about "distributions" for example? Presumably business people could define such a concept without resorting to a lawyer, whereas lawyers know that the legal definition of distribution is a matter of some complexity. To complicate matters even more, Lord Hoffmann accepted that particular concepts may be characterised in different ways depending upon their statutory context.

Secondly, what is the status of the *Ramsay* principle now? Whilst all the judges sought to emphasise that *Ramsay* does not create any legal principle as such but simply provides an aid to statutory construction, it is clear that the decision as it had been interpreted in subsequent cases did more than this since particular tests involving pre-ordained schemes and commercial purposes had been identified to determine whether a scheme was effective to avoid tax. But, as Lord Hoffmann recognised, these tests can only now be considered where particular concepts are given a commercial meaning. Even then, the *Ramsay* "approach" cannot be applied rigidly but is simply an aid to construction of the statute. Paradoxically, even though the House of Lords purported to reject the *Ramsay* principle, it has created a new principle which is founded on the fundamental distinction between legal and commercial concepts.

Lord Hoffmann's apparent motive for this new approach is laudable. He has sought to reconcile the judicial approach to tax avoidance with constitutional considerations of the appropriate role of Parliament and the courts in tax affairs, by minimising the situations where the courts will intervene, and so to create certainty in a notoriously uncertain area of the law. In fact, he has achieved the opposite effect. We are left with a situation where the efficacy of any tax avoidance scheme turns on the inherently vague distinction between legal and commercial concepts. The judiciary have not been given any adequate guidance as to how this distinction can be drawn and so they will act very much like Humpty Dumpty, for whom words meant what he chose them to mean. The only matter about which we can now be sure is that there is no longer a question of whether we will ever have a General Anti-Avoidance Provision in this country, but when.

GRAHAM VIRGO

ELECTION LATEST

DEPENDING on your point of view, the appeal in *Cerberus Software Ltd.* v. *Rowley* [2001] I.R.L.R. 160 involved either a "troublesome

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little point" or a "fundamental issue" of employment law (*per* Ward and Sedley L.JJ. respectively). Where an employment contract contains provision for a payment in lieu of notice, does a summary dismissal, not justified on grounds of gross misconduct, constitute a breach of the obligation to give notice or an election to make the payment in lieu?

John Rowley was summarily sacked as sales and marketing director of Cerberus Software in June 1996. Responding admirably to what was a "contrived and fabricated" dismissal, Mr. Rowley almost immediately secured alternative employment at a significantly higher salary before recovering judgment for nearly £25,000 against the company for unfair dismissal and breach of contract. That award, comprising mostly the salary he would have received during his six-month notice period, was upheld by the Employment Appeal Tribunal.

But a majority of the Court of Appeal ordered that the tribunal's award be set aside and be replaced by the much smaller amount of damages for the brief period between the date of dismissal and the start of the new employment. Ward L.J., with whom Jonathan Parker L.J. agreed, held that the relevant obligation was to give notice. By dismissing summarily, the employer had broken this duty and was liable for wrongful dismissal. That liability was subject to the duty to mitigate. Ward L.J. rejected Mr. Rowley's claim that there had been a duty to make a payment in lieu. The contract provided that the employer "*may* make" a payment in lieu to the employee (Ward L.J.'s emphasis). Such language was, he said, "totally inconsistent" with Mr. Rowley having any right to insist on such a payment. In effect, that right was contingent on Cerberus electing to exercise its power to make the payment. The employer denied having made such an election and Mr. Rowley's own evidence did not suggest a belief that the dismissal had been intended to be lawful.

Ward L.J.'s judgment is also noteworthy for distinguishing *Abrahams* v. *Performing Rights Society* [1995] I.C.R. 1028. The terms of the contracts in the two cases were, he said, "very different". Mr. Abrahams' contract provided that, in the absence of gross misconduct, he was *entitled* to two years' notice or a payment in lieu. But it could be suggested that any difference is superficial and that it is preferable to treat the contracts alike. Both gave the employer two means of ending the employment in the absence of gross misconduct. The argument in *Abrahams* that the employer "was not electing between two modes of performance but instead intimating that he would perform neither" mirrors that in *Cerberus* that it is "always open to a contracting party to break the contract

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provided it is willing to pay the price fixed by law for doing so". In *Abrahams* the Court of Appeal concluded that it would have been "absurd to treat the defendant's termination otherwise than as an election not to serve notice". In *Cerberus* the majority thought otherwise.

It is worth referring briefly here to the elective and automatic theories of termination. According to the former, an employee can refuse to accept the employer's repudiatory breach as ending the contract and apply to the court for relief. The court can, by means of injunction, prevent the employer from terminating the contract otherwise than in accordance with its terms—*i.e.* on notice or by payment in lieu. While Ward L.J. thought it unnecessary to "wade through" these "murky waters", it should be noted that the Court of Appeal did not hear legal argument on the issue; Mr. Rowley was not represented.

Sedley L.J., dissenting, preferred the approach of the earlier tribunals. The Employment Tribunal had held that the payment in lieu provision meant that the dismissal was lawful. According to the E.A.T., when the employer chose to give no notice the employee became entitled to be paid in lieu. Implicit here is the idea that the act of dismissal was not a breach of the duty to give notice but an election to make a payment in lieu. Sedley L.J. adopted this approach since it "carries into effect the parties' plain intentions".

There is a good deal to this point. Payment in lieu provisions are generally inserted by the employer to enable him to get rid of the employee immediately and lawfully, thereby maintaining the validity of any restrictive covenants. At the time of the contract the employer is probably happy to be seen as contemplating only dismissal by notice or with a payment in lieu. This leads to a presumption that the parties intended that an instant dismissal would, in the absence of gross misconduct, constitute an election by the employer to make the payment in lieu. The trick of such a construction is that it neatly sidesteps the argument that an employer can always break his contract and pay damages. By treating the dismissal as a lawful election the breach disappears.

It is plain that Sedley L.J. was motivated by a strong ethical impulse. If the employer's arguments correctly represented the law, "there is", he said, "something wrong with it". He referred to the principle that parties should honour their contracts and noted that, were the company's arguments to be accepted, employers who broke their contracts could frequently expect to do a great deal better than those who abided by them. The outcome he proposed

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not only gave effect to the parties' supposed intentions but also met the "undoubted morality of the case".

Presumptions as to parties' intentions can be rebutted by clear words in a contract. It is not easy to envisage wording reserving the power to effect a lawful summary dismissal without excluding the "right" to dismiss instantly and wrongfully. Perhaps this bears out a different sort of rule: you can't have your cake and eat it.

DAVID PEARCE

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