Partnership" legislation which essentially enables those in committed same-sex relationships, through the act of registration, to acquire for their relationships almost all the legal effects of marriage, the right to adopt children being the only substantial exception. Such legislation is under consideration in other jurisdictions, notably Germany. The Dutch have even gone so far as to contemplate legislation which, if enacted, would extend the right to marry to homosexuals. A separate Bill would tackle the adoption question. The United Kingdom is lagging well behind these developments and mere compliance with the European Convention would leave it trailing the field.

In *FitzPatrick* Lord Hobhouse was critical of Ward L.J. for considering himself "at liberty to give effect to his own views and to make his own value judgments as to the appropriate treatment of homosexual relationships having regard to changes in social attitudes". But to adopt a legalistic and conservative interpretation of the statutory language is just as much a statement of values in its own way. The truth is that it is perhaps impossible to escape from value judgments here as elsewhere. The majority decision may certainly be seen as support for value pluralism and the notion that the various forms of intimate relationships are of equal worth. As such it may be thought to chime rather better with the new emphasis on human rights than would the approach advocated by the minority.

ANDREW BAINHAM

## CHEATING THE PUBLIC REVENUE

THE line between legitimate tax mitigation and illegitimate tax evasion may be a fine one but if it is crossed the consequences can be serious, since tax evasion can constitute the common law offence of cheating the public revenue. The nature of this offence was considered by the Court of Appeal in *R.* v. *Dimsey*; *R.* v. *Allen* [1999] S.T.C. 846.

The various defendants in the two cases had sought to evade liabilities to pay tax by using various overseas companies to provide benefits for themselves. These companies did not appear to be liable to pay corporation tax because they were incorporated outside the jurisdiction, although they were in fact managed and controlled by some of the defendants who were resident in the United Kingdom and so should have been liable to tax here. Since the defendants tried to make it appear that the companies were not

https://doi.org/10.1017/S0008197300350012 Published online by Cambridge University Press

controlled from within the jurisdiction, they were convicted of cheating or, in the case of some of the defendants, conspiring to cheat the public revenue. In rejecting their appeals against conviction the Court of Appeal clarified a number of features of the cheating offence.

First, the Court confirmed that the offence would be committed by any form of fraudulent conduct which had the purpose and effect of depriving the Revenue of money which was or should have been due to it. Consequently, it must be shown that there was an actual or potential liability to pay tax which either continued or was prevented from arising by virtue of the cheat, although it does not matter that this liability was owed by somebody other than the defendant.

Secondly, the Court needed to consider whether the overseas companies were in fact liable to pay corporation tax here because their business was managed and controlled from the United Kingdom. In an important part of the judgment, the Court emphasised that the test of management and control was composite and that it sought to identify the place where decisions of fundamental policy relating to corporate business were made, as opposed to where the day-to-day profit earning activities were undertaken. Also the test related to the management and control of the business of the company rather than of the company itself. It followed that a company would usually be managed and controlled where its board of directors met and not where its shareholders met in general meeting. Since some of the defendants made all decisions about the companies' business from the United Kingdom, it followed that the companies were also resident here and were liable to pay tax here.

Thirdly, the Court considered whether the crime of cheating could be committed by an omission to act. In a somewhat confused section of the judgment the Court suggested that it was irrelevant whether the defendant had cheated by act or omission. This confusion arose from the Court's cursory dismissal of a general principle of the criminal law, which has long been recognised, that a defendant should only be convicted for failing to act where he or she was under a legal duty to act. The defendants had argued that they were under no duty to notify the Revenue of the overseas companies' profits because this duty was imposed by statute on the company secretary. The Court rejected this argument on the ground that it was enough that a defendant, who had total control of the company's business, arranged the company's affairs so that it made profits but did not declare them to the Revenue, especially where the company had been incorporated to operate in this way. But the

https://doi.org/10.1017/S0008197300350012 Published online by Cambridge University Press

Court did not explain why this was enough to create a legal duty to disclose corporate profits, in addition to the duty imposed by statute on the company secretary, save that it was "obvious".

The Court's conclusion would, however, have been easier to justify if it had sought to identify with greater care exactly what the alleged cheat was in a case such as this. Was it, as the Court appeared to accept, the failure to declare taxable corporate profits to the Revenue, or was it more simply the defendants' conduct in making it appear that the companies were not controlled or managed in the United Kingdom? If it was the former, it had to be shown that each defendant was under a duty to declare the company's profits. Such a duty cannot be conjured from the fact that the defendant was in control of the company's business, since this is inconsistent with the statute which clearly places the duty to act on the company secretary. If, however, the cheat was the defendants' obfuscation of the management and control of the companies' business, then this is something which all taxpayers should be under a legal duty to avoid and, anyway, it is much easier to characterise such conduct as an overt act rather than an omission. In fact, the Court concluded that the defendants had *acted* to defraud the Revenue by writing letters which were deliberately deceptive as to who controlled the corporate business and it was this action which caused pecuniary loss to the Revenue. Two lessons can be drawn from this. First, that the notion of cheating needs to be identified clearly but can be manipulated; a number of different cheats may arise from a single set of facts. Secondly, it is not acceptable to treat the serious crime of cheating the public revenue as divorced from the general principles of the criminal law.

Much of the Court's analysis of the offence of cheating the public revenue and the notion of corporate residence is unobjectionable. The offence is probably the most important weapon in the Revenue's armoury to deal with those who seek to evade their tax liability. Consequently, the Court adopted a distinctly robust approach to the definition of the offence, especially as regards liability for omissions and the manipulation of the notion of cheating. This might have been acceptable in the twentieth century to deter "cynical and deliberate tax evasion", as the Court described it, but as we shift to the brave new world of the twenty-first century, judicial robustness must be tempered by the Human Rights Act. That Act will have a potentially important role for the substantive criminal law, particularly for the common law offences. For by Article 7 of the European Convention on Human Rights, nobody "shall be held guilty of any criminal

https://doi.org/10.1017/S0008197300350012 Published online by Cambridge University Press

offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". It follows that if the common law offence is sufficiently uncertain that it is unclear whether the defendant had committed a crime at the time of acting or failing to act, then the defendant should not be convicted. The inherent fluidity of the common law offences may be inconsistent with human rights jurisprudence, and the solution will probably have to be their replacement by statutory offences which identify the ambit of the crime with greater precision. This might be particularly necessary in the tax context to prevent the offence of cheating the public revenue from becoming unworkable

GRAHAM VIRGO

## ANTISUIT INJUNCTIONS AND THE BRUSSELS CONVENTION

THE law concerning antisuit injunctions continues to develop, albeit in a conceptually unsatisfying, piecemeal fashion. English courts are increasingly concerned about the problem of extraterritoriality—witness Lord Goff's strictures about comity in *Airbus Industrie GIE* v. *Patel* [1998] 1 W.L.R. 686 (H.L.). But their cautious language conceals a readiness to grant relief in novel situations. A recent example is *Turner* v. *Grovit* [1999] 3 All E.R. 616, where, in the course of proceedings for constructive dismissal brought by Mr. Turner before an English employment tribunal, his employers sued him in Spain for repudiating his contract of employment. The Court of Appeal unhesitatingly restrained the Spanish proceedings. They were an abuse of process, intended solely to vex Mr. Grovit in the pursuit of his claim before the employment tribunal.

This approach is sound in principle:

(1) There is authority that English courts can restrain foreign proceedings that interfere with the process of the English court. Relief is justified, for example, where a defendant is sued abroad for properly providing evidence in English proceedings (*Bank of Tokyo* v. *Karoon* [1986] 3 W.L.R. 414, C.A.), or where foreign proceedings otherwise undermine an English court's control of its own procedure: *South Carolina Insurance Co.* v. *Assurantie Maatschappij "de Zeven Provincien" NV* [1986] 3 W.L.R. 398 (H.L.).

(2) The principle of comity is not infringed. A persistent complaint against antisuit injunctions is that foreign courts should regulate their own proceedings. But, whatever its strength

https://doi.org/10.1017/S0008197300350012 Published online by Cambridge University Press