2013/600. However, section 863 has been re-enacted, with some amendments, as section 859B.

Laypersons may think that debentures and bonds are longer-term tradable debt, whereas notes are shorter in duration. Patten L.J. did suggest (at para. [43]) that, if it were correct to see "securities" as synonymous with "investments", then the SLAs in *Fons* were "long term loan capital", as they were not repayable before the principal facility with the Royal Bank of Scotland. This lock-in quality is perhaps even more important when viewed from the perspective of prospectus disclosure for a public offer of securities as it heightens the need for investor protection. In *Culverden Retirement Villages Ltd. v Registrar of Companies* [1997] 1 A.C. 303, the Privy Council, on appeal from New Zealand, held that a debt security had been created in a sale and buyback of property where owners had to surrender their housing unit when they ceased to occupy it, even though the repayment price was possibly lower than the original payment they made (cf. *Handevel Pty Ltd. v Comptroller of Stamps (Vic)*, at p. 199, that, for stamp duty considerations, "a contingent future debt arising from a contingent obligation to purchase" was not a debenture).

Even this policy rationale must be properly understood when the issue is not simply one of whether a debenture prospectus is required, but whether a hybrid debt instrument has other characteristics which might trigger even more involved regulation. So, the notorious Lehman Minibond that was sold to the Hong Kong and Singapore public was registered as a debenture when it had elements of a derivative, insurance contract, and collective investment scheme (which section 235 of the Financial Services and Markets Act 2000 defines "in an open-textured way": *Financial Services Authority v Fradley* [2006] B.C.L.C. 616 at [32]). In these situations, the instrument, while clearly having a debt component, should perhaps also be subjected to a stricter regulatory regime (in the case of a collective investment scheme, for example, approval of the scheme and trustee/manager alongside prospectus disclosure). However, in a dispute between contracting parties with minimal externalities, perhaps even concerning legislation where words do not clearly dictate otherwise, it is likely that a court will, as a starting point, see debentures as "specific identifiable agreements embodied in written documents" (Patten L.J., at para. [37]) that create or acknowledge a debt.

HANS TJIO

MARRIAGE DISSOLUTION AS A PRE-REQUISITE FOR LEGAL GENDER RECOGNITION

IN *Hämäläinen v Finland* (Application no. 37359/09), 16 July 2014, the Grand Chamber of the European Court of Human Rights held that

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Contracting States of the Council of Europe may require the dissolution of an existing marriage before extending the right to legal gender recognition.

Following *Goodwin v United Kingdom*, (Application no. 28957/95) (2002) 35 E.H.R.R. 18, which first acknowledged a right to gender identity within the European Convention on Human Rights, a wide spectrum of gender recognition regimes has been adopted across Europe. The current statutory or administrative requirements range from invasive gender confirmation surgeries, such as those practised in Greece, to Denmark's recently adopted gender identity law, which focuses almost exclusively on self-identification. Twelve years after *Goodwin, Hämäläinen* presented the Strasbourg Court with an opportunity to begin considering what conditions – in this case, the requirement to dissolve an existing marriage – a Contracting State can impose for the legal recognition of gender.

The applicant, Ms. Hämäläinen, was a married, post-operative transgender woman. She sought to obtain legal recognition of her preferred gender in Finland but her application was refused because, contrary to national law, she and her wife were still married. Due to their religious beliefs, the couple were unwilling to make an automatic conversion of their marriage into a registered partnership, as provided for under section 2 of Finland's Transsexuals (Confirmation of Gender) Act. The applicant argued that the requirement to dissolve her marriage, and submit to a registered partnership, was a violation of Articles 8, 12, and 14 ECHR.

A majority of the Grand Chamber, affirming the earlier Fourth Section decision in *H v Finland* (Application no. 37359/09), 13 November 2012, rejected the applicant's claims. While Article 8 did apply to a married post-operative transgender individual in the applicant's position, Finland's dissolution or conversion requirement could not constitute a disproportionate interference with private and family life. Although, Ms. Hämäläinen had not specifically advocated for a general right to same-gender marriage, a finding in her favour would have led "to a situation in which two persons of the same sex could be married to each other" (at para. [70]). As the Court had previously ruled in *Schalk and Kopf v Austria* (Application no. 30141/04) (2011) 53 E.H.R.R. 20 at [63], Article 12 does not protect the right of two same-gender persons to marry. Contracting States therefore could not be forced to accept same-gender marriages under the cover of legal gender recognition.

The Finnish Transsexuals (Confirmation of Gender) Act permitted married transgender individuals, with the consent of their spouse, to "convert" their marriage into a registered partnership. Conversion would entitle the transgender spouse to obtain legal recognition, but would have no other effect on existing parental rights or the calculation of relationship length, for purposes such as a widow's pension. In this way, the majority were satisfied that Finland had struck a fair balance between the recognition rights of transgender persons and the right of the State to protect

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"traditional" marriage. The majority also held that the applicant could not bring her situation into comparison with "cissexual" couples, and therefore it was not necessary to consider her claim under Article 14 (at paras. [110]–[113]).

While a clear setback for transgender rights in Europe, the Grand Chamber's decision in *Hämäläinen* was not unexpected. Since *Schalk and Kopf*, the Court has reiterated on numerous occasions (e.g. *Gas and Dubois v France* (Application no. 25951/07), 15 March 2012) that Contracting States are not required to permit a situation where two persons of the same legal gender are married. *Hämäläinen* builds upon, and extends, that jurisprudence. Whereas the First Section in *Schalk and Kopf* had suggested that the "Court would no longer consider that the right to marry enshrined in Article 12 must … be limited to marriage between two persons of the opposite sex" (at para. [61]), the Grand Chamber in *Hämäläinen* expressly wrote that "Article 12 … enshrines the traditional concept of marriage as being between a man and a woman" (at para. [96]). This latter statement will disappoint marriage equality advocates who had hoped that, after *Schalk and Kopf*, rapid change in societal attitudes might also precipitate an evolution in Strasbourg's jurisprudence on same-gender marriage.

The applicant had claimed that Article 12 should not be interpreted as simply protecting the right to enter a heterosexual marriage. In arguments adopted by the dissenting judges (Sajó, Keller, and Lemmens, at para. [16]), Ms. Hämäläinen suggested that Article 12 would be redundant if, having permitted herself and her wife to contract a valid marriage, the Finnish authorities could thereafter require them to forfeit their marriage entitlements in order to vindicate another Convention right. While this point had previously found support from courts in France and Luxembourg, it was not specifically addressed by the majority. This is regrettable, as the recognition that Ms. Hämäläinen and her wife were in a valid heterosexual marriage is also relevant to the question of discrimination under Article 14. As the dissent notes, it is difficult to identify "any situation" where a comparable, happily married couple would be required "to choose between maintaining their civil status and obtaining identity cards reflecting the gender with which they identify" (at para. [19]). In 2008, the German Constitutional Court struck down the divorce requirement in section 8 of the Federal Transsexual Law 1980 (1 BvL 10/05, 27 May 2008). Existing marriages were constitutionally protected through Article 6 of the German Basic Law. That protection would effectively be withheld, however, if individuals were required to forfeit their marital rights simply because they chose to obtain legal gender recognition. In Italy, the Constitutional Court has recently held that, where a married couple was stripped of all their legal rights because one spouse obtained legal gender recognition, that couple was denied their "inviolable rights

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of man" as set out in Article 2 of the Italian Constitution (No 170 [2014], 11 June 2014).

The true consequences of *Hämäläinen* may only be discovered when the majority's decision is applied to other gender recognition regimes across Europe. Finland's Transsexuals (Confirmation of Gender) Act is comparatively favourable in this regard, providing an automatic "conversion" mechanism and allowing married couples to retain the majority of their existing marital rights. In other European countries, the gender recognition process is noticeably less sympathetic. Applicants must first obtain a full divorce from their spouses and it is only when they later gain legal gender recognition that they can then re-enter a registered partnership. Such systems may create a significant lag period, where the couple's relationship has no legal status whatsoever. In addition, unlike in Finland, the registered partnership schemes in many European countries, when finally contracted, offer the couple significantly fewer rights than marriage. In the Czech Republic, where couples must dissolve their marriage before one spouse obtains gender recognition, any future registered partnership would withhold the couple's previous marital rights to adoption, survivor's pensions, and joint ownership of property.

While the streamlined nature of the Transsexuals (Confirmation of Gender) Act was clearly one factor which led the Grand Chamber to conclude that there had been no disproportionate breach of Article 8, the majority did not condition its ruling on the existence of total parity between registered partnerships and marriage. Considering the wide margin of appreciation afforded to Contracting States in refusing to recognise same-gender marriages, it is likely that the Convention does not currently prevent transgender persons being required to dissolve their existing marriages if an alternative form of relationship status – even if significantly lesser – is available. *Hämäläinen* will thus result in transgender spouses suffering a significant loss in their legal entitlements simply because they choose to enforce their fundamental right to legal gender recognition.

In the UK, the impact of *Hämäläinen* has already been felt in the recent case of *MB v Secretary of State for Work and Pensions* [2014] EWCA Civ 1112; [2014] W.L.R (D) 355. In *MB*, the Court of Appeal held that the Secretary of State for Work and Pensions had not breached the EU Social Security Directive when he refused a state pension to a 60-year-old post-operative transgender woman. The individual had not yet obtained a full gender recognition certificate under the Gender Recognition Act 2004 because she wished to remain married to her wife. The Social Security Directive was only directly applicable where an EU Member State had made no provision for legal gender recognition. Where specific rules do exist, it is legitimate that individuals should have to satisfy those rules before accessing social security benefits according to their preferred gender. The only exception is where a Contracting State imposes

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requirements for recognition which are "unlawfully discriminatory" (at para. [13]). Relying on *Hämäläinen*, the Court of Appeal concluded that the previous marriage dissolution requirements under s. 4 of the 2004 Act had not been unlawfully discriminatory.

The decision in *Hämäläinen* is a significant blow for transgender rights in Europe. It creates an impossible choice between vindicating one's sense of self-identity and protecting the integrity of loving families. It is hoped that the Strasbourg Court is presented with an opportunity to reconsider its decision in the near future, and will then develop a jurisprudence which more appropriately ensures the rights of transgender persons and their families.

PETER DUNNE

"UMBRELLA EFFECTS" AND PRIVATE ANTITRUST ENFORCEMENT

UMBRELLA effects arise where anti-competitive conduct by one or more market actors results in general price rises across the sector concerned. The Court of Justice of the European Union has, with its preliminary ruling in Case C-557/12, *Kone and others v OBB-Infrastruktur AG*, Judgment of 5 June 2014, EU:C:2014:1317, now addressed the potential legal implications of such umbrella effects. In confirming that the right to compensation stemming from breach of EU competition law extends to umbrella claims as a matter of principle, the Court of Justice has offered its most expansive, and arguably most emphatic, interpretation of the scope and importance of private antitrust enforcement to date.

The right of "any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition" has been established since Case C-453/99, *Courage v Crehan* EU:C:2001:465 (at para. [26]). Three criteria must be satisfied: breach of an antitrust rule, quantifiable loss, and causation. Although the right to claim damages under *Courage* appears to derive directly from EU law, its application is conditioned by the principle of national procedural autonomy and, in particular, domestic rules governing the concepts of causation and loss. Yet EU law continues to shape the interpretation and application of these concepts. In Case C-295/04, *Manfredi* EU:C:2006:461, for instance, the Court of Justice clarified that, for the purposes of EU competition law, actionable loss encompasses both actual loss and loss of profit, plus interest (at para. [95]). Moreover, the forthcoming Directive on antitrust damages actions makes express provision for indirect purchaser standing, alongside a concomitant passing-on defence. With its decision in *Kone*, the Court of Justice has extended the reach of EU law even further into the ostensible domain of domestic rules and procedures.

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