear's sentence, used it as a vehicle for setting down guidelines, reconsidering those set out in *R.* v. *Turner* [1970] 2 Q.B. 321. *Goodyear*'s importance is marked by the convening of a five judge court, led by Lord Woolf C.J., accompanied by his Deputy. Those sitting included the late Wakerley J., who had recently been promoted from the circuit bench and was a member of the new Criminal Justice Rules Committee, and Calvert-Smith J., who until recently held office as Director of Public Prosecutions. These two could bring contemporary experience of Crown Court practice to the questions raised.

Turner had laid down the rule that, while an advocate may advise his client, "if need be in strong terms", of the benefit of a reduced sentence on conviction after a guilty plea, such information should not come from the judge. A judge "should never" state the sentence he was minded to impose. He must not say that he would impose one sentence following a guilty plea and a severer sentence on conviction after the trial following a not guilty plea. "This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice, which is essential" (p. 327). Exceptionally, a judge could say that, whatever the plea, the sentence would take a particular form. The judge could say that the sentence following a guilty plea would be non-custodial, without saying what would happen following a not guilty plea and finding of guilt.

The Court did not overrule *Turner*, as some journals have wrongly reported. It reviewed subsequent events and modified *some* of the *Turner* rules. It observed that the Royal Commission on Criminal Justice (1993, Cm 2263) had recommended that the judge should have a discretion to answer an advocate's query as to what maximum sentence the client would receive, following a guilty plea. This was reiterated by Auld L.J. in his Review of the Criminal Courts of England and Wales (2001) but he went further, recommending that the judge should be entitled to indicate the maximum sentence following a not guilty plea and conviction after trial. "That comparison is precisely what a defendant considering admitting his guilt wants to know" (at p. 442). In its 2002 White Paper, *Justice for All* (Cm 5563), the Government accepted this in part. It introduced what is now the Criminal Justice Act 2003, Schedule 3, which permits the accused to ask for an advance indication of sentence when deciding whether to choose summary trial, to which the court is entitled to respond. The Criminal

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Procedure Rules 2005 (SI 2005/384) now require the judge to obtain information on whether the defendant has been advised about credit for a guilty plea and whether steps have been taken to resolve the case without trial. The Court concluded that this demonstrated a "very different culture" from the *Turner* era. The main points of the guidelines are these. As prescribed in *Turner*, "The defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered voluntarily. There is to be no bargaining with or by the judge." Where the defendant does not request an advance indication, the *Turner* rules apply and the judge should not give an indication but may remind the advocate that he is entitled to request one. Where a request is made:

1. It should normally be made at the plea and case management hearing: the earlier, the better, to avoid "cracked", meaning collapsed, trials.
2. The facts must be agreed and the judge fully informed of the evidence.
3. The judge may refuse the request or defer an answer, especially in a complex case. He may give reasons but need not.
4. Once an indication has been given, it is binding on the judge and any other judge who becomes responsible for the case. A later sentencing judge should not exceed the earlier indication.
5. The hearing should normally be in open court and the sentence "indication" is only valid at the point when made. If a guilty plea is not tendered in the light of the indication, it ceases to have effect.
6. The judge may indicate the maximum sentence for a guilty plea but should not indicate the possible sentence on a finding of guilt after trial.

These guidelines reiterate most of the "safeguards" *Turner* prescribed and deal with a circumstance not covered in it—a request from the accused. Rather alarmingly, they do not apply in magistrates' courts, where over 95 per cent, of defendants are dealt with. Some commentators oppose sentence discounts on principle, as inducing innocent or ignorant defendants to plead guilty, punishing those who exercise their right to trial and encouraging American-style plea bargaining, but they knew they had lost the battle when Auld L.J. demolished their arguments (*Review*, pp. 434–444 and references therein). Discounts are now enshrined in the *Sentencing Guidelines* (www.sentencing-guidelines.gov.uk/docs/Guilty plea guideline.pdf). The Court here effectively endorsed the

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Sentencing Guidelines Council's justification, "It is in everyone's interest that those who are guilty of an offence indicate willingness to plead guilty at the earliest opportunity" (*Guidelines*). At least *Goodyear* did not go as far as Auld L.J.'s recommendation for further judicial involvement in the bargaining process, above. Its quest for transparency and the reiteration of the *Turner* safeguards are to be welcomed. Small mercies.

PENNY DARBYSHIRE

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