was that to prove the fraud it would be necessary to stage a re-run of the proceedings before the Disciplinary Tribunal.

The rule in *Hollington v Hewthorn*, surely, is a legal nonsense and ought to be abolished. The analogy it is based upon is false, because the finding of a public body charged with investigating or decision-making is not the same thing as the casual opinion of the man on the Clapham omnibus – or the bystander who happened to see it run him over. More often than not, the public body will have examined the evidence when it was fresher, and assessed it with an expert eye. So admitting its findings is likely to make judicial fact-finding more accurate and, usually, quicker and cheaper too. In civil proceedings, at least, the findings of any public body of this sort should surely be admissible in evidence, though subject to the discretionary power of the court to exclude them if persuaded that their admission would not carry the advantages described. And this reform should be achieved not by legislation that further nibbles at the edges of the rule, but by a simple statutory provision that abolishes it full-frontally by name – as when, in 1925, with section 131 of the Law of Property Act, "the rule of law known as the Rule in *Shelley's* case" was formally abolished.

J.R. SPENCER

FINALITY OR FAIRNESS?

THE finality of proceedings, resource constraints, a presumption of guilt, and the existence of the Criminal Cases Review Commission ("CCRC") all combine to outweigh the principle of fairness for a convicted individual. Such was the stark conclusion of the Supreme Court in dismissing Kevin Nunn's application to force prosecution authorities to grant access to material which he believed would help him get his conviction quashed: *R. (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2014] 3 W.L.R. 77.

In November 2006, Kevin Nunn was convicted of the murder of his former girlfriend, Dawn Walker. His defence was, and remains, that he is innocent and that some other person had killed Dawn. His application for leave to appeal was refused by the Court of Appeal in October 2007.

Mr. Nunn then appointed a new solicitor and forensic expert. They sought access to various items from Suffolk Constabulary and the CPS. Crucially, all of the materials or their existence had been properly disclosed at the time of trial. Mr. Nunn's representatives wanted access to the items to prepare an application to the CCRC in the hope that the case would be referred back to the Court of Appeal. Suffolk Police and the CPS declined the request for access, arguing that the scale of the material sought was tantamount to the defence wanting to carry out a full reinvestigation of the case.

https://doi.org/10.1017/S0008197314000919 Published online by Cambridge University Press

That refusal was challenged by way of judicial review, but rejected by the Divisional Court ([2012] EWHC (Admin) 1186). The case, unusually, bypassed the Court of Appeal and went straight to the Supreme Court, presumably based upon the recognition that, whatever the outcome at the Court of Appeal, there was likely to be a further appeal.

The issue before the Supreme Court was the extent of the disclosure obligations on the prosecution after conviction. Mr. Nunn argued that the police and CPS were under an obligation to provide access to the material requested. The Supreme Court carefully distinguished various situations in identifying the extent of the duty after conviction. First, if material came to light after conviction that might cast doubt on the safety of the conviction then in accordance with paragraph 72 of the Attorney General's guidelines, "the prosecutor must consider disclosure of such material" (at para. [30]). The Court strengthened the guidelines in favour of the convicted person, saying that in such cases "disclosure should be made unless there is a good reason why not" (at para. [30]). Secondly, where there had been a failure to disclose, there was a duty on the prosecutor to disclose on appeal "what should have been provided at trial" (at para. [25]). Thirdly, where proper disclosure had taken place and access was being sought to that material for re-examination, retesting, or reinterpretation. This was Mr. Nunn's position and it was submitted that the duty that existed was equivalent to the duty of disclosure prior to conviction.

The Court rejected that submission. It could find no authority for the proposition and, having perused authorities from New Zealand, Canada, and the US, concluded that no such equivalence was warranted. The justification for that conclusion involved a contentious switch of principle. The Court identified the key principle underlying disclosure provisions prior to conviction, from common law and the Criminal Procedure and Investigations Act 1996, as fairness. It did not follow that the principle of fairness required that the same level of duty to disclose applied at every stage of the criminal process. Once a person had been convicted, different considerations applied. Although there was a legitimate interest in addressing miscarriages of justice, there was also a "powerful public interest in finality of proceedings" (at para. [32]). The Court was concerned about the potential resource implications of dealing with requests, particularly if they were, as in this case, of a speculative nature. Furthermore, in perhaps the most explicit appellate court recognition of the point, the individual's status had changed and he was now "presumed guilty" (at para. [32]).

The Supreme Court did, nevertheless, recognise a clear interest of the individual and the public in correcting miscarriages of justice. Having decided that the post-conviction duty to provide access is different from that prior to conviction, it then had to try to explain the extent of it. The Court was unimpressed by the speculative requests in Mr. Nunn's case.

https://doi.org/10.1017/S0008197314000919 Published online by Cambridge University Press

Nevertheless, it envisaged a situation where a well-targeted and focused request might be made and expressed the hope that where such a request raised a "real prospect" of success the police and CPS would cooperate. The difficulty for applicants is that the determination of whether there is a "real prospect" will rest with the prosecuting authorities.

The Supreme Court partly justified the decision to limit the scope of the continuing duty to grant access because of the existence of the CCRC as a safety net. It pointed out that the CCRC has the power to requisition any material held by the police or CPS in order to conduct a review of a case (Criminal Appeal Act 1995, s. 17). The Court noted the CCRC's considerable expertise and experience in this regard, but also cautioned the CCRC against being drawn into "speculative" applications.

The criticism that may be levelled at this aspect of the judgment is that the Supreme Court seems to pay insufficient heed to the statutory requirements for a referral and to the CCRC's existing approach to those requirements. A pre-condition for the CCRC to refer a conviction to the Court of Appeal, in the absence of any exceptional circumstances, is some "evidence, or argument, not raised in the proceedings which led to it or on any appeal" (Criminal Appeal Act 1995, s. 13(1)(b)). Such evidence or argument must be sufficient to convince the CCRC that there is a "real possibility" (Criminal Appeal Act 1995, s. 13(1)(a)) that the conviction will be quashed. In practice, the CCRC places enormous emphasis on the requirement for applicants to furnish it with something new. Many applications to the CCRC are rejected for failing to do so. It is not clear whether the Supreme Court, which explicitly recognised the resource limitations of the CCRC, envisaged the CCRC's undertaking an enhanced role or merely considered that its existence provides the necessary protection against miscarriages of justice. Applicants who are denied access to materials because there is no "real prospect" of a conviction being rendered unsafe will be unable to submit something new to the CCRC and are thus highly likely to fail at the first hurdle.

The use of the term "real prospect" by the Supreme Court is also unfortunate, since it may give rise to confusion with the "real possibility" test for referral. This risk may be heightened by the unfortunate use of the term "real prospect" by Sir Brian Leveson P. in the judgment on the CCRC's referral of *R. v Xie* [2014] EWCA Crim 715 (at [1]). The question will now be whether applicants who unsuccessfully ask the CCRC to access material will challenge that refusal on the basis that there was a "real prospect" of the material yielding evidence or argument which might render a conviction unsafe. There are certainly some advisers, including those representing Mr. Nunn, who think that the Court's decision imposes additional obligations on the CCRC. That view may not be shared by the CCRC, who might point to the Supreme Court's caution to avoid being drawn into speculative matters. The Supreme Court placed even further faith in the

https://doi.org/10.1017/S0008197314000919 Published online by Cambridge University Press

CCRC by effectively directing applicants away from judicial review proceedings against the police and CPS if they have not taken their case to the CCRC.

In practice, the implications of the decision may be fairly modest. The Court has confirmed that the right to access material after a failed appeal is limited and certainly a more restricted right than that afforded to a defendant facing trial. It has sought to discourage requests that are speculative, but expressed the hope that prosecution authorities will cooperate with well-targeted requests for access that offer a "real prospect" of success. The role of the CCRC is unlikely to change much either. It already rejects applications that are speculative fishing expeditions, so once again a well-targeted application will be crucial.

Applicants will still face a significant hurdle in persuading the CCRC to review a case, because of the emphasis which the CCRC places on the statutory requirement that a referral should normally be based on some evidence or argument not put forward at trial or appeal. The catch-22 problem for applicants is that they may be unable to furnish the CCRC with sufficient fresh evidence or argument to secure a full review of their case precisely because they cannot gain access to the material that might enable them to do so.

It also seems legitimate to ask whether the finality of proceedings should be afforded greater weight than correcting a miscarriage of justice. Surely finality is much more satisfactory if the correct outcome is achieved.

STEPHEN HEATON

LOST ON PENALTIES

FREEDOM of contract is a fundamental principle of English law, but it is of course qualified by numerous protective regimes, some common law, most statutory nowadays, which protect vulnerable parties from untrammelled, unequal free bargaining. It is, quite rightly, exceptional for an experienced commercial party, negotiating at arm's length and with the benefit of specialist professional advice, to succeed in invoking such a regime to escape being bound by what he freely agreed. Yet, in *Cavendish Square Holdings BV v Makdessi* [2013] EWCA Civ 1539, this was precisely the controversial result.

The defendant Makdessi, founder of the largest advertising and marketing communications group in the Middle East, contracted in 2008 to sell his majority shareholding in the group's holding company ("the company") to the claimant, Cavendish. The agreed contract price, which included significant sums reflecting the goodwill of the company, was to be paid by instalments: most was paid on completion of the agreement, but two remaining

https://doi.org/10.1017/S0008197314000919 Published online by Cambridge University Press