on Article 47 may also be instructive. An argument can be made more generally that, as the BR is intended to facilitate the enforcement of judgments, all provisional and protective measures made under the regime should be limited to assets in the state which might be the subject of enforcement proceedings. Accordingly, whilst some rather discouraging hints might be taken from the general approach of the Court of Appeal, we still have no answer to the fundamental question and in principle we will not have until a further reference is made to the ECJ.

LOUISE MERRETT

REPAIRS, REFUSALS AND REJECTIONS

IN *J & H Ritchie Ltd.* v. *Lloyd Ltd.* [2007] UKHL 9, [2007] 1 W. L. R. 670, the House of Lords was required to solve a problem stemming from section 35 (6) (a) of the Sale of Goods Act 1979, by providing limited guidance on the question whether a buyer is bound to accept goods alleged to have been repaired. The subsection provides that the buyer of goods is not deemed to have accepted goods merely because he asks for, or agrees to, their repair by or under an agreement with the seller. However, the statutory provisions provide no guidance with respect to the continued availability of a right to reject if the buyer agrees to repairs; nor do they provide when, in relation to the stage of repair, the right to reject will be available.

In *J & H Ritchie*, the appellants purchased agricultural equipment from the respondents. On the first day of its use the machine emitted a noticeable vibration; however, the absence of a defect on visual inspection meant the machine was used in this condition for a further two days. The defective harrow was identified and removed to the respondents' premises for an inspection, which revealed missing bearings, the absence of which amounted to a major defect. The respondents fitted the missing bearings, and informed the appellants that the harrow was repaired and ready for collection. Mr Ritchie, one of the appellants' directors, attempted, not unreasonably, to ascertain what had been wrong with the harrow initially. The respondents' employees refused to say, merely saying that the harrow was now of "factory gate specification". However, Mr Ritchie learned informally that the cause of the fault was the missing bearings, which were omitted on manufacture. Therefore, concerned about the potential wider damage to the machine, Mr Ritchie intimated to the respondents that he was rejecting the equipment as a result of their refusal to explain the fault.

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The majority in the Inner House of the Court of Session had held that Ritchie could have rejected the equipment when first delivered, as not conforming to the contract. The effect of the repair was to remedy that breach, therefore removing Ritchie's right to reject the goods and rescind the contract (2005 1 S.C. 155). In allowing the appeal, the House of Lords proceeded on an entirely different basis from the lower courts. Instead of considering the chronological implications of s 35(6) of the Sale of Goods Act 1979, the appellate committee favoured the implication of a term that the respondents were under a duty to disclose, on demand, the nature of the defect in the equipment that it had been required to repair.

Lord Hope noted that, while the legislature identified that a buyer should not be assumed to accept goods by virtue of agreeing to their repair, the statute is silent with regard to what should happen after the parties agree to investigate a possible repair (at [13]). The situation fell to be regulated by an implied term, and not by reference to the doctrine of personal bar (broadly equivalent to estoppel) as suggested in the Court of Session, by Lord Marnoch (dissenting). The term to be implied into the contract of sale in this case (at [15]), was one by which the respondents were obliged to provide the appellants with information about the repair of the equipment. The failure of the respondents to accede to Mr Ritchie's requests for information placed them in breach of this implied term, and therefore the appellants were entitled to reject the equipment.

Lord Rodger's approach was conceptually different from that of Lord Hope, though with a similar result. The removal of the equipment for inspection and repair constituted a separate "inspection and repair agreement" (at [32]). This must have contained the implied term that while the respondents performed under that agreement, the appellants should not rescind the contract of sale (at [34]). The crux of the matter was whether this agreement also contained an obligation upon the respondents to inform Mr Ritchie of the problem with the harrow. Lord Rodger held that such a term was implied in accordance with the business efficacy test, based on the following factors: the harrow belonged to the appellants, thus entitling them to enquire as to the result of the inspection; as the respondents had originally supplied the defective equipment they were obliged to tell Mr Ritchie what they had discovered, and, finally, refusal to disclose undermined the appellants' "trust and confidence" in the respondents' performance of the contract (at [37]). This is a significant, if somewhat surprising, turn of phrase. The implied term of "trust and confidence" is a dynamic recent development in employment law (*Malik* v. *Bank of Credit and Commerce International S.A. (In Liquidation)* [1998] A.C. 20, 45–47) relating to the mutual interaction of employer and employee, more

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particularly the "impact of the employer's behaviour on the employee" (quoting D. Brodie "The Heart of the Matter: Mutual Trust and Confidence" (1996) 25 I. L. J. 121, 121–22). The development of the "trust and confidence" idea in similar commercial sale situations is potentially very significant, though not necessarily unwelcome. In any event, the respondents' refusal to provide such information entitled the appellants to rescind the agreement, therefore allowing them to rescind the contract of sale (at [38]).

While unanimous in implying a duty to disclose, their Lordships omitted to state when such a duty subsisted. Lord Mance suggested the duty to disclose might operate after inspection but before repair or, alternatively, when offered to the buyer as repaired; however, he left the point undecided (at [54]). It appears implicit in the other speeches that the duty arose when the goods were offered as repaired. Given that Lord Rodger identified an implied term in the agreement not to rescind whilst the respondents performed, there is also an unanswered question about the duty to disclose while the actual repair is in the process of being carried out.

Therefore, the decision really rests upon the respondents having behaved "thoroughly unreasonably" by not disclosing the nature of the fault: at [41] (Lord Brown). It is not clear if the appellants could have rejected the goods if the respondents had simply stated the nature of the fault repaired. Given that the goods were repaired to a "factory gate specification", it would seem that the buyer would not be able to reject them. Somewhat frustratingly, by deciding the case on this ground, the House of Lords has left such broader questions about the interpretation of section 35 (6) of the Sale of Goods Act 1979 for another day.

DANIEL CARR

BONA FIDE IN THE INTEREST OF CERTAINTY

THE rule that a company may only exercise the power to amend its articles of association "bona fide in the best interests of the company as a whole" (*Allen* v. *Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656) is neither "clear [n]or easy to apply"; there are "no recent English cases and the older ones [are] quite difficult" (per Christopher Nugee Q.C. in *Constable* v. *Executive Communications Ltd.* [2005] 2 B.C.L.C. 638 at 652). Fortunately, and in the absence of new English authority, greater clarity has been brought to the rule by the decision of the Privy Council in *Citco Banking Corporation NV* v. *Pusser's Ltd.* [2007] UKPC 13.

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