Thirdly, they rejected Davis J.'s finding that although DRCH's purpose in paying the accountants was to facilitate the due diligence exercise, the acquisition of its shares was merely a *reason* for forming this purpose. This attempt to reverse the logic of Lord Oliver's well-known distinction in *Brady* v. *Brady* [1989] A.C. 755 at 779–780 by applying it to the primary prohibition rather than the section 153 exception would, as Arden L.J. put it, "turn *Brady*, and the section, on its head" (at [49]). DRCH's sole purpose was to facilitate the acquisition of its shares by SWP. Moreover, the fact that the directors had acted in good faith in the interests of the company did not negative this purpose, being relevant only to their motive in forming it.

The Court of Appeal's approach, by focusing attention on the "commercial substance" of the transaction, brings increased certainty to the formulation of the law. Doubtless, however, much scope will remain for differences over the application of this test.

JOHN ARMOUR

CONDEMNED TO LIFELONG IGNORANCE

A DICKENSIAN law dating back to the dire days where women were driven, by poverty and stigmatization of single motherhood, to give birth in secret and abandon their newborn children outside nursing homes, allows women in France to give birth anonymously, which means that the child will never know the identity of its natural mother, nor—in practice—that of its father or any siblings, who in turn will never learn of the existence of the child. This legislative regime, originally introduced to encourage women to give birth to unwanted children in the safety of a hospital, is still invoked by roughly 600 women every year. Its compatibility with the European Convention of Human Rights was challenged unsuccessfully in a recent case before the European Court of Human Rights: *Odièvre* v. *France*, judgment of 13 February 2003 (Grand Chamber).

The applicant had been born anonymously in the 1960s and grown up with adoptive parents. Upon her request for information regarding her origins, the French authorities had furnished her with a non-identifying description of her biological family (which, incidentially, revealed the existence of siblings), but refused to disclose the identity of her birth mother or any other blood relative to her. The applicant argued that the non-disclosure of this (fortuitously available) information contained in her file amounted to a violation of her right to private and/or family life protected by

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Article 8 of the Convention, or alternatively of Article 8 read in conjunction with the prohibition of discrimination in Article 14. While a majority of ten judges rejected the applicant's complaint on both grounds, an impressive minority of seven, encompassing *inter alios* the President of the Court and the President of the Chamber which originally relinquished jurisdiction in favour of the Grand Chamber under Article 30 of the Convention, was prepared to endorse the applicant's case under Article 8.

All the judges in this case agree that, as an aspect of her right to private life under Article 8, the applicant has "a vital interest protected by the Convention in obtaining information necessary to discover the truth about important aspects of [her] personal identity, such as the identity of [her] birth parents" (Judgment, para. 29; Joint Dissenting Opinion, para. 3). Beyond that, there is little overlap between their views. The majority essentially accepts that "[t]he French legislation ... seeks to strike a balance ... between the competing interests", and finds that "France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue" (para. 49). The minority, however, is adamant that proper balancing is impossible under a law which in practice gives birth mothers a power to keep their identity hidden from their child which is absolute, and insusceptible to being "overruled" in the interests of the child (Joint Dissenting Opinion, para. 7).

Do biological parents have a prima facie duty towards their offspring to reveal their identity to them? The majority's judgment is defensible only on the assumption that they do not, because if they do, it can hardly be a proportionate restriction ("necessary in a democratic society") to allow mothers to keep their identity from their biological children merely because they wish to do so. Rather, in order to protect the child's right to know, the State would be obliged to put arrangements in place by which that right was protected in a way that did not make it unenforceable in practice. Under such a regime, sufficient information to identify the mother would have to be collected at birth, her wish that her identity be not revealed to the child and the reasons for it be recorded, and once the child sought to exercise its "right to know", an independent decision-maker would balance the competing interests against each other, with the child's disclosure interest prevailing unless it was outweighed by very grave private or public interests in preserving the mother's anonymity. This was in fact the view taken by the minority, and it is unsurprising that the minority arrived at this opinion after denying that a mother can have a legitimate interest in making a unilateral, unchallengeable decision to "bring a

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suffering child into the world and condemn it to lifelong ignorance" and "by the same means paralyse the rights of third parties, in particular those of the natural father or the brothers and sisters" (Joint Dissenting Opinion, para. 7).

The applicant argued her case as a claim about a right of "access to a file". This clouded the real issue. The nub of the case is not whether the applicant has a right to see a file, but whether the applicant has a right to know who her biological mother is. If she does have such a right, the existence of the file puts the State in the fortunate position of being able to comply with its positive obligation to ensure that the applicant can trace her birth mother. If she does not have any such right, the identifying information in the file can and arguably must be withheld from her in order to protect her mother's prevailing confidentiality interest.

A clear realisation of this point would have enabled the Court to come to grips with the temporal aspect of the case. The majority's argument that when the request for information is made, the competing interests of two adults face each other, is misplaced. The crucial moment for the assessment of the respective rights and interests is the moment when the child is born and its and its mother's interests diverge, the crucial question being whether the State, in order to protect the rights of the child, has a duty to record the mother's identity against her will. It matters not whether the child demands that knowledge while still a minor or an adult. Nor, if there is no duty to record it, does it matter whether the information is in fact available at the time it is sought and could enable the child to identify its mother. What matters is whether it is lawful for the State to allow and in fact assist a parent to keep his or her identity a secret from their child.

Odièvre v. *France* is an important case, not least because of its implications for the possible outcome of an eventual "right-to-know" claim brought by an IVF child seeking retrospective lifting of sperm donor anonymity. Clearly, if the interests of a child who was conceived naturally and independently of any legal guarantee of a choice of anonymity for its mother cannot outweigh the mother's anonymity interest once she has availed herself of a legal option to give birth anonymously, a child who might not have been conceived at all but for the prior assurance of anonymity for the gamete donor provided by the provisions of the Human Fertilisation and Embryology Act 1990 has an even weaker case under the Convention. Yet the sharp words of the minority act as a reminder that society will eventually have to revisit the question whether it is responsible public policy to enable people to bring human beings into the world who, as a result of conscious

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legislative design, will be ignorant of their biological heritage. The current campaign by children conceived through gamete donation to have gamete donor anonymity, at least for future cases, removed from the statute book, will only be momentarily deflated.

ANTJE PEDAIN

TAXATION—COMPOSITE BUSINESS TRANSACTIONS—BUSINESS TRANSACTIONS OR NOT?

TAX lawyers have to apply the concepts contained in the tax legislation to facts created by taxpayers; this is not easy. In *Barclays Mercantile Business Finance Ltd.* v. *Mawson (Inspector of Taxes)* [2002] EWCA Civ 1853, [2003] S.T.C. 66, the Special Commissioners agreed with the Revenue; Park J. [2002] EWHC 1527 (Ch), [2002] S.T.C. 1068, agreed with the Special Commissioners but for rather deeper reasons. Now the Court of Appeal has accepted the taxpayer's characterisation, making some very critical remarks about both lower level decisions. Normally, that would be the end of the matter, but the members of the Court of Appeal went out of their way to say, as closely as judges can do, that the recent decision of the House of Lords in *MacNiven* v. *Westmoreland Investments Ltd.* [2001] 2 W.L.R. 377, the case which rewrote the still emerging rules about when composite transactions are treated as one single transaction for tax purposes, had left the courts with a test which is unworkable (*e.g.* para. [69]).

Money had been spent by BMBF (a part of Barclays banking group) in buying an asset from X which it then leased back to X. If a company incurs expenditure on the provision of machinery and plant for the purposes of its trade, it is entitled to a capital allowance and can treat a percentage of that expenditure as a deductible expense in calculating its taxable profit. BMBF would expect to get the capital allowance; this would mean a lower rent and so a sharing of the fiscal benefit with X.

Such fiscal carrots attract manipulation; the question was whether the facts still fitted the terms of the capital allowance legislation—had BMBF "incurred expenditure" on the acquisition of an asset? The sums involved were significant. In simplified terms the asset was a pipeline which had just been built for X at a cost of £91m; X sold the pipeline to BMBF for £91m; BMBF leased it back to X which made a sublease to one of its subsidiaries which was going to transport and deliver the gas in accordance with X's directions. So far the lease looks reasonably normal. Further

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