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CASE AND COMMENT

DISAVOWING TORTURE IN THE HOUSE OF LORDS

THE threat and fear of terrorism place enormous pressures upon our established system of justice. Any idea that the United Kingdom might officially countenance the use of torture, even in cases of terrorism, had become unthinkable. After all, the Police and Criminal Evidence Act 1984 sets its face against the official use of "oppression", leave alone torture. But atrocities such as those perpetrated in the United States on 11 September 2001 and later in London (and Madrid and Bali) perniciously undermine certainties, forcing us to look again at our established practices and long-held beliefs. Might there be some circumstances in which we would, indeed, feel justified in resorting to such unacceptable practices? To the consternation of many, Harvard Professor Alan Dershowitz has suggested that we should look again at the possibility of using "torture warrants". These devices (last used in England in the 17th century) would permit a judge to license the use of torture by the authorities when faced with the ticking time bomb. Perhaps better some regulation, he suggests, than that the practice should go altogether uncontrolled.

The House of Lords in *A* v. *Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2005] 3 W.L.R. 1249 was not faced with questions quite so stark. But it is a measure of the seriousness and importance of the issues raised, directly and indirectly, that seven members of the House were summoned to hear the appeal. In the words of Lord Bingham [52]:

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> The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

On a more prosaic level, the case raised the question: how should the Special Immigration Appeals Commission (SIAC) act when considering an appeal from the Home Secretary's decision to issue a certificate designating a named person as reasonably suspected of being a terrorist if it was suggested that that some of the evidence had been, or might have been, procured by torture? It was not suggested that British officials might use torture; rather, it is a feature of cross-border terrorism that it might have been inflicted by foreign officials without the complicity of the British authorities. The case also raised another immensely important set of issues surrounding the burden of proof. Where does the burden lie when it is suggested that some of the evidence upon which reliance is sought to be placed has or might have suspect origins?

At first instance, the SIAC had held that the fact that torture might have been used was relevant to the weight of the evidence but did not render it legally inadmissible. That decision had been upheld by a majority in the Court of Appeal. By what process was such an apparently indefensible conclusion reached? The short answer is that it followed from the fact that the Secretary of State may, as a matter of strict law, when deciding whether or not to grant the certificate in the first place, act on the basis of evidence whose origins may have been tainted by torture. That being so (although it was apparently contested by some of the organisations who made submissions to the House on the issues in the case), the logic of the statutory appeals scheme would be undermined if the later tribunals were called upon to assess the lawfulness of the Secretary's decision without access to the same material.

None of their Lordships was prepared to push the logic of it so far, but their reasons for eschewing the logical result are far from uniform. On one point, their Lordships were unanimous—torture is completely unacceptable, and for the connoisseur of the spacious phrase, the speeches are a gold mine. But what are the consequences of this universal condemnation? According to Lord Bingham, there is a "mismatch" between the demands which the legal system places upon its executive and judicial arms. There is, in the words of Lord Bingham, "no correspondence between the material upon which they may act and that which is admissible in legal proceedings ... The common law is not intolerant of

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anomaly'' [46–47]. So the United Kingdom might at the same time permit the Home Secretary (and other authorities) to read and rely upon whatever evidence they choose to consult but not then permit reliance upon it when the legality of his subsequent conduct was questioned. There is, it must be said, an unresolved tension here, evident in the speech of Lord Nicholls (who sided with Lord Bingham) in the example he gives of the arrest by the police taking into account evidence obtained by the use of torture abroad. His Lordship appears to suggest that the police could continue to rely upon this evidence ''if the lawfulness of the arrest is challenged'' [72] in subsequent court proceedings. Lord Rodger's explanation was that the historical objections to torture and the use of statements obtained by torture were such that, in the absence of any Parliamentary authority to the contrary (which there was not here) the courts should continue to adopt the default position that the reception of such evidence is unacceptable. As a result, all were agreed that the orders made by the SIAC and the Court of Appeal should be set aside and remitted to the SIAC for reconsideration.

On the burden of proof point, however, their Lordships were split. All agreed that the conventional approach to the burden of proof was inappropriate in the context of a SIAC hearing and that the burden was placed upon the SIAC itself to make such diligent inquiries into the sources as it was practicable to carry out. The majority (whose principal spokesman was Lord Hope, the others being Lords Rodger, Carswell and Brown) took the view that the appropriate test (once the issue was raised by the appellant) was for the SIAC to ask itself whether it was established, on the balance of probabilities, that the information was obtained under torture. This was, according to Lord Bingham (with whom Lords Nicholls and Hoffmann were in agreement) ''a test which in the real world, can never be satisfied'' [59]. The minority would have preferred that if the SIAC was unable to conclude that there was not a ''real risk'' that the evidence had been obtained by torture, they should decline to admit it. The SIAC already inhabits a most peculiar if not unreal world of shadows and half lights in which the ordinary rules of evidence and procedure have been displaced. Where, for security reasons, the Secretary of State decides that it would be unsafe to allow an appellant to see the evidence against him, the appellant may be represented by a ''special advocate'', a senior, security vetted barrister who acts on behalf of the appellant. Once the evidence is given to the special advocate, he may no longer communicate with his ''client'' or his legal representatives, who remain therefore in ignorance of the full weight of the case against them. He is forced to rely instead upon

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the integrity and resources of the tribunal itself to arrive at the proper conclusion. These are the sorts of compromises with principle into which the war on terrorism appears to have forced us.

A.T.H. SMITH

LEGITIMATE EXPECTATIONS: PROCEDURE, SUBSTANCE, POLICY AND PROPORTIONALITY

THE appellants in *R. (Abdi and Nadarajah)* v. *Home Secretary* [2005] EWCA Civ 1363 sought to challenge steps taken by the respondent to deport them to Germany and Italy respectively (the States responsible under international arrangements for determining their asylum claims) rather than deciding the claims himself. The appellants argued that such action was precluded by the Home Secretary's own policy, which provided that asylum claims should generally be considered domestically where (*inter alia*) "the applicant's spouse is in the United Kingdom" or "the applicant is an unmarried minor and a parent is in the United Kingdom". Abdi argued that she fell into the latter category (her mother had been granted asylum in 2000), while Nadarajah relied on the former (his wife was in the UK, appealing against an adverse asylum decision). Giving the only reasoned judgment, Laws L.J. made a number of important (if obiter) observations concerning the doctrine of legitimate expectation and related matters.

As his Lordship recognised, there is certainly a case for holding that, in the absence of "a reasoned justification", public decision-makers are "oblige[d] ... to apply a stated policy to those to whom it is directed". However, it is unclear whether his Lordship was right to suppose (along with the court in *Rashid* [2005] EWCA Civ 744) that legitimate expectation furnishes an adequate doctrinal basis for a requirement of adherence to policy, particularly where the individual had no knowledge of it at the relevant time. It is true that the normative concerns (including transparency and certainty) underpinning such a requirement share much in common with those that animate the legitimate expectation doctrine. However, where the individual is ignorant of the policy (as Nadarajah apparently had been), the justification for enforcing adherence to it must be found primarily in the need for consistent and equal treatment of like cases independently of the virtue of protecting *expectations*. In fact, there is (as Collins J. recently acknowledged in *R. (A)* v. *Home Secretary* [2006] EWHC 526

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(Admin)) a strong argument for doctrinal disaggregation here, by recognising a requirement of adherence to lawful policies (unless departure can adequately be justified) which is independent of the legitimate expectation doctrine. It is, however, worth noting that the relationship between such a requirement and the non-fettering rule which precludes undue reliance on policy remains fully to be worked out.

Notwithstanding his preparedness, in principle, to hold the Home Secretary to his policy, Laws L.J. found that the Minister was entitled to conclude that, owing to her age (about which there had been some dispute), Abdi fell outside the policy. It was also held that a revised version of the policy (which excluded spouses of asylum-seekers in receipt of an initial adverse decision) could lawfully be applied to the disadvantage of Nadarajah. Such action, said Laws L.J., disclosed no abuse of power, in light of the Home Secretary's honest but mistaken belief that the *original* version of his policy excluded persons (like Nadarajah) married to "failed" asylum-seekers, and the absence of any reliance by the appellant on the original policy. However, Laws L.J. avowedly found the reasoning that had led him to this conclusion "unsatisfactory", thinking it "little distance from a purely subjective adjudication". He therefore sought to identify a more principled basis for deciding such cases.

He took as his starting point the proposition that the doctrine of legitimate expectation is underpinned by a "requirement of good administration" which demands that public bodies "deal straightforwardly and consistently with the public", but about whose reach the "dichotomy between procedure and substance has nothing to say". This may seem startling in light of the contrast, which has long been a defining feature of English administrative law, between the courts' rigorous supervision of the administrative *process* and their more reticent approach—classically, if elliptically, articulated by Lord Greene M.R. in *Wednesbury* [1948] 1 K.B. 223—to the *substance* of administrative decisions. And, although substantive review is now more rigorous in human rights cases, judges have been at pains to emphasise that there must remain what Laws L.J. has elsewhere called a "principled distance" between the respective roles of court and decision-maker: *Mahmood* [2001] 1 W.L.R. 840. The process/substance distinction has undeniably shaped the doctrine of legitimate expectation. In particular, the circumstances capable of triggering substantive enforcement of expectations are much more tightly defined than those which yield procedural protection. This distinction reflects the greater inroads into discretion made by the closing-off to decision-

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makers of substantive *outcomes* than by regulation of the *process* which precedes the agency's decision—a distinction to which importance is ascribed by deeper concerns about the implications, under the separation of powers, of judicial intervention on substantive as opposed to procedural grounds.

Laws L.J.'s eschewal of the process/substance distinction finds practical application in his view that the legality of a decision to frustrate any legitimate expectation—procedural or substantive—turns on whether such action is "a proportionate response ... having regard to a legitimate aim pursued by the public body in the public interest". This conclusion, like the premise concerning substance and procedure on which it rests, is not without difficulty. Certainly, a proportionality-style test may be apt where a court has resolved that a substantive expectation can lawfully be dashed only where it is outweighed by some competing public interest (see, *e.g.*, *Coughlan* [2001] Q.B. 213). It does not, however, follow that proportionality is a touchstone which can or should determine the legality of *any* decision which cuts across a legitimate expectation. For instance, the court may prefer to hold that a substantive expectation should be protected by characterising it as a (mandatory) *relevant consideration* (see, *e.g.*, *Bibi* [2001] EWCA Civ 607, [2002] 1 W.L.R. 237) or through insistence on *procedural fairness* in the taking by the public body of the decision whether to frustrate (see, *e.g.*, *Jones* [2005] EWHC 2270 (Admin)). More straightforwardly, where the legitimate expectation in play is in the first place procedural, the most the court can do is to require adherence to the *anticipated procedure*. In these circumstances, questions of proportionality seem beside the point: indeed, reliance on that concept may actually blunt judicial review, bearing in mind that, on questions of due process, the courts traditionally take a hard-edged approach uncompromised by any supposed need to defer to the agency's view of what is appropriate.

The search for principle in this sphere is to be applauded, and proportionality is certainly capable of supplying a principled structure for analysis in some cases. It is, however, mistaken to suppose that proportionality—or any other principle—can be a panacea. The content of, and the implications of protecting, legitimate expectations are not uniform, and it is unsurprising that judicial review of decisions which conflict with such expectations also exhibits diversity, in terms of both the intensity and the mode of scrutiny. The real challenge lies in the articulation of a framework capable of accommodating such diversity in a principled fashion.

MARK ELLIOTT

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ON BEING DISPOSSESSED OF A HEAD OF CLAIM IN A PENDING CASE

In two recent judgments, the Grand Chamber of the European Court of Human Rights affirmed that a Member State could violate the right to property enshrined in Article 1 of the First Protocol to the Convention by barring a claim through legislation applicable to pending cases: *Draon* v. *France* [GC], Application no. 1513/03; *Maurice* v. *France* [GC], Application no. 11810/03; judgments of 6 October 2005.

The issue arose in relation to the legislative curtailment of claims for "wrongful birth" and "wrongful life" in France. On 7 March 2002, new legislation came into effect which excluded any claim by a person, born with congenital or other disabilities not directly caused by medical negligence, in relation to the negligent non-prevention of his or her birth (*i.e.*, any action for "wrongful life"). The statute also limited any claim by a parent for the birth of a disabled child consequent upon a negligent failure to detect actual or possible disabilities in a fetus, to the extent that "the special burdens arising from the disability throughout the life of the child" would no longer form part of the parent's claim ("wrongful birth"). The law applied to pending cases except where "an irrevocable decision on the principle of compensation" had already been taken. Prior to the legislative change in March 2002 the French courts had recognised both wrongful life and wrongful birth claims (see Conseil d'Etat, Sect., 14 February 1997, *Centre hospitalier de Nice* v. *Quarez,* Rec. p. 44—wrongful birth; Cour de Cassation, Ass. Plén., 17 November 2000, Bull. Ass. Plén., no. 9 (*Perruche*)—wrongful life).

The applicants were affected by the birth of very gravely disabled children who required permanent 24-hour care and attendance, after they were negligently misinformed about the results of amniocentesis. They had started proceedings against the responsible service-providers in 1999 and 2000 respectively and would have been entitled to compensation for the costs of raising their disabled children but for the law passed in March 2002. The applicants contended, *inter alia,* that by blocking their claim to compensation insofar as it related to the special burdens arising from the disability of the child, the new legislation was in breach of Article 1 of Protocol 1, which guarantees to everyone "the peaceful enjoyment of [their] possessions", and the Court indeed found a violation of this right.

That the applicants would succeed with a complaint based on the right to property must at first blush appear surprising. But this is not the only occasion on which the European Court of Human

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Rights has accepted that claims may, in certain well-defined situations, be "possessions" within the meaning of Article 1 of Protocol 1. In order to qualify as a "possession", a claim must have a firm basis in national law (for instance in settled case law: see *Kopecký* v. *Slovakia* [GC], Application no. 44912/98, ECHR 2004-IX). Once a claim falls within the ambit of Article 1 of Protocol 1, the right-holder has a legitimate expectation that the established case law of the national courts will continue to be applied in respect of the damage that has already occurred. In the present case, the applicants had a claim which, prior to the enactment of the impugned law, they could legitimately have expected to be determined in accordance with the ordinary law of liability for negligence, and therefore had a "possession" protected by Article 1 of Protocol 1.

Restrictions of the right to property are, in essence, subject to a lawfulness requirement and a proportionality test. The Court recognises that "the applicability of legislation to pending proceedings does not necessarily in itself upset the requisite fair balance [between the demands of the general interests of the community and the affected individuals' fundamental rights], since the legislature is not in principle precluded in civil matters from intervening to alter the current legal position through a statute which is immediately applicable" (*Maurice* v. *France,* para. 89). But the new legislation "abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money" (para. 90)—a step that cannot lawfully be taken without providing the applicants with compensation "reasonably related to the value of their lost asset" (para. 91).

The most important direct implications of these judgments for English law do not lie in the field of medical law, but in the area of constitutional law. In England, unlike France, retrospectively applicable statute law (except for procedural rules) is unusual. But judicial changes to the law are no less rare than in other legal systems, and in certain instances (such as "overruling") they qualify perhaps more openly as "judicial legislation" than changes to an established jurisprudence in civil law systems do. If the retrospective curtailment of a claim by statutory legislation can violate the right to property, then so can, in principle, the curtailment of a claim by judicial decisions with comparable retrospective effects. To the extent that a change in the case law raises an issue under Article 1 of Protocol 1, the higher courts may well have to rethink their reluctance to engage in prospective overruling (see the discussion in *National Westminster Bank plc* v. *Spectrum Plus Limited and others* [2005] UKHL 41, noted [2005]

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C.L.J. 554). Alternatively, in order to avoid being caught by Article 1 of Protocol 1 they can in appropriate cases make plain their intention to reconsider a settled point of law in the future.

Of course, not every judicial development of the law raises an issue under Article 1 of Protocol 1. The judgment must change settled case law, and that change must be profound, coming close to a U-turn in the development of the jurisprudence (whether in form, as when an earlier decision is overruled, or in substance), and in its effects substantial. Moreover, only "claims" fall within the scope of Article 1 of Protocol 1; its protection does not extend to every settled legal position or question. Arguably, therefore, changes which broaden the scope of a damages claim (for instance by allowing a separate head of claim, such as the "conventional award" for a violation of the freedom to limit the size of one's family introduced by the House of Lords in *Rees* v. *Darlington Memorial Hospital NHS Trust* [2004] 1 A.C. 309) remain unaffected, as do changes which remove, with immediate effect, certain immunities from or restrictions on claims. In these cases, there is of course a party who experiences economic loss. But since this economic loss is not brought about by way of curtailment of a "claim", such changes to the law do not bring Article 1 of Protocol 1 into play.

A prime example of judicial legislation which (if it had ever been challenged before the European Court of Human Rights) might have been caught by Article 1 of Protocol 1 is the judgment in *McFarlane* v. *Tayside Health Board* [2000] 2 A.C. 59, which originally excluded any claim for the costs of raising a healthy child in wrongful birth cases. Whether any future developments in this area of law would raise an issue under the right to property depends on the direction they might take. Though the European Court of Human Rights leaves Member States' courts free to restrict claims prospectively, it is to be hoped that no further restrictions will be imposed on existing wrongful birth claims.

ANTJE DU BOIS-PEDAIN

A BIT JUSTICIABLE

IN *Republic of Ecuador* v. *Occidental Exploration and Production Co.* [2005] EWCA Civ 1116, [2006] 2 W.L.R. 70, the Court of Appeal (Civil Division) confronted issues stemming from the first challenge in the English courts to the jurisdiction exercised by an arbitral panel when adjudicating a dispute between a foreign State and an

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investor arising out a bilateral investment treaty (or "BIT", as the jargon has it).

In 1993, the United States of America and Ecuador concluded a typical BIT. Article VI provides for mixed arbitration in the event of an investment dispute: that is, nationals and companies of one State investing in the other State enjoy the right to bring arbitral proceedings against that other State without recourse to the traditional mechanism of the diplomatic protection of the first State. Paragraph 1 of Article VI defines "investment dispute" as follows:

> a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorisation granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

Occidental, a US company, acquired the right to explore and exploit certain oil reserves in Ecuador under a contract with a State-owned Ecuadorian corporation. A dispute arose between it and the Ecuadorian tax authorities over VAT. In accordance with Article VI of the US–Ecuador BIT, Occidental submitted the dispute for settlement by binding arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL rules"). The place of the arbitration, as recorded in the award, was London. Ecuador unsuccessfully contested the tribunal's jurisdiction and, on the merits, the arbitrators found for Occidental on all but one point. Ecuador applied to the High Court to have the award set aside under section 67 of the Arbitration Act 1996, in accordance with which a party to arbitral proceedings may challenge "any award of the arbitral tribunal as to its substantive jurisdiction" or may seek "an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction". It sought to argue that the tribunal had misinterpreted Article X of the US–Ecuador BIT, which excluded matters of taxation and therefore ought to have precluded Occidental's claim. The trial of a preliminary issue was ordered in respect of Occidental's prior objection that the claim was non-justiciable insofar as it required the court to interpret provisions of the US–Ecuador BIT. Aikens J., in the Queen's Bench Division, found for Ecuador.

The Court of Appeal (Mance L.J., as he then was, giving the judgment of the court) dismissed Occidental's appeal, holding that

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the court enjoyed jurisdiction to entertain Ecuador's claim under section 67 of the Arbitration Act.

Mance L.J. first disposed of Occidental's submission that what the company was doing by way of its claim under Article VI was enforcing the USA's rights under the BIT. His Lordship took the view that where, as under Article VI(l)(a), a dispute arose out of or related to a commercial agreement between a Party and an investor, it was "both artificial and wrong in principle to suggest that the investor is in reality pursuing a claim vested in his or its home State". As for claims under Article VI(l)(c), and probably also those under Article VI(l)(b), any substantive right on the investor's part would have to be found in the treaty, in which case the treaty "would have to be regarded as conferring or creating direct rights in international law in favour of investors". Citing *Jurisdiction of the Courts of Danzig* P.C.I.J. Series B, No. 15 (1928), pp. 17–18 and *LaGrand* [2001] I.C.J. Rep. 466, and drawing attention to human rights instruments such as the ECHR, Mance L.J. considered it well established that "treaties may in modern international law give rise to direct rights in favour of individuals", "particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national State's involvement or even consent". As regards the US–Ecuador BIT, the language of Article VI(1) made it clear that injured nationals or companies were to have standing in respect of all three types of claim specified in subparagraphs (a), (b) and (c), respectively, which led to the conclusion, in the words of one author and in line with the views expressed in numerous international arbitral awards cited by his Lordship, that "the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State" (quoting Z. Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" (2003) 74 B.Y.B.I.L. 151, 182).

Mance L.J. then addressed the issue of non-justiciability in exhaustive detail (albeit with a certain lack of focus), dealing with both the broad doctrine of "judicial restraint or abstention" enunciated by Lord Wilberforce in *Buttes Gas and Oil Co.* v. *Hammer (No. 3)* [1982] A.C. 888, namely that the English courts "will not adjudicate upon the transactions of foreign sovereign States", and the narrower doctrine recognised by Lord Oliver in the *Tin Council* case (*J.H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry)* [1990] 2 A.C. 418, that the English courts "have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign States between themselves on the plane of

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international law''—in short, that unincorporated treaties are non-justiciable.

As regards the latter, Mance L.J. stressed Lord Oliver's acknowledgment that the principle he posited ''[did] not ... involve as a corollary that the court must never look at or construe a treaty'', highlighting the exceptions identified by his Lordship, to which he added a few more drawn from the case law before concluding that ''English courts are not ... wholly precluded from interpreting or having regard to the provisions of unincorporated treaties''. They were permitted to do so ''for the purpose of determining a person's rights or duties under domestic law'', in the words of Simon Brown L.J. in *R. (Campaign for Nuclear Disarmament)* v. *Prime Minister of the United Kingdom* (2002) 126 I.L.R. 727. In the instant case, the court, which under the relevant English law principles of private international law recognised the agreement to arbitrate between Ecuador and Occidental, was ''being asked to interpret [the treaty's] scope in order to give effect to the rights and duties contained in the agreement to arbitrate'', and, as such, was not barred from considering the US–Ecuador BIT.

On the *Buttes* question, Mance L.J. observed that the agreement to arbitrate gave rise to rights on the part of Ecuador and Occidental respectively, ''including the right to have disputes arbitrated within its terms and not to have disputes arbitrated which fall outside its terms'', and he saw ''no good reason why any arbitration held pursuant to such an agreement, or any supervisory role which the court of the place of arbitration may have in relation to any such arbitration, should be categorised as being concerned with 'transactions between States' '' so as to implicate *Buttes* non-justiciability. Having earlier emphasised Lord Wilberforce's concern over the absence of ''judicial or manageable standards'' by which to judge the issues in *Buttes,* his Lordship conceded that the present questions were unlikely to be as clear-cut as those in *Kuwait Airways Corpn.* v. *Iraqi Airways Co. (Nos. 4 and 5)* [2002] A.C. 883, where the House of Lords distinguished *Buttes* on this point; but he was confident that they were not ''remotely comparable in difficulty of manageability or resolution or in sensitivity'' to the issues in *Buttes* itself. It was ''equally impossible to see'' how the challenge to the arbitrators' jurisdiction ''could be said to raise any considerations relating to this country's national and international interests remotely equating to those found in the *Buttes Gas* case''.

Moreover, his Lordship believed that ''the fact that the States party to the treaty deliberately chose to provide for a mechanism for dispute resolution which invokes consensual arbitration, with its

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domestic legal connotations, is a factor which should make the English court hesitate long about subjecting such arbitration proceedings to special principles of judicial restraint developed in relation to international transactions or treaties lacking any foundation or incorporation in domestic law". He noted, finally, that courts in other countries had "exercised or assumed that it was open to them to exercise equivalent supervisory power to review the jurisdiction of arbitrators appointed under investment treaties", citing *Czech Republic* v. *CME Czech Republic BV* (2003) 42 I.L.M. 919 and *Canada (Attorney General)* v. *S. D. Myers Inc.* [2004] 3 F.C.R. 368.

On these core issues, the Court of Appeal's judgment is unimpeachable, and evidences an assured understanding on the part of the now Lord Mance of complicated questions regarding the relationship between international and English law. One can quibble with his view, expressed *en passant,* that the agreement to arbitrate deemed by the BIT to have arisen between Ecuador and Occidental was best seen as governed by international law, but his lack of dogmatism on this score is refreshing. The decision will no doubt see more mixed arbitrations challenged in the English courts, although what the Court of Appeal giveth the House of Lords taketh away with its decision on a different point in *Lesotho Highlands Development Authority* v. *Impregilo SpA* [2005] UKHL 43, [2005] 3 W.L.R. 129. More generally, *Ecuador* v. *Occidental* marks a further stage in the slow death of *Buttes* non-justiciability.

ROGER O'KEEFE

NO SAFE HAVEN FOR UGANDA IN THE WORLD COURT

ON 19 December 2005, the International Court of Justice delivered judgment in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda*) I.C.J. Reports 2005. The proceedings dealt with Uganda's involvement in the catastrophic civil war and multi-State conflict that engulfed the Democratic Republic of the Congo ("DRC") between 1998 and 2003. The space available permits only a brief outline of this multifaceted judgment. There are also nuances and criticisms in the three declarations, four separate opinions and one dissenting opinion that are not examined. This note's primary focus will be on the law governing use of force.

The *dispositif* consists of fourteen parts. The Court held that Uganda had violated the principles of non-use of force and non-

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intervention. It stated, in the reasoning, that the magnitude and duration of Uganda's military intervention made it a "grave" violation of UN Charter Article 2(4). The Court did not, however, qualify this conduct as "aggression" or even discuss the DRC's specific request for such a finding (see criticism in the separate opinions of Judges Elaraby and Simma). Uganda also breached a range of obligations under international human rights law ("IHRL") and international humanitarian law ("IHL"). The main findings against Uganda were supported either unanimously or by a margin of sixteen to one. Judge Kateka (Uganda's *ad hoc* appointee) dissented on several grounds. Judge Kooijmans joined him in voting against the finding that Uganda had not complied with the 1 July 2000 order on provisional measures.

Uganda relied upon consent and self-defence as circumstances precluding the wrongfulness of its use of force. The Court found that the DRC had given consent to limited Ugandan counter-insurgency activities in its eastern border area; but the authorisation was withdrawn by 8 August 1998 at the latest. Further, the provisions of the Lusaka Agreement of 10 July 1999, and subsequent instruments entered into as part of the peace process, did not legalise Uganda's troop presence (save for a narrow exception in the Luanda Agreement of 6 September 2002).

Uganda pleaded self-defence only in respect of the period between 11 September 1998 and 10 July 1999. 11 September was the date of a Ugandan High Command paper describing the objectives for a large-scale operation known as "Safe Haven". But the Court found that Ugandan actions throughout August were already part of "Safe Haven" and far exceeded any prior Congolese consent.

Since Uganda purported to rely upon the right of self-defence in response to actual armed attacks, the Court declined to express any view on the legality of pre-emptive self-defence. It observed, however, that the "legitimate security interests" enumerated in the High Command document were "essentially preventative".

Uganda alleged a tripartite conspiracy between the DRC, a rebel group known as the "Allied Democratic Forces" and Sudan. The Court was not satisfied by Uganda's evidence. It acknowledged that Uganda had suffered a series of rebel attacks resulting in many deaths, injuries and abductions. Nonetheless, even if these attacks could be regarded as cumulative in character, they remained non-attributable to the DRC. The Court stated, *inter alia,* that the attacks did not emanate from armed bands sent by or on behalf of the DRC. This echoed its restrictive view in *Nicaragua* v. *United States of America (Merits) ("Nicaragua")* I.C.J. Reports 1986,

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p. 14, p. 103, para. 195). But the Court added that, owing to the absence of the legal and factual requirements for the exercise of a right of self-defence, it had "no need to respond" to the parties' contentions concerning "whether and under what conditions" international law permits self-defence against large-scale attacks by irregular forces.

This sleight of hand attracted criticism. Judge Kooijmans noted the implicit rejection of Uganda's more elastic criteria. On the general question of UN Charter Article 51 and its application to non-State actors, he construed the judgment as being consistent with the Court's State-centric interpretation in the 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Wall*" opinion) I.C.J. Reports 2004, p. 194, para. 139, (2004) 43 I.L.M. 1009, 1049–50. Judge Kooijmans repeated his view that the concept of "armed attack" in Article 51 is not limited to attacks that are attributable to a State. Judge Simma concurred, arguing that State practice and *opinio iuris* since 9/11 reflects an interpretive shift that should be recognised by the Court. Yet in 2004 he was remarkably silent about these developments. By way of contrast, Judges Higgins and Buergenthal, who plainly did contest the Court's cursory reasoning in the *Wall* opinion, appear to have been content with its enigmatic approach in *DRC* v. *Uganda*.

The Court did not address the customary conditions of necessity and proportionality beyond noting that the capture of airports and towns many hundreds of kilometres inside the DRC did not seem proportionate to the series of cross-border attacks Uganda claimed to be defending against, nor to be necessary to that end. It emphasised that Article 51 establishes "strict confines" for the exercise of self-defence and does not permit the use of force by a State to protect perceived security interests beyond these parameters. The Court added that other means are available to a concerned State, including recourse to the Security Council.

The training and support given by Uganda to the *Mouvement de libération du Congo* further violated the principles of non-use of force and non-intervention. However, the evidence did not indicate that the actions of this rebel group could be legally treated as those of Uganda. The Court concluded that "[a]ccordingly, no issue arises" as to whether the "requisite tests" were met for "sufficiency of control". It confined itself to citing, parenthetically, certain passages in *Nicaragua*. By this evasive manoeuvre it bypassed any discussion of the controversial "effective control" standard of responsibility for the actions of armed bands.

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Turning to *ius in hello* issues, Uganda was held to be an "occupying Power" in relation to Ituri district of the DRC on the basis that its forces were not merely stationed in particular locations but had substituted their own authority for that of the Congolese government. Uganda was responsible for the wrongful acts of its own military wherever located in the DRC. But, in occupied Ituri, it was also responsible for lack of vigilance in preventing violations of IHRL and IHL by *other* actors, including rebel groups. Ugandan troops were found to have committed a range of egregious abuses. In identifying relevant contraventions, the Court affirmed its view in the *Wall* opinion that IHRL may operate extraterritorially and concurrently with IHL.

The Court also found ample evidence that Ugandan military personnel—including the most high-ranking officers—were engaged in acts of looting, plundering and exploitation in breach of IHL. The DRC further contended that Ugandan conduct violated the principle of permanent sovereignty over natural resources. While acknowledging that this principle had entered customary international law, the Court found it inapplicable where exploitative acts are carried out by members of the armed forces of one State militarily intervening in another. In respect of Ituri, Uganda's obligations again were more onerous; it was required to take appropriate measures to prevent pillage not only by its own forces but also by private persons.

Uganda brought two counter-claims against the DRC. The first alleged that successive Congolese governments had either supported or tolerated armed activities by anti-Ugandan insurgents in the border region. The Court rejected this on the merits. The evidence was insufficient to prove active support at any time. Further, in the period prior to May 1997, the Mobutu regime's passivity towards rebel groups could not be regarded as acquiescing in their activities in such a way as to breach Zaire's duty of vigilance. Judges Kooijmans and Tomka strongly disputed the Court's reasoning in relation to this first period. Between May 1997 and 2 August 1998, the DRC had made efforts to suppress the rebels. From August 1998 onwards, the DRC was entitled to use force in self-defence to repel Ugandan attacks (and, in any event, its involvement in rebel activities was not proven). Uganda's only consolation was the partial success of its second counter-claim, insofar as it concerned breaches of the 1961 Vienna Convention on Diplomatic Relations.

The Court's approach to evidentiary assessment followed principles set out in *Nicaragua*. For example, it assigned high probative value to statements against interest made by senior Ugandan officials before the Porter Commission. Conversely, it was

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sceptical—if not disdainful—of materials that had been specially prepared for the instant litigation, or that were based on uncorroborated or partisan sources. Evidence will again be crucial in determining the quantum of reparation; the Court deferred this question to a subsequent phase of the proceedings (failing prior agreement between the parties).

In *DRC* v. *Uganda,* the Court's reasoning skims over certain controversial points or dodges them entirely. Of course, this is hardly unique to the present judgment and was facilitated by the forensic strategies chosen by the parties. According to certain judges, the Court has forgone a precious opportunity to "clarify" the law. But what some will berate as unhelpful timidity, others might applaud as prudent restraint. Like other recent efforts, this judgment will provoke debate not only for its express content but also for what it fails to articulate.

JUSTIN CHENEVIER

DRUNKEN DEFENCE

IT is black-letter law that a defendant who kills or maims in self-defence is entitled to be judged on the facts as he believed them to be. And it is also well established that the crucial question in such a case is whether the defendant's belief in those facts was honest, not whether it was reasonable. If the defendant honestly but unreasonably believed himself to be under attack, he is entitled (in effect) to the benefit of his unreasonable mistake. This rule was laid down by the Court of Appeal in *Williams* (1984) 78 Cr.App.R. 276 and affirmed by the Privy Council in *Beckford* v. *R*, [1988] A.C. 130.

But what if he was drunk? Here the Court of Appeal in *O'Grady* [1987] 1 Q.B. 995 and *O'Connor* [1991] Crim. L.R. 135 said the rule is different: a defendant who unreasonably believes he is being attacked because his understanding is dimmed by alcohol or drugs (or both) is to be judged on the facts as they were, and not as he erroneously imagined them. It follows, said the court in these two cases, that if he kills his supposed attacker by acts intended to kill or cause grievous bodily harm, he is guilty of a murder. In neither of these cases was this harsh rule actually applied, because both defendants ended up with manslaughter convictions for other, unconnected reasons. But in *Hatton* [2005] EWCA Crim 2951, [2006] 1 Cr.App.R. 16 (247) the Court of Appeal has now reaffirmed the rule, and actually applied it.

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Hatton, although not gay, was seen "camping it up" in a bar before he invited Pashley, the future victim, back to his flat. Pashley was a homophobe who claimed to belong to the SAS, and he was also a manic depressive, in a manic mood; before being picked up by Hatton he had been "behaving in a strange fashion" and "striking martial arts poses" in the pub. Back at the flat a fight broke out which Hatton won conclusively, by slaying Pashley with a sledgehammer. Hatton, who had drunk some 20 pints of beer, claimed to remember nothing: but he said "I must have believed that I was under attack". The trial judge told the jury to acquit Hatton of murder if they believed he might have acted in the honest belief that Pashley was attacking him—but, following *O'Grady* and *O'Connor*, omitted to tell them, when considering this, to bear in mind that Hatton was extremely drunk. The jury convicted him of murder—and the Court of Appeal, approving the direction, upheld the conviction.

It is understandable that the courts dislike defendants who support their claim to have acted under a mistake by evidence that they were drunk: the excuse itself consists of the inexcusable. But where a person kills another person in the genuine belief (however unreasonable) that the other was about to kill or maim him, to convict him of the offence of murder, with its mandatory life sentence, is remarkably severe. And it is also strangely inconsistent, too, with the rest of the law in relation to drunken mistakes. If Hamlet, high on drugs, kills Polonius because he honestly but unreasonably believes the shape behind the arras is a rat, he has the benefit of his mistake and his crime is manslaughter at most: see *Lipman* [1970] 1 Q.B. 152. But if he does the same thing in the equally honest but unreasonable belief that Polonius is an assassin lurking there to kill him, his crime, as we have seen, is murder.

This harsh and inconsistent rule is clearly not required to prevent those who kill or maim under the influence of drink or drugs from "walking free".

First, the issue here is only whether drunks should be allowed the benefit of their unreasonable mistakes *as to the underlying facts*. There is no question of allowing a defendant who understands the basic facts to be judged by his own drink or drug-warped perception of what it is reasonable to do in response to them. What is "reasonable" in this sense is an objective question, on which defendants (drunk or sober) disagree with juries at their peril, as the Court of Appeal recently reminded us in the case of "Saint" Tony Martin, the farmer who put the bullet in the back of the retreating burglar: *Martin* [2003] 2 Q.B. 1.

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Second, there is no question, even where the issue is the defendant's drunken mistake as to the underlying facts, of allowing him to escape punishment completely. Where drunken mistakes are concerned the law, on policy grounds, divides criminal offences into two groups: "crimes of specific intent", which carry the most severe penalties, and "crimes of basic intent", which are the rest. According to the leading case, the House of Lords decision in *Majewski* [1977] A.C. 443, a person may use his intoxicated state as evidence that he lacked *mens rea* when tried for offences in the first group, but not the second. It was on this basis that Lipman, who had strangled his girl-friend on an LSD trip when he thought he was fighting snakes in the centre of the earth, was acquitted of murder, but convicted of manslaughter. If this is how the law treats intoxicated mistakes which deprive the defendant of the *mens rea* for the offence, it is also how it could—and surely should—treat intoxicated mistakes as to external facts which, if true, would support a general defence.

In *Hatton* the Court of Appeal affirmed the conviction without much examination of the underlying issues, because it believed that it was bound by a clear line of authority. It did certify a point of public importance, but it also refused leave to appeal. This, I believe, was unfortunate. *O'Grady*, the case this story starts from, was an unreserved judgment, in which the issues were not thoroughly examined, as writers then and since have pointed out; and so too was *O'Connor*. With all due respect to a court that does its commendable best in the face of a gross excess of work, it could be said that this "clear line of authority" has evolved by a process reminiscent of Fougasse's cartoon about the spread of news in wartime: "two lies = one rumour; two rumours = one good authority ...". The issues in this case are important ones, and it is high time they were considered by the House of Lords.

J.R. SPENCER

ASBESTOS AND ANXIETY

IN the important test case *Re Pleural Plaques Litigation* [2006] EWCA Civ 27, the claimants had all been negligently exposed to asbestos dust by their defendant employers. As a result, patches of benign fibrous tissue (plaques) had formed on the membranes surrounding the lungs of the claimants (*viz*. their pleura). The central issue for the Court of Appeal was whether these pleural plaques constituted actionable damage, for the purposes of a

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negligence suit against the employers. The majority (Lord Phillips of Worth Matravers C.J. and Longmore LJ.) held that they did not. While the plaques were indisputably a physiological change, in 99% of cases they presented absolutely no physical symptoms detectable to the sufferer (and in the remaining one per cent occasioned some minor discomfort). In accordance with the maxim *de minimis non curat lex,* the development of the pleural plaques could not be a damaging event so as to provide the "gist of the action" in negligence. Thus, the claims failed.

Why sue over a painless and benign condition of this sort? The claimants also harboured understandable fears that they might go on to develop other (very serious) asbestos diseases, mesothelioma or asbestosis. It should be noted that these do not develop from pleural plaques, the presence of which simply has an evidential effect, signalling that substantial amounts of asbestos have been inhaled, which means an increased risk of the diseases. However, anxiety is not in itself actionable damage in negligence (unless so severe as to constitute a "recognised psychiatric illness"). Second, it follows from *Gregg* v. *Scott* [2005] UKHL 2, [2005] 2 A.C. 176, that the possibility of developing a disease in the future is not in itself actionable, either. The ingenious argument for the claimants was that three non-actionable kinds of damage (the plaques; the current anxiety; the threat of future disease) could somehow be actionable, taken together in combination. The Court of Appeal was surely right to resist this invitation, which it fairly described as illogical. And even if the alchemy involved could be squared with doctrinal logic, several policy factors militated against such an expansion of actionable damage.

Smith L.J., in dissent, provided weighty rebuttals of the policy arguments. At the heart of her judgment was an emphasis upon the anxious plight of those exposed to asbestos. While the claimants' chances of contracting mesothelioma (a particularly nasty and unbeatable cancer) were, in absolute terms, low, in the order of 1–5%, this was nevertheless 100–500 times *greater* than the background risk in the population at large. So the *increase* in risk was very considerable. With respect, while there is much to be said for holding such an increased risk actionable, this is surely ruled out now by *Gregg* v. *Scott,* where a chance of recovery lost through medical misdiagnosis was held not to be actionable damage.

In fact, the all-or-nothing rule is less harsh in the present case than in *Gregg* itself. Where there is uncertainty because an event may or may not happen in the future (developing mesothelioma), it can be completely resolved by simply waiting to see whether it

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does, indeed, happen. This should not be a hardship on claimants (unless, perhaps, an award of damages might facilitate preventative action). "Wait and see" no doubt offends the sensible policy that claims should be brought promptly and litigation should be final, but as the Court of Appeal pointed out, Parliament has intervened in this area: limitation periods start only when the claimant has knowledge of the injury, and under section 32A of the Supreme Court Act 1981 a claimant can opt for provisional damages, with the right to return to court should his condition worsen. In a "past hypothetical" case like *Gregg* v. *Scott* on the other hand (what *would have happened* had the diagnosis been correct?) the uncertainty (being in the past) must remain unresolvable, however long we might wait. This gives rise to the uncertainty problem which the House of Lords confronted in that case.

The claimants' approach (and perhaps that of Smith L.J.) is reminiscent of that which Lord Hope of Craighead (dissenting) accepted in *Gregg* v. *Scott*. Where non-actionable damage (anxiety; the threat of disease; a lost chance of recovery) arises in a situation where *other actionable damage* is present, then there is a complete tort, and the "non-actionable" damage will be included in the assessment of damages. This is trite law; Lord Phillips C.J. cited Lord Wensleydale in *Lynch* v. *Knight* (1861) 9 H.L.C. 577, 598: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested". Of course, the argument failed in *Pleural Plaques* since their development was not actionable, and thus the peg on which to hang the anxiety claim was missing. But in a case where actual, actionable damage is present, it is back-to-front to see this as an artificial "control device" to enable the limited compensation of anxiety (*etc.*)—*pace* Lord Phillips at [66] (and Lord Hoffmann in *Gregg* v. *Scott* at [86]–[88]). Rather, such recoverability directly follows as a matter of fundamental principles of actionable damage and recoverable loss. Hence it is important to analyse the boundaries of "actionable damage" with considerable care. The Court of Appeal laudably did this in the present case. It is suggested, with respect, that rather less care was taken by the majority of their Lordships in *Gregg* v. *Scott,* and that Lord Hope's dissenting opinion that there was a complete tort once the misdiagnosis caused the claimant's tumour to enlarge, invading neighbouring tissues and causing him severe pain, possesses very considerable force. It would pass the test for actionability applied in the present case. In its eagerness to address

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the "loss of a chance" conundrum the House of Lords seems to have lost sight of the other forms of actionable damage, which as the *Pleural Plaques* case demonstrates, remain highly significant.

JONATHAN MORGAN

HYPOTHETICAL BARGAINS: COMPENSATION OR RESTITUTION?

IT was held in *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798 that, where a defendant had built houses in breach of a restrictive covenant, the appropriate remedy was damages in lieu of an injunction to demolish the houses. These damages were assessed by reference to the price which the claimant would reasonably have demanded of the defendant to agree to a waiver of the covenant. This bargain was most definitely hypothetical because it was acknowledged that the claimant would not have agreed to waive the covenant. The damages were assessed as 5% of the defendant's profit from building the houses. But it is unclear how this particular figure was determined. Further, it is unclear whether this hypothetical bargain measure should be characterised as compensatory, by reference to what the claimant had lost in not being able to bargain with the defendant, or restitutionary, by reference to what the defendant had saved in avoiding the bargain, or whether this characterisation matters. Two recent decisions have somewhat belatedly sought to clarify the rationale and ambit of this hypothetical bargain measure.

In *Horsford* v. *Bird* [2006] UKPC 3 the claimant had sued the defendant for the tort of trespass to his land in Antigua. The defendant had built a boundary wall purportedly between his property and that of the claimant, but in fact the defendant had encroached on the claimant's land and added 455 square feet to the defendant's property. The Privy Council concluded that two types of pecuniary remedy should be awarded. First, mesne profits specifically to compensate the claimant for the defendant's use of the claimant's land until the point when the trial judge determined that damages should be awarded in lieu of an injunction to remove the wall. Second, damages in lieu of an injunction representing the price which the claimant would reasonably have demanded for the defendant to purchase part of the claimant's property by virtue of the *Wrotham Park* measure. This price was initially assessed by reference to the value of the land which the defendant had appropriated, but this amount was then doubled because the appropriation of the land had enhanced the amenity value of the

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defendant's own property by providing vehicular access and a garden, plus the defendant had saved money in not having to demolish the wall and rebuild it along the proper boundary. This analysis is significant but worrying. It is significant because there was explicit reliance on the benefit obtained by the defendant in committing the tort; this is consistent with a restitutionary characterisation of the remedy which deprives the defendant of benefits gained from the commission of a wrong. But it is worrying because the doubling of the value of the land appropriated was not justified; it was simply a sum plucked out of the air without reference to any discernible principles.

In *WWF—World Wide Fund for Nature* v. *World Wrestling Federation Entertainment* [2006] EWHC 184 (Ch) Peter Smith J., in a hearing on a preliminary issue, sought to add some flesh to the bones of the *Wrotham Park* hypothetical bargain measure. The *WWF* case arose from a dispute between the World Wide Fund for Nature and the World Wrestling Federation concerning the use of the initials WWF. The parties had entered into a settlement which had been broken by the defendant. It was agreed that the basis for the assessment of damages was the *Wrotham Park* hypothetical bargain measure, namely what the claimant would reasonably have demanded from the defendant to relax its rights under the agreement. The claimant claimed that this should be 12% of the defendant's gross receipts. The judge rejected this amount on the ground that its calculation was a "complete mystery" and sought instead to identify a number of key principles to assist with the assessment of the appropriate sum. These included:

(1) Determining what the parties would have agreed had each been making reasonable use of their bargaining positions without holding out for unreasonable amounts and having regard to their knowledge at the time of the negotiation.
(2) The award of damages lay in the discretion of the court, having regard to the circumstances of the case. However, two factors were particularly significant, namely whether damages would be an inadequate remedy and to ensure that the innocent party would obtain "just recompense" for the wrongdoer's breach in doing what he agreed not to do. Delay in bringing the claim should also be taken into account.
(3) The bargain was explicitly acknowledged to be hypothetical, since it was irrelevant that the innocent party would not have entered into such an agreement.
(4) Nevertheless, the parties could adduce evidence which would have been used in the hypothetical negotiations. So,

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for example, the claimant could use evidence that its reputation had been tarnished by the defendant using the abbreviation WWF and the defendant could adduce evidence that profits made from the use of the abbreviation may have arisen in part from its own efforts.

(5) The wrongdoer's conduct was irrelevant, since this would incorporate a punitive element in the award of damages for breach of contract.

(6) Crucially, the judge considered that the reasonable price was to be treated as compensatory damages rather than as a punitive award.

The judge is to be commended for his ambitious and original attempt at identifying principles to explain how the sum following a hypothetical bargain should be assessed. Many of the principles are sensible and justifiable. But his analysis is fundamentally flawed by the characterisation of the remedy as compensatory without acknowledging even the possibility of a restitutionary analysis. This causes a number of problems. First, there is an obvious inconsistency since the identified principles implicitly acknowledge a restitutionary slant, particularly as to whether benefits obtained by the defendant arose from the breach of contract or from the defendant's legitimate work. Secondly, there is a clear conflict with the approach of the Privy Council. Third, the emphasis on a compensatory analysis seems misplaced, and liable to mislead, where it is clear that the claimant would not have entered into the hypothetical bargain. For, where no bargain would have been made, how can the claimant have suffered loss from the failure to bargain? Surely in such circumstances it is more sensible to focus on the benefit which was actually obtained by the defendant in not paying the claimant for breaching the contract. Indeed, it has been assumed that the hypothetical bargain is the preferable mode of analysis of the remedy, even though this is by definition a fiction, and, like all fictions, there are dangers of confusion and incoherence, as illustrated in the law of restitution by the absurdities created by the implied contract theory. Fourth, the emphasis on the inadequacy of damages as being a significant factor in assessing the hypothetical bargain award is confused. This is apparently a reference to the inadequacy of compensatory damages. If such damages are inadequate it is presumably because there was no loss which could be identified or valued. But if a hypothetical bargain can be identified and a price for relaxation of the contract assessed, then, if this is characterised as compensation for the failure to bargain, it must follow that compensatory

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damages are adequate and so this factor becomes logically irrelevant. This paradox can be avoided if it is acknowledged that there is a restitutionary dimension to the hypothetical bargain and nothing can be gained by treating it solely as compensatory.

A further problem, not considered explicitly by the judge, concerns when the hypothetical bargain approach should be adopted, as opposed to awarding a full account of profits. This difficulty is illustrated by the different approaches to the award of restitutionary remedies for breach of contract in *Attorney-General* v. *Blake* [2001] 1 A.C. 268, where a full account of profits was awarded, and *Experience Hendrix LLC* v. *PPX Enterprises Inc.* [2003] EWCA Civ 323, [2003] F.S.R. 853, where a reasonable sum was awarded. Edelman in *Gain-Based Damages* (2002, Oxford, Hart Publishing) has suggested that a full account of profits should only be available where the breach of contract was deliberate and cynical. But the significance of the defendant's conduct in breaching the contract was specifically rejected as a factor in assessing damages by Peter Smith J. In addition, we know from both *Blake* and *Experience Hendrix* that restitutionary remedies are exceptional. If it is accepted that the hypothetical bargain is, to some extent at least, restitutionary, it follows that this remedy should also be treated as exceptional. But when should it be available? The analysis of the cases where this remedy has been awarded suggest that the hypothetical bargain measure is appropriate whenever the defendant has interfered with the claimant's property rights in some way. The policy of the law is to prevent such proprietary interference by ensuring that the wrongdoer does not profit from the wrong. This explains why this remedy was awarded in, for example, *Wrotham Park* (breach of a restrictive covenant over land), *Horsford* v. *Bird* (trespass to land) and *WWF* (interference with intellectual property rights).

It is clear that the hypothetical bargain measure should be characterised as having both compensatory and restitutionary characteristics, since any bargain would take into account losses suffered by the claimant and gains made by the defendant. In many situations the appropriate characterisation is of no significance since the loss suffered by the claimant is the same as the benefit obtained by the defendant in not making the bargain. But sometimes, as both *Horsford* v. *Bird* and *WWF* show, the proper characterisation will affect the amount awarded and it is therefore unhelpful to treat the hypothetical bargain measure as absolutely compensatory.

GRAHAM VIRGO

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UNJUST ENRICHMENT AND WRONGLY PAID TAX

Boake Allen Limited v. *Revenue and Customs Commissioners* [2006] EWCA Civ 25 concerned early payment of Advance Corporation Tax ("ACT"). ACT was normally payable when a company paid dividends to its shareholders, but there was a statutory exception where the company was a subsidiary of a United Kingdom company and both the parent and subsidiary made a group income election. If the tax authorities accepted the election, the obligation to pay ACT would only accrue when the *parent* company paid dividends. Section 247 of the Income and Corporation Taxes Act 1988 ("ICTA") stipulated that group income elections were only available to subsidiaries of United Kingdom companies. This provision was successfully challenged in *Hoechst* v. *Attorney General* [2001] S.T.C. 452 (noted by Virgo, (2002) 1 B.T.R. 4) as breaching the right of freedom of establishment enshrined in the EC treaty. In the aftermath of *Hoechst,* many claims for overpayment and/or premature payment of ACT followed. One of these was *Deutsche Morgan Grenfell* v. *IRC* [2005] EWCA Civ 78, [2005] S.T.C. 329 (noted by Hedley [2005] C.L.J. 296), involving a German subsidiary, which recognised that a claim for restitution lay in such circumstances, with the ground of restitution being an unlawful demand for tax rather than payment of tax pursuant to a mistake of law.

Boake is slightly different from *Deutsche Morgan Grenfell* in that the claimants were subsidiaries of non-European entities. The demand for early payment of ACT was alleged to be (1) a breach of relevant Double Taxation Conventions; and (2) a breach of Article 56 of the EC Treaty. The claimants asserted a claim for interest on the tax paid prematurely on the ground of an unlawful demand for tax and/or a mistake of law. The Court of Appeal (Lloyd, Sedley and Mummery L.JJ.) dismissed the claim. Lloyd L.J. found that the relevant provisions of the Double Taxation Conventions were not incorporated into the domestic laws of the United Kingdom. Also, he held that in this context there was no breach of the EC Treaty and hence no unlawful tax demand. Mummery L.J. found no element of an unlawful demand because the claimant had *not* made a group income election, so ACT *was* due. Thus, the demand (if any) for the tax was not unlawful since the tax was *lawfully* due. Among the three judges, only Mummery L.J. appeared prepared to allow a restitutionary claim based on a claim for interest on money prematurely paid if there was an unlawful demand. The other two judges were more circumspect on this point. Lloyd L.J. said that such a claim was difficult to

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reconcile with prior decisions (*e.g.*, *Pintada* [1985] 1 A.C. 104 and *Westdeutsche* [1996] A.C. 669) whereas Sedley L.J. highlighted the fact that the tax was in fact due because no group income election had been made.

Boake contains some interesting dicta on the law of unjust enrichment. Both Sedley and Mummery L.JJ. confirmed the *Deustche Morgan Grenfell* decision that a restitutionary claim based on mistake of law was inappropriate since the only ground for restitution was an unlawful demand for tax. This holding is significant because the former claim has a longer limitation period than the latter. Therefore, a claimant is not entitled to maintain an alternative mistake of law claim in circumstances like the present in order to enjoy a longer limitation period. Mummery L.J. criticised the whole enterprise of searching for a mistake of law in this claim and said it was arguable that the true foundation of the claim lies in the *absence of basis* for the payment. Another noteworthy point in this case was Sedley L.J.'s observation that the law of restitution is a residual remedy to *distribute loss* among parties whose rights are not met by some other stronger doctrine of law.

The confirmation of *Deutche Morgan Grenfell's* holding that a claimant must rely on an unlawful demand as a reason for restitution rather than a mistake of law is a welcome development. This is because this approach allows the court to address directly the public law policies surrounding such cases rather than simply allowing the claim using a mechanical application of mistake of law as a ground of restitution (see Williams, [2005] K.C.L.J. 194; *cf.* Virgo, (2005) 3 B.T.R. 281). In confronting the public law aspect of such tax cases, two pressing issues need to be resolved in future cases: first, whether a special public law defence such as a disruption to public funds ought to be developed, and secondly, whether the time bar for a claim based on an unlawful demand for taxes should be altered to take into account the public law dimension of the case. It might very well be that there should be a longer time bar in cases where the unlawful demand is in breach of EC law (*cf.* Buxton L.J.'s analysis in *Deutsche Morgan Grenfell* v. *IRC* [2005] EWCA Civ 78 at [287]). On the facts, these issues did not arise because the demand was not unlawful under domestic or EC law. Also, if there was indeed an unlawful demand, Mummery L.J.'s robust approach in allowing a claim for interest on an advanced payment of tax is to be preferred. Otherwise, a taxpayer is left without a satisfactory remedy in cases where the authorities unlawfully demand a tax before it is lawfully due. As shown in this case, the interest lost on such an alleged early payment can be quite substantial.

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More generally, Mummery L.J.'s observation that the true foundation of the claim lies in an absence of basis of the payment is also important. This is in line with Birks' thesis that the law of unjust enrichment ought to be re-oriented from the current "unjust factor" approach to a single master unjust factor, *i.e.*, "absence of basis" (see Birks, *Unjust Enrichment* (Clarendon 2005)). Unfortunately, Mummery L.J.'s terse statement on this point does not inform us whether such a re-orientation of the law should take place. Finally, Sedley L.J.'s observation that the primary aim of unjust enrichment is to distribute losses among parties is also potentially significant. If mistakes are seen as a form of accident, then the law of unjust enrichment becomes an exercise in how the social costs of mistakes should be fairly distributed (see Dagan, *The Law and Ethics of Restitution* (Cambridge 2004), pp. 37–82). This could affect rules of liability for mistaken payments and the defence of change of position.

TANG HANG WU

STRICT FIDUCIARY LOYALTY AND ACCOUNTS OF PROFITS

THE Murad sisters entered into a joint venture with Al-Saraj to purchase a hotel in Clapham. In negotiating the deal they relied wholly on the advice and expertise of Al-Saraj, who consequently was found to have owed them fiduciary duties. Al-Saraj fraudulently represented that his contribution to the purchase price would be £500,000 in cash; he deliberately deceived the Murads by concealing the fact that his "contribution" was in fact made by offsetting unenforceable obligations owed to him by the vendor of the hotel, including a sum of £369,000 which represented commission paid by the vendor to Al-Saraj for introducing the purchasers. Al-Saraj thereby committed a clear breach of fiduciary duty. The Court of Appeal held Al-Saraj liable to account for his capital profits when the hotel was later sold at a profit: *Murad* v. *Al-Saraj* [2005] EWCA Civ 959, [2005] W.T.L.R. 1573.

The issue that exercised the Court of Appeal was the extent of that liability to account. Under the joint venture agreement, any capital profit made on resale of the hotel was to be split equally between Al-Saraj on the one hand and the Murads on the other. Had Al-Saraj disclosed the true facts, the trial judge found that the Murads would still have proceeded with the joint venture but would have insisted upon a greater share of the capital profits for themselves. Al-Saraj appealed against the trial judge's order that he

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must account for all his capital profits, arguing that he should only be stripped of any profits that he made over and above what the Murads would have agreed to his keeping had the original joint venture agreement been entered into with full knowledge of the true facts.

A majority of the Court of Appeal, Arden and Jonathan Parker L.JJ., rejected this flawed argument. In effect, Al-Saraj's argument sought to cap his liability to account for his *profits* by reference to the *loss* which the Murads had suffered as a result of being unable to bargain with the benefit of full knowledge. Undoubtedly, a fiduciary's principal cannot rely on a breach of fiduciary duty to recover equitable compensation for loss unless the loss is shown to have been caused by the breach of fiduciary duty: *Swindle* v. *Harrison* [1997] 4 All E.R. 705 at pp. 718, 728, 733, 735. Yet countless decisions make clear that a fiduciary is liable to account for unauthorised profits *irrespective* of "such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff:" *Regal (Hastings) Ltd.* v. *Gulliver* [1967] 2 A.C. 134n. at p. 144 (see also *Parker* v. *McKenna* (1874) L.R. 10 Ch. App. 96 at p. 118; *Gwembe Valley Devt. Co. Ltd.* v. *Koshy* [2003] EWCA Civ 1478 at [145], [2004] 1 B.C.L.C. 131). Indeed, the Privy Council had rejected the very argument Al-Saraj sought to make 50 years earlier in *Gray* v. *New Augarita Porcupine Mines Ltd.* [1952] 3 D.L.R. 1 at p. 15:

> It is said that it would have made no difference if [the fiduciary] had told them. ... There may be an element of truth in all this, but in fact it constitutes an irrelevant speculation. If a trustee has placed himself in a position in which his interest conflicts with his duty and has not discharged himself from responsibility to account for the profits that his interest has secured for him, it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in possession of the same amount of profit.

The orthodox position is, thus, clear and was correctly applied by the majority in *Murad,* notwithstanding Clarke L.J.'s dissent. However, both members of the majority felt that the inflexibility of fiduciary doctrine can operate harshly, especially where the fiduciary has acted in good faith in what he or she considers to be the best interests of the principal. Each of them expressly envisaged the possibility that fiduciary doctrine's strict liability to account for profits might be relaxed in future by the House of Lords (at [82]–[83] *per* Arden L.J. and at [121]–[122] *per* Jonathan Parker L.J.), although Al-Saraj's deliberate deceit in the present case ruled out any such possibility. Such a relaxation would require justification.

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An attempt to provide such justification might conceivably be based upon Professor Langbein's recent argument that fiduciary doctrine's strict prohibition of conflicts between duty and interest should be relaxed where the fiduciary has acted in the best interests of the beneficiaries: (2005) 114 Yale L.J. 929. Langbein argues that the fiduciary conflict principle imposes too high a cost as it prohibits transactions which are beneficial to the fiduciary's principal as well as non-beneficial transactions.

This argument is not compelling and should be rejected in favour of the longstanding orthodoxy. Fiduciary doctrine is prophylactic, both in nature and in methodology, because "human nature being what it is, there is danger ... of the person holding the fiduciary position being swayed by interest rather than by duty": *Bray* v. *Ford* [1896] A.C. 44 at p. 51; see also *Harris* v. *Digital Pulse Pty. Ltd.* [2003] NSWCA 10 at [414]–[415], (2003) 197 A.L.R. 626; Conaglen, (2005) 121 L.Q.R. 452. In cost-benefit terms, therefore, the benefit is the protection against temptation that fiduciary doctrine provides. The courts refuse to consider whether the transaction has caused any loss, or whether the principal could have earned the profit for itself, or whether (as Al-Saraj sought to argue) the principal would have consented to the profit being made, because the possibility that courts might countenance such arguments can do nothing to reduce the fiduciary's temptation.

To understand the cost side of the cost-benefit analysis, it must be borne in mind that fiduciary doctrine is not punitive in the protection it affords. A fiduciary is liable to account only for profits "acquired in consequence of the fiduciary's breach of duty": *Warman International Ltd.* v. *Dwyer* (1995) 182 C.L.R. 544 at p. 565; *Murad* at [85], [112], [115]–[116]. The court can grant the fiduciary an allowance to reflect his skill and effort in obtaining the profit: *Boardman* v. *Phipps* [1967] 2 A.C. 46 at pp. 104, 112; *Warman* at pp. 561, 568. And crucially, in terms of a cost–benefit analysis, the fiduciary can immunise himself against any liability to account by seeking authorisation for the profit-making, in the trust instrument or equivalent, from a court, or by obtaining the fully informed consent of his principal. The courts risk undermining the internal logic and the protective function of fiduciary doctrine if they allow a fiduciary to seek to avoid liability by arguing that the impugned transaction was nonetheless in the best interests of the beneficiaries. In particular, the very fact that a fiduciary perceives a transaction involving a conflict to be justified, but has nonetheless chosen not to seek authorisation either from the court or from his principal, raises serious questions as to the wisdom of sustaining it—all too often "[s]ecrecy is the badge of fraud": *Agip (Africa)*

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Ltd. v. *Jackson* [1990] Ch. 265 at p. 294; see also *Fawcett* v. *Whitehouse* (1829) 1 Russ. & My. 132 at p. 148. Only in a minuscule number of cases will obtaining one or other of those forms of authorisation present any form of difficulty for an honest fiduciary, in which cases all the fiduciary need do is abstain. The cost involved in abstention in that small number of cases is minute when compared with the benefit of the prophylactic protection that fiduciary doctrine has successfully provided for hundreds of years.

MATTHEW CONAGLEN

IS IT REALLY FOR THE EUROPEAN COMMUNITY TO IMPLEMENT ANTI-TERRORISM UN SECURITY COUNCIL RESOLUTIONS?

BOTH before and after the terrorist attacks of 11 September 2001, the UN Security Council adopted several resolutions aimed at the Taliban, Osama Bin Laden and the Al-Qaeda network, and at individuals and entities associated with them. More specifically, it called on all the Members of the UN to freeze the funds which they controlled. A UN Sanctions Committee was entrusted with the task of identifying the persons concerned and the financial resources to be frozen, and of considering requests for exemption. The EC implemented those resolutions by adopting, among others, Regulation 881/2002, which contains a list of the persons concerned and is regularly reviewed by the Commission on the basis of the Sanctions Committee's updates.

Two applicants, whose assets had been frozen, sought the annulment of the Regulation under Article 230 EC. In Cases T-306/01 (*Yusuf*) and T-315/01 (*Kadi*), the Court of First Instance ("CFI") rejected their claims. Two main questions arose in these separate but very similar cases: first, whether the Council had the necessary competence to adopt the Regulation and, second, whether the Regulation violated the applicants' fundamental rights.

The Regulation is based on Articles 60, 301 and 308 EC. Articles 60 and 301 read together empower the Community to adopt financial sanctions in cases where urgent measures adopted within the framework of the Common Foreign and Security Policy ("CFSP") are required to "interrupt or reduce, in part or completely, economic relations with one or more third countries". The CFI accepted the applicants' argument that Articles 60 and 301 could not constitute, on their own, an adequate legal basis, insofar as the Regulation provided for the adoption of measures directed at individuals rather than third countries and as there was

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no sufficient link in this case between the sanctions laid down in the Regulation and a country.

The CFI also held that Article 308 could not serve as an adequate legal basis on its own, as the Regulation sought to attain CFSP objectives under the second pillar of the EU Treaty and not an objective of the EC Treaty, be it an objective expressly mentioned in Articles 2 and 3 or the more general objective of international peace and security. In particular, the CFI dismissed the argument that the measures laid down in the Regulation could be authorised by the object of establishing a common commercial policy, since the Community's commercial relations with third countries were not at stake in this case. It further noted that the implementation of the Security Council resolution by the Member States rather than by the Community was not capable of giving rise to a plausible and serious danger of discrepancies in the application of the freezing of funds from one Member State to another, and that a mere finding of a risk of disparities between the various national rules, and a theoretical risk of obstacles to the free movement of capital or payments or of distortions of competition liable to result therefrom, could not justify the choice of Article 308 as the Regulation's legal basis. In broader terms, the CFI held that this article could not be interpreted as giving the institutions general authority to rely on it as a basis with a view to attaining one of the objectives of the EU, as opposed to the EC, Treaty (for a comprehensive study on Article 308 EC, see R. Schütze, "Organised Change towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence", (2003) 22 Y.E.L. 79).

However, the CFI went on to find that the *combined* reliance on Articles 60, 301 and 308 EC granted competence to the Community to adopt the Regulation. It reasoned that Articles 60 and 301, by empowering the Council to impose economic and financial sanctions on third countries in specific circumstances, established a bridge between the first and the second pillars of the EU Treaty. Article 308 therefore justified the extension, under similar conditions, of the imposition of economic and financial sanctions on individuals, in connection with the fight against international terrorism: "Recourse to Article 308 EC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 and 301 EC, is justified by the consideration that, as the world now stands, states can no longer be regarded as the only source of threats to international peace and security".

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This reasoning is disappointing, if not contradictory. On the one hand, the CFI expressly stated that Article 308 EC could not be used as a basis for a Community legislative measure which aims to attain one of the objectives of the EU Treaty. On the other hand, it accepted that the scope of Articles 60 and 301 could be extended to situations which fell outside their ambit, precisely on the basis of Article 308. However, and as the CFI itself noticed, the current three-pillar structure of the EU makes the Union and the Community integrated, but nonetheless separate, legal orders, as confirmed by Article 47 EU. Thus, the EU should not use Community powers to impose sanctions for breaches of second pillar provisions, beyond what is provided in the EC Treaty. The sole fact that the Council adopted the Regulation unanimously should not warrant such an extension of Community competence.

After establishing that the Council was empowered to adopt the Regulation, the CFI discussed whether it infringed the applicants' fundamental rights, thus providing the opportunity to consider the legal effects in the Community legal order of the UN Charter and Security Council resolutions.

The CFI ruled that it was not empowered to examine the legality of UN Security Council resolutions, even in relation to human rights. It noted that, from the standpoint of international law, the obligations of UN Members under the UN Charter clearly prevailed over every other obligation of domestic law or of international treaty law including obligations under the EC Treaty. Under Article 27 of the Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Moreover, Article 103 of the UN Charter provides that, "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Furthermore, that primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter, under which UN Members agree to accept and carry out the decisions of the Security Council. With regard more specifically to the relations between the obligations of the Member States of the Community by virtue of the UN Charter and their obligations under Community law, the CFI held that the Community was also bound by Security Council resolutions on the basis of Articles 307 and 224 EC, as interpreted in *International Fruit Company* (Joined Cases 21/72 to 24/72 [1972] E.C.R. 1219).

It is true, from the point of view of international law, that Member States and the Community must comply with their

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international obligations: *pacta sunt servanda*. The Vienna Convention does not address the question, from the point of view of "internal" Community law, of the effects of international law (for a more extensive analysis, see P. Eeckhout, "Does Europe's Constitution Stop at the Water's Edge?", Walter Van Gerven Lectures (5), at 23). However, by stating that it could not review the legality of UN law, the CFI took a clear stance that international treaties automatically prevailed within the Community, thus defining the Community legal order as a monist system. Further, since EC law has supremacy over national law, Member States are constrained to adopt a monist approach to their international obligations once implemented through a Community instrument, notwithstanding their own constitutional traditions. That, in turn, deprives national courts of the power which they may otherwise have had under their domestic law to assess the compatibility of international law with fundamental rights.

Probably aware that its approach could deprive individuals of any right to judicial review, be it at Community or at national level, the CFI went on to declare itself competent "to check, indirectly, the lawfulness of the resolutions of the Security Council in question, with regard to *ius cogens,* understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible". In light of the nature of *ius cogens* as a supreme source of law, the CFI assessed whether the Regulation which implemented UN resolutions infringed the applicants' right to property, their right to be heard and their right to an effective judicial remedy, and concluded that they did not.

It is understandable that the CFI felt bound to mitigate the radical conclusion which it reached on the effects of UN law in "internal" Community law by relying on the supreme character of *ius cogens* (the content of which is, incidentally, subject to heated debates), so as to guarantee the protection of the applicants' fundamental rights. One nonetheless wonders how the CFI ever managed to reach this stage: the Regulation should have been annulled for lack of competence, and in any event, nothing in either international law or Community law prevented the CFI from assessing its compatibility with fundamental rights on the basis of the general principles of Community law.

Both cases are now under appeal. It is hoped that the European Court of Justice will adopt a more orthodox reasoning than the CFI in its judgments in cases C-402/05 (*Kadi*) and C-415/05 (*Yusuf*).

AMANDINE GARDE

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LIBERAL PATERNALISM IN THE COURTS

"UNLESS we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare." This ringing endorsement of the autonomy aspect of children's rights by Thorpe L.J. in *Mabon* v. *Mabon* [2005] EWCA Civ 634, [2005] 2 F.L.R. 1011 at [28] has potentially important implications for the separate representation of children in private law proceedings. It may also lead to a re-evaluation of the balance which needs to be struck throughout the law between the protection of children and respect for their gathering independence.

In *Mabon,* when the parents separated the three youngest children left with their mother while the three eldest, boys aged respectively 17, 15 and 13, remained with their father. The mother applied for residence orders and (unusually in private law proceedings) a CAFCASS officer was appointed guardian of all six children, who were made parties to the proceedings. Where a guardian is appointed the normal practice, whether in public law or private law proceedings, is for the guardian to instruct a solicitor who will instruct counsel where necessary. This so-called tandem model of representation was described by Thorpe L.J. in *Mabon* as a "Rolls Royce" model, "the envy of many other jurisdictions". But it cannot work where the children concerned fall out with the guardian. It is an essentially paternalistic, welfare-based, form of representation in which the guardian's *primary* duty is to advocate to the court the course which will promote the children's best interests and only *secondarily* to convey to the court their wishes. Here the three boys, all very able and according to the expert evidence "quick in terms of being articulate and perceptive", sought to remove the guardian and instruct their own solicitors for the resumed hearing. Rule 9.2A of the Family Proceedings Rules 1991 permits this with the leave of the court where the court "considers that the minor concerned has sufficient understanding to participate as a party in the proceedings ... without a next friend or guardian ad litem".

The first instance judge refused separate representation, taking the line that there were no advantages, but only disadvantages including delay, possible emotional damage to the children and exposure to the harshness of the litigation process. In so ruling, he was following a number of precedents, notably the Court of Appeal's guidance in *Re S (A Minor) (Independent Representation)* [1993] Fam. 263, which had exhibited caution when considering

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whether to allow children to engage directly in litigation, either by commencing their own proceedings or by separate representation in proceedings brought by adults. In *Mabon* the Court recognised that life had moved on in the intervening twelve years since *Re S* was decided. This was an opportune moment to recognise the growing acknowledgment of the autonomy and consequential rights of children, especially those arising under international instruments. The judge was plainly wrong not to recognise the clear case for separate representation and it was "simply unthinkable" to exclude young men who were educated, articulate and reasonably mature from knowledge of, and participation in, legal proceedings which affected them so fundamentally. Accordingly the appeal should be allowed and an order for separate representation should be made. The room for paternalism was constrained but not entirely non-existent. In some cases the child might be incapable of comprehending that direct participation in the proceedings could pose a risk to him or her and, accordingly, welfare might enter into the evaluation of the child's sufficiency of understanding.

One reasonably confident prediction following *Mabon* is that there are now likely to be significantly more private law cases in which children are joined as parties and separately represented. At the present time this occurs in only a very small minority of such cases. This is in contrast to public law applications, where separate representation is the norm and where the court is required under the Children Act 1989, section 41 to order it unless satisfied that it is not necessary to do so to safeguard the child's interests. This issue of separate representation is part of a wider debate in which there has been increasing criticism of the alleged inadequacies of the private law mechanisms for ascertaining and giving proper weight to children's views. The issue has taken on added urgency in the light of emerging evidence that the extent to which children are adversely affected by parental conflict depends not simply on the extent or severity of that conflict but on the children's own perceptions of it. Thus, it is argued that if we wish to discover why some children adjust well to the marital transitions of their parents, while others develop long-term behavioural and emotional problems, consideration of those children's different perceptions should be a critical component in the legal process (see particularly Gordon T. Harold and Mervyn Murch, "Inter-Parental Conflict and Children's Adaptation to Separation and Divorce: Theory, Research and Implications for Family Law, Practice and Policy" (2005) 17 C.F.L.Q. 185). At the same time it must be said that there is no obvious equivalence between public and private law. The case for separate representation of children in the former is overwhelming,

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given the very clear conflict of interest which arises. What is usually at issue in those proceedings is the quality of parental care, and the risk of harm to the child is the very essence of the proceedings. These conflicts of interest may also be apparent in acrimonious and protracted disputes over residence or contact; but this is manifestly not the case in a very large number of undefended divorces, where parents are able to co-operate entirely satisfactorily and in which both are committed to the best interests of their children and their continuing relationships with them. Careful thought therefore needs to be given, and caution exercised, in determining precisely when this independent representation of the child's views is appropriate in the private law.

Questions of representation apart, on a wider front, the Court of Appeal now appears keen, in the light of international obligations, to signal a more general shift away from welfare-based intervention and towards what Thorpe L.J. describes as "a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision-making processes that fundamentally affect his family life". It must be said that the courts' record in this matter is patchy. In the medical arena in particular, where admittedly the issue is sometimes one of life or death, virtually unbridled paternalism reigns. Following *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] 1 A.C. 112, we had the retreat from *Gillick* (*Re R (Wardship: Consent to Treatment)* [1992] Fam. 11 and *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam. 64). It is still the case that the mature child has the apparent right to consent to medical and other procedures and assessments but not to refuse them even where Parliament has appeared to give to the competent child an express statutory right of refusal (*South Glamorgan County Council* v. *W and B* [1993] 1 F.L.R. 574). Further, as noted above, there has been no strong inclination on the part of the courts to follow an "open door" policy where children have sought access to the courts to bring applications for private law "section 8" orders (see, for example, *Re C (A Minor) (Leave to Seek Section 8 Orders)* [1994] 1 F.L.R. 26 and *Re H (Residence Order: Child's Application for Leave)* [2000] 1 F.L.R. 780). Neither has there been obvious alacrity in embracing the new notion of children's Convention rights under the European Convention on Human Rights and Fundamental Freedoms, though the decision of Munby J. in *Re Roddy (A Child) (Identification: Restriction on Publication)* [2004] 2 F.L.R. 949 is a noteworthy exception. We should also observe that the form of autonomy endorsed in *Mabon* is a weak form of autonomy which amounts to something less than a right of

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participation and certainly not a right to take decisions. The courts must continue to grapple, on a case by case basis, with the question of when it is right to intervene paternalistically and when it is not. Over twenty years ago Michael Freeman (see M.D.A. Freeman, *The Rights and Wrongs of Children* (Frances Pinter 1983)) advanced his theory of liberal paternalism and posed the following question (at p. 57): "... what sorts of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding our own system of ends as free and rational beings?" Perhaps the message of *Mabon* is that we, as children, might not wish to be shielded from legal proceedings which fundamentally affect us nor from an increasingly large sphere of other activities.

ANDREW BAINHAM

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