which various Iranian naval vessels and aircraft were also destroyed or damaged. The Court noted that both Iran and Iraq were laying mines at the time so that evidence of other mine-laying operations by Iran could not be conclusive as to its responsibility for this particular mine. The Court left open the possibility that the mining of a single military vessel might be sufficient to trigger the right of self-defence. However, on the material before it, the Court was not persuaded that the US action had been shown to be a justifiable response to an "armed attack" by Iran (paras. [65]–[72]).

The Court was also not convinced by US evidence regarding the alleged military function of the platforms. It added that, even if this evidence had been compelling, none of the US actions were *necessary* to respond to the attacks allegedly perpetrated by Iran. On the requirement of proportionality, the Court considered that the 1987 action might have been proportionate. But in the case of the 1988 action, neither "Operation Praying Mantis" as a whole, nor even that part which destroyed the oil platforms, could have been regarded as a proportionate response to the mining by an unidentified agency of a single warship, where the vessel was not sunk and no lives were lost (paras. [73]–[77]).

Notably, the Court made no attempt to articulate any clear standard of proof, apart from varying references to evidence being "not sufficient" or "highly suggestive, but not conclusive". However, it should be recalled that the Court in *Nicaragua* was similarly Delphic (*e.g.*, [1986] I.C.J. Reports 14, p. 37 at para. [54], p. 62 at para. [110], p. 85 at para. [159], p. 86 at para. [159], and p. 113 at para. [216]).

Although the Court was arguably correct in dismissing both the claim and counter-claim, the reasoning is problematic in a number of respects. This case raises significant questions about the function of the Court: it underscores a practical tension between the Court's declaratory role and its duty to resolve particular legal disputes within the jurisdictional leeway conferred by party consent.

JUSTIN CHENEVIER

PRIOR RESTRAINT UNDER THE HUMAN RIGHTS ACT

WHEN the newly elected Labour Government introduced the Human Rights Bill into Parliament, its spokesmen were at pains to assert that the press had nothing to fear from this great constitutional measure. But the press were suspicious; they thought that the Bill was a Trojan Horse for an action in privacy, and

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persuaded the government to introduce amendments protecting their position, which subsequently became law as section 12 of the Act. Section 12(3) provides:

> No such relief [affecting the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

Somewhat surprisingly, given the number of recent occasions when the press have been the subject of proceedings for injunction ("gagging orders", to use the red top terminology), the precise effect of the section had not been the object of more than tangential consideration by the superior courts. That lacuna has now been filled by *Cream Holdings Ltd.* v. *Baneerjee* [2003] EWCA Civ 103, [2003] 3 W.L.R. 999.

Ms. Bannerjee, an accountant, settled her claim for unfair dismissal with her former employers, Cream Holdings. Shortly thereafter, she approached the newspapers with allegations of financial irregularities (including the making of corrupt payments to local government officials) against her former employers. An article was published repeating some but not all of Ms. Banerjee's allegations, and the company decided to seek injunctive relief to prevent further publication on the grounds of breach of confidence on Ms. Banerjee's part. This was granted by Lloyd J. pending trial or further order, and the primary question for the Court of Appeal was whether the judge had applied the correct test in making that determination. Unanimously (but for slightly different reasons, Sedley L.J. invoking the interpretative impact of section 3 of the Human Rights Act) the court held that he had.

The two possible interpretations of the expression "likely to establish" for which the opposing parties contended were that it meant, on the one hand "more likely than not" (the newspaper contention) and on the other a lesser meaning, "a real prospect of success". The constitutional ramifications for freedom of the press that lurk in these apparently linguistic quibbles are considerable. The "more likely than not" test is altogether the more difficult one for the person seeking prior restraint to satisfy at the interlocutory stage, not least because there may well still be unresolved disputes as to the facts. If adopted, it would give the press far greater freedom to publish than would be the case if the applicant merely had to show that it had, in effect, an arguable case ("a serious issue to be tried", to use the language of the more general threshold common law test for the grant of an injunction).

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By comparison with the fundamentalism of the American First Amendment jurists, the common law's abhorrence of prior restraint of the press is moderated if not muted. Before the Human Rights Act became law, the courts were free to pay attention to the nuanced factual situations with considerable subtlety. Thus, in the field of defamation, if the defendant indicated that it was intended to plead justification, the applicant for interim injunctive relief would succeed only if the court could be persuaded that the plea of justification was bound to fail, *i.e.*, that the proposed statement was plainly untrue. Where the application was based upon grounds of breach of confidence, however, the courts were much more readily moved to offer protection, unless there was some sort of public interest in favour of immediate publication. If damages were likely to be an adequate remedy, by contrast, the courts would permit the defendant to publish at his own peril (in damages and costs).

A problem that has emerged with the test propounded by section 12(3) is that it requires the judgment in all of these varied situations to satisfy the same one-size-fits-all test. The difficulties to which this gives rise are very clearly illustrated by the example that persuaded Lord Justice Simon Brown to opt for the "real prospect of success" interpretation. His Lordship postulated (paras. [51]–[52]) the case of

> ... a claimant ... who ... would suffer catastrophic, irreversible and uncompensatable harm (whether to his career, his family life or whatever). Assume that at the interlocutory stage he can establish only a 40% prospect of being able at trial to make good his right to privacy ....
>
> On the appellant's construction no interim injunction could be granted. Were the claimant, however, then to succeed in his claim at trial and establish that publication had involved an unlawful and unwarranted intrusion into his private life, surely he would have legitimate grounds for complaint, not least to the courts' inability to grant him the interim protection that he had sought.

Following that decision (which is a worst case scenario so far as the press is concerned), he took the line that the interim injunction should be upheld. Arden L.J. agreed and that was the order of the court. The result most feared by the press has in fact come about; in a case where the press wish to expose corruption by officials in local authority affairs, and where there has been no allegation of falsity (through the action in defamation) the right to freedom of expression is curtailed.

About the application of the law to the facts, however, their Lordships took markedly and importantly different positions. Sedley L.J. deduced that, since the proceedings had been initiated

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for breach of confidence rather than for defamation, the likelihood was that the allegations of corruption were true. That being so, he reasoned, the general principle that there is no confidence in iniquity applied, and that the public interest test was in any event satisfied, overriding the obligation of confidence. All that being so, he considered that the injunction should be discharged, and publication permitted.

It is difficult in a note of this length to do justice to the complexity of the legal arguments canvassed in the judgments. What is clear is that the issues at stake for freedom of the press are enormous, and leave has been given to appeal to the House of Lords.

A.T.H. SMITH

RESTORING CHANCELS AND HUMAN RIGHTS

WHEN presented with the bare facts of *Parochial Church Council of Aston Cantlow, Wilmcote with Billesley, Warwickshire* v. *Wallbank* [2003] 3 W.L.R. 283, the average non-lawyer reacts with horror. The idea that a homeowner might find herself liable to an unlimited extent for the repair of part of the local church rests uneasily with the general public. Yet the House of Lords' decision should be welcomed as restoring clarity to the law on whether charitable institutions are public authorities for the purposes of section 6(1) of the Human Rights Act 1998, in the wake of the Court of Appeal's confusing rulings ([2002] Ch. 51). Moreover, the judgment contains dicta which make it clear that land obligations which require expenditure on the part of the servient owner should not be regarded as an arbitrary taxation that might be impugned under Article 1 of Protocol 1 of the European Convention on Human Rights.

In 1986, Mrs. Wallbank obtained Glebe Farm by deed of gift from her parents, the Coultons. As the name suggests, the property encompassed glebe, or church, land. According to a conveyance of 1970, the Coultons had purchased the farm "subject to the liability for the repair of the Chancel of Aston Church". Such a burden was an overriding interest under the Land Registration Act 1925, s. 70(1)(*c*), and the Wallbanks, as successors in title to the Coultons, were therefore bound by it. By 1994 the chancel had fallen into a state of disrepair. Unfortunately for the Wallbanks, the church was not just any old church, but a thirteenth-century gem of English heritage, praised by Pevsner in his *Buildings of England* series, and the place where Shakespeare's parents married;

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