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CASE AND COMMENT

HUMAN RIGHTS, BURDEN OF PROOF, RETROSPECTIVITY AND PRECEDENT IN THE HOUSE OF LORDS

R. v. Lambert [2001] UKHL 37, [2001] 3 W.L.R. 206 and R. v. Kansal (No. 2) [2001] UKHL 62, [2001] 3 W.L.R. 1562 are important decisions of the House of Lords in the field of human rights and criminal justice. Lambert is primarily concerned with a question as to the retrospective effect of the Human Rights Act 1998 in criminal proceedings, and with the question whether a reverse onus provision in section 28 of the Misuse of Drugs Act 1971 is compatible with the presumption of innocence in Article 6(2) of the European Convention on Human Rights. Kansal is primarily concerned with the former question. A majority of the House in Kansal decided that the decision of the majority of the House in Lambert on the issue of retrospectivity was wrong, but nevertheless should be followed.

The defendant in Lambert was charged with the possession of a controlled drug with intent to supply, contrary to section 5(3) of the 1971 Act. He relied on a reverse onus provision in section 28 which required him to prove that he neither believed nor suspected nor had reason to suspect that the substance in his possession was a controlled drug. The trial took place before the Human Rights Act came into effect. In accordance with the law as it was then understood, the judge directed the jury that the defendant had to establish his defence on a balance of probabilities. After conviction the defendant appealed on the ground that that had been a misdirection which violated Article 6(2). By the time the case reached the House of Lords the Human Rights Act was fully in

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force. By a majority, the House held that the Act was retrospective in respect of proceedings brought by or at the instigation of a public authority, but not in respect of appeals in those proceedings. They accordingly dismissed the appeal.

Their Lordships did not discuss the important general question whether a reverse onus provision could ever be compatible with Article 6(2), but they held by a majority that the provisions of section 28 would be incompatible with it if they were read as requiring the accused to prove the defence on a balance of probabilities. Instead of making a declaration of incompatibility in terms of section 4 of the Human Rights Act, the majority resorted to section 3(1) of the Act, which provides that so far as possible legislation must be read and given effect to in a way which is compatible with Convention rights. They held that the provisions could be so read and given effect to by reading them as if they imposed on the accused only an evidential burden, that is, an obligation to satisfy the judge that there is sufficient evidence to require the issue to be considered by the jury. Lords Steyn, Hope of Craighead and Clyde expressed disapproval of the indiscriminate enactment of reverse onus provisions and supported the view of the Criminal Law Revision Committee that “both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only” (11th Report, Evidence (General) (1972) (Cmdn. 4991), para. 140). Notwithstanding a notable dissenting speech by Lord Hutton, it seems likely that the approach of the majority will have a profound effect on the interpretation of reverse onus provisions, encouraging courts to read them as imposing a legal or persuasive burden on the defence only if the legislation pursues a legitimate aim and satisfies the principle of proportionality by striking the correct balance between the general interest of the community and the protection of the fundamental rights of the individual.

On the issue of retrospectivity the majority (Lord Steyn dissenting) founded on the definition in section 7(6) of the Human Rights Act of the expression “legal proceedings” in section 7(1)(b), and on the provision in section 22(4) as to the retrospective application of section 7(1)(b). They drew a distinction between (a) proceedings brought by or at the instigation of a public authority and (b) an appeal against a decision of a court or tribunal, and held that the Act was retrospective in respect of the former but not the latter. Lord Hope held that the Act would have retrospective effect in an appeal founded on an alleged breach of the accused’s Convention rights by the prosecuting authority. Lord Steyn’s view was that the effect of section 6(1) of the Act was that the House
could not act unlawfully by upholding a conviction which had been obtained in breach of a Convention right. In *R. v. Director of Public Prosecutions, ex p Kebilene* [2000] 2 A.C. 326, 367–368, Lord Steyn, in a speech concurred in by Lord Slynn of Hadley and Lord Cooke of Thorndon, had approved a construction of section 22(4) read with section 7(1)(b) which treated the trial and the appeal as parts of one process. In the Divisional Court Lord Bingham of Cornhill C.J. and Laws L.J. had expressed similar views. Subsequently Lord Woolf C.J. had made observations to the same effect in *R. v. Benjafield* [2001] 3 W.L.R. 75, 92.

A few months after *Lambert* the issue of retrospectivity arose again in *Kansal*. The defendant had been convicted in 1992 on two counts of obtaining property by deception contrary to section 15(1) of the Theft Act 1968 and two counts of removing and failing to account for property under section 354 of the Insolvency Act 1986. The trial judge had held that evidence of answers given by him under compulsion in his bankruptcy proceedings were admissible under section 433 of the 1986 Act, and the Court of Appeal had upheld his convictions ([1993] Q.B. 244). In 2000 the Criminal Cases Review Commission referred to the Court of Appeal his convictions on the counts under the 1986 Act on the ground that, subsequent to the decision of the European Court of Human Rights in *Saunders v. United Kingdom* (1996) 23 E.H.R.R. 313 and the passing of the Human Rights Act, there was a real possibility that the Court would find the admission of the respondent’s testimony obtained under compulsion to have been in breach of Article 6. The Court referred to section 22(4) of the Human Rights Act as interpreted by the majority in *Kebilene* and held “with no enthusiasm whatever” that, once a reference by the Commission had been properly made, the Court had no option, however old the case, but to declare the conviction unsafe if that was the result either of the admission of evidence obtained in breach of Article 6 or of a change in the common law. The Court held that the evidence of the defendant’s answers in the bankruptcy proceedings was inadmissible and the convictions on all four counts were unsafe.

The Crown appealed, relying on the decision of the House of Lords on retrospectivity in *Lambert*. Their Lordships unanimously allowed the appeal, but there emerged a remarkable conflict of judicial opinion. Lord Slynn and Lord Hutton remained of the view that *Lambert* was right. Lord Lloyd of Berwick, Lord Steyn and Lord Hope said it was wrong. But although the majority were of opinion that *Lambert* was erroneous, there was no majority in favour of departing from it, as proposed by Lord Hope in a
powerfully argued speech, or in favour of requiring the appeal to be reargued before a panel of seven Law Lords, as suggested by Lord Lloyd. Various reasons were given for not adopting either course. Lord Slynn said that the issue of retrospectivity had been the central issue in *Lambert* and had been deliberately resolved after detailed argument. He also agreed with Lord Steyn that the House was dealing only with a transitional provision on which it had very recently given “a clear-cut decision”. Lord Lloyd indicated that a rehearing before a panel of seven could not be arranged before the hearing in the Court of Appeal of the appeals of the “Guinness Appellants”, who had been granted leave to intervene and had presented oral and written submissions to the House. Lord Lloyd considered that justice to them required that the appeal in *Kansal (No. 2)* be reheard, and the conflict finally resolved. He went on to say that the reasons given by Lord Hope for departing from *Lambert* justified in full a rehearing before a panel of seven but fell short of “the sort of compelling considerations necessary to justify your Lordships departing from so recent a decision”. The reasoning in *Lambert*, he said, represented a possible view which had not been shown to be unworkable. Lord Hutton said that if he had considered that *Lambert* was wrong, he would nevertheless have been of opinion that it should be followed, since the view of the majority was an eminently possible one.

*Kansal (No. 2)* is a striking example of the reluctance of the House to depart from its previous decisions. The result is unsatisfactory, because the retrospectivity issue will obviously have to be reconsidered on another occasion. *Lambert* is inconsistent with *Kebilene* and with the views expressed by Lord Bingham C.J. and Laws L.J. in that case and by Lord Woolf C.J. in *Benjafield*. It seems difficult to disagree with Lord Hope: “Looking to the wider public interest, it seems to me that in the present context correction is more desirable than consistency.”

I.D. Macphail

THE LEGALITY OF THE MANDATORY LIFE SENTENCE

Challenges to the mandatory life sentence by way of judicial review continue to hit the courts. Among the most dramatic are *R. v. Lichniak* and *R. v. Pyrah* [2001] EWHC Admin 294, [2001] 3 W.L.R. 933, where it was argued that the mandatory sentence violated Article 3 of the European Convention on Human Rights
(prohibition of torture or degrading treatment or punishment) because it was disproportionate, and that it violated Article 5 of the Convention (right to liberty and security) because it was arbitrary. When Scott Baker J. granted leave to apply for judicial review he ordered that the court should sit both as a Divisional Court and as the Court of Appeal (Criminal Division). Kennedy L.J., giving the judgment of the Court of Appeal, held that “the most attractive route” was for the Court to sit as a division of the Court of Appeal.

The facts were that in 1990, Lichniak, a 29-year-old woman with four children, had killed her partner of 12 years after a stormy relationship. The trial judge did not believe that upon release she would be likely to commit offences of a kind making her a public danger. Her tariff was fixed at 11 years. In 1996, Pyrah had punched and fatally kicked a man whom he had seen assaulting a woman, and his tariff was fixed at 8 years. The trial judge described the incident as a tragic event, concluding that “in my view he does not present any danger to the community and there is no likelihood of him re-offending”. Many people will sympathise with the suggestion that a life sentence seems unnecessary in such cases. Neither is likely to be detained long beyond their “tariff”. However, the challenge was unsuccessful. Kennedy L.J. concluded that “the weight of the jurisprudence” was overwhelming: “There is sufficient individualised consideration of the offender’s case within the context of the sentence” not to violate Article 3. Given that the European Court of Human Rights in T and V v. United Kingdom (1999) 30 E.H.R.R. 121 had accepted the legality of detention during Her Majesty’s Pleasure, a life sentence could not, he argued, be arbitrary for an adult if it was appropriate for a young offender. Whilst the arguments for the applicants were “persuasive in favour of a change of policy, and may carry weight in a political debate”, they did not enable the Court to allow the appeal.

A few months later, the Court of Appeal (this time the Civil Division!) returned to the subject. In R. (Anderson and Taylor) v. Secretary of State for the Home Department [2001] EWCA Civ 1698 two mandatory lifers sought to challenge the power of the Home Secretary to fix the tariff element of their mandatory life sentences. Anderson had been convicted in 1988 of two separate murders, having kicked his victims to death in the course of theft. Despite a tariff of 15 years recommended by the trial judge and the then Lord Chief Justice, the Home Secretary imposed a tariff of 20 years. Taylor was convicted of murdering a woman by strangulation. After the trial judge and Lord Chief Justice had recommended a tariff of 16 years, the Home Secretary had imposed
a tariff of 30 years (reduced in March 2000 to 22 years). Both applicants sought judicial review on the grounds that, following the coming into force of the Human Rights Act 1998, the Home Secretary’s power to set the tariff breached the claimant’s rights under Article 6 (right to a fair trial) of the European Convention on Human Rights.

The Court of Appeal upheld the decision of the Divisional Court to dismiss the applications. The stumbling block was again a decision of the European Court of Human Rights: in *Wynne v. UK* (1994) 19 E.H.R.R. 333 it had held that the post-tariff phase of the detention of a mandatory life sentence prisoner does not attract the safeguards of Article 5(4): “The fact remains that the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender. That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases . . . does not alter this essential distinction between the two types of life sentence” (at p. 347). The Court of Appeal made clear its concerns, Buxton L.J. stating that the conclusions of the European Court of Human Rights were “surprising, and . . . depart from the now current English understanding of the nature of the mandatory life sentence”. Simon Brown L.J. found no principled basis for treating tariff-fixing in mandatory cases differently from the similar exercise required for discretionary life sentence prisoners and expressed “deep misgivings” about the cogency of the reasoning by which mandatory life sentences are singled out for exclusion from protection under Articles 5(4) and 6. Yet the Court, led by the Lord Chief Justice, was unanimous that it should not pre-empt the decision of the European Court of Human Rights which next year will reconsider the legality of the mandatory life sentence.

This will be in the case of *Stafford* (see [1999] 2 A.C. 38). That case concerns a released mandatory lifer who was then recalled to prison by the Home Secretary. Despite the recommendation of the Parole Board that he should be released once more, the Home Secretary decided not to release him on the ground of the risk of his committing further serious non-violent offences. Lord Steyn, giving the only speech, accepted that it was anomalous that the system for release of discretionary lifers, who as a class are more dangerous than mandatory lifers, had been “judicialised”, but that the system for mandatory lifers had not. But since the “duality” was embedded into domestic law, there was nothing that the House could do. But he concluded by echoing the concluding words of the
then Lord Chief Justice, Lord Bingham, in the same case in the Court of Appeal: “The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law”.

It was argued in Lichniak that since Stafford was decided before the incorporation of the European Convention on Human Rights, the Court should be able now to consider whether the mandatory penalty was disproportionate under Article 3. Curiously R. v. Secretary of State for the Home Department, ex p. Pierson [1998] A.C. 539 (see Padfield at (1997) 56 C.L.J. 477) was not cited before the Court. There the majority of the House of Lords held that a mandatory lifer’s tariff had been unlawfully increased by the Home Secretary. Lord Hope pointed out that the Home Secretary’s role “has now become so rigid as to be virtually indistinguishable from a sentence imposed by a court by way of punishment”. Lord Steyn noted that “the principle of legality served to protect procedural safeguards provided by the common law, but the principle applies with equal force to protect substantive basic or fundamental rights … the rule of law enforces minimum standards of fairness, both substantive and procedural” (at p. 605). Surely this argument applies as strongly in the cases of Lichniak and Pyrah as it did in Pierson’s case?

These cases all concern those convicted of murder. We are not here concerned with the legality or ethics of indeterminate sentences for dangerous offenders. The question in Lichniak was whether a mandatory life sentence is a proportionate sentence for all murders, however heinous. The basis on which the European Court of Human Rights accepted that the mandatory life sentence was different from the discretionary life sentence was that the mandatory sentence constitutes punishment for life. If one accepts the reality that the majority of mandatory lifers will be released sometime relatively soon after they have served their “tariff”, then the essential distinction disappears. Post-release supervision may well be more stringent for the discretionary lifer than for the mandatory lifer. Once the gap between the Government’s rhetoric and the reality is recognised, the mandatory life sentence can no longer be justified.

Nicola Padfield
Terminally ill with motor neurone disease, Mrs. Diane Pretty wanted her husband to assist her commit suicide. She asked the DPP for an assurance that he would not prosecute her husband. The DPP refused. In proceedings for judicial review she sought an order that the DPP give the undertaking or a declaration that the prohibition on assisted suicide was incompatible with the European Convention on Human Rights.

The Divisional Court rejected her claim. The Law Lords unanimously dismissed her appeal: R. (Pretty) v. DPP [2001] UKHL 61, [2001] 3 W.L.R. 1598. Lord Bingham delivered the leading judgment, with which Lords Steyn, Hope, Hobhouse and Scott agreed. Their Lordships held that the DPP had no power to grant the undertaking. Lord Bingham observed that the DPP was not being asked for a statement of prosecuting policy but for an anticipatory grant of immunity from prosecution. The power to suspend laws and the execution of laws without the consent of parliament was denied to the crown and its servants by the Bill of Rights 1688.

Their Lordships also rejected Mrs. Pretty’s claim that the European Convention contained a right to assisted suicide. Her counsel relied principally on Articles 2 and 3 but also on Articles 8, 9 and 14.

Counsel argued that Article 2, protecting the right to life, protected not life itself but the right not to be deprived of life by third parties. The corollary of life, he argued, is death and thus the corollary of the right to life is the right to die at a time and in a manner of one’s own choosing. Lord Bingham replied that Article 2 was “framed to protect the sanctity of life” and could not be interpreted as conferring a right to die or enlist the aid of another in bringing about one’s death. Moreover, to the extent that there was any Convention case law on the matter, it went against counsel’s argument. Lord Bingham also noted that it was not enough for Mrs. Pretty to show that the UK would not breach the Convention by permitting assisted suicide; she had to go further and argue that it breached the Convention by not permitting it. Such an argument was, he concluded, “untenable”.

His Lordship also rejected the argument that, by denying her assisted suicide, the State would be subjecting her to inhuman or degrading treatment, contrary to Article 3. He observed that Article 3 complemented Article 2. There was, in his opinion, nothing in Article 3 which bears on an individual’s right to live or to choose not to live. Moreover, given that Article 3 was (like Article 2) absolute, the word “treatment” should not be given an extravagant meaning.
Lord Bingham went on to consider whether, if Article 3 could be assumed to be applicable, there was a breach of the State’s positive obligation to prevent inhuman or degrading treatment. He noted that this positive obligation was not absolute and the steps required to fulfil it were prone to variation from State to State. He concluded that that obligation did not require the United Kingdom to permit assisted suicide for the terminally ill.

Turning to Article 8, protecting the right to respect for private and family life, Lord Bingham concluded that the article was expressed in terms directed to the protection of personal autonomy while individuals are living and there was nothing to suggest that it protected the choice to live no longer. Even if Mrs. Pretty’s rights under Article 8(1) were engaged, the law’s prohibition of assisted suicide was justified under Article 8(2) as necessary in the furtherance of certain interests. The case for relaxing the prohibition had, he observed, been rejected by several bodies including the Lords Select Committee on Medical Ethics and the Council of Europe. The United Kingdom’s prohibition on assisted suicide was in accordance with “a very broad international consensus”.

Counsel for Mrs. Pretty had disclaimed any general attack on the prohibition and had sought to restrict the claim to the particular facts of her case: that of a mentally-competent adult free from any pressure who has made a fully-informed and voluntary decision. Whatever the need to protect the vulnerable, counsel had argued, Mrs. Pretty was not vulnerable. Dismissing this argument, Lord Bingham cited Dr. Johnson, who wrote that “Laws are not made for particular cases but for men in general”, and that “To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied.” It was, said Lord Bingham, for the State to assess the risk of abuse, and the risk was, as the Lords Select Committee had shown, one which could not lightly be discounted. If the prohibition infringed any right of Mrs. Pretty the State had shown “ample grounds to justify the existing law and the current application of it”. Similarly, even if Mrs. Pretty were able to show an infringement of Article 9, protecting freedom of thought, conscience and religion, the justification shown by the State in relation to Article 8 would again defeat her.

As for Article 14, prohibiting discrimination in the enjoyment of the rights and freedoms set out in the Convention, Lord Bingham rejected Mrs. Pretty’s argument that the prohibition on assisted suicide discriminated against those who, like her, were incapable of committing suicide without assistance. He pointed out that this
article had no application unless she could show a breach of another article, which she could not. Even if she could, she would still have to show that the prohibition was discriminatory because it prevented the disabled, but not the able-bodied, from exercising a right to commit suicide. Such an argument would be based on a misconception, for while the Suicide Act abrogated the offence of suicide it conferred no right to commit suicide. The criminal law could not be criticised as discriminatory because it applied to everyone.

Pretty is a beacon case in medical and human rights law and was, it is suggested, rightly decided. Although their Lordships could have laid greater emphasis on the fundamental equality-in-dignity of human beings which underlies the inviolability principle, the case represents a weighty endorsement of that principle. Further, their Lordships properly emphasised the risks of permitting assisted suicide. They recognised, in the words of Lord Bingham, that if the law were to allow assisted suicide for the “non-vulnerable” it “could not be administered fairly and in a way which would command respect”.

Indeed, the risks of the slippery slope were evident in the logic of the central argument deployed by Mrs. Pretty’s own counsel. If she had a “right to self-determination in relation to issues of life and death” then, as Lord Bingham noted, this would extend to voluntary euthanasia for those too disabled to commit suicide. Indeed, why would the claimed right not extend to those who were neither disabled, dying or suffering?

Moreover, their Lordships rightly refrained from endorsing certain contentious aspects of the judgment of the Divisional Court, such as its formulation of the human rights issue as a conflict between the (authentic) right to life and the (spurious) “right to decide what will and will not be done with one’s own body”.

The outcome of the case was as predictable as it is important. In light of the courts’ reluctance to question prosecutorial discretion, of their view (expressed by Lord Goff in Bland [1993] A.C. 789 at 865 and echoed in this case) that the decriminalisation of active euthanasia is a matter for Parliament, not the courts, and of the rejection of a right to physician-assisted suicide by the Supreme Courts of Canada ((1994) 53 C.L.J. 234 and the United States ((1997) 56 C.L.J. 506), Mrs. Pretty’s attempt to persuade the English courts to allow non medically-assisted suicide was somewhat ambitious.

John Keown
INDECENT ASSAULT: THE PRESUMPTION OF MENS REA REVISITED

In B (a minor) v. DPP [2000] 2 A.C. 428 (noted (2001) 60 C.L.J. 26) the House of Lords held that mens rea must be established as regards the age element of the crime of gross indecency with a child under the age of 14, contrary to the Indecency with Children Act 1960. It followed that the defendant in that case, who honestly, but mistakenly, believed that the victim was over 14, was not guilty because he lacked the necessary fault. The Court left open the question whether mens rea also had to be established for the age element of indecent assault committed on a child under 16, but it has had the opportunity to consider this in R. v. K [2001] UKHL 37, [2001] 3 W.L.R. 471.

K, a 26-year-old man, had been charged with indecently assaulting a 14-year-old girl contrary to section 14 of the Sexual Offences Act 1956. By virtue of section 14(2), the victim’s consent will not negate liability for this offence if she is under 16 since she is deemed to lack the capacity to consent. The defendant proposed to plead that the victim consented to the activity and also that she told him she was over 16 and that he honestly believed her. The issue for the court was whether his belief as to her age was relevant. The House of Lords unanimously held that the prosecution was required to prove that the defendant did not honestly believe that the victim was 16 or older, so his belief would mean that he was not guilty.

In reaching this conclusion the Court applied the principles of statutory construction which had been recognised in B (a minor). The starting point is the general presumption that fault is an essential ingredient of every statutory offence unless Parliament has indicated otherwise. There is no express exclusion of this presumption in section 14, so it was necessary to consider whether the presumption had been impliedly excluded. A strong case was made for such exclusion. Section 14(2) makes no reference to the defendant’s belief in the age of the victim and this provision was enacted against the common law background that liability as regards the age of the victim is strict (see Prince (1875) L.R. 2 C.C.R. 154). Further, sections 14(3) and 14(4) do make provision for the defendant’s lack of awareness of the victim’s incapacity to consent (as regards validity of marriage to a girl under 16 and the consent of a defective respectively), which might suggest that, since no similar provision is made in section 14(2), the presumption of fault as regards age had been impliedly excluded.

The House of Lords disagreed. This was primarily because the case for rebutting the presumption of fault must be “compellingly
clear” (per Lord Nicholls in *B (a minor)*)) and this strict test had not been satisfied. Particular emphasis was placed on the fact that the Sexual Offences Act 1956 was a consolidating statute. Lord Bingham traced the convoluted history of the subsections in section 14 and concluded that, because they derived from different sources, subsections (3) and (4) could not be used to construe subsection (2). Further, the decision in *Prince* was considered to be a “spent force”. Importantly, unlike the approach adopted in *B (a minor)*, which was concerned as much with the policy underlying the offence as with the language and structure of the statute, the court in *K* made no explicit reference to policy considerations in reaching its decision; rather, as Lord Steyn emphasised, the “contextual meaning of the enacted text is controlling”.

On the face of it, this appears to be a straightforward exercise in statutory interpretation; that, at least, appears to have been the view of Lords Bingham, Steyn and Hobhouse. Lord Millett, however, had more difficulty in reaching the same conclusion and indicated that the decision flew in the face of parliamentary intention, although he justified the result on the ground that “injustice is too high a price to pay for consistency”.

But if fault is required as regards the age element of indecent assault, why is it generally not required as regards the element of indecency (see *Court* [1989] A.C. 28)? The presumption of fault cannot be confined in its operation to the age elements of offences, because the court affirmed that there is nothing special about such elements, so the presumption should apply to all ingredients of the offence unless it has been expressly or impliedly excluded, and there is no indication in the statute that the presumption has been excluded as regards the indecency element.

Lord Bingham added that nothing in his judgment had any bearing on a case where the victim did not consent. So what of the situation where the defendant was mistaken in his belief as to the consent of the victim? Three different scenarios are relevant. First, where the defendant correctly believed that the victim was over 16 and mistakenly thought that she consented, then he will not be guilty: *Kimber* [1983] 1 W.L.R. 1118. Secondly, where the defendant mistakenly thought both that the victim was over 16 and that she consented, then he should not be guilty, by virtue of the ruling in *K* itself and *Kimber*. Thirdly, where the defendant knew that the victim was under 16 but mistakenly thought that she consented, then he will be guilty because legally she cannot consent, as Lord Bingham recognised.

Lord Bingham also emphasised that crimes involving under-age sex were to be treated differently. Certainly, as regards sex with a
girl under 16, contrary to section 6 of the 1956 Act, the presumption of fault must be excluded by section 6(3) which creates the “young man’s defence”. The more serious offence of a man having sex with a girl under 13, contrary to section 5, is not qualified in this way. According to Lord Bingham, this should be interpreted as a strict liability offence as well. This must be right, but for reasons of policy rather than interpretation of the offence in its statutory context.

Finally, how difficult a task will it be for the prosecution to prove that the defendant did not honestly believe that the victim was 16 or over? In many cases the defendant is unlikely to have considered the victim’s age, and is probably unaware of its legal significance anyway. But, if there is some evidence that the defendant may have thought the victim was over-age, or even a bare assertion by the defendant to this effect, then the burden will be on the prosecution to prove that the defendant did not believe this, and this will be very difficult to establish. So the effect of the decision will undoubtedly be to make it more difficult to secure the conviction of those who indecently assault children where the child consents, or is believed to consent, to the assault. Where the defendant is close in age to the victim, this may be appropriate, but where there is a larger age difference, this is a cause of concern.

The law is in a mess. A statutory provision has been interpreted in a way which one of the Law Lords considers to be contrary to the intention of Parliament, but he still justified that interpretation. Although the general acceptance of the presumption of mens rea is appropriate, problems arise in identifying clear principles as to when it will be impliedly rebutted. This is yet another decision of the House of Lords the implications of which make the case for a Criminal Code. But at least in the area of sexual offences, with the publication of the Home Office Consultation Paper Setting the Boundaries (July 2000), there is some hope that the offences themselves will be reformed, but it will be vital that all new offences identify explicitly what fault, if any, is required.

GRAHAM VIRGO

NEGLIGENCE AND ARTICLE 6: THE GREAT ESCAPE?

When, the European Court of Human Rights decided in Osman v. UK [1999] 1 F.L.R. 193 that striking out a claim in negligence (in Osman v. Ferguson [1993] 4 All E.R. 344) against the police, for failing to prevent a disturbed teacher injuring a pupil and killing
the pupil’s father, amounted to a breach of Article 6 of the European Convention, many domestic lawyers felt that human rights law had gone too far. Article 6 protects the right to a fair and public hearing in the determination of one’s civil rights. The E CtHR did not say that the hearing had not been fair, but that it had not really been a hearing at all. By so deciding, the E CtHR subjected the public policy considerations that had been relied on by the Court of Appeal to strike out the claim to the requirements of legitimacy and necessity which have to be satisfied to justify an interference with Article 6.

In two decisions, Z v. UK [2001] 2 F.L.R. 612 and TP and KM v. United Kingdom [2001] 2 F.L.R. 549, the E CtHR has taken a marked step back from Osman. The same claims were heard as the “abuse cases” in X v. Bedfordshire CC [1995] 2 A.C. 633. In the first case the E CtHR found a violation of Article 3, in the second a violation of Article 8, but the striking out of these claims in Bedfordshire, as disclosing no arguable claims in negligence, escaped condemnation under Article 6.

The implications of Z v. UK and TP and KM v. UK cannot be analysed without first looking at the Osman judgment itself. There are at least two aspects to the E CtHR’s judgment in Osman. In the first place it was felt that the public policy considerations, relied on by the Court of Appeal to determine whether it would be fair, just and reasonable to allow the claim, were distinct from the duty of care. The Court of Appeal had applied the House of Lords authority of Hill [1989] A.C. 465 which had found that there were cogent policy reasons why the police should not owe a duty of care while carrying out their “investigative” functions. In distinguishing the fairness, justice and reasonableness aspect of the duty of care from its other components, the E CtHR was no doubt misled by the Court of Appeal itself: McCowen L.J. stated that the policy considerations were “a separate point which is not reached at all unless there is a duty of care”. This aspect of Osman was highlighted in Palmer [1999] Lloyd’s L.R. Med. 351 in which the Court of Appeal expressed the opinion that Osman precluded the striking out of claims by reference to policy considerations, but not for absence of proximity.

This approach may appear to rest on a division between principle and policy, but in fact policy considerations are integral to the negligence determination in hard cases. The requirement of “proximity” is itself not simply a categorisation of facts from which conclusions about responsibility can be straightforwardly drawn. A finding of proximity is underpinned by policy considerations. Moreover, Pill L.J. in Palmer noted that in many cases proximity
and the fairness, justice and reasonableness requirement are “merely facets of the same thing” (cf. Stovin v. Wise [1996] A.C. 923, 932 and Hill v. Van Erp (1997) 188 C.L.R. 159). Osman threatened what has been a welcome trend in recent years, viz. the open articulation of the policy issues which influence courts.

The second central aspect to the Osman decision was that the policy considerations had been applied in a blanket fashion without considering competing considerations. In Osman v. Ferguson, however, the immunity was said only to apply to the “investigative” functions of the police, in a similar way that some political areas are considered unsuitable for a negligence enquiry and non-justiciable. This type of policy “immunity”, at least, does seem to be accurately and properly divorceable from the seriousness of the harm or other competing factors. The ECtHR suggested that such “immunities” not only require justification, but should be reconsidered in every case. It was even suggested that that the applicants ought to have had the facts of their case investigated at trial.

In TP and KM v. UK the ECtHR stated that the striking out of the claim had been based on “ordinary principles of negligence law” and thus not on an “exclusionary rule”. Lord Browne-Wilkinson in Bedfordshire had said that social workers and psychiatrists had not assumed responsibility towards the mother or children in question, but he also said that the public policy considerations applied with equal force to preclude a duty of care. Taken in isolation, TP and KM v. UK could be taken to confirm the view that the ECtHR is seeking to draw an arbitrary distinction between determining cases by invoking conceptual tools such as “proximity” and “assumption of responsibility”, and by relying on policy considerations as to what is fair, just and reasonable.

In both TP and KM v. UK and Z v. UK the ECtHR said that in the Bedfordshire case the House of Lords had been concerned with the “existence” of civil rights, since they had been faced with wholly novel claims. Once determined against the claimants, however, the ECtHR suggested there would be no arguable civil right at all in comparable cases. It is then difficult to see that there had been any right in negligence after Hill with regard to the investigative functions of police activities, yet Osman v. UK was not explicitly disapproved. Surely the ECtHR is not suggesting that it reserves the right to determine whether precedent has been properly applied, since this would be tantamount to an appellate function (compare Bellet v. France (1995) A 333B)?

In Z v. UK the ECtHR went further than in TP and KM v. UK and acknowledged that it had been mistaken in concluding that the
public policy factors were not an integral part of the duty of care in English law. It thus implied that Article 6 could not, in fact, bite on such matters at all, since they are inextricably bound up with the substance and content of the civil right in English law. The E CtHR stressed: “Article 6 does not in itself guarantee any particular content for civil rights and obligations in national law ...”. In addition, it recognised that, far from having been denied access to a court, the applicants had “litigated with vigour up to the House of Lords...”.

Unfortunately the E CtHR did not fully withdraw the jaws of Article 6 from negligence. In particular it stated: “the ruling of law concerning [the policy considerations] in this case does not disclose the operation of an immunity” (emphasis added). It seems to be suggesting that some “immunities” would still have to be justified and that Osman v. Ferguson was indeed wrong in not sufficiently “weighing in the balance the competing considerations of public policy”, in particular the policy that wrongs should be remedied, as was done in Bedfordshire. The reservation is probably meant to bite on the “sweeping” or “blanket” use of “immunities” to limit the reach of negligence law, but it could clearly retain the influence of Article 6 on the content of substantive rights.

The effects of the reservation may well, however, be limited. The recent trend of English cases reassert a balancing approach on domestic principles (although influenced by Osman: e.g. Barrett [2001] 2 A.C. 550). Moreover, the E CtHR has suggested that such “immunities” must not be an element of the “substantive content, properly speaking, of the relevant civil right” (McElhinney v. Ireland (2002) 34 E.H.R.R.13). This will, however, be determined independently of the domestic characterization of the “immunity” in question.

Finally, it is worth noting that the E CtHR expressly disclaimed the suggestion in Osman that all cases should go to trial, noting the value of the striking out procedure. It had more than one eye on the new CPR and the approach taken in S v. Gloucestershire [2001] Fam. 313. There the Court of Appeal in a preliminary hearing considered all the important evidence and, in one of the cases before it, gave summary judgment against the claimants under CPR r. 24.2 since there was no real prospect of the applicants making out a breach of duty. After Z v. UK English courts should also be less hesitant to invoke the valuable striking out procedure in r. 3.4(2).

While it is clearly appropriate and highly desirable for the law to be confined by human rights norms, it is not right that Article 6 should interfere with the content of substantive rights. Domestic
negligence lawyers will no doubt welcome the fact that the *Bedfordshire* cases have made it to clear ground beyond Article 6; but negligence is not completely home and dry, and probably never will be. It remains in what some English private lawyers would still consider to be unfamiliar territory. But now, of course, human rights have been brought home.

Tom Hickman

NO NEW SCOPE FOR CONTRIBUTORY NEGLIGENCE

Contributory negligence has never been a defence to an action in deceit. Of the dozen or so authorities to this effect, the dictum most often cited is that of Sir George Jessel M.R. in *Redgrave v. Hurd* (1881) 20 Ch.D 1 at 13–14:

Nothing can be plainer, I take it, on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.

Although these words leave little space for argument, the High Court has been invited to review the decision in *Redgrave v. Hurd* on no fewer than three occasions in recent years. Each time the invitation has been declined: *Alliance & Leicester Building Society v. Edgestop Ltd.* [1993] 1 W.L.R. 1462, *Corporación Nacional del Cobre de Chile v. Sogomin Metals Ltd.* [1997] 1 W.L.R. 1396, and *Nationwide Building Society v. Thimbleby & Co.* [1999] Lloyd’s Rep. P.N. 359.

In *Standard Chartered Bank v. Pakistan National Shipping Corporation (No. 4)* [2001] Q.B. 167, the Court of Appeal has finally given reassurance that *Redgrave v. Hurd* remains good law. The dispute arose from false bills of lading issued by PNSC. The bills were passed to SCB, the confirming bank under a letter of credit transaction. SCB confirmed payment, but was later left out of pocket when the issuing bank identified other discrepancies in the shipping documents (unrelated to the fraud) and refused to pay. SCB claimed its losses from PNSC in the tort of deceit. The Court found that SCB’s employees had been at fault in failing to identify the discrepancies before forwarding the bills to the issuing bank, and therefore the issue arose whether its damages should be reduced under the Law Reform (Contributory Negligence) Act 1945. By a majority (Aldous and Ward L.JJ., Sir Anthony Evans dissenting), the Court held that contributory negligence is no defence to an action in deceit.
This proposition is obviously correct. Contributory negligence has never been applied in this context because deceit is an unusual tort with an unusually broad set of remedies: *Smith New Court Securities Ltd. v. Citibank NA* [1997] A.C. 254, 279. In particular, the claimant in deceit is not required to prove that the fraud was the sole, or even predominant, cause of loss. It is sufficient if the fraud was a “material inducement” acting on the claimant’s mind at the relevant time: *Peek v. Derry* (1887) 37 Ch.D 541, 574. So contributory negligence is legally irrelevant to an action in deceit.

Sir Anthony Evans saw the authorities differently, concluding that contributory negligence has always been available as a defence to deceit. At 178B–E, his Lordship said that *Redgrave v. Hurd* establishes only that the claimant should not be blamed for failing to detect the fraud; there might be other forms of contributory fault which would give rise to the defence. This reasoning gives rise to two sources of difficulty. First, it does not seem to address the causation point. If, as *Peek v. Derry* dictates, the defendant’s deceit is in law the sole cause of the claimant’s loss, what legal relevance can any form of contributory fault possess? Secondly, it is difficult to conceive of any conduct on the claimant’s part which might fall within the definition. Other than failing to identify the fraud (for which the claimant is clearly not to be regarded as culpable), what other relevant species of fault can the claimant possibly commit? The only real possibility is that he might discover the fraud and carry on incurring loss regardless. But such loss would be unrecoverable in any event as the deceit would have ceased to be a material cause of loss.

The Court also considered whether the Law Reform (Contributory Negligence) Act 1945 has affected the scope of the contributory negligence defence. Unanimously, the Court found that it had not—the scope of the defence remains as stated by the common law, and the Act operates only where the claimant’s conduct would have amounted to contributory negligence prior to 1945.

The Court’s decision on this point is to be welcomed. The 1945 Act has always operated in the context of an established common law rule. The Act was passed—further to the Eighth Report of the Law Revision Committee (Cmd. 6032)—to abolish the principle that contributory negligence operated as a total defence to a claim in tort. To this end, section 1(1) does not establish a new defence, but provides that “a claim … shall not be defeated by reason of the fault of the person suffering the damage” (emphasis added).

While the Act may have modified the consequences of the defence at common law, there is no reason to believe that the Act
should have altered its scope. On the contrary, the scope of the common law defence is expressly preserved. Section 1(1) states that the defence is to be triggered when damage occurs by reason of the claimant’s “fault”. “Fault” is not an easy concept under the Act, as section 4 (which sets out to define the concept) is poorly drafted. However, correctly interpreted, section 4 provides that a claimant is only guilty of contributory negligence under the Act if his conduct would have amounted to contributory negligence at common law: Reeves v. Commissioner of Police of the Metropolis [2000] 1 A.C. 360 at 369G.

This case provides welcome relief on all fronts. It tells us what we always knew, which is that the Law Reform (Contributory Negligence) Act 1945 reformed rather than replaced the common law defence of contributory negligence. But most importantly, the majority judgments dispose convincingly of the recent challenge to the principle in Redgrave v. Hurd. Conventional wisdom, if it ever left us, has been firmly restored.

NEIL BERESFORD

INCORPORATING PARTICULARLY ONEROUS OR UNUSUAL TERMS

In O’Brien v. MGN Ltd. [2001] EWCA Civ 1279, the Court of Appeal gave a significant decision dealing with the issue of incorporation of onerous or unusual terms.

The claimant thought he had won £50,000 in a scratchcard game played in the Daily Mirror on Monday 3 July 1995; the Mirror Group Newspapers (MGN) thought otherwise. The issue was whether the contract between them incorporated the Mirror Group’s rules, including rule five. The Court of Appeal decided it did.

The scratchcard game was designed and the cards were printed to produce only one or two £50,000 prizes each week. Someone responsible for determining winning combinations made a mistake, and too many winning cards were produced. The claimant’s card revealed two sums of £50,000. As was required, he telephoned the mystery hotline, and a message indicated that he had won that amount. He had trouble in ringing up to register his claim. As it turned out, 1,472 other people made the same claim.

The newspaper apologised for the “mix up” and announced a special draw for one £50,000 prize, for which those with cards showing two sums of £50,000 would be eligible. In addition, a further £50,000 would be shared equally among all those with such
cards. The claimant’s card was entered in the draw. It was unsuccessful, but he did receive £33.97 as his share of the extra £50,000.

The judge and the Court of Appeal concluded that the contractual offer was made in the Mirror on 3 July and accepted that day by the claimant when he telephoned the hotline, and that the offer and the contract clearly incorporated the term “Normal Mirror Group rules apply”. The offer was therefore one that was capable of acceptance by a mere telephone call (though it would be dubious to interpret this as meaning that MGN was contractually obliged to award prizes without having the opportunity to check that those registering claims held eligible cards). Rule five read as follows: “[s]hould more prizes be claimed than are available in any prize category for any reason, a simple draw will take place for the prize”.

The trial judge and the Court of Appeal concluded that only one £50,000 prize was “available” on 3 July 1995 in the sense that the draw’s organisers had previously determined that there should be only a single prize in that category. Hence, more prizes were claimed than were available. If rule five formed part of the contract, MGN was therefore entitled to insist upon holding a draw. The question was whether the words “Mirror Group rules apply” were enough to incorporate rule five into the contract in the circumstances.

The well-known “red hand” rule establishes that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party, unless the contractual document is signed (see Interfoto Picture Library v. Stiletto Visual Programmes Ltd. [1989] 1 Q.B. 433, 438H to 439A per Dillon L.J.). The claimant emphasised that rule five “turns winners into losers”. The offer in the 3 July copy of the Daily Mirror clearly stated that if the bonus cash amount announced on the mystery bonus cash hotline “matches two identical cash amounts you have scratched off on today’s section of the card, you win that amount”. Rule five took that away. The claimant argued that this was not a game in which it was made clear that there was only one £50,000 prize to be won. In those circumstances, he argued, the defendant had not done enough to bring the rule to his attention. The offer did not explain where the rules could be found, nor had the newspaper published the rules regularly or frequently around the time of the offer.

MGN accepted that special steps have to be taken to give proper notice of an onerous or unusual term, but argued that there
was nothing particularly onerous or unusual about this particular term. It simply deprived the claimant of a windfall. It could not be compared with the exclusion of liability for negligently causing personal injuries in *Thornton v. Shoe Lane Parking* [1971] 2 Q.B. 163 or the imposition of extortionate charges for delay in *Interfoto Library Ltd. v. Stiletto Ltd.* [1989] 1 Q.B. 433.

The trial judge and the Court of Appeal accepted the defendant’s argument. Hale L.J. delivered a judgment on behalf of herself and Potter L.J. The crux of the trial judge and Hale L.J.’s judgments was that although rule five does turn an apparent winner into a loser, it cannot by any normal use of language be called “onerous” or “outrageous”, since “[i]t merely deprives the claimant of a windfall for which he has done very little in return” (Hale L.J. at para. [21]). In addition, the limited evidence suggested that provisions of the kind sought to be relied on by MGN are not unusual or uncommon in the field of such games and competitions, and “indeed it would have been surprising if there had been no protection on the lines of Rule 5” (Hale L.J. at para. [24]).

Sir Anthony Evans, agreeing with reluctance, felt constrained not to interfere with the judge on an issue of fact, but said there was no obvious reason why the rules could not appear in every edition which offered tickets for the game, except the editor’s wish to use the space for publishing hyperbole about the prizes. In his opinion, the promise of significant riches by the newspaper required more information. The reference to the rules could have been accompanied by some indication of where they had been printed or could be found.

*O’Brien* is a valuable reminder that a clause can be unusual without being particularly onerous or unreasonable, and vice versa. Courts often appear to think that whether terms are unreasonable is the same thing as whether they are not standard or customary in the trade (P.S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford 1995), p. 187). The case also re-affirms that the starting point for consideration of whether a clause is unusual should be empirical evidence. This empirical evidence should then help to determine what should be known to the reasonable man in the position of the relevant party (E. Macdonald, “The Duty to Give Notice of Unusual Contract Terms” (1988) Journal of Business Law 375, 383–384). The obvious places to look for guidance as to whether a clause is unreasonable are the “grey list” (the “indicative and non-exhaustive list of terms which may be regarded as unfair”) in the Unfair Terms in Consumer Contracts Regulations 1999, and the case law on the application of the “reasonableness” test in the Unfair Contract Terms Act (UCTA) 1977. However, if the contract
is one to which UCTA or the Regulations apply, then the term can be challenged directly for its unreasonableness or unfairness, meaning that the “red hand” rule is not necessarily needed to invalidate the clause. Guidance is often lacking where the rule matters most, and the difference in approach between Sir Anthony Evans and the majority in *O’Brien* reminds us that the question of adequate notice can be far from straightforward.

**Jesse Elvin**

**EVOLUTION OR REVOLUTION? UNFAIR TERMS IN CONSUMER CONTRACTS**


First National Bank is a major provider of consumer finance. It lends money under agreements regulated by the Consumer Credit Act 1974. A standard term in its non-negotiated contract was the debtor’s obligation to pay the contractual rate of interest after as well as before any judgment. The term was included to prevent the covenant to pay interest merging in the judgment. A lender seeking to enforce a regulated credit agreement is obliged by the 1974 Act to bring his action in the county court, which was precluded by legislation from awarding statutory interest on a money judgment. The court can order that a money judgment be paid in instalments over time. In such circumstances the effect of the impugned contractual term was that it was possible for a debtor to make all his instalment payments and still be substantially in debt. But this was not necessarily its effect. Under the 1974 Act, the court had the power in making any order to include “such provision as it considers just for amending any agreement or security in consequence of a term of the order”. It could also reopen credit agreements to do justice between the parties where the credit bargain was extortionate. In practice, however, judgments were entered in the county court without the court considering whether to exercise these powers.
Two issues were present. First, was the term subject to scrutiny under the 1994 Regulations or was it an essential term within regulation 3(2) and thus immune from scrutiny? Second, if the term was subject to scrutiny, was it an unfair term within regulation 4(1)? Both at first instance and in the Court of Appeal, it was held that the term was subject to scrutiny. Evans-Lombe J. found that it was not unfair, the Court of Appeal found that it was. The House of Lords allowed First National’s appeal. Whilst each Law Lord delivered a separate speech, all agreed with Lord Bingham’s reasons.

Lord Bingham dealt briefly with the first issue. The object of the Regulations in protecting consumers against unfair and prejudicial terms in standard form contracts would be thwarted if regulation 3(2)(b) was given a broad interpretation to encompass terms other than those which clearly fell within it. The term in question was an ancillary provision, intended to operate upon default. It did not concern the adequacy of remuneration received by First National. It was not within regulation 3(2)(b).

The second issue, of unfairness, received greater consideration. This is not surprising since Article 3(1) of the Directive is based upon concepts familiar to the civil law yet exotic to the common law. Lord Bingham stated that the purpose of the Directive was to harmonise the law in this area. The Directive did not state the law of any particular Member State. Instead, it created a common test to be applied in all Member States. Lord Bingham identified this test in the words of regulation 4(1): “a term falling within the scope of the regulations is unfair if it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith”. A significant imbalance exists “if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour”. The contract as a whole must be examined to determine if this imbalance exists. Lord Bingham did not define detriment to the consumer.

Lord Bingham established good faith as a substantive requirement, one that “looks to good standards of commercial morality and practice”. It requires fair and open dealing; it seeks to prevent a supplier taking advantage of the consumer. Importantly, “good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers”. Because there was no particular consumer involved in this case, the position of typical parties was examined to establish whether or not the term was unfair.
Lord Bingham then considered the regulatory framework established by the 1974 Act; it was significant that the Act, passed to protect consumers, did not prohibit terms providing for post-judgment interest. Unacceptable consequences can arise in these cases because borrowers are unaware that the court has the power, under the 1974 Act, to redraw the terms of their contractual obligations. They do not occur because of the unfairness of the contractual term. First National’s failure to alert borrowers to potential grounds of relief was not unfair by the customs of the industry. Regulation 4 is not directed at “the use which a supplier may make of a term which is in itself fair”. The term was not unfair within the meaning of regulation 4(1).

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

Catharine MacMillan

FARLEY V. SKINNER: RIGHT OR WRONG?

Mr. Farley’s action for breach of contract against his surveyor gave the House of Lords an opportunity to consider the recovery of damages for non-pecuniary loss (Farley v. Skinner [2001] UKHL 49, [2001] 3 W.L.R. 899). Mr. Farley had been considering buying a house and instructed Mr. Skinner to survey the property. In particular, Mr. Farley asked Mr. Skinner to investigate whether the
property was affected by aircraft noise, saying he did not want a property on a flight-path. Mr. Skinner subsequently reported that he thought it unlikely that the property would be so affected. Mr. Farley, having acquired and spent significant sums refurbishing the house, was therefore disappointed to discover that his enjoyment of the property was significantly impaired by the sound of aircraft waiting to land at nearby Gatwick airport.

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

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

Taking inconvenience first, Lord Steyn and Lord Hutton rejected the argument that the judge’s finding as to physical inconvenience had not been open to him. Lord Clyde and Lord Scott also endorsed the judge’s finding but each sought to refine the test set out by Bingham L.J. in Watts v. Morrow. Lord Clyde considered that “inconvenience” sufficiently covered the kinds of discomfort falling within the exception, while “disappointment” covered matters of pure sentiment which fell outside the exception and damages for which were excluded by the law on policy grounds. Lord Scott considered that the “critical distinction” lay not in the different types of inconvenience but in their cause: “If the cause is no more than disappointment that the contractual obligation has been broken, damages are not recoverable even if the disappointment has led to a complete mental breakdown. But, if the cause of the inconvenience or discomfort is a sensory (sight, touch, hearing, smell etc.) experience, damages can, subject to the remoteness rules, be recovered” (at para. [85]).
As for being a contract to provide pleasure, neither Lord Steyn nor Lord Clyde had difficulty in finding that the contract with Mr. Skinner fell into that exceptional category, bearing in mind the defendant’s “specific undertaking to investigate a matter important for the buyer’s peace of mind”. However, Lord Steyn did say that it was not necessary for the “very object” of the contract to be to provide pleasure for an agreement to fall within this category; it was sufficient if the provision of pleasure was a “major or important” object.

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

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

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

DAVID PEARCE

ENFORCING A POSSESSORY TITLE TO A STOLEN CAR

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

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

In Costello v. Chief Constable of Derbyshire Constabulary [2001] EWCA Civ 381, [2001] 1 W.L.R. 1437 the Court of Appeal allowed his claim. Lightman J., who delivered the leading judgment, applied the classical rules on enforcement of possessory titles. Costello’s possession of the car gave him a title to possess which was good against all the world except one who could assert a better title (at para. [31]). The Police’s authority to possess under PACE had expired, so Costello’s title, which had temporarily been “suspended”, now reverted to being stronger than that of the Police (ibid. at para. [14], applying Webb v. Chief Constable of Merseyside Police [2000] Q.B. 427). The person with the best title, the original owner, was unknown. He could not be joined as a party to the action so as to defeat Costello’s claim to possession on the ground that Costello’s title was weaker than the original owner’s. Although section 8(1) of the Torts (Interference with Goods) Act 1977 purports to abolish the rule that a jus tertii is no defence in an
action for wrongful interference with goods, the statutory exception has no place where the third party is unknown. Any other conclusion would allow a defendant to succeed against a claimant with a stronger title than his own by relying on the yet stronger title of an unknown third person to whom he might never have to return the goods.

It made no difference that Costello knew the car was stolen so that by buying it he probably committed the offence of handling stolen goods under section 22 of the Theft Act 1968. In Lightman J.’s view: “possession ... is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means” (at para. [31]). To return the car to Costello did not infringe the principle *ex turpi causa non oritur actio*. Lightman J. accepted that Costello’s previous possession of the car was sufficient evidence of his title as against the Police (see F. Pollock and R.S. Wright, *Possession in the Common Law* (Oxford 1888), p. 22—regrettably this authoritative work was not cited in judgment), so there was no need for Costello to rely on any prior illegal transaction to prove his title to the car (cf. *Tinsley v. Milligan* [1994] 1 A.C. 340, 370 per Lord Browne-Wilkinson).

Even accepting this result, it is surprisingly difficult to explain how Costello still had a title to sue for conversion when the Police’s authority to retain the car expired.

A possessory title to a chattel is more vulnerable to destruction than the possessory title acquired by a squatter in adverse possession of land. Any number of relative fee simple estates can be generated at law by successive acts of adverse possession of real property. Legal estates cannot be created in personal property. Only two legal ownership interests can exist concurrently in a chattel, one relative in the possessor and the other indefeasible in the original owner. This follows from the evidential presumption that possession is prima facie evidence of ownership. Possession is an exclusive, and therefore unitary, concept. It cannot vest separately in different people. Consequently, the presumption can generate only one relative ownership interest at a time, and that must vest in the possessor for the time being (see *Pollock and Wright*, p. 25). It might be thought, therefore, that the presumption could no longer work in favour of the person who was dispossessed of the chattel, with the result that he would not have any continuing relative ownership interest and a right to possess (*Buckley v. Gross* (1863) 3 B. & S. 566, 573 per Blackburn J. and *Irving v. National Provincial Bank Ltd.* [1962] 2 Q.B. 73, 80 per Holroyd Pearce L.J.). He might have a claim in trespass for the very act of being dispossessed of the chattel (though section 19 of PACE meant that Costello lacked
even this), but nothing to support an action arising from the defendant’s later dealings with the chattel.

Costello must therefore illustrate a small extension of the presumption that possession is prima facie evidence of ownership. Past possession may be evidence of present ownership and a continuing right to possess where a defendant can no longer rely on the positive authority by which he first lawfully dispossessed the claimant, and where he cannot pretend to be holding the chattel on behalf of the true owner whose title is superior to the claimant’s (Field v. Sullivan [1923] V.L.R. 70, 84 per Macfarlan J.). There is a robust practical logic to support this result. A defendant who has a limited statutory authority to dispossess the relative owner without incurring tort liability should be open to liability in respect of his later dealings with the chattel once his statutory authority expires.

No abstract theory of reified property interests will explain the result. It is unhelpful to ask whether Costello’s relative ownership interest was somehow suspended while the Police lawfully retained the car, or whether it reverted to him when the Police’s authority expired. To say that Costello had a relative ownership interest in the car when he lacked possession simply expresses the conclusion that the court, for pragmatic reasons, was willing allow him an action in conversion against the Police. As has long been true of common law actions, the availability of the remedy determined the existence of Costello’s substantive right, not the right of the remedy.

David Fox

IF AT FIRST... UNDUE INFLUENCE AND THE HOUSE OF LORDS

The House of Lords in Royal Bank of Scotland plc v. Etridge (No. 2) [2001] UKHL 44, [2001] 3 W.L.R. 1021 refined and reformulated the principles laid down in Barclays Bank plc v. O’Brien [1994] 1 A.C. 180. Among other things, Etridge sets out new minimum requirements for mortgagees who take third party security from wives or partners and for solicitors whose task it is in such cases to advise the surety.

The goal is balance. The law should protect the victim of undue influence, but should also protect the interests of the lender. If lending institutions cannot with confidence create binding charges, they will stop lending on the security of concurrently owned homes. In O’Brien the House set this balance by recourse to a new and unconventional use of the doctrine of constructive notice. Etridge
builds upon this development to create a revised set of minimum requirements to be met by mortgagees and solicitors. In rejecting the approach adopted by the Court of Appeal, their Lordships were sensitive to the need to create a test that was “simple, clear, and easy to apply in a wide range of circumstances”. At the same time, the reformulation enhances in important respects the protection afforded to wives.

The bank

A bank is put on inquiry whenever, in a non-commercial situation, one person offers to stand surety for the debts of another, or for the debts of a company through which the other carries on business. It is irrelevant that the surety may be a shareholder and/ or director of the company in question. The principle extends to spouses, unmarried couples (whether heterosexual or homosexual), and to non-sexual relationships such as that in Crédit Lyonnais Bank Nederland NV v. Burch [1997] 1 All E.R. 144, where an employee charged her home as security for the debts of her employer. In cases of joint loan, by contrast, the bank is put on inquiry only if it is aware that the loan is for the husband’s purposes as distinct from the parties’ joint purposes.

Once put on inquiry, the bank may escape liability by taking “reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction” (para. [54]). In O’Brien Lord Browne-Wilkinson had prescribed for this purpose the holding by the bank of a private meeting with the wife, at which she is told the extent of her liability, warned of the risks and urged to take independent legal advice. Their Lordships in Etridge acknowledged that banks have good reasons for resisting such meetings and formulated an additional and alternative route by which banks may discharge their obligation.

The bank must communicate directly with the wife and obtain from her the name of the solicitor she wishes to act for her. She must be told (a) that the bank will require, for its own protection, written confirmation from a solicitor that he has fully explained to her the nature of the documents and the practical implications they will have for her; (b) that the purpose of this requirement is that thereafter she should not be able to dispute that she is legally bound; and (c) that she may be advised by the same solicitor as her husband, but she may nominate a different solicitor if she chooses. The bank must not proceed with the transaction until it has received an appropriate response from the wife.
The bank must provide the solicitor with the financial information needed to advise the wife, including details of the debtor’s current indebtedness, current overdraft facility and the amount and terms of any proposed new facility. If the husband refuses to consent to such disclosure, the bank should not proceed.

If the bank believes or suspects that the wife is being misled by her husband or is not entering the transaction of her own free will, it should insist that she receive separate legal advice and inform her solicitor of the relevant facts. In every case the bank should obtain written confirmation from the solicitor, and is entitled to rely on that confirmation. A solicitor who advises a surety does not in so doing act as the bank’s agent.

As regards past transactions, the bank will ordinarily have discharged its obligations if a solicitor acting for the wife gave the bank confirmation to the effect that he had brought home to her the risks she was running by standing as surety.

The solicitor

Practitioner will be pleased to learn that the House felt that the duties imposed in the Court of Appeal placed too heavy a burden on solicitors. In particular, unless it was “glaringly obvious” that a wife was being grievously wronged, it was not for solicitors to veto transactions by declining to provide the confirmation sought by the bank. The decision whether to proceed is for the wife, not the solicitor. Nevertheless, the role of the solicitor is important and not a mere formality. Because many of the disputed cases involved allegations of extremely poor legal advice, the House provided detailed guidance on what was required.

A solicitor acting for both husband and wife who at any stage becomes concerned that other interests or duties may inhibit his advice to the wife should cease to act for her. The meeting with the wife must be in person, in the absence of the husband, and couched in suitably non-technical language. The solicitor must first explain that his involvement is to allow the bank to counter any later suggestion of undue influence or misrepresentation. If the wife confirms that she wishes him to act for her, he should then, as a “core minimum”:

- Explain the nature of the documents and the practical consequences for the wife if she signs them—that she could lose her home, or be made bankrupt, if her husband’s business does not prosper.
- Point out the seriousness of the risks involved, giving details of the purpose and terms of the proposed facility and the amount of her liability. She should be warned that without
reference to her the bank might increase the amount, change its terms, or grant a new facility. They should discuss her resources and her understanding of the value of the property being charged.

- The solicitor should state clearly that she has a choice and that the decision is hers alone.
- He should ask whether she wishes to proceed; if so, whether she wishes him to confirm to the bank that he has explained the nature of documents and their practical implications, or whether she would like him to negotiate the terms on her behalf. Such negotiation could include, *e.g.*, the sequence in which securities are called in, or the limit of her liabilities. The solicitor should not give any confirmation to the bank without the wife’s authority.

*Etridge* constitutes a very welcome further development of the principles expounded in *O’Brien*. True, the decision does not mean that wives will never enter into such transactions under the undue influence of their husbands—as Lord Nicholls pointed out (at para. [20]), it is possible for a person to be independently advised and fully to understand a transaction, and yet still be acting under undue influence. But the decision provides a workable compromise that goes further than *O’Brien* in reducing the risk of undue influence. *Etridge* benefits potential victims in setting a very low threshold to determine when banks are put on inquiry; moreover it involves the surety at an early stage and ensures that the full implications of the proposed transaction are clearly explained. Lending institutions benefit in that even though the threshold is low, the steps required to avoid liability are clear, simple, and sufficiently formulaic to keep compliance costs within manageable bounds.

Lord Nicholls of Birkenhead (at paras. [32–33]) cautioned that undue influence has connotations of impropriety and courts should not too readily treat a husband’s “reasonable conduct” as undue influence. He drew a distinction between natural hyperbole and exaggeration when forecasting the future of a business (which are acceptable), and “inaccurate explanations” of a proposed venture (which are not). The distinction may provide a focus for future litigants.

That consideration aside, will *Etridge* succeed in staunching the flow of litigants who seek to impugn surety transactions on grounds of undue influence? Who knows?—it might at that.
OF FAST FOOD AND FIR TREES

Occasionally, the report of a case provides a disturbing depiction of a particular aspect of contemporary life, a narrative which is all the more powerful because of the scrupulously neutral language which is used to describe the relevant details. Uratemp Ventures Ltd. v. Collins [2001] UKHL 43, 3 W.L.R. 806 is one such case. It deals with legal issues surrounding the bleak world of residential private hotels and such other spartan accommodation as is available in city centres for the single and rootless. In Uratemp, the House of Lords adopted a purposive construction of the Housing Act 1988 in a well-intentioned attempt to protect those on the precarious bottom rungs of the housing ladder. The result of the case will no doubt be beneficial in the short-term to those individuals clinging on to their meagre accommodation, but the long-term effects of the judgment are, as ever, more uncertain.

The case concerned a Mr. Collins, who lived in Room 403, Viscount Hotel. The room contained a shower and basin, but no cooking facilities. It did however have a power point, and Mr. Collins somehow fed himself with the aid of a kettle, a toasted sandwich maker, a pizza warmer and a warming plate. The meals that can be prepared on such equipment are necessarily limited in scope, and presumably Mr. Collins bought take-aways which he then warmed up, or he ate out—both of course comparatively expensive options, and of dubious nutritional value.

In 1998, the owners of the hotel, asserting that Mr. Collins occupied the room as a licensee, began possession proceedings in the county court. At first instance, they were disappointed, and no doubt startled. The judge declared that, instead of being a licensee, Mr. Collins was a tenant, and an assured tenant under the Housing Act 1988 to boot. The plaintiffs’ appeal to the Court of Appeal brought them some joy, in the (majority) ruling that, even if Mr. Collins had a tenancy (which was undecided), Room 403 was not a “dwelling” so as to come within the Housing Act, because it lacked cooking facilities. Thereupon, Mr. Collins appealed to the House of Lords, who thus once again had to construe the much litigated phrase, now contained in section 1 of the 1988 Act, “a dwelling-house . . . let as a separate dwelling”. The question before their Lordships was simple—could a room without cooking facilities amount to “a dwelling”? If so, then Mr. Collins and indeed the tenant of any such room could possibly enjoy the security of tenure offered by the Housing Act 1988.

The leading speech was delivered by Lord Millett, who began by considering the ordinary meaning of “dwelling”. He prayed in aid
an eclectic range of sources, from the psalmist who noted that “the fir trees are a dwelling for the storks”, via The Mikado’s billiard sharp condemned to dwell in a dungeon cell, to Paradise Lost and Lucifer dwelling (presumably without cooking facilities despite the penal fire) in adamantine chaos. Literature thus revealed that one could dwell quite happily (or perhaps unhappily) without a stove. In ordinary usage, a dwelling just meant a home, and a home was no less a person’s home because he did not cook there. As His Lordship wryly explained, an individual might prefer to eat out or bring in ready-cooked meals. Lord Millett also noted that there were no apparent policy considerations to dictate that a tenant who prepared his meals at home should enjoy security of tenure, while a tenant who brought in all his meals ready-cooked should not.

So why had the Court of Appeal come to the opposite conclusion? The answer lay in some ambiguous dicta from previous judgments which the Court of Appeal felt bound to follow—and in particular, in Lord Templeman’s assertion, in Westminster City Council v. Clarke [1992] 2 A.C. 288, 299A, that “a bed-sitting room with cooking facilities may be a separate dwelling-house even though bathroom and lavatory facilities might be elsewhere and shared with other people”.

The statement needs to be understood in the context of previous case law, which Lord Millett carefully analysed. He pointed out that most of the judicial consideration of the wording now found in section 1 had focused on the issue of whether or not the premises had been let “as a separate dwelling”. Generally, some room or facility had been shared, and the issue was whether or not this sharing took the premises out of the statute’s ambit. Case law decided that if living accommodation (sometimes, perhaps misleadingly, referred to as “essential” living accommodation) was shared, then there was no separate dwelling. The sharing of facilities such as a bathroom or lavatory did not preclude the Act, however, on the basis that these rooms did not constitute living rooms. Kitchens were classified as living rooms—on the reasonable grounds that people often lived in the kitchen. So a shared kitchen would prevent premises from being let “as a separate dwelling”. As Lord Millett demonstrated, however, this did not mean that only living rooms containing a kitchen or cooking facilities could amount to a dwelling. He convincingly showed that Lord Templeman’s dictum was directed to the issue of sharing, and did not amount to a requirement that cooking facilities be present. He also noted that Mr. Clarke had enjoyed cooking facilities, and so that any finding by Lord Templeman as to the necessity for such would inevitably have been obiter.
The House of Lords has reversed an unfortunate decision of the Court of Appeal, and has restored to the protection of the Housing Act those tenants who live in ill-equipped bed-sits and exist on fast food and little else. This must be right, and it is good that any past ambiguities or uncertainties have been laid to rest. There is however a nagging worry about the future implications of the decision. Recently, the House of Lords has shown itself to be the robust protector of the tenant, even to the extent of finding a tenancy in a novel, non-proprietary context in *Bruton v. London & Quadrant Housing Trust* [2000] 1 A.C. 406. The cause for concern is whether this legislative protection will rebound to the disadvantage of the tenants themselves. Mrs. Thatcher’s Government certainly thought that the Rent Acts had been largely responsible for the marked decline in the private-rented sector during the last century, and indeed passed the landlord-friendly Housing Act to address the problem. One hopes that the Housing Act is considered sufficiently user-friendly by potential landlords—such as the owners of private hotels—not to deter them from conducting their business in the future. It is a fine line that the conservationist has to draw, between providing adequate protection on the one hand, and over-protection on the other. The lack of any protection can prove very dangerous to a vulnerable species, but so unfortunately can over-protection. Let us hope that the Housing Act as presently drawn is about right.

Louise Tee

**Non-discriminatory trade restrictions after Keck**

In its *Keck* judgment—famous or notorious according to taste—the Court of Justice drew a distinction, for the purposes of the application of the prohibition in Article 28 EC against measures having equivalent effect to quantitative restrictions (“MEEQRs”), between two categories of national measures. On the one hand were “product requirements”: measures specifying requirements to be met, in order to obtain access to the market of a Member State, by products coming from other Member States where they are lawfully manufactured and marketed, like the minimum alcohol requirement for fruit liqueurs in *Cassis de Dijon* (Case 120/78 [1997] E.C.R. 649). Such product requirements are liable to constitute MEEQRs, and therefore require specific justification, in order to escape prohibition, on one of the public interest grounds recognised by Community law. On the other hand was the category of measures
described in the judgment as “provisions restricting or prohibiting certain selling arrangements”. An example was the legislation at issue in the main proceedings in Keck, which prohibited the resale of products below their purchase price, thereby depriving retailers of a form of sales promotion. Other examples, attested by the case law post-Keck, are measures regulating advertising methods, the kind of shop in which goods of a certain description can be sold, shops’ opening hours and Sunday trading. National provisions in this latter category are not normally such as to hinder trade between Member States under the test formulated by the Court in Dassonville (Case 8/74 [1974] E.C.R. 837, at para. 5), and so do not call for justification; not, that is, “so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States”: see Joined Cases C-267 and 268/9 [1993] E.C.R. I-6097, at paras. 15–17.

One of the questions which has been debated since Keck is how the reasoning adopted in the judgment might affect the assessment under Article 28 of measures which are capable of restricting the free movement of goods, while being neither directly nor indirectly discriminatory. A particularly clear example of such a measure came under the Court’s scrutiny in Case C-473/98 Kemiekaliinspektionen v. Toolex Alpha AB, not yet reported in the E.C.R. The case has not attracted much attention so far (though it is mentioned in a footnote on page 330 of Wyatt & Dashwood, European Union Law; 4th ed.) perhaps because it is interesting not so much for what the Court had to say in its judgment, or Advocate General Mischo in his Opinion, as for what is passed over in silence.

The question put to the ECJ, in a reference for a preliminary ruling under Article 234 EC from a court in Sweden, concerned legislation prohibiting the marketing or use for industrial purposes of a chemical solvent, trichloroethylene, which was believed to be carcinogenic. The Court was asked, in effect, to rule as to whether such legislation, if caught by the prohibition of Article 28 EC, would qualify for exemption under Article 30 EC. (The order for reference having been made before the entry into force of the Amsterdam Treaty, the provisions there mentioned were, respectively, Article 30 and Article 36.)

A preliminary issue for the Court was whether existing EC legislation relating to dangerous substances covered the same ground as the Swedish legislation under challenge in the national proceedings. That was because Article 30 ceases to be available as
an escape route from the prohibition in Article 28, once the
measures for securing the public interest objective it is sought to
rely on (here, protection of human health against risks from the
industrial use of trichloroethylene) have been harmonised at
Community level: among many authorities, see Case C-5/94, Hedley
the three relevant Community measures in force, the Court found,
as the Advocate General had done, that these did not present a bar
to the action taken by the Swedish authorities.

Both the Court and the Advocate General specifically considered
whether national legislation such as that in issue constituted a
MEEQR within the meaning of Article 28, and found that it did.
That was so because the general prohibition on the industrial use
of trichloroethylene in Sweden was likely to bring about a
reduction in the volume of imports of that product; and, although
exemption could be obtained on an individual basis from the
competent national authority, “the concept of a measure having an
effect equivalent to a quantitative restriction also applies to the
obligation imposed upon economic operators to apply for exemption …” (paras. 36 and 37 of the judgment). However, the
Court, again following the Advocate General, held that a complete ban (as opposed to the imposition of a time limit on exposure to
the substance) was justifiable, owing to the difficulty of determining
a safety threshold; and also that the system of individual exemptions appeared to be “appropriate and proportionate”
(paras. 45 and 46 of the judgment). The conditions for the
application of Article 30 were, accordingly, satisfied.

The wider significance of the case lies in the fact that not a
word was said about Keck by the Court, nor by the Advocate
General nor, seemingly, those who submitted observations,
including the Commission. That this was not simply an oversight is
strongly suggested by the similar silence of the Court and of
Advocate General Jacobs in a case decided back in 1997, Case
C-316/95 Generics BV v. Smith, Kline and French Laboratories Ltd.
[1997] E.C.R. I-3129. One of the questions in that case was whether
a rule of patent law prohibiting the submission of samples of a
product manufactured by a patented process, before the expiry of
the patent, for the purposes of an application for marketing
authorisation following such expiry, amounted to a MEEQR. The
Court, following the Advocate General, was satisfied this was so,
but went on to find the restriction justified under Article 30. The
Court evidently regards Keck as simply having no relevance in such
cases, to the point where it does not even need to be explicitly
The explanation for this, it is submitted, is as follows. Provisions of the kind considered in Keck do not either regulate access to the market (like product requirements), or bar such access, as in Toolex. Their effect is simply to deny traders certain sales opportunities for goods which are already on the market: see the discussion in Wyatt & Dashwood, p. 332. Such provisions can, therefore, only hinder trade in the Dassonville sense if they discriminate against imports, at least indirectly. On the other hand, measures like the legislation in Toolex actually prevent products circulating elsewhere in the single market from getting onto the market of one of the Member States. Such market-splitting measures are caught by Article 28 because they hinder intra-Community trade: the fact that (unlike most of the measures constituting MEEQs) they may be wholly non-discriminatory makes no difference to their impact on the free movement of goods. Accordingly, they require justification, in order to escape prohibition. Toolex and Generics confirm that, on this point, the Court has not resiled from the position it took, before Keck, in Joined Cases 60 and 61/84 Cinéthèque [1985] E.C.R. 2605.

A further lesson of Toolex is that the two categories of national measures identified in the Keck judgement were not intended by the Court to be exhaustive. Otherwise, we should have expected to find in Toolex an anxious discussion as to whether a marketing prohibition amounts to a “product requirement” or a “selling arrangement”—whereas manifestly it is neither. How such a measure should be assessed under Article 28 depends on the Court’s relevant case law, not including Keck.

ALAN DASHWOOD

COURAGE V. CREHAN: JUDICIAL ACTIVISM OR CONSISTENT APPROACH?

In Case C-453/99 Courage Ltd. v. Crehan (judgment of 20 September 2001, not yet reported), the European Court of Justice has been confronted once more with the difficult task of reconciling the effectiveness of Community rights with national rules on remedies. By virtue of a series of agreements between Inntrepreneur Estates Ltd. (IEL), a company which owned public house estates, and Courage Ltd., a brewery with a 19% share of the United Kingdom market in sales of beer, all IEL tenants were required to purchase the whole of their beer requirements exclusively from Courage Ltd. In 1993, Courage Ltd. brought an action for the recovery from Mr. Crehan, a tenant of IEL, of a sum of more than
£15,000 for unpaid deliveries of beer. Mr. Crehan contended that the exclusive purchasing obligation was anti-competitive because Courage Ltd. sold its beers to independent tenants of public houses at substantially lower prices than those imposed on IEL tenants. He claimed that the beer tie was therefore contrary to Article 81(1) EC and sought damages for loss caused to him by the imposition of the beer tie. Carnwath J. dismissed the counter-claim and found in favour of Courage Ltd. (Courage Ltd. v. Crehan [1998] E.G.C.S. 171). Mr. Crehan appealed.

The case raised two important and contentious questions which the Court of Appeal decided to refer to the European Court (Courage Ltd. v. Crehan [1999] 2 E.G.L.R. 145). These were first, whether a party to an agreement prohibited under Article 81(1) EC might be given rights against the other party, and in particular, whether it could seek compensation for loss against its co-contractor. Secondly, the court asked whether the English rule which prevents a party to an illegal agreement from seeking damages from the other party (Langton v. Hughes (1813) 1 M. & S. 593, at 596, per Lord Ellenborough; Boissevain v. Weil (H.L.) [1950] A.C. 327) was compatible with EC law. The decision to make a reference can be contrasted with the approach followed in a previous case, Gibbs Mews plc v. Graham Gemmell [1999] 1 E.G.L.R. 43, where the Court of Appeal declined to refer and applied the rule in the context of a similar agreement. It is difficult to see on what grounds such a rule could be incompatible with EC law. After all, a bar to actions for damages brought by a party to an illegal contract not only can be found in several of the national legal systems but also seems a logical reflection of the “estoppel” principle (nemo auditur propriam turpitudinem allegans). The main issue was, however, as pointed out by Advocate General Mischo in his Opinion, whether the rule was so broadly framed as to gravely impair the effectiveness of the Community right enshrined in Article 81 EC.

The case law of the European Court on national remedies for breaches of EC law has been plagued by the tension between the principles of procedural autonomy and effectiveness. In Case 33/76 Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland [1976] E.C.R. 1989 the Court held that, in the absence of Community harmonisation, it was for the national legal systems to lay down the procedural rules governing actions to safeguard EC rights. This principle, however, would apply subject to two limitations. First, national rules should not be less favourable than those governing similar domestic claims (principle of equivalence). Second, they should not render excessively difficult or impossible
the exercise of a Community right (principle of effectiveness). Since then, national courts have on numerous occasions asked the European Court to rule on the compatibility of national rules on remedies with EC law. These references provided the backdrop for judgments as controversial and well known as those delivered in Case C-213/89 Factortame (1) [1990] E.C.R. I-2433 and in Case C-271/91 Marshall II [1993] E.C.R. I-4367, where the Court set aside national principles that compromised the effectiveness of Community rights.

The judgment in Courage was deeply progressive. The Court first held that Article 81 EC conferred rights on any individual even where he is a party to an anti-competitive agreement. This would include the right to compensation for loss suffered as a result of that agreement because any other conclusion would undermine the full effect of that provision. Significantly, the Court added that actions for damages between co-contractors could contribute effectively to the maintenance of healthy competition. This policy argument largely coincides with the approach followed by the US Supreme Court in Perma Life Mufflers Inc. v. International Parts Corp. (1968) 392 U.S. 134, where emphasis was laid on the threat that private actions could pose to anyone contemplating the conclusion of an anti-competitive agreement. The Court, however, did not seize the opportunity to create a centralised action for damages for horizontal situations and confirmed that the configuration of a right to compensation in these cases was a matter for national law. The Court then struck down the English rule, but only in so far as it was an absolute one and prevented a private party from seeking compensation for loss suffered as a result of an anti-competitive agreement solely on the ground that it was a party to it. Finally, the Court considered in which circumstances the rule would be compatible with EC law. It held that Community law did not preclude it where the claimant is found to “bear significant responsibility for the distortion of competition” (at paragraph 31 of the judgment). The Court went on to lay down the criteria that a national court should apply in deciding whether a party to an illegal agreement did or did not bear such a responsibility. These were the economic and legal context of the agreement and the respective bargaining power of the parties. The first was relevant in cases where an agreement that has no anti-competitive object is found to be contrary to Article 81(1) EC solely for being part of a network of agreements that cumulatively have a harmful effect on competition (Case C-234/89 Delimitis [1991] E.C.R. I-935). In these cases, only the party controlling the network bears significant responsibility for the
breach of that provision. The second criterion had a wider
application and referred to cases where one of the parties is in a
markedly weaker position than the other, so as to compromise its
freedom to negotiate the contractual terms or its capacity to avoid
the loss.

It is suggested that the decision in Courage is consistent with the
case law on national remedies and procedural rules. By narrowing
the English bar, the Court struck a balance between the need to
ensure the uniform and effective protection of Community rights
and the respect for a soundly principled rule of national law. In
Courage, the Court had a clear opportunity to extend the
Francovich principle (Joined Cases C-6 and 9/90 [1991] E.C.R.
I-5357) to actions between private parties (see the Opinion of
Advocate General Van Gerven in Case C-128/92 Banks v. British
Coal Corporation [1994] E.C.R. I-1209, which strongly supported
such an extension). However, instead of framing a Community
right to damages against private parties, the Court preferred to
ensure a minimum level of effectiveness for Community rights
while preserving the application of national rules.

More importantly, the judgment can be construed as an
endorsement from the Court of two strands of the Commission’s
competition policy. First, it explicitly upholds the view that actions
for damages between co-contractors can be used as valuable
instruments of public policy to promote competition. Secondly, it
implicitly favours the achievement of the main objective pursued by
the recent proposals for the reform of the current system of
enforcement of the EC Competition rules, namely the fully
decentralised application of Article 81 EC. It is from this point of
view that the judgment can be seen as having an evident
teleological slant.

ALBERTINA ALBORS-LLORENS

THE ‘BABY-DRY’ CASE: THE MODERNISATION OF TRADE MARKS?

When is a monopoly not a monopoly? Following the decision of
the European Court of Justice in Case C-383/99 P Procter &
Gamble v. Office for Harmonisation of the Internal Market (OHIM)
[2002] E.T.M.R. 3, the answer appears to be when it is a registered
trade mark.

The facts of the case are these. In 1996, Procter & Gamble
applied to the OHIM to register BABY-DRY as a Community
Trade Mark for “disposable diapers made out of paper or
cellulose” and “diapers made out of textile”. The application was refused, on the grounds that it infringed the absolute grounds for refusal of registration as set out in Article 7(1)(c) of the Trade Mark Regulation No. 40/94. It was a descriptive mark, consisting, as the examiner later put it, “only of a combination of non-distinctive words baby and dry, thus consisting exclusively of an indication which may serve in trade to designate the intended purpose of the goods such as those for which registration is sought, i.e. keeping a baby dry” (Case C-383/99 P Procter & Gamble v. OHIM [2001] E.T.M.R. 829 Opinion of Advocate General Jacobs at 835). Procter & Gamble appealed to the First Board of Appeal, where it also sought to submit evidence of acquired distinctiveness, which under Article 7(3) might allow registration of descriptive marks. On the substantive issue, Procter & Gamble again failed. The Board also declined to consider the evidence of acquired distinctiveness, suggesting that Procter & Gamble might adduce the evidence in a new application for registration (Case R 35/1998–1 Procter & Gamble Company’s Application [1999] E.T.M.R. 240). Once again, Procter & Gamble appealed.

The Court of First Instance upheld the appeal on the procedural issue. The Board of Appeal should have looked at the evidence of acquired use. However, the Court agreed that the mark was unregistrable under Article 7(1)(c). Since the purpose of nappies was to keep babies dry, the Court concluded that the mark was composed exclusively of words which may serve in the trade to designate the intended purpose of the goods (Case T-163/98 The Procter & Gamble Company v. OHIM [1999] E.C.R. II-2383). Despite Procter & Gamble’s partial success on the procedural issue, it nonetheless appealed on the substantive question of the interpretation of Article 7(1)(c) to the European Court of Justice.

The Court upheld the appeal. It held that signs which infringe Article 7(1)(c) are only those which are purely descriptive. Conversely, if their descriptive components were presented in such a way that the resultant whole was distinguished from the usual way of designating the goods at issue or their essential characteristics, they would be registrable. It followed that when marks were composed of descriptive words, such as BABY-DRY, the words should be considered not only in relation to each other but as a whole. Any difference between that whole and the usual way in which relevant consumers might describe the goods or their characteristics would be sufficient to confer distinctiveness. Here it was necessary to look at the mark from the viewpoint of the average English-speaking consumer. Was this a normal way of referring to nappies? It was not. While the words in combination
might form part of a description of the function of nappies, their “unusual juxtaposition” was not a familiar English expression. Thus, while BABY-DRY was descriptive, it was also distinctive and could be registered.

This apparently straightforward decision appears to bring to a conclusion an approach to trade mark registration and monopolies which has been followed by the English courts, since the introduction of registered trade marks in 1875, and even lingered on beyond the passage of the Trade Marks Act 1994. In this approach, although some marks might be capable in practice of distinguishing the goods of their proprietors from those of other undertakings (the essential characteristic of a registered trade mark), they were held to be incapable of registration in law if the result would be to award monopolies for marks which should, in the public interest, be freely available. Hence, the courts refused, before the 1994 Act, to register shape marks (Coca Cola Trade Marks [1985] F.S.R. 315), certain geographical designations (YORK Trade Mark [1982] 1 W.L.R. 195) and, in the later case of Procter & Gamble Ltd.’s Trade Mark Application [1999] R.P.C. 673 (C.A.), a bottle for cleaning preparations. According to Walker L.J. in the latter case, distinctive character should be determined in the context “of traders who are in competition with each other in the marketplace, and to whom Parliament wishes to accord proper protection but not any exorbitant monopoly” (at 679).

In the present case, Procter & Gamble argued before the European Court of Justice that the refusal to allow registration of BABY-DRY was based on this “outdated” view of trade marks (characteristically an approach pursued in the United Kingdom and Germany), according to which registration of a trade mark gives the holder of the mark a monopoly right over the signs or indications of which it is composed, so that any signs or indications which are descriptive and need to be left free for trade mark use are by definition not capable of constituting trade marks. Interestingly, the OHIM took a similar view that Article 7(1)(c) should not be read as prohibiting the registration of terms which should remain in the public domain. Indeed, both parties accepted that Article 7(1)(c) should be read in conjunction with Article 12(b), which allows a third party to use a registered mark, in the course of trade, to indicate, inter alia, the kind, quality, quantity or other characteristics of goods and services provided the use is in accordance with honest business practices. Where they disagreed was simply on whether the BABY-DRY sign was solely descriptive or whether it actually had distinguishing characteristics.
In his opinion, which was followed by the European Court of Justice, the Advocate General had “broadly agreed” with both Procter & Gamble and the OHIM. He noted that Article 12(b) means that a trade mark may include descriptive signs or indications, or else the provision would serve no purpose. However, it was also clear from Article 7(1)(c) that it must not consist exclusively of them. He also sought to reassure the presumably “outdated” advocates of the English approach. Articles 7(1)(c) and 12(b) read in combination should, he said, “go far to meet the concern expressed long ago by an English judge: ‘Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure’” (at 847; citing Joseph Crosfield & Sons’ Application (“Perfection”) (1909) 26 R.P.C. 837, at 854 (C.A.). Whether the Master of the Rolls, Sir H. H. Cozens-Hardy, who was firmly committed to a clearly defined public domain, would indeed have been reassured is surely open to question.

Jennifer Davis

Does Sex Matter?

Are sex or gender crucial components of modern marriage? In Bellinger v. Bellinger [2001] EWCA Civ 1140, [2001] 2 F.L.R. 1048, the Court of Appeal returned to the question of the relevance of biological sex to the validity of marriage, first considered thirty years ago by Ormrod J. in Corbett v. Corbett (otherwise Ashley) [1971] P. 83. Both cases involved male-to-female transsexuals who had undergone gender reassignment surgery but in Bellinger, Mrs. Bellinger sought a declaration under section 55 of the Family Law Act 1986 that her marriage to Mr. Bellinger was valid at its inception and still subsisting (unlike Corbett, which involved a nullity petition). The Court, by a majority, upheld the decision of Johnson J. refusing the declaration.

The Matrimonial Causes Act 1973 s. 11(c) provides that a marriage will be void where the parties are not respectively “male and female”, apparently giving statutory recognition to the classic definition of marriage in Hyde v. Hyde and Woodmansee (1866) L.R. 1 P. & D. 130, 133 as the “voluntary union for life of one man and one woman, to the exclusion of all others”. Yet, while it is evident that Lord Penzance was talking about biological sex, it is open to argument that the reference to “male and female” in the legislation is a reference not to sex but to gender. Such an
interpretation would admit of factors other than purely biological criteria and could, significantly, embrace a psychological element.

In *Corbett*, Ormrod J. adopted the former interpretation. He held that sex was an essential determinant of marriage, that it was fixed at birth and was immutable. Sex was to be determined by the threefold biological assessment of chromosomal, gonadal and genital factors, while excluding psychological and hormonal factors along with secondary sexual characteristics. The majority in *Bellinger* conceded that the expression “male and female” was broader than “man and woman” but refused to accept that the current state of medical evidence concerning the causes of gender dysphoria (in particular that relating to brain differentiation) required the Court to abandon the *Corbett* test. The Court distinguished the recent decision of Charles J. in *W v. W (Nullity: Gender)* [2001] 1 F.L.R. 324 on the basis that the biological indicators in that case had not been congruent. *W v. W* involved a person of indeterminate sex at birth, a so-called physical inter-sex. Her chromosomal and gonadal sex at birth was male but the appearance of her external genitalia was ambiguous. Her general appearance and gender orientation from early teens had been female and she too had later undergone male-to-female gender reassignment surgery. In these circumstances Charles J. was not bound by the *Corbett* decision, which depended on the congruence of all three biological criteria. It was, therefore, open to the judge to hold, taking into account wider psychological and hormonal factors, that the respondent was female at the time of her marriage, though registered as a boy at birth.

In a powerful dissenting judgment in *Bellinger*, Thorpe L.J. rejected the view that only physiological factors were relevant when taking into account scientific, medical and social change. He regarded the proposition that marriage depends on sex not gender as “now of very doubtful validity” and stated that there was “no logic or principle in excluding one vital component of personality, the psyche”. The whole Court expressed strong concern that the Government had taken no steps to initiate a public consultation on the *Report of the Inter-Departmental Working Group on Transsexual People* (presented to Ministers in April 2000). The Court also noted that the European Court of Human Rights had found in several cases involving transsexuals that the United Kingdom was not in breach of either Article 8 or Article 12. Nevertheless, in *Sheffield and Horsham v. United Kingdom* (1998) 27 E.H.R.R. 63, it had been strongly critical of the failure in this country to legislate, given “the increased social acceptance of transsexualism and the increased recognition of the problems which post-operative transsexuals...
encounter”. It was noted in that case that the United Kingdom was one of only four of the 23 States of the Council of Europe not to give legal recognition to a change of gender (the others being the Republic of Ireland, Andorra and Albania).

The majority differed from Thorpe L.J. in what should be done about this state of affairs. According to the majority it was a matter for Parliament rather than the courts to take action. Thorpe L.J., disagreeing, thought that the family justice system should be sufficiently flexible to accommodate social change, that there were no compelling policy reasons to deny the petitioner legal recognition of her marriage and that his experience over the last decade suggested how hard it was “for any department to gain a slot for family law reform by primary legislation”.

Both Bellinger and W v. W reveal an apparent preoccupation with questions of sex and gender, but it is arguable that they are really more concerned with sexuality and the capacity for its expression in sexual relations. Thorpe L.J. noted that scientific changes had “diminished the once cardinal role of procreative sex”. It is worth remembering in this context that, in the immediate post-war period, the House of Lords held that the possibility of conception was not an essential prerequisite for consummation (Baxter v. Baxter [1948] A.C. 274). Moreover, the law has long made concessions to the elderly who may wish to marry on the understanding that sexual relations are to play no part in their relationship (Brodie v. Brodie [1917] P. 271, Morgan v. Morgan [1959] P. 92). Yet, even so, for Thorpe L.J. the sexual dimension of a couple’s relationship is an “essential ingredient” and one of “cardinal importance”. Thus it was crucial that Mrs. Bellinger, possessing as she did “an orifice which [could] be described as an artificial vagina”, was apparently capable of heterosexual intercourse.

This view of heterosexual intercourse as occupying a central role in marriage today is questionable, as is the continued relevance of biological sex and gender. Recognition is increasingly given to the social and emotional interdependence found in familial arrangements (see especially FitzPatrick v. Sterling Housing Association [2001] 1 A.C. 27) which include single-sex relationships. In these latter relationships the capacity for heterosexual intercourse is of course nil and, if homosexual marriage is ever recognised (as it already is in the Netherlands), there could surely be no requirement of consummation. Heterosexual intercourse is also fast losing its centrality in the acquisition of legal parenthood. Quite apart from adoption, scientific advance has multiplied the occasions on which children are conceived without the necessity of any sexual
relationship. Yet here too the United Kingdom has adhered to the traditional view that a legal father must have been registered male at birth (X, Y and Z v. The United Kingdom [1997] 2 F.L.R. 892) and that parenthood is gender-specific in that there can be only one mother and one father and not two of either. Increasingly the argument is likely to be pressed, from a human rights perspective, that marriage is about the commitment of two persons (of whatever sex, gender or sexuality) to each other and that parenthood is primarily about the social commitment to children and not about the sex or gender of the adults concerned. Indeed, the reality is that sex, gender and sexuality are all of diminishing significance in the new family law of the twenty-first century, and these decisions, though recent, are liable to be quickly overtaken by events.

ANDREW BAINHAM

CHEATING THE PUBLIC REVENUE: FICTIONS AND HUMAN RIGHTS

The decisions of the House of Lords in R. v. Allen [2001] UKHL 45, [2001] 3 W.L.R. 843 and R. v. Dimsey [2001] UKHL 46, [2001] 3 W.L.R. 843 concerned appeals against convictions for cheating and conspiring to cheat the public revenue. The appeals were heard together before the Court of Appeal (noted (2000) 59 C.L.J. 42) and before the House of Lords, although separate decisions were handed down in the latter court. Both cases arose from the evasion of tax through the use of overseas companies. Allen had evaded his own tax liability by, inter alia, making false declarations of his income and Dimsey, a financial services adviser, had administered overseas companies for various clients, including Allen, to evade their tax liability. The grounds of appeal fell under two main headings. A third ground, relating to Allen alone, was that benefits in kind received by him from overseas companies of which he was a shadow director were not taxable. It was held that he was liable to pay tax on such benefits, even though the link between those benefits and the services he provided as a shadow director might be tenuous.

1. The deeming provision

Both Allen and Dimsey argued that they were not guilty of cheating the public revenue of corporation tax because the overseas companies were not liable to pay such tax. This issue was considered by Lord Scott in Dimsey’s appeal. The defendants’ argument turned on the proper interpretation of section 739(2) of
the Income and Corporation Taxes Act 1988. The effect of this provision in cases such as these is that, where an individual has sought to avoid income tax by the transfer of assets to an overseas company in circumstances where the transferor obtains the benefit of the income within the United Kingdom, then the income is deemed to be that of the transferor. The defendants argued that since this provision deemed the income which had been received by the overseas companies to be the income of the transferor, it followed that the overseas companies were not liable to pay corporation tax since the income was not theirs, and so the Revenue could not have been cheated of this tax. After a careful analysis of the legislative history of section 739(2) and related provisions, Lord Scott concluded that its purpose was to ensure that the transferor of assets did not avoid his tax liability, by deeming the income to be his. It did not follow that the transferee ceased to be liable to pay tax on this income.

The issue here is not uncommon: how real are the consequences of a fictional deeming provision? The conclusion of the court that the provision only operates to prevent the transferor of assets from avoiding tax, with no effect on the transferee, seems perfectly reasonable, but it does produce a difficult consequence, namely that both the transferor and the transferee would be liable to pay tax on the same income since, unusually, the transferees were subject to the UK tax jurisdiction. Although Lord Scott recognised that once tax had been paid by one party it could not be demanded from the other, there remains the difficulty that the Revenue has a discretion as to which party should be charged to tax, contrary to the principle of taxation according to law. But Lord Scott did not appear unduly concerned by this state of affairs, since he regarded it simply as a consequence of the construction of a statutory provision for which Parliament bore responsibility. But, as will be seen, this does raise a separate issue concerning human rights.

2. The Human Rights Act 1998

The defendants relied on two separate human rights arguments to undermine their convictions. Both of these arguments were rejected, but there was one further issue which proved decisive, namely that the Human Rights Act 1998 was not to be applied retrospectively to make unsafe a conviction obtained before the Act had come into force, as had been recognised by the House of Lords in Lambert [2001] UKHL 37, [2001] 3 W.L.R. 206. The Court did however consider the defendants’ human rights arguments in their own right.

Dimsey’s argument was grounded on Article 1 of the First Protocol to the European Convention, which recognises the right to
peaceful enjoyment of possessions. Dimsey argued that the Revenue's discretion to tax either the transferor or the transferee on the income contravened this Article by breaching the principle of proportionality between the means employed and the aim pursued: Gasus Dosier- und Fördertechnik GmbH v. Netherlands (1995) 20 E.H.R.R. 403. Lord Scott concluded that this was justified by means of public policy and, anyway, the tax avoider cannot be taxed on income which has been taxed already. He went on to say that no element of administrative discretion is involved. But there is such an element, since the Revenue has the discretion whether to pursue the transferor or the transferee, assuming it has jurisdiction over both parties. But Lord Scott's conclusion is surely correct; this degree of discretion is justifiable on grounds of public policy to deter tax avoidance.

Allen's human rights argument was founded on Article 6 of the European Convention, which recognises the right to a fair trial. He argued that during the investigation of his tax affairs he had been threatened with prosecution if he failed to produce a schedule of his assets, and so his right not to incriminate himself had been violated. Lord Hutton, with whom the other Lords concurred, had no hesitation in concluding that the demand to reveal assets under a threat of prosecution did not infringe Article 6, since it was justified to ensure the due payment of taxes to the State. A contrary conclusion would mean that any taxpayers who were prosecuted for submitting false information in their tax return could escape conviction by arguing that the return contained a threat that they would be prosecuted if they did not declare their income for the tax year. Further, Allen argued that he had been induced to disclose information by the Revenue suggesting that if he did so he might not be prosecuted for cheating. But Lord Hutton held that this did not infringe the right against self-incrimination either, because the inducement had related to the provision of true information and the information Allen had produced had been false. In other words, his conviction was based on the very fact that the information which he had disclosed had been false and the provision of that type of information did not result directly from the inducement. However, Lord Hutton did recognise that if Allen had disclosed accurate information which revealed earlier dishonesty, and was then prosecuted for that earlier dishonesty, those proceedings might be treated as unfair because the information was disclosed as a direct result of the inducement.

Analysis of these two cases shows that the courts have sought to defend the important offence of cheating the public revenue against subtle arguments which, by themselves or cumulatively, would
render it impotent. Although sometimes, especially as regards the double taxation consequences of section 739(2), the result is unprincipled, this is surely justified since, as Lord Greene M.R. said in *Lord Howard de Walden v. IRC* [1942] 1 K.B. 389, quoted by Lord Scott, “[it] scarcely lies in the mouth of the taxpayer who plays with fire to complain”.

**Graham Virgo**

**COMMERCIAL EXPECTATIONS AND THE ROME CONVENTION**

Which law governs a contract where none has been chosen by the parties? The solution lies in Articles 3 and 4 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations. Article 3 allows a court to infer the parties’ intentions from the circumstances. But such intentions must be “real”, not presumed, and in the absence of genuine consent, Article 4 provides that the applicable law is that most closely connected with the contract. Under Article 4(2) this is (in effect) the law in force where the supplier of goods or services is located, or (if relevant) has a branch—for the supplier’s performance is invariably “characteristic” of a contract, in the sense intended by the Convention. But any clarity thereby won is immediately lost because the presumption is rebuttable under Article 4(5) whenever a contract is better connected with another law, exposing Article 4(2) to the risk of constant challenge. The presumption is especially vulnerable because it will so seldom be appropriate to apply the supplier’s law, the law of the place of performance frequently having a stronger claim to govern. Perplexingly, it is a presumption more apt to be rebutted than applied.

How might paragraphs 4(2) and 4(5) be reconciled? The authorities suggest that which paragraph governs may depend upon the requirements of commercial efficiency, objectively judged by reference to the expectations of those in the relevant market. Article 4(5) prevailed in *Bank of Baroda v. Vysya Bank Ltd.* [1994] 2 Lloyd’s Rep. 87, because business sense suggested that the law governing a letter of credit should be the same whether payment is sought from the issuer or the confirming bank, a result which Article 4(2) would have prevented. But in *Sierratel v. Barclays Bank plc* [1998] 2 All E.R. 821, commercial efficiency ordained that the law governing a bank account should be that applicable at the branch where it is held, a result achieved by applying Article 4(2). This mirrors the approach of the Dutch Hoge Raad in *Société
Nouvelle des Papeteries de l’Aa SA v. BV Machinefabriek (1992 Nederlandse Jurisprudentie, No. 750), where Article 4(2) prevailed, apparently because it is commercially preferable that cross-border sales are governed by the supplier’s law. It also echoes the Official Report on the Convention (O.J. 1980 No. C282/1), which may suggest (if ambiguously) that Article 4, reflecting the traditional rules of most contracting States, is concerned with locating contracts in their “social and economic environment” (see pp. 19–20).

The recent decision in Definitely Maybe (Touring) Ltd. v. Marek Lieberberg Konzertagentur GmbH [2001] 1 W.L.R. 1745 is therefore puzzling. Oasis, the band, represented by the English claimants, had agreed to appear at concerts in Germany. The German defendants, the promoters, withheld full payment when the band performed without Noel Gallagher. Whether the claimants could sue in England for the balance depended upon whether the English courts had jurisdiction under Article 5(1) of the Brussels Convention, as they would if the defendant’s obligation to pay was to be performed in England. The contract being silent on the point, England was the place of payment provided that English law governed the contract, because the presumption in English law is that a debtor must make payment where the creditor resides. But Germany, as the debtor’s domicile, would be deemed the place of payment if German law applied, and the English courts would then have no jurisdiction under Article 5(1).

English law would have governed in Marek under Article 4(2) of the Rome Convention, because the claimants, the suppliers of the band’s services, were English. But Morison J. held that German law was better connected under Article 4(5). Germany, where the defendants staged the concerts, and where Oasis performed, was the contract’s “centre of gravity”.

An immediate puzzle is why Morison J. thought it relevant that Germany was (in his view) the appropriate forum (see para. [16]). His conclusion that German law governed was reinforced by the consideration that the courts of Germany, not England, would then have jurisdiction (under Article 2 of the Brussels Convention, the defendants being German-domiciled). But the concept of the natural forum is redundant where the Brussels Convention applies, and the logic of such cases is surely that jurisdiction depends upon the identity of the applicable law, not the other way around.

The decision in Marek is also questionable for more important reasons. Neither Baroda nor Sierratel were mentioned in the judgment, although Baroda was cited in argument. And Morison J. was concerned solely with the contract’s factual associations,
ignoring the more subtle, evaluative approach suggested by the earlier authorities. But the decision is more robust, and more interesting, than this suggests. The contract was unusual, or at least was unlike the mainstream commercial contracts considered in Baroda and Sierratel. It was not a situation in which experience suggested what business efficiency required, and in which a court might confidently discern the contract’s “economic context”. Lacking evidence of market expectations, because deprived of any purchase on market practice, it is unsurprising that Morison J. may have resorted instead to a search for factual connection.

Marek may thus complete our picture of how a contract’s applicable law should be ascertained. Article 3 of the Rome Convention defers to the parties’ real intentions (express or implied), while Article 4 gives effect to market expectations, as suggested by commercial considerations. But where those expectations are undiscoverable, as perhaps in Marek, the balance of factual connection becomes decisive by default.

But a nagging question remains. Should the Article 4(2) presumption be displaced so readily? The twin goals of predictability and uniformity, which properly underpin the Rome Convention, suggest that Article 4(2) is paramount, because it lends stability to contractual relations. Presumably, it cannot jeopardise these goals to implement recognised commercial expectations, for there is no uncertainty in reflecting accepted business practice and achieving the result the parties would expect. So the approach in Baroda and Sierratel (and in Machinefabriquek) is defensible. But where market expectations are uncertain, as apparently in Marek, the only path to predictability and uniformity lies in applying the statutory presumption. This suggests that Article 4(5) cannot prevail merely because a contract has greater factual attachment to another law, a conclusion reflected in the court’s insistence in Machinefabriquek that Article 4(2) cannot be ousted unless the law applicable thereunder lacks “real significance as a connecting factor”. If so, the decision in Marek becomes suspect, for where commercial expectations are unclear, the proper course is to enforce the Article 4(2) presumption.

Marek offers a somewhat unsubtle response to the difficulties inherent in Article 4. But it usefully exposes its conceptual incongruities, and highlights the need for a more workable, evolved replacement. And, like Baroda, Sierratel, and Machinefabriquek, it provides another clue to how the puzzle of Article 4 might be solved.