Lord Bingham then considered the regulatory framework established by the 1974 Act; it was significant that the Act, passed to protect consumers, did not prohibit terms providing for post-judgment interest. Unacceptable consequences can arise in these cases because borrowers are unaware that the court has the power, under the 1974 Act, to redraw the terms of their contractual obligations. They do not occur because of the unfairness of the contractual term. First National's failure to alert borrowers to potential grounds of relief was not unfair by the customs of the industry. Regulation 4 is not directed at "the use which a supplier may make of a term which is in itself fair". The term was not unfair within the meaning of regulation 4(1).

The decision is a welcome one. A strange aspect to this case is that while consumers could face an unpleasant state of affairs, this occurred within an existing regulatory system. The 1974 Act arguably provides a greater degree of protection to consumers than the Directive. The decision establishes a number of important points. First, the judgments strive to interpret the pre-existing consumer regulations and case law in such a way as to provide a system of substantive fairness to borrowers independently of the Directive. Secondly, there is emphasis that the requirement of good faith does not come from the legal system of any particular Member State but that it is a new requirement of European Union law. Thirdly, it is recognised that this concept is not an alien irritant to the common law, but one already present within it in one form or another: the Directive's requirements mark an evolutionary, rather than revolutionary, change to the common law. This is true; much of the Directive's protection is provided within the common law by various doctrines and devices. However, the concept of good faith is not widely recognised in modern contract law. Revolutionary changes will occur in the common law of contract. The nature of this revolution is unpredictable.

CATHARINE MACMILLAN

FARLEY V. *SKINNER*: RIGHT OR WRONG?

MR. Farley's action for breach of contract against his surveyor gave the House of Lords an opportunity to consider the recovery of damages for non-pecuniary loss (*Farley* v. *Skinner* [2001] UKHL 49, [2001] 3 W.L.R. 899). Mr. Farley had been considering buying a house and instructed Mr. Skinner to survey the property. In particular, Mr. Farley asked Mr. Skinner to investigate whether the

https://doi.org/10.1017/S0008197302291503 Published online by Cambridge University Press

property was affected by aircraft noise, saying he did not want a property on a flight-path. Mr. Skinner subsequently reported that he thought it unlikely that the property would be so affected. Mr. Farley, having acquired and spent significant sums refurbishing the house, was therefore disappointed to discover that his enjoyment of the property was significantly impaired by the sound of aircraft waiting to land at nearby Gatwick airport.

The trial judge held that Mr. Skinner had been negligent but dismissed Mr. Farley's principal claim for diminution of the value of the property, finding that the price paid matched the market value taking into account the aircraft noise. However, the judge awarded Mr. Farley £10,000 for distress and inconvenience caused by the physical consequences of the breach. The defendant's appeal was initially heard by a two-member Court of Appeal, but Judge and Hale L.JJ. disagreed. On a re-hearing before a three-member court, the majority (Stuart-Smith and Mummery L.JJ., Clarke L.J. dissenting) allowed the appeal ([2000] Lloyd's Rep.P.N. 516).

The House of Lords unanimously restored the trial judge's award. The Appellate Committee's decision was based on two exceptions to the general principle of contract law that "compensation is only awarded for financial loss resulting from the breach of contract" (*per* Lord Steyn at para. [16]). These exceptions, described by Bingham L.J. in *Watts* v. *Morrow* [1991] 1 W.L.R. 1421, operate where the award relates to physical inconvenience caused by the breach and where the very object of the contract is to provide pleasure. The House of Lords took the view that both exceptions were applicable in Mr. Farley's case.

Taking inconvenience first, Lord Steyn and Lord Hutton rejected the argument that the judge's finding as to physical inconvenience had not been open to him. Lord Clyde and Lord Scott also endorsed the judge's finding but each sought to refine the test set out by Bingham L.J. in *Watts* v. *Morrow*. Lord Clyde considered that "inconvenience" sufficiently covered the kinds of discomfort falling within the exception, while "disappointment" covered matters of pure sentiment which fell outside the exception and damages for which were excluded by the law on policy grounds. Lord Scott considered that the "critical distinction" lay not in the different types of inconvenience but in their cause: "If the cause is no more than disappointment that the contractual obligation has been broken, damages are not recoverable even if the disappointment has led to a complete mental breakdown. But, if the cause of the inconvenience or discomfort is a sensory (sight, touch, hearing, smell etc.) experience, damages can, subject to the remoteness rules, be recovered" (at para. [85]).

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As for being a contract to provide pleasure, neither Lord Steyn nor Lord Clyde had difficulty in finding that the contract with Mr. Skinner fell into that exceptional category, bearing in mind the defendant's "specific undertaking to investigate a matter important for the buyer's peace of mind". However, Lord Steyn did say that it was not necessary for the "very object" of the contract to be to provide pleasure for an agreement to fall within this category; it was sufficient if the provision of pleasure was a "major or important" object.

Lord Hutton and Lord Scott, while reaching the same conclusion on this point, went further. Applying *Ruxley Electronics* v. *Forsyth* [1996] A.C. 344, Lord Hutton said that where no financial loss arose from the breach, justice required that an award of reasonable damages be made "solely to compensate the buyer for his disappointed expectations". In Lord Scott's view, where a claimant had been deprived of a valuable contractual benefit he ought to be compensated in damages to the extent of that value notwithstanding that the ordinary means of measuring recoverable damages were inapplicable. Damages, he said, were awarded in *Ruxley* even though "the breach of contract by the builders had not caused any consequential loss to the pool owner".

Two brief comments on the case can be made. First, the awards in *Farley* and *Ruxley*, together with those available via the other exceptions to the broad general principle that only financial loss is recoverable in a breach of contract claim, call into question the continuing utility of the principle itself.

Second, and on a more conceptual level, the deprivation of a valuable contractual benefit approach adopted by Lord Scott raises a significant issue as to the nature of Mr. Farley's claim. A contractual claim tends to be thought of as involving the enforcement of rights. But given that the remedy generally comprises compensation for loss arising from the breach, a contractual claim is better conceived of as based on the wrong of breach of contract. Wrong-based claims seek the enforcement of the *secondary duty* to compensate for the consequences of the wrong. A contractual action can sometimes properly be viewed as rights-based. Examples include an action to enforce an agreement to sell land and an action for the price of goods sold. Rights-based claims seek the enforcement of the *primary right* through the granting of specific relief such as specific performance, an injunction, or the award of an agreed sum. The award of unliquidated damages in *Farley*, albeit for normal, as distinct from consequential, loss, demonstrates that the deprivation of a benefit approach must strictly be considered as wrong-based. But by treating the award as

https://doi.org/10.1017/S0008197302291503 Published online by Cambridge University Press

representing the value to Mr. Farley of his right to a competently-performed survey, the approach demonstrates a willingness to give greater substance to the idea that primary contractual rights are enforceable rights in themselves.

DAVID PEARCE

ENFORCING A POSSESSORY TITLE TO A STOLEN CAR

JASON Costello, who made "something of a living" by doing up and selling cars, was found by the Police in possession of a turbo-charged Ford Escort. Although he was the car's registered keeper, the Police (rightly) suspected that it was stolen. They seized it under section 19 of the Police and Criminal Evidence Act 1984 ("PACE"). In this they acted lawfully. They questioned Costello but never actually prosecuted him—despite the original vehicle identification and engine numbers' having been ground off; Costello's having acquired the car through a "friend" with multiple convictions for handling stolen cars; and his keeping a "car ringing kit" for forging registration numbers under the back seat.

Under section 22 of PACE the Police had power to retain the car for as long as was necessary to establish its lawful owner. Their inquiries yielded nothing so their statutory power to retain the car expired. Nonetheless, the Police refused to return it to Costello. He thereupon sued them in conversion, seeking specific return of the car and damages for wrongfully detaining it after the expiry of their authority.

In *Costello* v. *Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 W.L.R. 1437 the Court of Appeal allowed his claim. Lightman J., who delivered the leading judgment, applied the classical rules on enforcement of possessory titles. Costello's possession of the car gave him a title to possess which was good against all the world except one who could assert a better title (at para. [31]). The Police's authority to possess under PACE had expired, so Costello's title, which had temporarily been "suspended", now reverted to being stronger than that of the Police (*ibid.* at para. [14], applying *Webb* v. *Chief Constable of Merseyside Police* [2000] Q.B. 427). The person with the best title, the original owner, was unknown. He could not be joined as a party to the action so as to defeat Costello's claim to possession on the ground that Costello's title was weaker than the original owner's. Although section 8(1) of the Torts (Interference with Goods) Act 1977 purports to abolish the rule that a *jus tertii* is no defence in an

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