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CASE AND COMMENT

APPEALS

APPEALS in cases noted in an earlier number of the *Journal* have now been disposed of as shown:

Dunnachie v. *Kingston-upon-Hull City Council,* noted [2004] C.L.J. 303. Appeal allowed: [2004] UKHL 36, [2004] 3 W.L.R. 310

Evans v. *Amicus Healthcare Ltd. and others,* noted [2004] C.L.J. 47. Appeal dismissed: [2004] EWCA Civ 727, [2004] 3 W.L.R. 681

THE ICJ ADVISORY OPINION ON *LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY*

IN 2002 Israel began construction of a "wall" running not only across its own territory but also across the occupied territory of the West Bank. Israel argued that the wall was to enable it to combat terrorist attacks launched from the West Bank; Palestine said that it constituted a form of illegal annexation of territory in an attempt to undermine the right of the Palestinians to self-determination. In 2003 the UN General Assembly passed a resolution declaring that the construction of the wall was a violation of international law; the Security Council had been prevented from adopting a similar resolution by a US veto.

In December 2003 the General Assembly asked the International Court of Justice for an advisory opinion on the question: What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the

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rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Many States, including the USA and the UK, joined Israel in arguing that the Court should deny jurisdiction or should exercise its discretion to refuse an opinion, but only Israel argued that the construction of the "wall" was lawful. (The choice of term is controversial: the Court recalled that the "wall" in question was a complex construction so that the term could not be understood in a limited physical sense. But the other terms used, either by Israel (fence), or by the Secretary-General (barrier), were no more accurate. The Court therefore chose to use the terminology employed by the General Assembly.) The Court issued a clear and unequivocal opinion which, although technically not binding, represents an authoritative statement of the legal position. By 14–1 it held that the construction of the wall in occupied territory violated international law.

A: Jurisdiction and propriety

The Court devoted almost half its opinion to the preliminary questions of its jurisdiction and the propriety of giving an opinion. On jurisdiction, Article 96(1) of the UN Charter provides: "The General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question". As in earlier cases, the Court avoided any ruling on the proper interpretation of Article 96(1); it did not decide whether this wide provision should be interpreted as essentially identical to the more restrictive provision in Article 96(2) which allows specialised agencies to request advisory opinions only on "legal questions arising within the scope of their activities". Instead the Court merely indicated that the question was in fact within the general competence of the General Assembly under Articles 10, 11 and 14 of the Charter.

The Court did not accept Israel's argument that the General Assembly had acted ultra vires in requesting an opinion because the matter was being dealt with by the Security Council. Although Article 12 of the UN Charter seemed to provide for a strict division of powers between the Security Council and the General Assembly, in practice its interpretation had evolved to allow the General Assembly to make recommendations on matters which were on the Security Council's agenda.

The Court also held that the advisory opinion concerned a "legal question" within the meaning of Article 96(1). The question about the legal consequences of the construction of the wall had been framed in terms of law and raised problems of international

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law. It was clear in the Court's jurisprudence that the fact that a question had political aspects did not suffice to deprive it of its legal character.

The Court then considered whether it should exercise its discretion under Article 65 of its Statute to decline to give an opinion. Its predecessor, the PCIJ, had refused an opinion in *Status of Eastern Carelia* and the ICJ had subsequently paid some lip-service to the principles in that case. But the ICJ had never actually refused an opinion in the exercise of this discretionary power. Earlier cases had established that only "compelling reasons" should lead the Court to refuse an opinion; it now strongly reaffirmed the reasoning in its earlier opinions, especially that in *Legality of the Threat or Use of Nuclear Weapons*.

In the current case, some States argued, first, that the request concerned a contentious matter between Israel and Palestine in respect of which Israel had not consented to the exercise of the Court's jurisdiction. The Court in earlier opinions had said that lack of consent might constitute a ground for refusing an opinion if considerations of judicial propriety so required. But the Court found that the subject-matter of the request could not be regarded as only a bilateral matter between Israel and Palestine; the construction of the wall was directly of concern to the UN in the maintenance of international peace and security.

Second, the Court addressed the argument that an opinion would impede a negotiated solution under the *Road Map* which had been endorsed by the Security Council. Participants in the present proceedings differed on this issue and the Court therefore did not find this a compelling reason to refuse an opinion. Third, Israel had refused to cooperate with the Court after submitting its Written Statement challenging the Court's right to give an opinion. Israel now argued that the Court did not possess the requisite facts and evidence to enable it to reach its conclusions. The Court rejected this argument; it had at its disposal a report by the Secretary-General as well as a mass of other material. Israel's Written Statement contained relevant observations and many other documents issued by the Israeli government were in the public domain. Fourth, it was argued that the opinion would serve no useful purpose. But, as in the *Nuclear Weapons* opinion, the Court said that it would not substitute its assessment of the usefulness of the opinion requested for that of the organ seeking the opinion.

B: The legality of the construction of the wall

The Court then addressed the question put to it by the General Assembly. It began with a brief analysis of the status of the

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territory concerned, of the nature and impact of the wall, and of the applicable law. (There is unfortunately no space here for discussion of this historical and legal background.) The Court found that the construction of the wall severely impeded the exercise by the Palestinian people of its right to self-determination and was therefore a breach of Israel's obligation to respect that right. The contested part of the wall was planned not in the territory of Israel as created in 1948, and subsequently delimited in the 1949 Armistice agreement, but in the territory Israel had occupied by force in 1967—the West Bank, including East Jerusalem. An area of about 17 per cent. of the West Bank, home to 237,000 Palestinians, would be cut off from the rest of the West Bank by the wall. The construction of the wall could well become permanent and would be tantamount to annexation. It would protect the Israeli settlements in the occupied territory which had been established in breach of international law. The Court recalled the prohibition of the use of force in Article 2(4) of the UN Charter and its corollary, as set out in the Declaration on Friendly Relations (1970), that no territorial acquisition resulting from the threat or use of force should be recognised as legal.

The construction of the wall also violated international humanitarian law. Although Israel is a party to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), it does not accept its applicability to the occupied Palestinian territory. The Court examined the intentions of the drafters, the *travaux préparatoires* and statements by States parties, and came to the same conclusion as the ICRC, General Assembly and Security Council which had all found that Israel was indeed bound to comply with the Geneva Convention. Moreover the Court found that certain human rights conventions applied not only within Israeli territory but also within the occupied territories under its control, The construction of the wall had led to the destruction or requisition of Palestinian properties under conditions which contravened the Geneva Convention, impeded the freedom of movement of the inhabitants and breached their right to work, to health and to education.

Israel had argued that the construction of the barrier was consistent with the right of self-defence in Article 51 of the UN Charter and in Security Council resolutions 1368 and 1373, passed after 9/11. The Court in a brief and controversial ruling (challenged by Judge Buergenthal in his Declaration and by Judges Higgins and Kooijmans in their separate opinions) found that Article 51 had no relevance in this case. Article 51 recognises the existence of an inherent right of self-defence in the case of armed attack by one

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State against another State. However, Israel had not claimed that the attacks against it were imputable to a foreign State; the threat originated within the occupied territory. The situation was thus different from that contemplated by Security Council resolutions 1368 and 1372 which had recognised a wide right of self-defence against global terrorism.

Could Israel rely on a state of necessity to preclude the wrongfulness of the construction of the wall? The Court followed the *Gabçikovo-Nagymaros* case in holding that necessity can be accepted only on an exceptional basis, under certain strictly defined conditions which must be cumulatively satisfied. One of those conditions was that the act being challenged be the only way for the State to safeguard an essential interest against a grave and imminent peril. The Court was not satisfied that the construction of the wall along the route chosen was the only means to safeguard Israel against the peril it had invoked as justification for that construction.

Having concluded that by the construction of the wall in the occupied Palestinian territory Israel had violated international obligations, the Court then examined the consequences of those violations. The responsibility of Israel was engaged under international law; it must comply with the obligations to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and human rights law. It must also put an end to its internationally wrongful acts: it should cease forthwith construction of the wall in the Occupied Palestinian territory, dismantle all parts of the structure in occupied territory and repeal all legislative and regulatory acts adopted with a view to its construction. Furthermore, given that the construction of the wall in the occupied territory had entailed the destruction of homes, businesses and agricultural holdings, Israel must make reparation for the damage caused under the principle laid down in the *Chorzów Factory* case. It should return the land, orchards, olive groves and other immovable property seized for the purpose of construction of the wall in occupied territory. In the event that restitution should prove to be impossible, Israel had the obligation to compensate those who had suffered material damage.

The Court also spelled out the consequences for other States. The obligations violated by Israel included certain obligations *erga omnes* which by their very nature are the concern of all States. By 13–2 the Court held that all States are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the occupied territory and not to render aid and assistance in maintaining the situation. Also the UN, and especially the

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General Assembly and the Security Council, should consider what further action was required to bring to an end the illegal situation resulting from the construction of the wall.

The Court's opinion is unambiguous, a clear rejection of the Israeli position on the legality of the wall. But Israel's response has been defiant: the ICJ has through its opinion itself become "a sponsor of terror". The General Assembly has now called on Israel to comply with the opinion but the prospects are not encouraging.

CHRISTINE GRAY

ALIEN TORT STATUTE SURVIVES THE SUPREME COURT

IT took 215 years for the right case to come along, but the United States Supreme Court has finally shed light on the Alien Tort Statute, 28 U.S.C. §1350 (ATS, also known as the Alien Tort Claims Act or ATCA) and begun defining the scope of its applicability to transnational human rights litigation. Enacted by the First Congress as part of the Judiciary Act 1789, the ATS provides federal district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". The ATS lay dormant for nearly two centuries until its spectacular resurrection in *Filartíga* v. *Peña-Irala* 630 F.2d 876 (2d Cir. 1980), where it was held to provide New York district courts with jurisdiction over the law suit ("civil action") of a Paraguayan plaintiff ("an alien") against a Paraguayan police officer for torture committed in Paraguay ("a tort ... committed in violation of the law of nations"). For its supporters, *Filartíga* heralded the dawn of meaningful enforcement of internationally proclaimed human rights. For its detractors, it represented an illegitimate exercise in judicial lawmaking and an extension of judicial jurisdiction into matters that were more properly for the Executive. Twenty-four years and dozens of lawsuits later, the time was ripe for guidance from the Supreme Court.

The facts and 14-year procedural history of *Sosa* v. *Alvarez-Machain* 159 L. Ed. 2d 718 (2004) are too involved to permit anything but a brief summary. In 1990, officers of the Drug Enforcement Administration (DEA) hired Mexican nationals, including the petitioner Sosa, to abduct the respondent Dr. Alvarez-Machain in his home in Mexico and transport him to Texas to be arrested and stand trial in connection with the 1985 death in Mexico of an undercover US federal agent. Claiming the arrest to be outrageous governmental conduct, the respondent

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moved to vacate the indictment. The motion was denied. The respondent was eventually acquitted and returned to Mexico, from where he launched civil claims against the DEA under the Federal Tort Claims Act, 28 U.S.C. §134 (FTCA) and against Sosa under the ATS. The Ninth Circuit court, sitting en banc, granted both claims, holding that the US government had no authority to effect the respondent's arrest and detention in Mexico and was therefore liable under the FTCA. On the ATS claim, the court held the abduction in Mexico to be a violation of the "clear and universally recognised norm prohibiting arbitrary arrest and detention": 331 F.3d 604 (9th Cir., 2003). The Supreme Court reversed unanimously. Space constraints do not permit discussion of the FTCA claim. The rest of this note will thus focus exclusively on the Court's fragmented pronouncements on the ATS.

Whilst unanimous in the result—that arbitrary arrest and detention are not actionable torts under the ATS—the Court was divided on the interpretation of the statute and whether it provided plaintiffs with a cause of action, in addition to granting curial jurisdiction. That disagreement hinges on different understandings of the interaction between the ATS, customary international law and US federal common law.

After a scholarly historical exposition of the ATS and the ambient law at the time of its enactment, the majority, led by Souter J., concluded that the ATS is a jurisdictional statute intended to give effect to a limited set of international legal prohibitions understood by the Founders to be part of the common law, namely offences against ambassadors, violations of safe conducts and piracy. In the Court's view, the ATS was born of the Founders' eagerness to show the world that the law of nations would be respected and enforced in the new Republic.

The majority then went on to define the stringent standards by which federal courts may cautiously recognise present-day customary international norms as part of the common law. To be actionable under the ATS, contemporary international legal norms must possess at least as much "definite content and acceptance among civilised nations [as] the historical paradigms familiar when §1350 was enacted". The prohibitions of torture, genocide and slave trading meet that requirement. ATS claims, the Court added, would also probably be subject to limitations such as the exhaustion of local remedies and judicial "case-specific deference" to the Executive's assessment of a given case's impact on foreign policy. In short, the doors of the common law remain open to the incorporation of actionable torts derived from the law of nations, "subject to vigilant doorkeeping" by federal courts.

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On this point, Scalia J., joined by Rehnquist C.J. and Thomas J., disagreed vehemently. In the minority's view, as a mere jurisdictional statute, the ATS is not a grant of law-making authority. Moreover, the minority continued, the ability of federal courts to derive new actionable international norms in the absence of congressional authorisation is precluded by the holding in *Erie Railrod Co*. v. *Tompkins* 304 U.S. 64 (1938) in which the Supreme Court denied "the existence of any federal general common law". In the absence of a federal common law, federal courts therefore cannot assert jurisdiction over violations of international human rights under the ATS without the approval of Congress.

The minority view ignores two important points. First, it fails to account for the residual post-*Erie* common law-making authority of federal courts in proceedings implicating international law and relations: *Banco National de Cuba* v. *Sabbatino* 376 U.S. 398 (1964); *Texas Industries* v. *Radcliff Materials Inc*. 451 U.S. 630 (1981). The concentration of matters of international concern in the federal judiciary was a major impetus behind the Judiciary Act 1789. The suggestion that *Erie* repudiated this essential constitutional objective is highly dubious. Second, the minority completely disregards the congressional ratification of the post-*Filartíga* jurisprudence through the enactment of the Torture Victim Protection Act (TVPA) codified at 28 U.S.C. §1350 alongside the ATS. In passing the TVPA, which extends the ATS cause of action to US citizens in proceedings for torture and extrajudicial killing, the Judicial Committee of the Senate recognised the power of federal courts to derive causes of action from international law when it stated that "claims based on torture or summary execution do not exhaust the list of actions that may be appropriately covered by [the ATS]. Consequently that statute should remain intact": S. Rep. No. 249, 102d Cong., 1st Sess. (1991).

Alvarez is a cautious decision about a unique statute. While reminding federal courts that customary norms must meet the highest standards of specificity to be actionable under the ATS, a majority of the Supreme Court has endorsed the *Filartíga* jurisprudence. However, the Court has left many questions for another day, including, among others, the actionability of violations of international law by non-State actors.

FRANÇOIS LAROCQUE

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POLICING PROTEST AFTER THE HUMAN RIGHTS ACT 1998

A MONTH after the United States had unleashed the forces of "shock and awe" on Bagdhad, Jane Laporte boarded a London coach bound for RAF Fairford (one of three which had been especially commissioned for the purpose), where she intended to demonstrate in peaceful protest against the war with Iraq. The base (which has a perimeter of 13 miles, and which in consequence had proved on several occasions extremely difficult to protect from militant trespassers) was being used operationally by the US Air Force. On the morning of the protest, and after the buses had set course, the Chief Superintendent in the Gloucestershire Constabulary in charge of the policing operation gave instructions that the three buses were to be stopped and searched for items and equipment that might be used to "disrupt the protest" (as he has power to do under the Criminal Justice and Public Order Act 1994, section 60) and (if appropriate) the material was to be seized. But he also instructed that there were to be no arrests at that stage, since he took the view that there were no reasonable grounds to suspect an imminent breach of the peace; a breach of the peace would be imminent in his view only if the coaches containing passengers intent on violent disruption were permitted to proceed to Fairford.

The buses were duly stopped some time before 12.45p.m., at a distance said to be "less than 5 kilometres" from the air base. Offending items were seized and the buses were then (at 2.30p.m.), upon the instructions of the Chief Superintendent, escorted back to London. The demonstration went ahead peacefully, but it was not perforce attended by Ms Laporte, who brought proceedings for judicial review of the Chief Superintendent's decision, *R. (Laporte)* v. *Chief Constable of Gloucestershire* [2004] EWHC 253 (Admin), seeking a declaration and damages for the violation of her rights now protected under the Human Rights Act 1998 that the policing operation had entailed.

The principal (and interlocking) legal issues to which this scenario gave rise were:

(1) whether (bearing in mind Articles 10 and 11 of the European Convention, protecting respectively freedom of expression and freedom of assembly), the action of the police in preventing the coaches from proceeding to Fairford was unlawful, and
(2) whether the detention short of arrest between the time when the bus was ordered to return to London and when the claimant was released in London at 4.55p.m. was a

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violation of Ms Laporte's right to freedom from unlawful arrest contrary to Article 5 of the Convention.

The Divisional Court (consisting of May L.J. and Harrison J.) answered these questions "no" and "yes", but gave the unsuccessful party on each issue (the claimant and the Chief Constable respectively) leave to appeal to the Court of Appeal.

So far as issue (1) was concerned, the court relied upon *Moss* v. *McLachlan* [1985] I.R.L.R. 76 to the effect that the police have common law powers to prevent an imminent breach of the peace which might include powers to restrict movement but falling short of arrest. A failure to comply with any direction given for this purpose would amount to the obstruction of a constable in the execution of his duty. The role of a reviewing court in determining whether that power had been lawfully exercised was not that of *Wednesbury* reasonableness (as the defendant had contended) but, (since violation of Convention rights had been alleged) the much more "rigorous and intrusive" test that the application of a doctrine of proportionality requires; the court should assess the balance which the decision maker has struck, and not merely decide whether it is within the range of reasonable decisions. Whether the prospect of a breach of the peace was sufficiently "imminent" to warrant turning back the buses was a fact-sensitive issue depending upon all the circumstances; those circumstances here including the facts that the coach contained some implements of disruption which were, however, disowned by all of the passengers, and that the passengers (including Ms Laporte) were generally uncooperative. This, the court said, ultimately justified the indiscriminate "blanket" treatment of all of the passengers, irrespective of what their individual intentions might be.

On issue (2), the arguments for Ms Laporte fell on more fertile ground. The European jurisprudence on Article 5 of the Convention is to the effect that it permits "lawful arrest or detention" only for limited purposes including (5(1)(c)) bringing the person arrested before a competent legal authority (which was not in play here, however), or (b) ... "in order to secure the fulfilment of any obligation prescribed by law". This might just include a power to detain without arrest for a very short period to prevent the commission of an imminent breach of the peace, although that was not a particularly happy reading of the Article, since here the "obligation" must refer to an obligation not to commit a breach of the peace. The Court found (at [47]) that: there was no immediately apprehended breach of the peace by Ms. Laporte sufficient to justify even transitory detention; that detention for two and a half

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hours was in any event much more than the permissible "transitory" detention and that the circumstances and length of detention were wholly disproportionate to the apprehended breach of the peace.

Almost apologetically, the court notes the difficulties that this view of the law will occasion to the police, but it gave the declaration sought nevertheless, and authorised an inquiry as to damages. It must be said that the judgment bears marks of the pressure of time under which it was delivered, and leaves a number of questions unanswered. If the police had no power to arrest, what were they supposed to do? Could they have instructed the bus driver to return to London, but not provide an "escort"? That would be operationally disingenuous, since the driver might well not comply—if he did comply, would that not be an equally objectionable detention? Under a less strict standard for judicial review, these questions would once have been treated as matters best left to the judgment of the police. Unless the Court of Appeal determines otherwise, the decision shows that the reach of the Human Rights Act brings the policing of demonstrations more firmly within the scrutiny of the law.

A.T.H. Smith

DO HEADSCARFS BITE?

There are few countries in Europe whose courts have not yet had occasion to rule on the presence of headscarfs in educational institutions, whether worn by pupils or by teachers. The conclusions they have reached differ widely—partly owing to their divergent interpretations of the "message" which the headscarf sends, partly because of differing views about the role and place of religious symbols in education and partly as a result of different conceptions and formulations of the "freedom of religion" in their national constitutions. In Germany, where the right to religious freedom is not subject to an explicit limitation clause, and is thus constrained only by inherent limitations which derive from the rights of others, pupils and students are free to wear religious symbols in expression of their personal beliefs, provided that they do not cause real offence or disruption. Teachers, however, cannot claim the same scope for their freedom, since expressions of religious beliefs by them might easily conflict with the negative right of the pupils and their parents to be free from exposure to unwanted religious influences, while it follows from the teacher's

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status as a public official that she can be expected to show particular loyalty to the State's commitment to religious neutrality and tolerance, and to subordinate her desire to give expression to her personal beliefs and commitments to the interests and commitments of the State institution she represents. France, by contrast, considers the prevalence of Islamic headscarfs or other religious symbols in schools incompatible with the principle of a secular State, which entails the separation from state education of religion, and has recently prohibited the wearing of signs or dress in primary and secondary schools by which pupils overtly manifest a religious affiliation. In England, despite a recent High Court case, the issue is usually seen as one which raises no more fundamental questions than the violation of school uniform rules, and can be resolved by reaching appropriate compromise solutions at an individual institutional level. In Turkey, however, the constitutional court held in 1989 that it would be contrary to the principle of secularism enshrined in the Turkish constitution to allow the wearing of religious symbols in educational institutions. Schools and universities must be headscarf-free zones. The implementation of the resulting policy of "headscarf suppression" at the University of Istanbul formed the subject-matter of a recent decision of the European Court of Human Rights.

The Court, already on record as affirming the compatibility of restrictions on the wearing of headscarfs by primary school teachers with the Convention (*Dahlab* v. *Switzerland*, Appl. No. 42393/98, ECHR 2001-V), ruled that the absolute prohibition on the wearing of headscarfs during lectures by university students in Turkey does not violate the freedom of thought, conscience and religion (Article 9 ECHR) of the students concerned: *Sahin* v. *Turkey*, Appl. No. 44774/98, judgment of 8 June 2004. Proceeding "on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's freedom to manifest her religion" (para. 71), the Court considers that this interference—prescribed by Turkish law and pursuing the legitimate aims of protecting public order, and the rights and freedom of others—was justified by the need to ensure the secular nature of the Turkish State and, through this, the very preconditions of democracy and the equality of women in Turkey.

How can a mere headscarf, worn by the applicant for non-political, religious reasons, be linked to a threat of this magnitude? In its reasoning, the Court does what it can to disentangle the maze of personal motivations, "objective" meanings and permissible limitations relevant to the merits of these headscarf cases. The

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personal motivation of the wearer is what determines whether a restriction on the wearing of the headscarf affects the freedom of religion. But even at this stage, the issue is not assessed entirely from the "internal point of view" of the believer. For the believer, the point of wearing a headscarf is not to "announce her belief to others", but to comply with a duty that follows from her relationship with Allah/God. In treating the headscarf as a manifestation of a belief, the Court effectively takes an observer's perspective. This may reflect the Court's general understanding of Articles 9 to 11 ECHR as communicative freedoms within a pluralist society, rather than as freedoms whose point is to create space for individual self-fulfilment. It thus stresses the public dimension of following a belief even where, from the perspective of the believer, only the private dimension (her relationship with God) is engaged.

When it comes to justifying restrictions, the personal motivation of the right-holder is no longer determinative of how her act is to be understood. Connotations of meaning which the wearer of the headscarf neither intends nor supports, and unintended effects on others deriving entirely from the societal context in which the headscarf is worn, can be taken into account in justifying the restriction. The wearer of a headscarf in Turkey cannot disassociate herself from the fact that the headscarf has become a powerful political symbol of fundamentalist Islam in recent years. Nor can she expect the Court to disregard the impact that "wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it"—whether they are believers or non-believers—"in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith" (para. 108). The Court appears to have in mind not the likely impact of the applicant's conduct when viewed in isolation, but the likely consequences of a general lifting of the ban on Islamic headgear in Turkish universities, which might well lead to large numbers of female students and University staff wearing headscarfs on University premises, and be capable of undercutting the educational institution's secondary function as a training ground for pluralism and tolerance.

Two important conclusions can be drawn from the Court's reasoning: first, the scope of the freedom of religion is context-dependent. The political and social context in Turkey—in particular, the feared dominance of the "majority faith", and within it the resurgence of influence of its most conservative members—may justify restrictions on the manifestations of this faith which

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may well be unjustifiable in other countries, where only a minority adheres to it. Second, while the individual right-holder's personal motivations determine whether her conduct amounts to an "act of faith" which falls within the scope of the freedom of religion, restrictions may be imposed precisely because that "act of faith" can be misread by others as a statement in support of political Islam, or because it may cause discomfort not just to those who adhere to a different faith, or to no faith at all, but also to other believers in Islam who reject the dress code and feel that pressure is put on them to conform to the expectations of more conservative readings of the Koran.

The Court was certainly right to tread carefully in relation to this sensitive issue, and to leave it to the Member States to find a compromise which is acceptable to their communities. But one would have wished for a less ringing endorsement of the policy choices of the Republic of Turkey in this regard: whatever the reasons for the rise of politicised Islamic fundamentalism in that country, one must be allowed to question whether Turkey's particular brand of militant secularism is really the best way to ensure freedom and democracy.

ANTJE PEDAIN

THE "PUBLIC TRUST" REVIVED

THE independent external auditor's finding under statutory powers that Lady Porter, whilst leader of the Westminster City Council, had by wilful misconduct caused loss of public money for which she must compensate the Council was confirmed by the House of Lords in *Porter* v. *Magill* [2001] UKHL 67, [2002] 2 A.C. 357 (see Williams, [2002] C.L.J. 249). Lord Bingham confirmed a "routinely applied" principle, which was "old and very important", that "Statutory power conferred for public purposes is conferred as it were upon trust ..." and that "... those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves".

In *Westminster City Council* v. *Porter* [2002] EWHC 1589 (Ch) & [2002] EWHC 2179 (Ch), [2003] Ch. 436, the council's claim for compensation against Lady Porter for breach of that trust, alternative to the auditor's statutory "surcharge", was hesitantly recognised, reviving for consideration an almost forgotten equitable jurisdiction. Hart J. was cautious, commenting on incomplete history in the argument before him both of the "public trust" and

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of the auditor's surcharge. He rejected the description of Porter as a "trustee", preferring to regard her misconduct as a breach of her "duty" as the council's agent set out by Lord Cottenham L.C. in *AG* v. *Wilson* (1840) Cr. & Ph. 1. However, Lord Cottenham had based his award of compensation to the corporation for breach of duty firmly on the public trust reposed in a councillor, and *Wilson* is merely one of a series of cases in which the public trust was expressly accepted by the Chancery courts. Whether as agent or as trustee, Porter's liability was based on breach of the public trust.

From the late 17th to the early 19th centuries, statutes and common law courts referred to "trust" attaching to exercises of governmental power, but without remedial consequences. Frequent ouster provisions limited common law remedies against statutory authorities, who had little by way of express duties, as ineffective turnpike "trusts" demonstrated. The vires of vestries or chartered boroughs were ill-defined. Unaccountable boroughs were "captured", and their non-charitable funds used for electioneering, mainly by Tories.

The growth in statutory governmental bodies with only limited accountability led to increasing pressures on all courts, but in *AG* v. *Carmarthen Corporation* (1805) G. Coop. 30, Lord Eldon L.C. declined to intervene in a borough's non-charitable affairs, and in *Colchester Corporation* v. *Lowten* (1813) 1 V. & B. 226, he was emphatic: "In the course of my Experience in this Court, of my present Researches, and of my Examination of Authorities, ... nothing has occurred, shewing, that there ever was a Case, in which this Court attached the Doctrine of Trust, as applied under the Words 'Corporate Purposes' to the Alienation of a Civil ... Corporation". In *AG* v. *Brown* (1818) 1 Swans. 265; 1 Wils. Ch. 323, local statutory commissioners had reduced their general rate on local people by misappropriating income from coastal protection levies on coal-importing ships. It is not clear from the confusing reports whether Lord Eldon founded his hesitant order restraining and bringing the commissioners to account on traditional charity, or on novel, grounds. In *AG* v. *Heelis* (1824) 2 Sim. & St. 67, Leach V.C., expressly following *Brown*, found charitable purposes on which to enforce statutory publication of commissioners' accounts.

In *AG* v. *Dublin Corporation* (1827) 1 Bligh. N.S.P.C. 312, the relators before the Irish Lord Chancellor had unsuccessfully requested that the respondents "might be declared trustees of [water rates for their statutory uses] ... that the trusts thereof might be carried into execution" by an account and compensation for misappropriation. In the House of Lords, Lord Eldon denied he

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had decided *Brown* upon charity jurisdiction, and criticised *Heelis* accordingly.

At the argument's conclusion Lord Eldon adjourned for Lord Redesdale, another eminent equity lawyer, to "look sufficiently into the old law", because "it is a case of very great importance to the parties, and more so as to the general doctrine to be established or overturned". Lord Redesdale emphasised an ancient principle providing jurisdiction whenever there was an otherwise uncontrollable breach of the law, at the instance of the Attorney General's prerogative right. This jurisdiction was "to call upon the several Courts of Justice ... to see that right is done to ... subjects who are incompetent to act for themselves, as in the case of charities and other cases". He had emphasised in *Ludlow Corporation* v. *Greenhouse* (1827) 1 Bligh N.S.P.C. 17, having completed his researches, that the jurisdiction only existed where the misconduct was otherwise unremediable: "Where the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent". In *Dublin* a mere statutory account to Parliament, without any means to remedy any misappropriations disclosed, was adjudged inadequate to prevent the court's intervention.

Taking advantage of this decision, the Whig Municipal Corporations Regulation Act 1835 limited borough decisions to those made publicly by ratepayer-elected councils, whose spending from local rates was confined to specified purposes. However, other than for some borough rate funds, Chancery actions against statutory authorities for misappropriation were, from 1844, gradually eclipsed by statutory, independent, audit disallowance and surcharge, which was administratively more effective, and comparatively speedy and inexpensive. As boroughs, too, increasingly came within statutory audit in the 20th century, all that apparently remained of the "public trust" was the widely-misapprehended local authority "fiduciary duty to ratepayers".

Hart J. thought it "odd" that the older remedy had been left untouched by the auditor's statutory power, and its limits were not argued before him. His decision may be doubted because of the statutory alternative of audit surcharge then available to enforce this public trust on Lady Porter, but the abolition of this alternative by the Local Government Act 2000, section 90 circumvents any such doubt for the future. Although the principles of compensation under the two systems were held by Hart J. to be the same, different interest rates and their incidence emphasised the systems' separateness. Given the personal liability involved, a

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potentially more serious difference is that between "wilful misconduct", adjudged initially by an administratively-attuned auditor, and judicially-determined illegality, as pre-audit cases amply demonstrate.

Although the 19th century "public trust" litigation related almost exclusively to local authorities, its doctrinal scope was never so limited. Central statutorily-empowered expenditure only arose extensively after "public trust" litigation had become redundant, *Frewin* v. *Lewis* (1838) 4 My. & Cr. 249, a case against the central Poor Law Commissioners, being distinguishable, as the Commission was not the equivalent of a modern central department. Other public expenditure, unless subject to alternative controls which enable restoration of misapplied funds, is therefore potentially subject to the public trust.

"Public trust" jurisdiction raises the possibility of politically-motivated litigation against individual public office-holders, both central and local. Under present limitations, such litigation would have to be brought by local authorities under their general statutory power to litigate (which the courts have been over-keen to limit) or under their inherent default power to compensate their trust fund, or by individual relators with the Attorney-General's consent. Given concerns about any appearance of bias in judicial or quasi-judicial matters, the propriety of the Attorney General's control, dating from another age, is questionable, but the public interest function his control involves should surely not be ignored.

For lawyers, the public trust's revival may provide interest in the future. If government is to avoid inappropriate litigation, a more administratively-sensitive alternative system is preferable. The recently-repealed audit legislation provides an experienced alternative basis.

JOHN BARRATT

IS THAT A GUN IN YOUR POCKET, OR ARE YOU PURPOSIVELY CONSTRUCTIVE?

IN *Bentham* [2003] EWCA Crim 3751, [2004] 1 Cr.App.R. 487 a robber, to intimidate his victim, put his hand inside his pocket to make it look as if he had a gun. For this he was convicted not only of robbery, but also of an offence under section 17(2) of the Firearms Act 1968, which provides that

> If a person, at the time of his committing or being arrested for an offence specified in Schedule 1 to this Act, has in his

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> possession a firearm or imitation firearm, he shall be guilty of an offence under this subsection unless he shows that he had it in his possession for a lawful object.

The judge held that, so used, Bentham's fingers were an "imitation firearm"; and as he was in possession of them when committing a robbery, which is a Schedule 1 offence, he was guilty of the Firearms Act offence as well. The Court of Appeal—in an unreserved judgment—upheld the conviction. Section 17(2), they said, should be construed purposively. "[T]he protection which the Act seeks to afford is protection to the public who are being put in fear".

This result looks very odd—and there are reasons for thinking that the case is wrongly decided.

First, purposive or otherwise, the construction that the Court of Appeal put on the provision is a strained one. What this defendant did does not look like the behaviour described in the section, which is being in possession of a firearm or an imitation firearm when committing an offence. The Court has read "possessing a pretend firearm" to include "pretending to possess a firearm", a form of misbehaviour that is different, and wider, and to which the words of the section do not naturally apply. If it is permissible for the courts to interpret penal statutes purposively, surely this is only where the reading is one that the words can naturally bear. It does not permit an interpretation to which the reaction, when you hear it, is a sharp intake of breath and the word "Gosh!".

Secondly, it is questionable whether the purpose the Court of Appeal identified is actually the right one. Section 17 was not enacted to deter people from scaring others, but to deter them from going out on criminal purposes "tooled up": that is, having equipped themselves with objects which, if used, are likely to endanger to others, or at least to cause them fear. This is clear from the fact that, in order to secure a conviction, it is only necessary to show that the defendant was in possession of the object; it is irrelevant whether or not he tried to use it. The rationale for the section 17 offence is the same as for the offence of possessing an offensive weapon under the Prevention of Crime Act 1953. In that context, the courts have had to deal with the defendant who had an innocent object with him for a proper purpose—a carpenter with a hammer in his tool-bag, for example, as in *Ohlson* v. *Hylton* [1975] 1 W.L.R. 724—which he used as an impromptu weapon in a fight. The courts have refused to apply the Prevention of Crime Act offence in such cases, interpreting it as limited to those who took the object with them intending to use it as a weapon all along.

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Third, the Court of Appeal's interpretation of the provision is a harsh one. Offences under section 17 are very serious. The maximum penalty is life imprisonment. And the Court of Appeal has said that where someone is convicted under section 17(2) of possessing a firearm when committing a Schedule 1 offence, he should receive a separate sentence for the firearm offence, to run consecutively (*R.* v. *McGrath* (1986) 8 Cr. App.R. (S.) 372). So on principle, the offence should be limited to behaviour that is really serious. Furthermore, if fingers count as an "imitation firearm" for the purposes of the section 17(2) offence, they presumably do so for the offence under section 17(1) as well: using or attempting to use a firearm "or imitation firearm" to resist arrest. As resisting arrest carries a maximum penalty of two years, a person who resists arrest by putting his hand in his pocket and saying "Stick 'em up!" instantly converts a two year offence into one that is punishable with life imprisonment. That this is potentially oppressive should be obvious.

This case illustrates a recurrent problem with English criminal law, which is that the courts have no coherent philosophy about the way in which penal statutes are to be interpreted.

Repressive political systems like their criminal law to be as wide as possible, and favour the rule that prohibitions in penal statutes are to be read broadly: like Nazi Germany, which in 1935 adopted the rule that "If there is no penal law applying directly to the act it shall be punished under the law whose basic idea best fits it". But political systems that proclaim their adherence to the rule of law and individual liberty usually operate a rule that penal statutes are to be strictly interpreted, and where they are ambiguous the defendant must have the benefit of the doubt. This is so in France, for example, where Article 111–4 of the *Code pénal* provides that *"La loi pénale est d'intérpretation stricte"*.

What the position is in English law is doubtful. The "strict construction" principle is recognised by writers, and in some of the case law. In practice, the courts oscillate between applying an extreme version of it—as in the celebrated case of *Harris* (1832) 7 C. & P. 446, where they held a "wound" requires a weapon, and so does not cover biting off the victim's nose—and forgetting about it altogether, as they did in *Bentham*.

If this country ever acquires the modern criminal code that the Government has said it wants but does nothing serious about getting, let us hope that the "general part" includes a provision like Article 111–4 of the *Code pénal* in France.

J.R. SPENCER

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PUBLIC AUTHORITY NON-LIABILITY: SPINNING OUT OF CONTROL?

A Prime Minister's Strategy Office Paper, *Personal Responsibility* (February 2004), claims that we might participate more in civic life if, instead of enjoying rights, such as free education, we received "social gifts", such as bursaries. Gifts, unlike rights, apparently generate a sense of reciprocity. If so, some people might be very pleased with the House of Lords' decision in *Gorringe* v. *Calderdale MBC* [2004] UKHL 15, [2004] 1 W.L.R. 1057, in which part of the court seemed content to classify many public services as such social gifts, the unreasonable failure to deliver which cannot give rise to liability in negligence.

Admittedly, the claimant's case was weak. She drove over the crest of a hill at about 50 mph, braked suddenly, skidded and collided with a bus. The accident was plainly not the bus driver's fault, so the claimant sued the local authority, claiming that if the council had painted the word SLOW on the road, no accident would have occurred.

Such claims often fail. First, causation—would the sign really have made any difference? Second, fault—was the risk so high and the sign's probable effectiveness so great that not installing it was unreasonable? And third, obviousness—was not the risk of driving over the crest of a hill at 50 mph so evident that warnings were pointless (cf. *Tomlinson* v. *Congleton BC* [2003] UKHL 47, [2004] 1 A.C. 46)? The trial judge decided, however, that not only was the council liable, there was also no contributory negligence. The claimant was only driving too fast, the judge maintained, because the council had failed to tell her the hill was there. The Court of Appeal disagreed with the judge on contributory negligence, but upheld his finding on causation. It dealt with *Tomlinson* obviousness solely as contributory negligence.

Thus a case the defendant could easily have won on the facts arrived at the House of Lords on two legal issues: first, could the council be liable for failing to maintain the highway in good repair under sections 41 and 58 of the Highways Act 1980—sections that give rise to a remedy in damages if the council fails to show that it acted reasonably? And second, was the council under a common law duty of care?

The House of Lords answered "no" to the first question, as had the Court of Appeal. It referred to *Goodes* v. *East Sussex County Council* [2000] 1 W.L.R. 1356, which decided that the duty to "maintain" under section 41 was restricted to the highway's physical condition. It did not extend to road signs. The House of Lords was not impressed by the fact that Parliament reversed the

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precise result of *Goodes* (that councils had no duty to clear roads of ice and snow) by section 111 of the Railways and Transport Safety Act 2003. Section 111 was taken as a narrow reform, not as criticism of the courts' approach to section 41.

On the common law claim, the court had decide whether to approve the Court of Appeal's habit (*e.g.*, *Lamer* v. *Solihull Metropolitan Borough Council* [2001] R.T.R. 469) of distinguishing the House of Lords' controversial decision in *Stovin* v. *Wise* [1996] A.C. 923. Lord Steyn, in a powerful concurring speech, warned his colleagues not to undermine the qualifications made to *Stovin* in *Barrett* v. *Enfield London Borough Council* [2001] 2 A.C. 550 and *Phelps* v. *Hillingdon London Borough Council* [2001] 2 A.C. 619, especially on whether public authority "discretion" excludes liability (it does not). Lord Steyn said that although courts should not surrender to the view that every harm deserves compensation, they should also remember that wrongs should not go unremedied. Moreover, he warned against confusing the question of whether a statute gives rise to a private cause of action with the question of whether a statutory framework excludes a common law duty of care.

Lord Steyn's wise words went largely unheeded. Lord Hoffmann admitted that *Phelps* and *Barrett* qualify *Stovin*, but only where local authorities assume responsibility to the claimants. He conceded that his remarks in *Stovin* about a possible common law duty if authorities act "irrationally" were ill-advised, and, thankfully, he abandoned his whole "discretion" analysis. But, disapproving of cases such as *Larner*, he reasserted his view that if a statute gives rise to no private cause of action, a common law duty is highly unlikely. He also implied that this view applies as much to statutory duties as statutory powers.

Lord Hoffmann's view can be summarised thus: before the Highways (Miscellaneous Provisions) Act 1961, councils were immune from actions in negligence arising from bad highway maintenance; all subsequent legislation imposing road safety duties on highway authorities is a matter for public law alone; therefore, unless councils create dangers or assume responsibility in some other way, a common law duty cannot "arise". Lord Hoffmann stresses that, as in *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74, the defendants did nothing, and, commenting that he cannot see how there can be any public authority liability for failure to confer a benefit, he seems to affirm the extraordinary rule in *Capital and Counties pic* v. *Hampshire County Council* [1997] Q.B. 1004 that the public rescue services have no duty to rescue anyone. He explains away the liability of NHS hospitals by saying that their

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staff assume responsibility to patients, but he fails to discuss the troublesome in-between case of the ambulance service (see *Kent* v. *Griffiths* [2001] Q.B. 36).

Lord Hoffmann's approach is more radical than giving public authorities the benefit of the pure omission rule, that there is no liability for omissions unless they can be re-described as carrying out tasks badly (*e.g.*, "omitting to brake" is "bad driving"). He allows councils to escape liability even when they carry out tasks badly. This surely goes too far. His argument works when one begins with an admitted immunity, such as the pre-1961 highway immunity, because the starting point is no liability for the task itself. This is presumably why Lord Scott declared that where no other basis of liability exists apart from statute, if that statute does not generate a private right, no common law liability can possibly exist. But it does not work where there is no such immunity. As the court in *Gorringe* concedes, the point of *Barrett* and *Phelps* is that it does not matter that the ultimate authority for carrying out a task is a statute. It is enough that the council takes on the task.

The other members of the court, apart from Lord Steyn, follow Lord Hoffmann's approach, but, significantly, they offer few comments on issues not strictly before the court, such as public rescue service liability.

Lord Hoffmann justifies his conclusion by repeating his *Stovin* assertion that councils should not have to spend public money on litigation. He seems to forget that if councils win, they recover their costs. He also seems to ignore the possibility, clear to those who run councils, that the easiest way to avoid liability is for officers not to act carelessly. In *Gorringe* the council might have suffered an injustice at the hands of the judge, but correcting that injustice did not require an attack on all public authority liability. Fortunately, *Gorringe* is, like *Stovin*, eminently distinguishable. It is a case about roads that could have been decided solely on the *Tomlinson* point about obvious dangers. One hopes that future courts pay more attention to Lord Steyn's balanced approach than Lord Hoffmann's approach, which seems increasingly influenced by Atiyah's *The Damages Lottery* and its extremist hostility to the very idea of negligence liability.

DAVID HOWARTH

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A RETREAT FROM *BRYAN* V. *MALONEY* IN AUSTRALIA?

Do consulting engineers who design *commercial* buildings owe a duty of care in tort to subsequent purchasers of such buildings to avoid causing them pure economic loss? The High Court of Australia in the recent case of *Woolcock Street Investments Pty. Ltd.* v. *CDG Pty. Ltd.* (2004) 205 A.L.R. 522 (Kirby J. dissenting) answered "no". Almost a decade ago, however, the same court held in *Bryan* v. *Maloney* (1995) 182 C.L.R. 609 that a builder of a *dwelling house* owed a duty of care to a subsequent purchaser for financial losses resulting from the construction of the house with inadequate foundations. The decision in *Bryan* was based on "proximity" (resting on notions of assumption of responsibility and known reliance) as between the builder and the subsequent purchaser. Since then, however, the doctrine of proximity as a "conceptual determinant" has been categorically rejected (*e.g., Sullivan* v. *Moody* (2001) 207 C.L.R. 562). A list of alternative factors had, instead, been applied in *Perre* v. *Apand Pty. Ltd.* (1999) 198 C.L.R. 180 to determine whether there was a duty of care. Furthermore, subsequent statutory reforms in Australia protecting purchasers of defective dwelling houses have largely outstripped the decision in *Bryan*. So it seems the ghost *of Bryan* has been laid to rest—or has it?

The claimant in *Woolcock* was a subsequent purchaser of a commercial building. The first defendant had been engaged to design the foundations of the building for the first owner, who subsequently sold the land to the claimant. The second defendant was the first defendant's employee. In the contract of sale between the first owner and the claimant, there was no warranty against building defects nor any assignment of the first owner's rights against third parties in respect of such defects. Substantial structural defects due to the defective foundations of the building were discovered more than a year after the claimant had bought the land. In proceedings brought before the Supreme Court of Queensland, the parties agreed to state a case for the opinion of the Court of Appeal, which subsequently decided that the defendants did not owe a duty of care to the claimant. The claimant therefore brought the present appeal before the High Court of Australia.

A few important issues have emerged from the present case. The first and arguably the most significant issue relates to the relevance and status of *Bryan* in Australia. Has the High Court retreated from its seminal decision in *Bryan*? The joint judgment of Gleeson C.J., Gummow, Hayne and Heydon JJ. was, with respect, less than clear on this issue. Despite noting that "[d]ecisions of the Court

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after *Bryan* v. *Maloney* reveal that proximity is no longer seen as the 'conceptual determinant'" (at para. [18]), the learned judges still proceeded to apply the principles in *Bryan* to the present case, although other factors (such as vulnerability to risk) were also considered. In this regard, they found that, on the basis solely of the case stated, the elements of assumption of responsibility and known reliance were not satisfied in *Woolcock;* hence, a duty of care did not arise (see paras. [25]–[27]). Unfortunately, the remaining judgments were not more helpful. McHugh J. confined the ratio in *Bryan* to dwelling houses and the bare facts of that case. Though McHugh J. had, as a result, diluted the significance of *Bryan*, there was no explicit overruling. Callinan J. (at paras. [211] and [215]) came out fairly strongly and "questioned the correctness" of *Bryan*; but he refrained from expressing any "final opinion" (para. [218]). Kirby J. referred to the criticisms of *Bryan*, but refused to overrule the decade-old precedent. Hence, it would appear that the High Court in *Woolcock* could well have dealt a death-blow to *Bryan*, but refrained from doing so.

Secondly, the present criteria in Australia for determining duty of care appear to be the five factors set out by McHugh J. in *Perre* (above at 220). These include reasonable foreseeability of loss; indeterminacy of liability; autonomy of the individual; vulnerability to risk; and the knowledge of the risk and its magnitude. However, these factors are—for the most part—rather general and vague and they tend to focus merely on the *factual* context. In this regard, it is submitted that the more comprehensive criterion of proximity is still relevant as an organizing concept as it provides a normative basis upon which these five factors may be anchored.

We would nevertheless suggest that it might still be possible to justify the majority holding in the present case by recourse to *policy* in the following manner. It could be argued that where commercial buildings are concerned, the policy considerations in favour of recovery for pure economic loss are far less persuasive than those for dwelling houses (see, *e.g.*, para. [96] *per* McHugh J.). Such reasoning is discernible throughout the various judgments, although arguments in the policy context should be approached with understandable caution (*e.g.*, Kirby J., at paras. [169]–[170], cautioned, *inter alia*, that one cannot assume that commercial purchasers will, *ipso facto*, be in a stronger position compared to purchasers of dwelling houses), and particularly so when the court does not have the benefit of more concrete facts and evidence (an outcome exacerbated by the procedural constraints in the decision itself, which was by way of a case stated). Still, such an approach is not only more conceptually coherent but also more easily applied

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when utilising Lord Wilberforce's two-stage test *in Anns* v. *London Borough Council* [1978] A.C. 728, 751–752. Certainly, the utilisation of such reasoning in the context of the above list of five factors gives rise to much more vagueness and uncertainty.

Kirby J. would have preferred the three-part test in *Caparo Industries* v. *Dickman* [1990] 2 A.C. 605, but acknowledged that this was not the present law in Australia (see paras. [158]–[159]). It should, however, be noted that the *Anns* test has been adopted (in various forms) in other Commonwealth jurisdictions (the numerous authorities from which were, at best, treated ambivalently in *Woolcock*—compare, *e.g.*, paras. [34] and [233] with [49]–[55] and [184]–[190]) and that it is, in any event, possible to argue that the three-part test in *Caparo* is, in substance, the same as the two-stage test in *Anns* (see Phang, "Negligence" in Phang (gen. ed.), *Basic Principles of Singapore Business Law* (2004), especially at paras. [19.33]–[19.34]). On balance, if certainty and a principled development of the law of negligence are to be valued, the proximity-cum-policy approach in *Anns* has much to commend it as compared to the multivariate and factual approach in *Perre*.

Alternatively, it has been suggested that legislative reform is the best way forward (*pace* Callinan J. at paras. [227] and [233]; *cf.* also para. [229]). However, if this is so, then it has to be both uniform and principled so as to conduce towards certainty in the law (*cf.* the somewhat patchy development in the various Australian states with regard to dwelling houses as succinctly summarised by Kirby J. at para. [177]).

The present court's refusal to effect an extension of *Bryan* is clear. However, its reasons are much less persuasive—leaving us with more questions than answers in this very difficult area of tort law. In our view, *Woolcock* has, unfortunately, further muddied the jurisprudential waters, at least insofar as Australian courts are concerned.

Cheng-Lim Saw
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NUISANCE, HUMAN RIGHTS AND SEWAGE—CLOSING THE FLOODGATES

THE tort of private nuisance is often defined as "an unreasonable interference with a person's use and enjoyment of his land". At face value, this would plainly include having one's garden regularly and seriously flooded with effluent and foul water, that soils the soil, poisons plants and causes internal damp and subsidence. However the House of Lords in *Marcic* v. *Thames Water Utilities Ltd.* [2003] UKHL 66, [2004] 2 A.C. 42 held unanimously (overturning the Court of Appeal) that, where the flooding comes from overloaded sewers, owned and operated by the statutory water authority, private nuisance offers no redress for the beleaguered householder.

The public sewers beneath Old Church Lane, Stanmore were adequate when constructed in the 1930s but, because of later housing developments linking into the sewage system, by 1992 they could no longer cope with the volume of surface water generated by heavy rainfall. So whenever it rained heavily for more than a few minutes Mr. Marcic's garden, situated at the low point in the drainage system, was flooded with water and raw sewage, which lapped at the brick walls of his house—indeed it was only by constructing makeshift flood defences at his own expense that Mr. Marcic was able to prevent internal flooding. In 1998 he sued Thames Water, statutory sewerage undertaker for the area, seeking compensation and injunctions to prevent further flooding and to compel Thames Water to upgrade its sewers.

At first instance, Judge Richard Havery Q.C. held that, in the light of long-established precedents such as *Glossop* v. *Heston and Isleworth Local Board* (1878) 12 Ch. D. 102 and *Robinson* v. *Workington Corporation* [1897] 1 Q.B. 619, Thames Water could not be liable in private nuisance, but that as a public authority it had acted incompatibly with Mr. Marcic's human rights, namely his right to respect for his private and family life and his entitlement to the peaceful enjoyment of his possessions. The Court of Appeal held that the authorities relied on at first instance as exempting public water authorities from nuisance liability for flooding from overloaded sewers were no longer good law, in the light of subsequent developments in nuisance that landowners can be liable for failing to take reasonable steps to abate nuisances caused for example by trespassers or natural forces, notably *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 and *Leakey* v. *National Trust* [1980] Q.B. 485. Accordingly Mr. Marcic succeeded in private nuisance as well as under the Human Rights Act. Following this decision, Thames Water carried out the remedial work necessary to upgrade

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the sewers in Old Church Lane, but nonetheless appealed to the House of Lords (mindful no doubt of the £1000 million potential cost of alleviating the flooding problems of all its customers in a similar or worse position to Mr. Marcic), on the unusual basis that it would pay Mr. Marcic's costs even if the House of Lords found in its favour.

The House of Lords considered that the Court of Appeal had erred in treating Thames Water like an ordinary private landowner and ignoring the statutory scheme in the Water Industry Act 1991 under which it operated the sewerage system. This imposes a general statutory duty on sewerage undertakers to ensure effectual drainage, but provides that the duty is enforceable by an "enforcement order" made by the Director General of Water Services (the "Director"), the statutory regulator of the water industry. The public can refer complaints to the Director and pursue judicial review proceedings against him if dissatisfied, but it is the Director to whom Parliament has entrusted enforcement of the statutory sewerage obligations and the Director who must resolve the conflicting priorities for water authorities, balancing (for example) the need for investment in infrastructure and the charges levied on customers. However at no time did Mr. Marcic complain to the Director, seeking instead to "side-step" the statutory scheme by bringing civil proceedings instead.

This meant the claim in nuisance was doomed for two related reasons—first because the detailed statutory scheme, not the common law, was the appropriate way of enforcing the rights and obligations in the statute, and secondly because "Parliament did not intend the fairness of priorities to be decided by a judge". The human rights claim was likewise scuppered, because (according to the European Court of Human Rights in the Heathrow night-flights case of *Hatton* v. *UK* [2003] All E.R. (D) 122) it is primarily for Parliament to balance the interests of the individual with those of the community at large. Moreover, the Court of Appeal had been wrong to treat the *Sedleigh-Denfield* line of cases as casting doubt on the 19th century precedents establishing that public sewerage undertakers were not liable in nuisance for flooding from inadequate sewers—they were "not about general principles of the law of nuisance" but were "cases about sewers". The public status of sewerage undertakers took them outside the normal "measured duty of care" between neighbouring private landowners. After all, Thames Water had no choice but to accept the extra volume into its sewers and was not free to charge the cost of all the necessary remedial work to its customers.

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All this closely reflects the attitude in many recent *negligence* cases, which emphasise that public bodies operating under statutory powers and duties are not in the same position as ordinary private citizens (it is particularly interesting to see Lord Nicholls, the dissenter in *Stovin* v. *Wise* [1996] A.C. 923, joining forces with Lord Hoffmann in *Marcic*) and that questions of priority in resource allocation are non-justiciable. It is a further example of Lord Goff's observation in *Cambridge Water Co*. v. *Eastern Counties Leather plc* [1994] 2 W.L.R. 53 that for "passive" nuisances not caused by the defendant's own actions, "the applicable principles in nuisance have become closely associated with those applicable in negligence". So unlike normal "active" nuisance, where the starting point is liability for unreasonable interference, with statute relevant only in giving the defence of statutory authority, where the defendant merely "adopted or continued" the nuisance, fault and a "measured" duty of care are required for liability. And, as ever, the courts are reluctant to superimpose a duty of care onto a public body's statutory functions.

Two niggling thoughts remain. First, Lord Nicholls expressed unease about the uncertain position regarding the payment of compensation to those who suffer external sewer flooding while waiting for remedial works to be carried out, for which there is no statutory provision—some authorities make payments, others do not. For Lord Nicholls, all water customers, rather than the minority who suffer flooding, should bear the burden of it and this was a "matter for the Director to look into". So although the statutory system for balancing priorities is human rights compliant, in this respect minority rights are not protected. Is Lord Nicholls hinting that, if not addressed by the Director, this anomaly might be susceptible to an "appropriately penetrating degree of judicial review"? Secondly, there is not a hint in the speeches of the House of Lords that Thames Water is a *privatised* water company, out to make a profit for its shareholders whilst operating pursuant to the much discussed statutory scheme. All the 19th century precedents relied on by their Lordships involved truly public, local water boards. That is not to say that the result in *Marcic* is wrong, but it would have been preferable had Thames Water's privatised status not been ignored completely.

JANET O'SULLIVAN

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RECOGNISING PRIVACY IN ENGLAND AND NEW ZEALAND

Two recent cases have changed the nature of privacy protection in the common law. In *Campbell* v. *MGN Ltd.* [2004] UKHL 22, [2004] 2 W.L.R. 1232 the House of Lords unanimously recognised, for the first time, that there is a right in English law to protection of private information. In *Hosking* v. *Runting and others* [2004] NZCA 34 a majority of the New Zealand Court of Appeal also confirmed, after nearly twenty years of uncertainty, that a tort of publication of private information was part of New Zealand law. The two countries arrived at this position via different routes—in the United Kingdom the right was developed from within breach of confidence while in New Zealand it has always been regarded as a free-standing tort—but the cases are now more remarkable for their similarities than their differences.

In *Campbell*, a well-known fashion model sought damages for the publication of an article outlining the time, place and frequency of treatment she was receiving for drug addiction and of a photograph showing her outside one of her therapy meetings. Although she accepted that the defendants were entitled to correct public statements she had made about managing to stay away from drugs, Campbell claimed that publication of the photograph and the additional details interfered with her right to privacy. All five members of the House agreed that there was a tort protecting against the misuse of private information, although only a majority held that the action succeeded on the facts of the case (the minority held that publication of the extra details fell within the defendants' editorial latitude).

In *Hosking*, the claimants (a television presenter and his ex-wife) sought to restrain the defendants from publishing photographs of their two young children being wheeled down a busy street in a pushchair. The claimants said that the photograph breached the children's privacy and, given the celebrity of the first claimant, potentially jeopardised their safety. The result was the inverse of that in *Campbell*: all five judges agreed that, because of the children's location at the time they were taken, publication of the photographs could not be regarded as a breach of privacy. However, (perhaps surprisingly, given that it did not need to be decided on the facts of the case) three of the five judges also held that there was a right to privacy in New Zealand law.

One important issue addressed in both cases was how the newly recognised privacy actions should be formulated. Two main possibilities emerged, the first of which was a two-stage test put forward by Lord Hope in *Campbell*. Lord Hope said, first, that the

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requirement that a disclosure must be "highly offensive to a reasonable person of ordinary sensibilities" is a useful test for determining what is private. However, he continued that the test should only be used where "there is room for doubt" and that it is "not needed where the information can easily be identified as private" (para. [94]). Unfortunately, however, Lord Hope gave no indication of how a court might go about determining whether information is "obviously private": he simply said that the fact that group therapy is widely recognised as effective treatment for drug addiction and that anonymity is an important part of that process meant that the requirement was satisfied in that instance. This seems problematic: one need only refer to the fact that two members of the House of Lords and a unanimous Court of Appeal held that what was "obviously private" to Lord Hope was not private at all, to highlight the uncertainty such a requirement could create.

The second formulation to emerge from the decisions is the requirement that the claimant should have a "reasonable expectation of privacy". Lord Nicholls was the main proponent of this test in *Campbell*: he said that "[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy" (para. [21]). In *Hosking*, Gault P. and Blanchard J. saw the "reasonable expectation" test as the first aspect of a two-part tort: they said that the claimant had to establish both "[t]he existence of facts in respect of which there is a reasonable expectation of privacy" and "[p]ublicity given to those facts that would be considered highly offensive to an objective reasonable person" (para. [117]). Tipping J. agreed but held that the second requirement—which he referred to as the need for "substantial offence"—should be incorporated within the requirement that the expectation of privacy be reasonable. This approach seems desirable and the reasonable expectation test preferable to the highly offensive test or to a combination of the two. Not only does "offence" seem an inappropriate way to describe what is suffered by privacy claimants (humiliation or affront to dignity would be more appropriate terms), the reasonable expectation test also focuses more clearly on the *claimant's* attitude towards the disclosure and hence on the subjective nature of the privacy interest.

Indeed, the mixed objective/subjective "reasonable expectation" test has much to recommend it. By placing the emphasis on the *claimant's* expectations the test recognises that "private" can mean different things to different people: Y, for example, might regard her annual salary as an intensely private matter while X will boast about his to anyone who will listen. Yet the test also ensures that

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the particular sensitivities of a claimant will only be protected if it is objectively reasonable to do so, thus ensuring that defendants are not left to the mercy of neurotic or over-sensitive claimants.

However, the reasonable expectation test does seem to have one serious shortcoming. By focusing on the claimant's reasonable *expectations* it suggests that the right to privacy depends not on whether it is reasonable to think that one's privacy *should* be protected in a particular situation, but on whether it is reasonable to think that it is *likely* to be protected in that situation. This creates a risk that the parameters of the action will be set by privacy intruders themselves: once an intrusive practice becomes sufficiently widespread to be in no way unexpected, there can be no reasonable expectation of privacy in relation to it. For example, although it seems that most people would think it a serious breach of privacy for reporters to "door-step" the parents of a child who is missing and feared murdered, could it really be said (knowing what we do about the behaviour of the media) that they could *reasonably expect* that this would not occur? If not, the reasonable expectation test provides no way of saying that they have suffered an invasion of privacy. It therefore seems that privacy would be better protected by a test which asks not whether the claimant had a reasonable *expectation* of privacy, but whether he or she had a reasonable *desire* that it would be respected.

As well as defining the scope of the privacy interest, the courts in *Campbell* and *Hosking* also recognised that freedom of expression (which is included in human rights legislation in both countries) is not a "trump card". Instead, both courts applied a proportionality test to determine the privacy/freedom of expression balance, which means that the more serious the breach of the claimant's privacy, the greater must be any freedom of expression interest which can override it. In particular, the courts in both cases held that, because of its pivotal role in the functioning of a democratic society, political speech enjoys greater protection than other types of speech, such as that made for artistic or commercial purposes.

This willingness to deconstruct the freedom of expression interest is pleasing. Little is gained from the suggestion (which the minority came close to making in *Hosking*) that the democratic importance of freedom of expression means that it should nearly always defeat privacy rights. Like interferences with freedom of expression, breaches of privacy can threaten democratic institutions: people who do not have the freedom to develop their ideas and personalities away from the scrutiny of others can have little to contribute to a democracy. It is also increasingly questionable

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whether absolutist free speech arguments developed at the time of the lone pamphleteer struggling against state censorship are still appropriate in a world in which, to borrow Sir Stephen Sedley's words, "the media possess power of which the state itself stands in fear" (Tugendhat and Christie (eds.), *The Law of Privacy and the Media* (2002), p. vii).

However, what is important about *Campbell* and *Hosking* is that by recognising the existence of an informational privacy tort, the courts have taken such issues out of the journals and into the courts. It is a great relief, to this writer at least, that English and New Zealand lawyers can now leave behind the question of whether privacy should be protected and instead concentrate on the important question of how that protection should be provided.

N.A. Moreham

IMPLICATION OF TERMS IN LAW: ANOTHER NAIL IN THE COFFIN OF "NECESSITY"

The question of the correct basis for the implication of terms in law has long occupied the courts. The latest attempt at an answer was provided in *Crossley* v. *Faithful and Gould Holdings Ltd.* [2004] EWCA Civ 293.

Mr. Crossley, a long-standing senior employee of the defendants, decided to take early retirement on health grounds. While employed, he was entitled to payments under the company's long-term disability insurance scheme. However, after retirement payments were at the discretion of the insurer and were eventually discontinued. The defendants would have been happy for Mr. Crossley to remain employed while on permanent sick leave in order to maintain his entitlements under the scheme.

The claimant alleged that the defendants had breached an implied duty to take reasonable care for his economic well-being either (i) by asking him to submit a letter of resignation, knowing that this would affect his entitlements under the insurance scheme, or (ii) by failing to warn him about the effect his resignation would have. Judge Langan Q.C. at first instance and the Court of Appeal rejected both claims.

Dyson L.J. (with whom Sir Andrew Morritt V.-C. and Thomas L.J. agreed) began with an overview of the relevant authorities and concluded (at para. [33]) that no "portmanteau obligation" to take reasonable care for the employee's economic well-being could be implied. He acknowledged (at para. [39]) that an "evolutionary

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process'' had led to a variety of duties being imposed on employers in cases like *Mahmud* v. *BCCI* [1998] A.C. 20 and *Scally* v. *Southern Health and Social Services Board* [1992] 1 A.C. 294, but emphasised that these had always been formulated and applied in a narrow way. Consequently, he rejected the suggested implied term, not only because the House of Lords had refused to countenance such a wide duty in *Scally*. but also because it ''would impose an unfair and unreasonable burden on employers'' (at para. [43]).

Seen merely as a decision on the implication of terms in the employment context this judgment is unsurprising, representing a straightforward continuation of the judicial attitudes displayed in earlier cases. This can also be seen in the fact that both Judge Langan Q.C. and Dyson L.J. mentioned the possibility (at paras. [19] and [52] respectively) of the case having been decided differently if the employee in question had been a junior one. While this may appear to foreshadow a future departure from the current restrictive approach, it is in fact simply the application of the awareness criterion in *Scally*, as, unlike Mr. Crossley, a junior employee could not reasonably be expected to be aware of the relevant provisions without being informed by the employer. It seems likely, therefore, that the courts will remain hesitant to recognise new implied terms in the employment context, especially where these would involve the imposition of positive duties on employers.

Much more interesting is what Dyson L.J. had to say about the test for implication generally. While the judgment at first instance was phrased very much in the traditional language of necessity, he acknowledged that the terms recognised in cases like *Spring* v. *Guardian Assurance plc* [1995] 2 A.C. 296 had not always been strictly ''necessary'' and concluded (at para. [36]): ''It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations''.

In *Scally*, Lord Bridge had referred to terms implied in law as ''based on *wider considerations* ... which the law will imply as a *necessary* incident'' ([1992] 1 A.C. 294, 307, emphasis added), thereby combining (rather uncomfortably) the affirmation of the traditional test of necessity with the recognition of the influence of other factors.

In *Crossley*, Dyson L.J. attempted to improve the situation by identifying these ''wider considerations'' and by expressly distancing himself from the concept of necessity. This clear recognition that ''necessity'' does not mean the same in the implication of terms in

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law as it does in the business efficacy test for the implication of terms in fact is to be welcomed. In order to avoid the confusion that would result from attaching two different meanings to one word depending on the context, implication in law should be completely divorced from this terminology.

At that point, unfortunately, Dyson L.J. showed that he did not have the courage of his convictions. In merely suggesting that "to some extent, questions are raised", he failed to identify an actual alternative to necessity, thereby undermining his own rejection of the traditional test.

This hesitant language could perhaps be no more than an attempt to avoid the obvious inconsistency with *Liverpool City Council* v. *Irwin* [1977] A.C. 239, and Dyson L.J. did expressly base his decision on the fact that "[t]here are no obvious policy reasons to impose on an employer the general duty to protect his employer's [*sic*] economic well-being" (at para. [44]). What is perhaps regrettable, however, is his failure to address the precise meaning of the phrase "reasonableness, fairness and the balancing of competing policy considerations". Are these words tautologous or do they carry distinct meanings? And if so, what exactly do they mean? If, as seems likely, the courts continue to move away from strict necessity as the basis for implication in law, any alternative must be identified and analysed as precisely as possible; to be content with a simple assertion such as that of Dyson L.J. merely replaces one elusive concept with three others.

The decision in *Crossley* is clearly a step in the right direction; necessity may not be quite dead yet, but its coffin appears to be ready and waiting. However, much work remains to be done to ensure that its replacement provides the answers the law has sought for so long.

VANESSA SIMS

FLOATING CHARGES: ALL ADRIFT?

RECENT developments in the law of secured credit have not been kind to banks. First, the Privy Council's decision in *Agnew* v. *C.I.R.* [2001] UKPC 28, [2001] 2 A.C. 710 reaffirmed that for a charge to be characterised as *fixed*, the chargee must exercise control over the security. This restricts the practical scope of such security, for a bank taking control of assets used in the course of business risks becoming a *de facto* director (*Secretary of State* v. *Deverell* [2001] Ch. 340). Second, the *floating* charge traditionally

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taken over such assets has been rendered less attractive to lenders by the Enterprise Act 2002, which generally abolishes the remedy of administrative receivership. Chargees are instead encouraged to participate in administration proceedings, run for the benefit of the creditors as a whole, but paid for out of floating charge assets (Insolvency Act 1986, Sch. Bl, paras. 70, 99). Banks may therefore take cheer, if only briefly, from two recent decisions that go against this trend.

(1) Fixed or floating? Spectrum Plus

National Westminster Bank plc v. *Spectrum Plus Ltd.* [2004] EWCA Civ 670 concerned the effect of a "specific charge" over book debts. Under the debenture, Spectrum Plus Ltd. ("the Company") was not permitted to "sell factor discount or otherwise charge or assign" the book debts without the consent of NatWest ("the Bank"), and was required to pay the proceeds of collection into its account with the Bank. At first instance ([2004] EWHC 9 (Ch), [2004] 2 W.L.R. 783), Sir Andrew Morritt V.-C. applied *Agnew* to find that this was a floating charge. In so doing, he held that *Siebe Gorman & Co. Ltd.* v. *Barclays Bank Ltd.* [1979] 2 Lloyds Rep. 142, in which Slade J. had held an identical debenture to create a fixed charge, was no longer good law.

Surprisingly, the Court of Appeal reversed the Vice-Chancellor. Lord Phillips M.R., who gave the only reasoned judgment, held that because the Privy Council's opinion in *Agnew* was inconsistent with the Court's earlier decision in *Re New Bullas Trading Ltd.* [1994] B.C.C. 36, the Court was unable to follow it. Whilst technically correct, he acknowledged that victory for the Bank on this point alone would be Pyrrhic, for the House of Lords would be certain to prefer *Agnew* to *Bullas*. *Spectrum* has indeed been appealed. More significant, then, is Lord Phillips' alternate conclusion: the charge was fixed, even applying *Agnew*.

The *Agnew* test has two stages: construction of the parties' agreement and characterisation of its effect. First, construction. For Lord Phillips, the distinguishing feature of *Spectrum* and *Siebe Gorman* was that the proceeds had to be paid into an account with the *chargee* Bank. This, he considered, required that the terms of the banker-customer contract be considered in addition to the debenture itself. This approach to construction is to be welcomed (*cf. Ex p. Copp* [1989] B.C.L.C. 13). The parties' rights and obligations under a related agreement necessarily form part of the relevant background to the interpretation of the debenture (see *Investors Compensation Scheme Ltd.* v. *West Bromwich B.S.* [1998] 1 W.L.R. 896, 912–13). The exercise revealed that, were the account

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in credit (as in *Siebe Gorman*), the Company would be entitled to draw upon it freely unless the Bank exercised its right to combine accounts. However in *Spectrum*, the account was an overdraft facility so the Company had only a right, terminable at will by the Bank, to borrow further funds up to the overdraft limit.

Now to characterisation. The critical distinction is whether the agreement gives the Company a liberty to deal in the ordinary course of its business. That the Bank retains a power to terminate that liberty at will is entirely consistent with a floating charge (*Agnew*). However, in *Spectrum*, the liberty was not general. Significantly in Lord Phillips' view, it was only up to the amount of the overdraft limit, and subject to the proceeds of future book debts being used to repay it.

With respect, this conclusion is unsound. In the ordinary course of business, companies draw on their overdraft accounts, which are ordinarily subject to a limit. Thus the Company was free to deal in the ordinary course, and *Spectrum* (and *a fortiori, Siebe Gorman*) should have been characterised as a floating charge. The result might have been justified if evidence about the context showed that it was understood that the Bank would regularly conduct informal reviews of the Company's financial status and that the facility would be withdrawn were its requests not met. Unsurprisingly, given the risk of *de facto* directorship, no such evidence was adduced.

Lord Phillips offered two further grounds, neither of which seems convincing. He appeared to suggest that because the payments into the account transformed the proceeds into contractual rights against the Bank, then "strictly speaking" the Company was not entitled to deal freely with *the proceeds*. This semantic sidestep cannot evade the logic of *Agnew:* if the Company can draw freely on the bank account into which book debts are paid, then it is in substance free to withdraw them from the security. Moreover, His Lordship held that as *Siebe Gorman* had stood for so long, debentures in this form had acquired the status of fixed charges by customary usage. Yet regardless of whether it is the case that parties generally believe such charges to be fixed, *Agnew* makes clear that the question of characterisation is one of law.

(2) (One reason) why it matters: Buchler v. Talbot

Liquidation expenses have always been entitled to prior payment out of the "assets of the company" (Companies Act 1862, section 144, now Insolvency Act 1986, section 115). This is necessary for the successful operation of winding up, as liquidators will not work

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for free. Early in the history of corporate insolvency, it was established that floating charge assets do not form part of the "assets of the company" available for unsecured creditors: all that the company retains is the equity of redemption (*Re David Lloyd & Co*. (1877) 6 Ch. D. 339). Hence liquidation expenses were not payable out of floating charge assets (*Re Regent's Canal Ironworks Co*. (1877) 3 Ch. D. 411).

However, the Court of Appeal in *Re Barleycorn Enterprises Ltd*. [1970] Ch. 465 held that the position had been altered by later legislation, now consolidated into section 175 of the Insolvency Act 1986. This notoriously Delphic provision states that in a company's liquidation, preferential debts (that is, employees' and, until recently, certain tax claims): (1) are payable in priority to all other debts; (2)(a) rank after the expenses of the liquidation; and (2)(b) to the extent that the assets of the company available for the payment of general creditors are insufficient to meet them, have priority over the claims of a floating charge holder and are payable out of property subject to such charge. It was held in *Barleycorn* that because liquidation expenses rank ahead of preferential debts, section 175(2)(b) must necessarily also elevate the expenses ahead of the claims of a floating charge holder. In *Buchler* v. *Talbot* [2004] UKHL 9, [2004] 2 W.L.R. 582, the House of Lords overruled this.

Section 175(2)(b) dates from the Preferential Payments in Bankruptcy Act 1897. Their Lordships in *Buchler* found it inconceivable that the 1897 Act, which expressly expropriated debenture holders in favour of preferential creditors, was also intended to do so *impliedly* as regards liquidation expenses. Liquidation, as Lord Hoffmann put it, is a form of "collective execution by all its [unsecured] creditors against all its available assets". Debenture holders are entitled to stand outside liquidation proceedings, and realise their security by appointing a receiver. Their Lordships saw the assets available for the unsecured creditors and those of the debenture holder as "two separate funds". On this view, it is eminently reasonable that each fund should only bear its own expenses of realisation.

Buchler raises an apparent conundrum about the nature of the interest granted to the holder of a (floating) charge. As the decision reminds us, assets subject to a floating charge are not "assets of the company" when it comes to liquidation. Yet we also know from *Re M.C. Bacon Ltd*. [1990] B.C.C. 78 that the grant of a (floating) charge does not deplete the assets of the company. To point out that crystallisation effects an assignment of the company's property (see, *e.g*., *Re E.L.S. Ltd*. [1995] Ch. 11, 25–26) will not do, for *M.C. Bacon* concerned both *fixed and floating* charges, as—

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necessarily—does the reasoning in *Buchler*. Rather, the answer must be that the "assets of the company" mean different things in different contexts. In ordinary circumstances, the phrase refers to the left-hand side of the company's balance sheet—that is, those assets of which the company is the ultimate owner, notwithstanding encumbrances. Yet when liquidation supervenes, "the company" becomes no more than a vehicle for the unsecured creditors, and its "assets" mean only that part of the pool which is earmarked for them.

Buchler also raises a serious practical problem, because the House of Lords and the Enterprise Act 2002 seem to have passed each other like ships in the night. The Act is drafted on the assumption that *Barleycorn* was rightly decided, and so refers to "property of the company" in a sense that includes floating charge assets. Given this starting point, it was natural for the Act to subordinate floating charges to the costs of administration proceedings. Yet *Buchler* now gives banks a perverse incentive to prefer *liquidation*, whereby they will no longer bear the collective expenses. This cannot help the "rescue culture" that the Act was intended to foster.

Banks' delight will be muted, as both decisions are likely to be reversed, respectively by the House of Lords and Parliament. Many will share Lord Phillips' hope, expressed in *Spectrum*, that the law's continuing uncertainty may be resolved by the proposed statutory framework for personal property security law (see L.C.C.P. 164, *Registration of Security Interests*). Yet a note of caution must be sounded. The treatment of liquidation expenses illustrates that the legislature is just as capable of creating uncertainty as of resolving it.

JOHN ARMOUR

MEMBER STATES' LIABILITY FOR JUDICIAL ACTS OR OMISSIONS: MUCH ADO ABOUT NOTHING?

CASE C-224/01 *Gerhard Köbler* v. *Republic of Austria* is the first case before the European Court of Justice ("the Court") on Member State liability for judicial acts or omissions.

Mr. Köbler applied for the length of service increment payable to university professors in Austria. His application was dismissed on the ground that he had not served fifteen years in the Austrian university system. Mr. Köbler claimed that Austrian law was contrary to Article 39 of the EC Treaty on the free movement of

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workers, as it did not take into account periods of service in other Member States and was therefore discriminatory.

The *Verwaltungsgerichtshof* (the Austrian Administrative Supreme Court) dismissed Mr. Köbler's claim. Mr. Köbler subsequently brought an action before the *Landesgericht für Zivilrechtssachen* (the regional civil court) for damages against the Republic of Austria in respect of the *Verwaltungsgerichtshof*'s decision. Several questions concerning the liability of the State for judicial acts or omissions were referred to the Court.

Upholding Advocate General Léger's Opinion, the Court explicitly ruled for the first time that national courts should not, in principle, be immune from an action in damages as a result of their acts or omissions. The State is a subject of international law and it is viewed as a single entity, notwithstanding its internal division of powers. Moreover, acknowledging the responsibility of national courts is the necessary corollary of the important role that they play in directly, immediately and effectively protecting the rights which individuals derive from Community law.

In line with previous case law on Member State liability, the Court then confirmed that three conditions had to be met for a damages action against a Member State to succeed:

1. the rule in question must be intended to confer rights on individuals,
2. the breach must be sufficiently serious, and
3. there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party.

The Court finally held that, on the facts, Austria was not liable in damages, as its breach of Article 39 was not sufficiently serious.

This judgment raises several issues.

First, the question arises of how a sufficiently serious breach should be assessed. Both the Advocate General and the Court agreed that the assessment of whether a breach was sufficiently serious should be particularly strict in relation to judicial acts, so as to leave the necessary margin of discretion to national courts to exercise their function effectively. In particular, it appears that the Court has limited the liability of national courts to courts of last instance. Further, it held that State liability could be incurred only in the exceptional case where the court had "manifestly infringed the applicable law". The Court listed several factors which should be considered in making this assessment of manifest infringement: the degree of clarity and the precision of the rule infringed, whether the infringement was intentional, the position taken by a

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Community institution, and the non-compliance by the national court in question with its obligation to make a reference under Article 234 of the Treaty. However, the application of these factors to judicial acts or omissions is particularly controversial and certainly not straightforward. Indeed, the Advocate General and the Court applied a similar test but nonetheless reached a different outcome on the facts of the case. The duty which courts of last instance have to refer questions of interpretation of Community law under the third paragraph of Article 234 further complicates the issue. More specifically, the question arises whether a national court could commit a sufficiently serious breach if it invoked the *acte clair* doctrine in a case which did not satisfy the *CILFIT* criteria. Obvious misuses of this doctrine would probably give rise to a successful claim in damages. The widely discussed judgment of the French *Conseil d'Etat* (the Administrative Supreme Court) in *Cohn-Bendit* should fall within this category, especially as the *Conseil d'Etat* had refused to follow the advice of its *Commissaire du Gouvernement* to seek a preliminary ruling from the Court. However, the question is arguably much more delicate when a grossly negligent, as opposed to a wilful, misuse of the doctrine is at stake.

Secondly, the requirement that there should be a direct causal link is also likely to cause difficulties in claims concerning judicial acts or omissions. If a national court has not applied Community law when required to do so, the problem remains that it is still necessary to determine the extent to which this failure has contributed to the applicant's loss. It may be that the contentious question of Community law was only one question among several others. In such a case, how can an individual establish successfully that he would have been in another position if the national court had referred the relevant preliminary questions to the Court?

Finally, there is the question of practical enforcement. State liability is a Community remedy which is enforced in national courts. Thus, an individual who has suffered a loss as a result of the act or omission of a court of last instance has to lodge a claim in damages before a national court of first instance. Serious difficulties could arise if this lower court was somehow related to the court of last instance which took the contentious decision in the first place. In other words, how could a lower court decide that national law did not comply with a specific provision of Community law if the court of last instance held that it did? Also, how could a lower court rule that the *acte clair* doctrine did not apply when the court of last instance held that it did? The difficulty

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involved in finding a suitable forum is exacerbated in Member States with a strict doctrine of binding precedent. For example, is it realistic to expect the High Court to rule that the House of Lords committed "a manifest breach of Community law" and award damages as a result? It is likely that High Court judges will systematically either dismiss such claims in damages or refer them to the Court under Article 234. Moreover, it can be doubted whether an aggrieved individual could seriously contemplate lodging an appeal against the damages judgment of the lower court if that meant that he would have to appear before the higher court against which his claim in damages was directed.

In *Köbler*, the United Kingdom, which made some observations to the Court, submitted that the question of enforcement was highly problematic in the context of State liability for judicial acts or omissions. In particular, it pointed to "the difficulties in determining the court competent to adjudicate on such a case of State liability, particularly in the United Kingdom where there is a unitary court system and a strict doctrine of *stare decisis*". However, the Court dismissed the argument by simply stating that determining the competent court was a question for Member States to resolve.

This judgment lays down a principle which flows from the Court's previous case law and which unequivocally confirms, first, that Member States are single entities and, secondly, that national courts have a duty to ensure that Community law is upheld. However, it is difficult to assess, at this stage, whether the remedy of State liability for judicial acts or omissions will have any practical impact: not only is the *Köbler* test extremely restrictive but it is also unlikely to be applied in national courts. It is arguable that *Köbler* raises more questions than it provides answers.

AMANDINE GARDE

FOREIGN LAW AND PROPERTY IN ENGLAND

PEER International Corpn. and others v. *Termidor Music Publishers Ltd. and others* [2003] EWCA Civ. 1156, [2004] 2 W.L.R. 849 has confirmed that English law will not give effect to a foreign law purporting to divest the owners of property situated in England. No distinction is drawn between confiscatory and non-confiscatory foreign law; the determining factor is the location of the property rather than the nature of the foreign law. The case related to English copyright in Cuban musical works. It was confirmed at first

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instance by Neuberger J., as he then was ([2003] E.M.L.R. 19), that English copyright is property located in England. This was not an issue on appeal. The significant issue for present purposes was the effect on the English copyright of Cuban Law 860. This came into effect after the Castro revolution. It required all publication contracts in respect of Cuban music to be submitted for approval to the Cuban Musical Rights Institute and prohibited certain types of contract. It was held by the Court of Appeal, affirming the decision of Neuberger J., that the rights of a company which had taken assignments of the English copyright without having had them approved pursuant to Cuban Law 860 were valid.

Peer International finally overrules the discredited decision in *Lorentzen* v. *Lydden & Co. Ltd.* [1942] 2 K.B. 202. That case related to a decree of the Norwegian government made on 18 May 1940, shortly before Norway was overrun by Nazi Germany. The decree requisitioned all Norwegian-registered ships outside German occupied territory owned by entities domiciled, carrying on business or registered in the occupied area. It also gave the curator the right to collect all existing and future claims of the owners. The curator appointed pursuant to this decree brought an action in England against the charterer of a ship for breach of a charterparty. The ship had been sunk before the decree took effect. The property to which the curator claimed to be entitled by virtue of the decree was therefore an English chose in action. It was held that the decree was effective to transfer this property to the curator. Atkinson J. referred to the exigent circumstances, noted that the decree provided for compensation and invoked public policy to find in favour of the curator. Although the decision was followed in a subsequent case *(O/Y Wasa S.S. Co. Ltd. and another* v. *Newspaper Pulp and Wood Export Ltd.* [1949] 82 L1. L. Rep. 936) it has been much criticised and can be seen as reflecting the times in which it was decided. It was not followed in *Bank voor Handel en Scheepvaart NV* v. *Slatford* [1953] 1 Q.B. 248, decided some time after the war, where a wartime decree of the Netherlands government in exile was not given effect in relation to tangible movable property (gold) located in England.

In *Peer International*, Aldous L.J. stated expressly (at [31]) that *Lorentzen* v. *Lydden* was wrongly decided, and followed *Bank voor Handel*. He also cited with approval the Scottish case *The El Condado* [1939] 63 L1. L. Rep. 330. In that case, the Court of Session refused to give effect to a nationalisation decree of the Republican Spanish government in relation to a Spanish flag ship located in Scotland when the decree took effect. A similar result had been reached in *The Jupiter (No. 3)* [1927] P. 122 relating to

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the effect of nationalisation decrees of the Soviet government, although that case was not directly referred to in *Peer International*. *The Jupiter (No.3)* related to a ship registered in Odessa which was at Cardiff when the decrees took effect. (However, part of the ratio of *The Jupiter (No. 3)* was that Odessa was not part of the Soviet Union at the relevant time and that the decrees did not, on their construction, purport to take effect outside the Soviet Union.) *The El Condado* and *The Jupiter (No. 3)* were not decided on the basis that the relevant Spanish and Soviet decrees were confiscatory and therefore to be denied effect on that ground, as noted by Devlin J. (as he then was) in *Bank voor Handel*. Whilst Aldous L. J. did say in *Peer International* (at [48]) that he found the Cuban legislation confiscatory, this remark was *obiter*. Emphasis was placed on not giving laws extraterritorial effect. Remarks to this effect by Nourse J. and Lord Templeman in *Williams & Humbert Ltd.* v. *W & H Trade Marks (Jersey) Ltd.* [1986] A.C. 368 and by Lords Hoffmann and Millett in *Société Eram Shipping Co. Ltd.* v. *Cie. Internationale de Navigation* [2003] UKHL 30, [2004] 1 A.C. 260 were cited by Aldous L.J. with approval. Older cases, before *Bank voor Handel* (*Frankfurther* v. *W.L. Exner, Ltd.* [1947] Ch. 629 and *Novello & Co. Ltd.* v. *Hinrichsen Edition Ltd.* [1951] Ch. 595), which were decided on the basis of the confiscatory nature of the relevant foreign law, were referred to both at first instance and in the Court of Appeal in *Peer International*. The ratio, but not the result, of those cases must now be regarded as doubtful.

It has been said that public policy is an unruly horse. The head of public policy which was applied (or perhaps invented) in *Lorentzen* v. *Lydden* was not so much an unruly horse as a tired old nag grazing in an obscure field and being verbally abused by the occasional passer-by. It has now been quietly led off to the knacker's yard, However, counsel for the defendants in *Peer International* unsuccessfully attempted to lead a younger and more lively animal out of the stable in the form of the decision of the House of Lords in *Kuwait Airways Corpn.* v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883. In that case, a decree of the Iraqi government purporting to dissolve Kuwait Airways and transfer its assets to Iraqi Airways was not given effect on grounds of public policy. The result was that Kuwait Airways was successfully able to sue Iraqi Airways for conversion of, and tortious interference with, its aircraft, some of which had been destroyed while under the control of Iraqi Airways. Counsel for the defendants in *Peer International* referred to Rule 120 in Lawrence Collins (ed.), *Dicey and Morris on the Conflict of Laws*, 13th edn. (2000), which states:

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> A governmental act affecting any private proprietary right in any movable or immovable thing will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the thing was situated (lex situs) at the moment when the act takes effect, and not otherwise.

Counsel for the defendants divided this into two parts. First, UK courts will recognise foreign governmental acts relating to property outside that foreign country where the act is accepted as valid by the law of the country where the property is located. Secondly, UK courts will not recognise a foreign governmental act affecting property in the UK. This analysis appears to have been accepted by the Court of Appeal, though there is an exception to the first limb of Rule 120 on grounds of public policy (*Kuwait Airways* as explained in *Peer International*). The *Kuwait Airways* public policy exception is actually wider than appears from the analysis in *Peer International*, since the aircraft were in Iraq itself when the Iraqi decree was promulgated. Aldous L.J. held that there was no public policy exception to the so-called second limb, *i.e.*, the rule that a foreign decree or law will not be given effect in relation to property in England, although it was noted by Neuberger J. in *Peer International* at first instance (at [61]) that the rule is subject to contrary "Parliamentary or EC direction". It would appear that public policy only strikes down foreign laws or decrees which would otherwise be given effect in accordance with conflict of laws principles; it does not give effect to foreign laws or decrees which otherwise do not apply, on the grounds that they might be benign or worthy of enforcement.

DAVID OSBORNE

A LACK OF RESTRAINT IN EUROPE

COUNCIL Regulation (EC) 44/2001 ("the Regulation"), like its predecessor the Brussels Convention 1968 ("the Convention"), seeks to allocate jurisdiction according to a rigid set of mandatory and (supposedly) clear rules. Controversially, however, the English courts have continued to exercise their discretionary common law powers to stay their proceedings, if a *forum non conveniens*, or to restrain foreign proceedings which are unconscionable, vexatious or oppressive or commenced in breach of an English jurisdiction agreement, even when jurisdiction has been allocated according to the rules of either the Regulation or the Convention. Whilst the Court of Justice has still to decide whether the doctrine of *forum*

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non conveniens can operate consistently with the Convention (see *Owusu* v. *Jackson* [2002] EWCA Civ 877; *American Motor Insurance Co*. v. *Cellstar Corporation* [2003] EWCA Civ 206), in C-159/02 *Turner* v. *Grovit* [2004] 2 All E.R. (Comm) 381 it has decided that it is inconsistent with the Convention for an English court to grant an anti-suit injunction, restraining proceedings in another Contracting State.

In *Turner*, the claimant, Mr. Turner, was employed as a solicitor by the "Chequepoint" group of companies. The first defendant, Mr. Grovit, was the directing mind of that group, of which the second defendant, Harada Ltd., and the third defendant, Changepoint SA, were members. Following a transfer from the group's London office to its Madrid office, the claimant resigned and commenced proceedings for wrongful and unfair dismissal in the UK. Following an unsuccessful challenge to the court's jurisdiction, the Employment Tribunal awarded the claimant damages. Almost immediately, the third defendant commenced proceedings against the claimant in Madrid, alleging that the claimant's unprofessional conduct had caused it damage. In response, the claimant sought an injunction from the English courts restraining the defendants from commencing, continuing or participating in the Madrid proceedings. Mr. Donaldson Q.C., sitting as a deputy high court judge, refused to grant a final injunction on the ground that the Madrid court alone should decide whether it had jurisdiction to hear the dispute before it and the English courts should not preempt that decision by granting an anti-suit injunction ([1999] 1 All E.R. (Comm) 445). Subsequently, the Court of Appeal (Laws, Stuart-Smith L.JJ. and Jonathan Parker J.) unanimously reversed the judge's decision and granted the anti-suit injunction on the ground that, as the proceedings in Madrid had been launched "for no purpose other than to harass and oppress" the claimant, they constituted an abuse of process which the English courts had an inherent power to restrain ([2000] 1 Q.B. 345). Laws L.J. also considered that the injunction was necessary to compel the Madrid court, as the court "second seised", to stay its proceedings in accordance with Article 21 of the Convention (now Article 27 of the Regulation). Upon appeal against the first of these grounds, Lord Hobhouse (Lords Nicholls, Hoffmann, Millett and Scott concurring) referred to the Court of Justice the question whether a court could, consistently with the Convention, restrain proceedings in another Contracting State, which had been commenced in bad faith in order to frustrate proceedings in England ([2002] 1 W.L.R. 107).

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In answering this question in the negative, the Court of Justice dealt with each of the arguments most commonly relied upon to justify granting anti-suit injunctions within the Convention scheme. First, it was argued that anti-suit injunctions can in fact bolster the proper functioning of the Convention, by allowing Contracting States to restrain proceedings commenced in breach of its terms. The Court in *Turner*, however, rejected this argument, stressing that the practice of granting anti-suit injunctions undermined the Convention's most basic tenet, namely that Contracting States should trust each other to apply the Convention scheme correctly. According to this principle of mutual trust, no Contracting State should seek to determine any other State's jurisdictional competence. The Court of Justice considered that anti-suit injunctions involved just such a determination (see para. [27]). In prohibiting the use of anti-suit injunctions in this context, however, the Court in *Turner* was somewhat equivocal as to whether this prohibition was absolute (as suggested in para. [31]) or subject to limited exceptions (as suggested in para. [26]). It is suggested that the second of these readings is the preferable one. The principle of mutual trust between Member States should not apply when the foreign proceedings involve breaching the jurisdictional rules contained in sections 3, 4 or 6 of Chapter II of the Regulation. Given that the Regulation's Article 35(1) makes clear that any judgment issued in breach of these provisions may be refused recognition in other Member States, it is entirely appropriate that a Member State be permitted to question any jurisdiction assumed in breach of those provisions. The Court of Justice appears to have already recognised this, at least in relation to proceedings commenced in breach of Article 16 of the Convention (now Article 22 of the Regulation): C-351/89 *Overseas Union Insurance Ltd.* v. *New Hampshire Insurance Co*. [1991] E.C.R. I–3317, [24]. It should be noted, however, that even if anti-suit injunctions may continue to be granted in these limited circumstances, it would not permit the English courts to enjoin proceedings commenced in another Contracting State in breach of an English jurisdiction agreement. The troublesome decision in *Continental Bank NA* v. *Aeakos SA* [1994] 1 W.L.R. 588 now appears unsupportable.

In addition, it was often argued that anti-suit injunctions would bolster the Regulation scheme by enabling courts to avoid parallel proceedings. This argument was also rejected in *Turner* on the ground that it would render otiose the mechanisms contained in Article 21 and 22 of the Convention (now Articles 27 and 28 of the Regulation) for dealing with *lis alibi pendens* and related actions and on the ground that it would not necessarily reduce the risk of

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irreconcilable judgments, as the anti-suit injunction might not in fact bring the foreign proceeding to an end. The Court also raised the spectre of different Contracting States issuing conflicting anti-suit injunctions, as occurred during the *Laker Airways* litigation, which is a situation that could not be dealt with by any mechanism in either the Convention or the Regulation.

Secondly, it was argued that, as an anti-suit injunction is directed at the foreign claimant personally, rather than at the foreign court itself, it did not involve questioning the jurisdictional competence of that court. Whilst this may be correct in strict procedural terms, it is clear that litigants seeking an anti-suit injunction do in fact rely upon arguments relating to the jurisdictional propriety of the foreign proceedings, as occurred before the Court of Appeal in *Turner* itself. Indeed, some English courts, such as the House of Lords in *Turner*, have already accepted that an anti-suit injunction may amount to an *indirect* interference with the foreign court's jurisdiction, and the Düsseldorf Court of Appeal (see *Re the Enforcement of an English Anti-suit Injunction* [1997] I.L.Pr. 320) and the English Court of Appeal (see *Philip Alexander Securities and Futures Ltd.* v. *Bamberger* [1997] I.L.Pr. 73) have recognised that that interference may even be *direct*. The Court in *Turner* quite correctly gave this argument short shrift.

Thirdly, it was argued that as anti-suit injunctions are essentially procedural in nature, their operation is unaffected by the Convention. In this regard, the Court of Justice has previously stated that, whilst the Convention establishes uniform jurisdictional rules between Contracting States, it does not purport to harmonise their divergent procedural rules: *Kongress Agentur Hagen GmbH* v. *Zeehaghe BV* [1990] E.C.R. I–1845. This does not mean, however, that the characterisation of a rule as procedural should automatically take that rule outside the scope of the Convention or the Regulation. In fact, the Court of Justice has expressly reserved the ability to control those procedural rules which "impair the effectiveness of the operation of the Convention": see *Hagen*, above. In *Turner* the Court of Justice felt that anti-suit injunctions were just such a procedural rule. Nor can anti-suit injunctions be saved from this conclusion by Article 31 of the Regulation, as a final anti-suit injunction is unlikely to qualify as either a "provisional" or "protective" measure: *Van Uden Maritime BV* v. *Firma Deco-Line* [1998] E.C.R. I–7091.

The decision in *Turner* is largely to be welcomed as a clear restatement of the basic philosophy underlying both the Convention and the Regulation. Arguably, however, one effect of that decision is to remove a potentially useful tool for preventing forum

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shopping across the Member States. After *Turner*, there will be little that an English court can do in relation to proceedings, which have been commenced first in another Member State, even if the jurisdictional basis of those proceedings and the merits of that case are extremely weak. More than ever, the race will go to the swiftest. This problem, however, whilst exacerbated by the decision in *Turner*, stems primarily from the use of the "first in time" rule in Article 27 of the Regulation. *Turner* may highlight the need to reassess this approach.

CHRISTOPHER HARE

THE ENFORCEMENT OF FOREIGN JUDGMENTS IN CANADA

In *Beals* v. *Saldanha* [2003] 3 S.C.R. 416, an Ontario couple sold their holiday home in Florida for US$8,000. The buyers complained of various breaches of duty, and sued the vendors in Florida. Some ten years and several discontinued lawsuits later, a judgment was rendered in Florida, and the buyers sought to enforce this judgment in Ontario—for US$590,000. The case raised a question of general importance, in England as in Canada. How ought the law to ensure that claimants can effectively pursue legitimate claims against defendants, while protecting defendants from esoteric foreign laws and foreign lawsuits?

In England, the balance has been struck—at common law—by enforcing only judgments rendered by courts in whose jurisdiction the defendant was present when the cause of action arose, or to whose jurisdiction the defendant has submitted. In contrast, the Supreme Court of Canada adopted a more flexible test towards sister province judgments in *Morguard Investments Ltd.* v. *De Savoye* [1990] 3 S.C.R. 1077, inquiring whether a "real and substantial connection" existed between the defendant and the jurisdiction in which judgment was rendered. Rejecting the traditional test, the Court in *Morguard* felt that the problems that motivated nineteenth-century English courts—a distrust of the quality of justice administered abroad and the difficulties of international travel—were inapposite in modern cases involving judgments of sister provinces. The new test was said to bring conceptual and practical benefits: it explicitly linked the tests by which the Canadian courts themselves accept jurisdiction and by which they enforce judgments rendered in sister provinces, and it promoted interprovincial commerce.

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Beals has now extended the "real and substantial connection" test to judgments obtained outside Canada. Notwithstanding its superficial theoretical neatness, however, this is difficult to justify using the reasons proffered in *Morguard*, it exacerbates existing difficulties inherent in the test and it creates new problems for those with assets in Canada.

Some of the reasoning deployed in *Morguard*, mentioned above, has equal force in the context of international judgments: there is appeal in the linkage of the tests for accepting jurisdiction and enforcing foreign judgments. However, most of the arguments made in *Morguard* are weaker in the international context. The risk of injustice to the defendant is real in international cases since the procedures of the foreign court are potentially unfamiliar to Canadian eyes, and lack the overarching supervision of the Supreme Court. Moreover, the inconvenience of travel to the four corners of the globe is not comparable to travel within Canada. Finally, Canada's interest in international comity seems only a distant relative of the constitutional imperative of respect for judgments rendered in sister provinces. Nonetheless, it may be argued that these factual differences could be accommodated within the application of a single test; it seems likely, for example, that the defence of want of natural justice might be applied more frequently in international cases, but the conceptual framework need not vary. However, this approach has not been adopted elsewhere in Canadian law: in choice of law in tort *Tolofson* v. *Jensen* [1994] 3 S.C.R. 1022 has been interpreted as permitting a public policy exception to the *lex loci delicti* rule in international, but not interprovincial, cases; this jurisprudence will need to be revisited. From an English perspective, the more liberal enforcement regime within the EU under the Judgments Regulation supports distinguishing between jurisdictions on the basis of these factual differences.

Even accepting the need for a unitary approach, it is far from clear that the "real and substantial connection" test is desirable: after twelve years of evolution, fundamental questions remain concerning the nature of the "connection" required. It might have been hoped that the conceptual linkage with *forum non conveniens* cases would assist: such cases might have provided an analytical structure. However, such a transplant introduces difficulties of its own. In particular, such cases involve consideration of factors affecting the cost efficiency of a trial in a particular jurisdiction, based on the location of evidence and so on. These factors seem of little relevance where a judgment has already been rendered. This point seems to have been accepted in *Beals* where, despite

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references to the link between *forum non conveniens* and enforcement cases, Major J. emphasised that the inquiry is focused on the connections between the *defendant* (rather than the factual matrix) and the foreign jurisdiction.

This link with *forum non conveniens* also gives rise to a problem that is particularly troublesome in the international context. *Beals* seems to require that the foreign court have some doctrine of *forum non conveniens* as a precondition of enforcement (a problem noted in respect of the Court's approach to anti-suit injunctions: *Amchem Products Inc*. v. *Workers' Compensation Board* [1993] 1 S.C.R. 897, discussed [1998] C.L.J. 467). However, unlike the Canadian provinces, most civil law jurisdictions lack such a doctrine: litigants with judgments from civil law jurisdictions will have to rely on the traditional rules. An alternative approach might have been for the Canadian court to ask whether—if it were in the position of the foreign court—it would have declined to exercise jurisdiction, and to refuse to enforce judgments in such cases.

In addition to failing to address, much less resolve, these pre-existing problems, the Court has deposited fresh intellectual clutter. In particular, Major J. stated ambiguously that the traditional grounds for enforcement have not been replaced entirely, but "bolster" the "real and substantial connection" test. A second area of uncertainty is the role of defences to enforcement: *Beals* leaves open the possibility that any liberalisation of the enforcement of judgments regime may be strangled at birth by new (but unspecified) defences. On the other hand, it may be doubted whether the existing defences provide adequate protection to defendants. Some of the defences—such as want of natural justice and fraud—may be evident to a defendant only upon some involvement in the litigation (particularly if a default judgment is rendered), but such involvement risks being a "submission" to the foreign court's jurisdiction.

Until the parameters of the test are clarified, defendants with assets in Canada may risk losing those assets if they fail to argue on the merits in the foreign court, while if they do make such arguments, their assets in London will be vulnerable if an English court regards this as a submission to the foreign court's jurisdiction. It is hard to greet this development with enthusiasm, and it is hoped that other common law jurisdictions will see beyond the allure of its supposed conceptual neatness to perceive the considerable difficulties created by such judicial innovation.

SIMON ATRILL

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SAME-SEX RELATIONSHIPS: GOING WITH THE GRAIN OR JUDICIAL VANDALISM?

In *Ghaidan* v. *Godin-Mendoza* [2004] UKHL 30, [2004] 3 W.L.R. 113 the House of Lords by a majority (Lords Nicholls of Birkenhead, Steyn and Rodger of Earlsferry and Baroness Hale of Richmond; Lord Millett dissenting) upheld the decision of the Court of Appeal by according homosexuals in a stable relationship the same status as if they were husband and wife. *Ghaidan* concerned the construction of paragraph 2(2) of Schedule 1 to the Rent Act 1977, which confers the right to succeed to a statutory tenancy on a person who was "living with the original tenant as his or her wife or husband". In *Fitzpatrick* v. *Sterling Housing Association* [2001] 1 A.C. 27, the House of Lords held the language of this provision to be gender-specific. Thus in that case the appellant was allowed to succeed to a less favourable assured tenancy, as a member of the deceased's family.

In *Ghaidan* the Court of Appeal read the words of paragraph 2(2) to mean "as *if they were* his or her wife or husband". The court was able to do so by virtue of the new interpretative powers under section 3(1) of the Human Rights Act. The House of Lords approved of this interpretation in what Lord Steyn called a classic illustration of the permissible use of section 3(1), that is, the court's duty to read and give effect to legislation in a way which is compliant with Convention rights "so far as it is possible to do so". The Convention rights engaged were under Articles 8 and 14. Article 8 guarantees, among other matters, the right to respect for a person's home. Article 14 prohibits unjustified discrimination in the "enjoyment of the rights and freedoms set forth" in the Convention.

On an ordinary reading the schedule was discriminatory unless legitimate social aims were being met in a proportionate manner. The Lords found that the discrimination did not meet any legitimate aims. As same-sex couples can have the same sort of inter-dependent couple relationships as heterosexuals, there must be a rational and fair basis to justify discrimination. Fairness dictated that Mr. Godin-Mendoza was entitled to the statutory tenancy.

Ghaidan is more than a mere echo of *Karner* v. *Austria* [2004] 38 E.H.R.R. 24, in which the European Court of Human Rights held that there had been a violation of Article 14 taken together with Article 8 where the Austrian Supreme Court had held that the right of family members to succeed to a tenancy did not apply to persons in a homosexual relationship. The ECtHR found

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that a same-sex relationship can be treated "like that of a marriage". It is noteworthy that whatever the theoretical position is, this is the first time that the ECtHR has in practice found a violation of Article 14 in conjunction with another right without finding a violation of the latter. Further, the Strasbourg court stressed that in cases where difference in treatment is based on sexual orientation, the State's margin of appreciation is narrow. It is surprising that the House of Lords did not give explicit recognition to this particularly influential point. In response to *Karner* the UK government has introduced the Housing Bill and the Civil Partnership Bill which, if enacted, will endorse the approach taken in *Ghaidan*.

Hewson ("Usurping Parliament" 13 December 2002 S.J. 1127) and Marshall ("The Linchpin of Parliamentary Intention: Lost, Stolen or Strained?" [2003] P.L. 236) believe the decision of the Court of Appeal to be a heterodox exercise of power. Marshall criticises the removal of the linchpin of parliamentary intention when interpreting legislation. Yet, by phrasing section 3 as it has, *Parliament* has paved the way for a generous interpretation where fundamental rights are at stake. Indeed, Lord Steyn expressed alarm at the number of declarations of incompatibility being made under section 4, some of which he believes indicate a failure to appreciate the scope of section 3 and its consequent under-use.

However, section 3 itself is not free from ambiguity. Lord Nicholls of Birkenhead said that the criterion by which possibility is to be judged remains elusive. What is clear is that for the sake of consistency more guidelines are needed on how to exercise the powers under section 3. The "know it when you see it" or elephant approach is too uncertain. Unfortunately the House of Lords did not make use of this opportunity to clarify the law.

Those who think the judges have crossed the Rubicon pay insufficient heed to the fact that a traditional role of the judiciary is to protect fundamental rights. The House of Lords and the Court of Appeal were keen to emphasise that judicial deference has only a minor role to play where high constitutional issues of discrimination are concerned. There must be cogent reasons for interference with fundamental rights.

Lord Rodger of Earlsferry stated that words implied must go with the grain of the legislation but must not turn the legislative scheme inside out (see *R. (Anderson)* v. *Secretary of State for the Home Department* [2003] 1 A.C. 837). Hewson has argued that the decision "does violence to the words of paragraph 2(2) in purporting to create a new category of *de facto* marriage. It evades

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the issues posed by Parliament's explicit use of gendered language. Marriage is, by definition, a heterosexual institution here. Nothing in the Convention alters that. The revised wording is, therefore, linguistically and conceptually inept.''

Lord Steyn stressed that it is the concept expressed in the language that is of importance, not a literal interpretation of it. That concept is ''marriage-like''. The majority of the House thought it unclear how denying protection to same-sex couples protects the ''traditional'' family. *Ghaidan* provides belated recognition in English law that same-sex couples can have marriage-like relationships. Baroness Hale of Richmond stated: ''What matters most is the essential quality of the relationship, its marriage-like intimacy, stability and social and financial inter-dependence''. She noted that the roles of husband and wife are no longer defined by gender. She mentioned that, although the protection of the Rent Act is not aimed at children, when certain sections of the Adoption and Children Act 2002 are in force, same-sex couples will be able to adopt. This is arguably the strongest sign of the increasingly insignificant role of gender in marriage-like and parental relationships.

Once the Civil Partnership Bill gains the force of law, discriminatory provisions found in many acts which prioritise unmarried heterosexual couples over same-sex couples will disappear. It is expected that *Ghaidan* will have widespread effects on other areas of law before the Bill is enacted—provisions conferring rights on heterosexual cohabitants must be examined to determine if there is a breach of the Convention regarding same-sex couples. *Ghaidan* may be warmly welcomed as a robust decision highlighting that spurious arguments about protection of the traditional family will no longer be tolerated.

For those who prefer grammatical perfection and the literal rule to purposive construction of legislation, *Ghaidan* is an anathema. Yet *Ghaidan* is ultimately about the recognition and protection of human dignity and equality in the context of personal relationships. The House has recognised that many same-sex couples live together as *de facto* married couples. Reality has triumphed and the grain of the Rent Act and the HRA has been followed.

While the Civil Partnership Bill aims to provide same-sex couples who register their partnership with an equivalent status to marriage, it is significant that such couples will still be denied access to this institution. Is it necessary for public policy to guard the right to marry, contained in Article 12 of the Convention? Belgium and the Netherlands think not. Landmark decisions in Ontario and Massachusetts have held it unconstitutional to deny

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same-sex couples the right to marry. It is hoped that in time the point will be reached where it is no longer too controversial to allow same-sex couples the opportunity to marry. Is *Ghaidan* the first chink of light?

ELIZABETH TOMLINSON

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