THE CAMBRIDGE LAW JOURNAL

VOLUME 60, PART 3 NOVEMBER 2001

CASE AND COMMENT

APPEALS

Appeals in cases noted in earlier numbers of the Journal have now been disposed of as shown:


THOU SHALT NOT VIOLATE PROVISIONAL MEASURES

In its judgment in the _LaGrand_ case (Germany v. United States of America), delivered on 27 June 2001, the International Court of Justice found, for the first time in its history, that its orders indicating provisional measures were legally binding. This has long been the subject of extensive controversy, but the Court has traditionally refrained from stating its views on this point, even though such orders are frequently disregarded (e.g., in Anglo-Iranian Oil Co. (1951), Fisheries Jurisdiction (1972), Diplomatic Staff in Téhran (1979) and Genocide Convention (1993)). In _LaGrand_ the Court adopted a positive stand on provisional measures and displayed full readiness to draw serious consequences from non-compliance therewith. One can expect that the important ruling in this case will have a far-reaching impact on future attitudes toward the Court’s provisional measures.

The brothers Karl and Walter LaGrand were German nationals but permanently resident in the US since childhood. They were arrested in 1982 in Arizona on suspicion of armed robbery and murder and were later convicted and sentenced to death. Since they

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were German nationals, the Vienna Convention on Consular Relations 1963, to which both Germany and the US were parties, required the US authorities to inform them without delay of their rights to communicate with the German consulate; but they were not so informed. When the consulate eventually became aware of the case in 1992, the LaGrands were precluded by a “procedural default rule” in US law from challenging their conviction and sentence in federal courts by raising the issue of the lack of consular notification, because of their failure to have done so earlier in the state proceedings. Karl LaGrand was executed on 24 February 1999. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, Germany brought the case to the Court. On 3 March 1999, upon Germany’s request, the Court issued an Order indicating provisional measures, stating that the US should take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court, but he was executed later that day.

At the jurisdictional stage, the Court rejected a US contention that Germany’s claim based on the individual rights of the LaGrands was beyond the Court’s jurisdiction under the Vienna Convention because diplomatic protection was a concept of customary international law. According to the Court, a State party to a treaty, which created individual rights, could take up the case of one of its nationals and institute international judicial proceedings on his behalf, on the basis of a general jurisdictional clause in such a treaty.

In objecting to the admissibility of Germany’s submissions, the US argued that Germany was improperly asking the Court to play the role of ultimate court of appeal in national criminal proceedings, a role the Court was not empowered to perform. The Court observed that Germany only requested the Court to apply the relevant rules of international law to the issues in dispute between the parties, which function did not convert the Court into a court of appeal. The US also contended that the LaGrands had failed to exhaust local remedies by not raising the issue of consular notification in a timely fashion. The Court responded that the US could not rely on this fact, which was precisely the result of its own failure to fulfil its obligation under the Vienna Convention.

The Court then considered the merits of Germany’s four submissions.

1. Article 36(1) of the Vienna Convention

Germany’s first submission was that the US, by not informing the LaGrands of their rights under Article 36(1)(b) of the Vienna
Convention without delay, and by depriving Germany of the possibility of rendering consular assistance, had violated Article 36(1) of the Vienna Convention; that is, in violating Article 36(1)(b) (consular notification) the US had also violated Article 36(1)(a) (consular communication and access) and (c) (consular visit and assistance). The US admitted a violation of Article 36(1)(b) but denied that any other provision had been violated.

The Court observed that the breach of Article 36(1)(b) had indeed also violated Article 36(1)(a) and (c). Article 36(1), the Court held, “establishes an interrelated régime designed to facilitate the implementation of the system of consular protection”. When the sending State was unaware of the detention of its nationals owing to the failure of the receiving State to provide the requisite consular notification, the sending State was prevented for all practical purposes from exercising its right under Article 36(1).

The Court noted, in particular, that Article 36(1)(b) ended with the following words: “The said authorities shall inform the person concerned without delay of his rights under this subparagraph” (emphasis added). Moreover, under Article 36(1)(c), the sending State’s right to provide consular assistance to the detained person may not be exercised “if he expressly opposes such action”. Thus the Court concluded that Article 36(1), in addition to the rights accorded to the sending State, “creates individual rights, which … may be invoked in this Court by the national State of the detained person”.

Besides bearing significantly on diplomatic protection, this holding was important in LaGrand. If, as the US contended, the rights of consular notification and access under the Vienna Convention were rights of States but not of individuals, then the gravity of the US violation of its various legal obligations would be considerably discounted, and the scope of the remedies greatly reduced.

2. Article 36(2) of the Vienna Convention

Germany’s next submission was that the US, by applying rules of its domestic law, in particular the procedural default rule, had violated Article 36(2) of the Vienna Convention, which required that the laws and regulations of the receiving State “must enable full effect to be given to the purposes for which the rights accorded under this Article are intended”.

The Court emphasised that a distinction must be drawn between the procedural default rule as such and its specific application in the present case. In itself, the rule did not violate Article 36. The problem arose when the rule did not allow the detained individual
to challenge a conviction and sentence by invoking his right to consular information under Article 36(1), thus preventing the person from seeking and obtaining, and the sending State from rendering, consular assistance. Under these circumstances, the rule violated Article 36(2).

3. The Order on Provisional Measures

The Court dealt at length with Germany’s third submission that the US had violated its international legal obligation to comply with the Order of 3 March 1999 indicating provisional measures. The US replied that it had already complied with the Order by immediately transmitting the Order to the Governor of Arizona, and further stated that two factors had constrained its ability to act: the extraordinarily short time available and the character of the US as a federal republic of divided powers. Moreover, the US alleged that the Order did not create legally binding obligations.

The Court first compared the equally authentic English and French texts of Article 41(1) of the Court’s Statute, under which the Court had “the power to indicate … any provisional measures which ought to be taken to preserve the respective rights of either party” (le pouvoir d’indiquer … quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire). Finding the two texts not in total harmony, the Court resorted to the object and purpose of the Statute together with the context of Article 41. According to the Court, the object and purpose of the Statute was to enable the Court to fulfil the basic function of judicial settlement of international disputes by binding decisions, while the context of Article 41 was to prevent the Court from being hampered in the exercise of its functions. “It follows”, the Court said, “that the power to indicate provisional measures entails that such measures should be binding”.

The Court then considered Article 94 of the United Nations Charter, which provides that

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.
The word “decision” in paragraph 1 could be understood either as referring to any decision rendered by the Court, thus including orders indicating provisional measures, or as meaning only judgments rendered by the Court as provided in paragraph 2. In the former case the binding nature of provisional measures could be confirmed, but in the latter the effect of provisional measures would be in serious doubt, since States might not have an obligation to comply with them. Here the Court cleverly circumnavigated the difficulty by holding that the second interpretation would not “preclude” provisional measures from “being accorded binding force under Article 41”. Therefore, “Article 94 ... does not prevent orders made under Article 41 from having a binding character”. Thus the Court reached the conclusion that “orders on provisional measures under Article 41 have binding effect”. Accordingly, the Order of 3 March 1999 “was not a mere exhortation ... [but] was ... binding in character and created a legal obligation for the United States”.

The Court then observed that the mere transmission of the Order to the Governor of Arizona without any comment was “certainly less than could have been done even in the short time available”. The Court took further notice of the US Solicitor General’s statement that an order indicating provisional measures was not binding, the Governor of Arizona’s refusal to implement the Order, and the US Supreme Court’s rejection of an application for a stay of execution, despite the possibility of a preliminary stay. In the Court’s view, all these indicated that the various competent US authorities had failed to take all the steps at their disposal to give effect to the Court’s Order. Thus the Court concluded that the US had not complied with the Order of 3 March 1999.

4. Assurance of non-repetition

Germany’s final submission was that the US should provide Germany with an assurance that it would not repeat its unlawful acts.

The Court noted that the US had acknowledged its failure to comply with its obligations to give consular notification and had presented an apology to Germany. The Court considered however that an apology was not sufficient in this case. But the Court also noted that the US had repeatedly stated in all phases of these proceedings that it was carrying out a vast and detailed programme in order to ensure compliance with Article 36. The Court considered that this commitment to ensure implementation of the specific measures concerning Article 36 must be regarded as
meeting Germany’s request for a general assurance of non-repetition.

The Court held, nevertheless, that an apology would not suffice in cases where the individuals concerned had been subjected to prolonged detention or sentenced to severe penalties; in such cases it would be incumbent upon the US to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Vienna Convention.

XIAODONG YANG

REFUGEES AND INTERNAL ARMED CONFLICTS

Most people forced to flee across national borders do so to escape the consequences of internal armed conflicts. But the extension of protection to such people by the countries from which they seek asylum has proved to be uncertain. Most of these countries have undertaken protection obligations towards persons claiming refugee status in accordance with the 1951 Convention for the Protection of Refugees (“the Convention”). For the purposes of the Convention, a “refugee” is defined as any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Article 1A(2)). Although that definition is contained in an international instrument, national immigration laws incorporate or refer to it and its construction and application generally fall to national administrators and judges. It is, therefore, not altogether surprising that decision-makers in different countries reach different conclusions as to its scope and meaning. Such is the case with Minister for Immigration and Multicultural Affairs v. Haji Ibrahim (2000) 175 A.L.R. 585, in which the High Court of Australia rejected the approach of the House of Lords in Adan v. Secretary of State for the Home Department [1999] 1 A.C. 293. At issue in both cases were claims for refugee status made by persons having fled Somalia, a country riddled by internecine clan conflict and lacking any recognisable governmental authority. Although the ultimate decision in each case turned on the appreciation of the specific findings of fact made by the initial adjudicators, a significant difference of approach in the application of the Convention definition may be identified.
In *Adan*, the House of Lords held that in a civil war consisting of clan conflict it is not enough for a claimant to show that he or she is at risk because of his or her membership of one of the warring clans, even though these were accepted as constituting “particular social groups” for the purposes of the Convention. Such a claimant must be able to show “a differential impact” or “fear of persecution for Convention reasons over and above the ordinary risks of clan warfare”: [1999] 1 A.C. 293, 311 *per* Lord Lloyd of Berwick. A claimant might achieve this by establishing that he or she is at greater risk of adverse treatment than others or is being targeted for one of the other reasons enumerated in the Convention definition. But it is not sufficient that the civil war is being fought on racial or religious grounds.

The House of Lords was prompted to apply this gloss to the definition because of the concern that in a civil war where members of one group were attacking members of another group, the members of both sides would be eligible for protection and the only persons not entitled to protection would be those who were not active participants in the fighting. This concern would abate, however, when one side emerged as victorious, at which time the additional criteria would no longer be necessary.

The High Court in *Haji Ibrahim* rejected this approach. Gummow J., who delivered the leading judgment of the majority, recognised that the Convention was not intended to encompass those fleeing generalised violence or internal turmoil, but held that this exclusion is not to be effected by reliance on notions such as civil war, differential impact or risk of harm over and above that of others. These are, he observed, “distractions from applying the text of the Convention definition”. The task of the decision-maker, his Honour continued, is to determine whether the particular experiences of the claimant (or of his or her particular social group) fall within the terms of the Convention definition, and there is nothing to be gained by asking whether the claimant is to be differentiated from other members of the general population who are all at risk from the conflict. McHugh J., although in the minority as to the result of the appeal, similarly rejected the use of such additional concepts. He noted that, as a practical matter, it might be difficult to determine in a context such as Somalia whether the feared persecution is for one or more of the Convention reasons or, alternatively, for military or economic reasons, but that this is different from a rule that a claimant must prove that he or she is exposed to a greater risk of harm than others.
The Convention definition is problematic in many respects and there are increasing calls for its revision. However, its terms are at least tolerably clear on the point at issue in these two cases. The Convention was not intended as a panacea for all those forced to leave their country of nationality for whatever reason. As the definition clearly provides, protection is limited to those people who can establish a well-founded fear of persecution for reasons of their race, religion, nationality, membership of a particular social group or political opinions. Consequently, flight motivated by fear of economic hardship, of the effects of natural disasters, or even of the ordinary incidents of civil conflict such as increased exposure to injury, death or deprivation, is not enough, by itself, to attract Convention protection.

The converse, however, is that if the harm is feared on account of one of the enumerated grounds, then, provided the other requirements of the definition are met, no further limitations should be placed on the entitlement to recognition as a refugee. The terms of the definition, and the Convention itself, do not justify imposing additional requirements, notwithstanding concerns that too many people involved in a particular civil war situation may be entitled to refugee status. If a refugee claimant from Somalia can establish that the harm he or she fears is causally related to his or her membership of a particular clan, rather than a fear of harm held by all Somalis irrespective of their clan membership due to the military or strategic imperatives of other clans, then it should not matter whether the claimant can show a differential impact or risk of harm over and above the ordinary risks inherent in the conflict.

A further issue considered by the High Court but on which, given the way in which the claimant’s case was presented, it was not required to come to a decision, was the relevance of “state responsibility” for the persecution feared by a claimant. It is generally accepted that persecution carried out by state authorities or in which such authorities are complicit will come within the definition. It is not clear, however, whether the definition extends to persecution that is merely tolerated by the state or persecution occurring within a country where there is no effective state authority, such as Somalia. In Haji Ibrahim, Gummow J. indicated his opinion that the Convention offered protection only where there is a government from which a claimant is unable to obtain protection. McHugh J. took the opposing view. He held that where a state has disintegrated to the extent that there is no government to prevent the persecution of a person by private individuals or groups, the terms of the Convention definition will be satisfied. By way of comparison, in R. v. Secretary of State for the Home
Department, ex p. Adam [1999] 3 W.L.R. 1274, the Court of Appeal had held that the protection of the Convention does extend to situations where a recognisable government has ceased to exist.

Ben Olbourne

ARTICLE 6(1) OF THE EUROPEAN CONVENTION AND THE CURATIVE POWERS OF JUDICIAL REVIEW

The European Convention on Human Rights and Fundamental Freedoms makes no mention of any right to procedural justice in the making of administrative decisions. Any protection for such rights must be found in Article 6(1) which provides that in the determination of their “civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. But Article 6(1) was originally intended to apply to the determination of private law rights only and not to public law matters (see Le Compte, Van Leuven and De Meyere v. Belgium (1981) 4 E.H.R.R. 1, 36 (Sir Vincent Evans, dissenting); König v. Germany (1978) 2 E.H.R.R. 170 (Matscher J., dissenting)). The article plainly envisages judicial proceedings, and there are obvious difficulties in applying it straightforwardly to administrative proceedings.

Given the modern far-reaching duty of procedural fairness applicable to administrative decision-makers, it would not matter much if there were no protection of administrative justice under the Human Rights Act 1998. And the easy way to decide R. (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions [2001] 2 W.L.R. 1389 (where it was argued that the Secretary of State would be in breach of Article 6(1) if he, rather than an independent inspector, decided a planning appeal) would have been to hold that Article 6(1) was not applicable. However, the House of Lords followed the European jurisprudence (Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455; Fredin v. Sweden (1991) 13 E.H.R.R. 784 and other cases) and accepted that Article 6(1) applied in planning matters.

Stripped of unnecessary detail, what had happened was that Alconbury Developments Ltd. had agreed with the Ministry of Defence that, if planning permission were granted, it would develop a disused airfield owned by the Ministry into a national distribution centre. The company made an application for planning permission to the Huntingdonshire District Council but this was refused; and an appeal was launched.
Although such appeals are in form made to the Secretary of State, most are decided, after an inquiry, by independent inspectors acting under delegated powers. However, the Secretary of State has power “if he thinks fit, [to] direct that an appeal which would otherwise fall to be determined by an appointed person [the inspector] shall instead be determined by the Secretary of State” (Town and Country Planning Act 1990, Schedule 6, para. 3(1)). And the Secretary of State “recovered” the company’s appeal for his own determination. When this happens, an inquiry by an inspector is still held but the inspector makes recommendations rather than a decision. Over 100 such appeals, dealing with cases of national importance or sensitivity, are recovered each year.

In deciding the appeal the Secretary of State will take into account his own planning policy. This, with the fact that the land in question was owned by another government department, meant, argued the objectors, that the Secretary of State could not be an “independent and impartial tribunal” as required by Article 6(1). The Divisional Court agreed and made a declaration of incompatibility under section 4 of the 1998 Act; but the matter went on appeal to the House of Lords.

The Secretary of State is plainly not an “independent and impartial tribunal”. The Secretary of State’s relationship with his own policy is intimate, and he is entitled to take broader matters of government policy into account. This does not mean that he can act unfairly. He must not make up his mind in advance, he must not act for an improper purpose and he must not take irrelevant considerations into account. But he is an administrative not a judicial decision-maker and so it is inevitable and proper that matters of policy will loom large in his decision. As Lord Greene M.R. stressed in B. Johnson & Co. (Builders) Ltd. v. Minister of Health [1947] 2 All E.R. 395, it is not just the objectors and the developers who must be considered: “[T]here is [also] a third party who is not present, viz., the public, and it is the function of the minister to consider the rights and interests of the public”. And as Sir William Wade explained, in such cases “... the place where policy should be explained is in Parliament, where the responsibility lies. Nothing therefore can prevent the ultimate responsibility lying outside the forum of an inquiry, whereas [in a judicial proceeding] it must lie inside the forum of a court of law” (Wade and Forsyth, Administrative Law, 8th ed. (2000), p. 945). Critics may say, with some justice, that ministerial responsibility is a broken reed and that the current system means that such decisions are in reality taken in secret by civil servants: rather, final decisions should be taken by independent inspectors. But in Alconbury the House of
Lords clearly felt that such a change should be initiated in Parliament.

In any event the engagement of Article 6(1) in planning matters might be thought to throw this aspect of planning law into disarray. But the jurisprudence of the Human Rights Court itself provided a solution. It has accepted that the failure of an initial decision to comply with Article 6(1) may be cured if the person aggrieved can bring the case on review before an independent and impartial tribunal of “full jurisdiction” (Le Compte, para. 29; Bryan v. United Kingdom (1995) 21 E.H.R.R. 342). And, of course, the decision of the Secretary of State may be questioned before the High Court by a special form of judicial review—an application made under section 288 of the 1990 Act. Although the merits of the decision may not be questioned in such proceedings, the House of Lords held that this was not necessary to enable review before the High Court to cure the lack of impartiality and independence of the Secretary of State (see Zmutobel v. Austria (1994) 17 E.H.R.R. 116). The declarations of incompatibility made by the Divisional Court were set aside.

This pragmatically satisfactory conclusion reached through the “curative powers” of judicial review is, perhaps, incoherent. The supposed flaw in the Secretary of State’s decision was his reliance upon his own policy and understanding of the public interest. That “flaw” cannot be cured by judicial review proceedings that do not reconsider his reliance upon that policy, i.e., do not touch the merits. None the less, the curative principle will be an important, and helpful, way whereby the law of procedural justice can accommodate the European Convention without too much disruption. Thus, for example, it has been held that the disciplinary arrangements of the General Dental Council would not comply with Article 6(1) (insufficient independence) were it not for the right of appeal to the Privy Council: Preiss v. General Dental Council [2001] The Times, 14 August, where it was held “that any tendency to read down rights of appeal in disciplinary cases was to be resisted”.

This last remark shows that there will be pressure to extend the grounds of judicial review to ensure that the jurisdiction of the reviewing court is sufficiently full. Thus in Alconbury Lord Slynn (confirming his view in R. v. Criminal Injuries Compensation Board, ex p. A [1999] 2 A.C. 330 at 344) held that “the court has jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact” (at 1407), thus firming the footing of judicial review for error of fact.
Moreover, were the grounds of judicial review to come from the common law without any legislative imprimatur, then the court hearing a review under section 288 of the 1990 Act (being limited to review on the ground that the decision is “not within the powers of this Act”) would not have “full jurisdiction”. So the curative principle requires—in planning matters at least—the adoption of the modified ultra vires doctrine (see Forsyth (ed.), Judicial Review and the Constitution (2000), pp. 406–407).

The curative principle, however, has limits as shown by Kingsley v. The United Kingdom (Application No. 35605/97) [2001] The Times, 9 January. Here the Gaming Board had found that the applicant was not a fit and proper person to hold a gaming licence. The applicant contended that, in the particular circumstances, there was a real danger of bias. But the judicial review court said that even if there was such a danger only the Gaming Board could make the decision and so the rule against bias gave way to necessity; and the Court of Appeal refused leave on similar grounds. (See Wade and Forsyth, op. cit., pp. 452–453 on necessity.) The Human Rights Court held that the judicial review court lacked “full jurisdiction” and the curative principle did not operate. Time has thus been called on the principle of necessity and the impact on the law of bias will be considerable.

CHRISTOPHER FORSYTH

“RAPE SHIELDS” AND THE RIGHT TO A FAIR TRIAL

In R. v. A (No. 2) [2001] 2 W.L.R. 1546 the House of Lords knocked a dent in the controversial “rape shield” provision, section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA). They did so wielding Article 6 of the European Convention on Human Rights, given direct effect by another piece of “flagship” legislation, the Human Rights Act 1998. The decision is important for constitutional law as well as for criminal evidence.

In a rape case where the defendant claimed that the complainant had consented, at one time she could always expect to have her sex-life publicly examined in some detail. In an attempt to limit the abuses to which this was put, section 2 of the Sexual Offences (Amendment) Act 1976 forbade questions or evidence about this except where the judge gave leave. But feminists complained that judges gave leave too readily, and in response to this, the government promoted section 41 of the YJCEA. This, like the 1976 provision, imposes a requirement of judicial leave—but
sets out in exhaustive detail the circumstances in which it may be given.

Even as amended on its way through Parliament this provision was highly controversial, and it has attracted heavy criticism. It is said to be too narrow, because whilst banning evidence (or questions) about the complainant’s sex-life when used to suggest that the complainant actually consented, it allows them without restriction to suggest that the defendant, having heard about her reputation, mistakenly believed she did. And it is said to be too wide, because in banning the use of such evidence to suggest that the complainant did consent, it sometimes prevents the court from hearing information that is highly relevant.

Section 41 allows evidence (or questions) about the complainant’s sex-life in support of a defence of consent in three situations only. One is where the prosecution made the running by leading evidence about her sex-life, and the defence wishes to rebut or qualify it (s. 41(5)). Another is where the sexual behaviour to which the evidence relates consists of events that allegedly occurred “at or about the same time as the event which is the subject matter of the charge against the accused” (s. 41(3)(b)). And the third is where the evidence is about incidents which are so similar to the defendant’s account of the alleged rape “that the similarity cannot reasonably be explained as a coincidence” (s. 41(3)(c)).

Unlike the 1976 provision, the ban in section 41 even extends to evidence about the complainant’s previous sexual behaviour with the defendant. Thus it apparently prevents the defendant from adducing evidence that, at the time of the alleged rape, they had an on-going relationship which included regular consensual sex—unless the last occasion was “at or about the same time” as the alleged rape. As even the most committed feminists presumably accept that a person more readily consents to sex with her regular sexual partner than with others, it seems quite extraordinary that the defendant should not be allowed to show he was one. And yet this seems to be what was actually intended.

The scenario described in the previous paragraph was part of the defence version of events in *R. v. A.* Before trial, the judge made a preliminary ruling that the defendant could not lead evidence of any previous sexual relationship between them because of section 41. The Court of Appeal held that he could—but only for the purpose of showing that he believed that she consented, and not to show that she actually did. In the House of Lords, the defence argued that to exclude this evidence contravened his right to a “fair trial” as protected by Article 6 of the European Convention on Human Rights. The defence invited the House to
use section 3 of the Human Rights Act—which requires the courts to construe statutes in the light of the Convention—to find a way of reading section 41 to allow the evidence in, or failing this, to make a “declaration of incompatibility” under section 4.

To cut a long story—55 pages of erudite and closely-reasoned argument—very short, Lords Slyn, Steyn, Clyde and Hutton all agreed that section 41, if read according to the previously-accepted principles of construction, would exclude evidence of the sort the defendant wished to admit. They also agreed that in some cases, such evidence would be highly relevant to consent, and that if section 41 then rendered it inadmissible this would indeed contravene his right to a “fair trial”. But in such a situation, they said that section 3 of the Human Rights Act now required the courts to abandon traditional principles of construction, and (in effect) to do whatever violence was necessary to the language so that the evidence, if truly relevant, was admissible. On that basis, evidence of the complainant’s previous sexual relationship with the defendant could be squeezed within the apparently inelastic wording of section 41(3)(c): behaviour so similar “that the similarity cannot reasonably be explained as coincidence”. So there was no need for a declaration of incompatibility. On this basis, they sent the case back to the Crown Court for the judge to reconsider his ruling. (With some of this Lord Hope was most uneasy. Commenting that section 3 “does not entitle the judges to act as legislators”, he found it “very difficult” to accept that the courts could read into section 41 a qualification that it could never shut out evidence required to ensure a fair trial under Article 6 of the Convention.)

Much could be said about this case, and the problems with which it grapples. But here there is room for two short comments only.

The first is wonderment at the change that section 3 of the Human Rights Act wrought. Four of the five Law Lords were clear that it gives the courts power to bend an Act to fit the requirements of the Convention, even where the Act is not ambiguous. We may be on the threshold of exciting times!

The second is satisfaction that their Lordships felt able to interpret section 41 in the way they did. For Parliament to pass a law prohibiting a defendant from producing cogent evidence that tends to show his innocence is nothing short of monstrous.

It is monstrous too, of course, that complainants in sex-cases have their sex-lives publicly dissected. But what is wrong here, surely, is not that their sex-lives are examined, but that this happens publicly. The problem should be tackled not by restricting
the questions, but by limiting the audience. Complainants should routinely give their evidence with the public and the press excluded: something the “fair trial” requirement in Article 6 undoubtedly permits. And what is also wrong, surely, is that the complainant can be asked if she regularly consents to sex without the defendant having to admit—if such be so—that he has previously forced others to have sex with him without it. In this respect, if in no other, we need to change the rules about evidence of previous misconduct.

J.R. SPENCER

HUMAN RIGHTS REVIEW: RAISING THE STANDARD

The decision of the House of Lords in R. (Daly) v. Secretary of State for the Home Department [2001] 2 W.L.R. 1622 provides authoritative guidance as to how human rights issues should be treated in judicial review cases. In common with a number of other recent leading cases in this area, Daly concerns prisoners’ rights. All governors of closed prisons were required by the Home Secretary to operate a cell searching policy under which prisoners were not permitted to remain in their cells during searches, so as to prevent intimidation of those conducting searches and to stop prisoners gaining knowledge of search techniques. Prison officers were permitted to examine, but not read, legal correspondence stored in cells. The claimant, who stored such correspondence in his cell, successfully contended that the policy was unlawful to the extent that it precluded prisoners’ presence during examination of legal correspondence. This note highlights four points of general importance which arise from their Lordships’ decision.

First, Daly was explicitly decided by reference to the principle of proportionality, as the three-stage methodology embraced by Lord Bingham clearly demonstrates. His Lordship began by determining that the policy infringed the claimant’s right to legal professional privilege. However, he then observed that the policy was prima facie justified by the competing public interest in prison security, since legal correspondence may constitute a hiding place for illicit material. Finally, rather than asking whether the policy was reasonable in the Wednesbury sense, his Lordship found it “necessary to ask whether … the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline”. It was at this third stage that the policy foundered: although it was possible to justify the
exclusion of prisoners who posed a particular security risk, a policy requiring indiscriminate exclusion constituted a disproportionate infringement of the relevant right. Such reliance on the proportionality test is unsurprising, given its adoption (albeit in rather ambiguous terms) in earlier cases such as Simms [2000] 2 A.C. 1115 and the activation of the Human Rights Act. Their Lordships’ clear determination in Daly that the test is to be applied in human rights cases is nevertheless welcome, given the remarkable reluctance of the lower courts to move beyond sub-Wednesbury review in earlier cases which considered the Human Rights Act (most notably Mahmood [2001] 1 W.L.R. 840).

Secondly, Daly usefully addresses the relationship between the Wednesbury and proportionality concepts. In particular, it emphasises that they are distinct but related principles. Each of these points has, in the past, been disputed. As to the former, Lord Cooke noted that “the view that the standards [of review supplied by the two principles] are substantially the same appears to have received its quietus” in Smith v. UK (1999) 29 E.H.R.R. 493, in which the European Court of Human Rights held Wednesbury review to be an inadequate remedy for the purposes of Article 13 ECHR in a case where Convention rights were at stake. Importantly, however, their Lordships recognised in Daly that although proportionality is capable of founding a higher standard of curial scrutiny, it subsists in a public law context which still recognises reasonableness as a principle of judicial review. This characterisation of the relationship between the two concepts is most apparent in Lord Steyn’s remarks: he observed that “there is an overlap” between the principles, but that “the intensity of review is somewhat greater under the proportionality approach”. The reasoning in Daly therefore supports the view commended by, amongst others, Laws L.J. (see, e.g., Begbie [2000] 1 W.L.R. 1115), according to which “Wednesbury” and “proportionality” merely describe different parts of a single substantive review continuum; it is the courts’ task to determine the precise intensity of review which is apposite to individual fact situations. As Lord Steyn correctly concluded in Daly, this model applies “even in cases concerning Convention rights. In law context is everything.” It is, however, worth noting that while Lord Cooke generally appeared to share this vision of context-sensitive substantive review, he did raise a question as to the breadth of the continuum: in terms of low-intensity review, is it ever constitutionally necessary to embrace a standard as low as Wednesbury? Lord Cooke thought not, opining that although “the depth of judicial review and the deference to due administrative discretion vary with the subject matter … the
law can never be satisfied ... merely by a finding that the decision under review is not capricious or absurd”.

Thirdly, their Lordships were at pains to emphasise that the proportionality doctrine and the appeal-review distinction can coexist. For instance, Lord Steyn said that applying proportionality in human rights cases “does not mean that there has been a shift to merits review ... [T]he respective roles of judges and administrators are fundamentally distinct and will remain so.” This is consistent with Strasbourg case law on the “margin of appreciation” and the flexible conception of proportionality found in EU jurisprudence, as well as with the “discretionary area of judgment” concept endorsed by Lord Hope in Kebilene [2000] 2 A.C. 326. Recent cases decided by UK courts (e.g. R. v. A (No. 2) [2001] 2 W.L.R. 1546; Brown v. Stott [2001] 2 W.L.R. 817) also reflect a conception of the proportionality principle which constrains but does not destroy decision- and policy-making discretion. The emphasis is therefore on judicial identification of disproportionate (and hence unlawful) avenues of administrative action, rather than on judicial dictation of a single proportionate response.

Fourthly, the decision in Daly illuminates how the courts are likely to determine the proportionality doctrine’s sphere of influence. It is noteworthy that Lord Bingham applied the proportionality principle because a common law constitutional right was at stake, without the need to rely on the Human Rights Act. This suggests that the courts are adopting a substantive, rather than a formalistic, approach to the scope of high-intensity review: the proportionality doctrine is thus to be deployed whenever fundamental rights are involved, irrespective of whether their juristic basis is in the common law or the Convention. Indeed, at least for Lord Cooke, it seems that to attempt to distinguish between common law and Convention rights is to set up a false dichotomy: “some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.” On this view, the common law and the Convention coalesce to form a single set of fundamental norms which it is the courts’ task to uphold by recourse to appropriately rigorous tools of substantive review.

The decision in Daly raises the standard of human rights review in terms of both its acceptance of the proportionality principle, which is now acknowledged to be capable of supplying a higher standard of review than the Wednesbury doctrine, and the clarity with which their Lordships have laid the foundations for rights-based review in the post-incorporation era (in contrast to the
disappointingly opaque judgments of the lower courts on this point). Daly reflects a measured approach to human rights review by embracing a flexible and sophisticated conception of proportionality, and by correctly locating the principle within a public law framework which characterises the intensity of review as a function of context.

Mark Elliott

WHAT IS THE COURSE OF EMPLOYMENT?

Sir John Salmond stated in the first edition of his *Law of Torts* (1907) that a wrongful act is deemed to be done by a servant in the course of employment if it is “either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master”. This passage, to be found at page 443 of *Salmond & Heuston on the Law of Torts*, 21st ed. (1996), has been cited with approval in many judgments. The first alternative is unproblematic, save that it refers to a situation where the master is primarily rather than merely vicariously liable. But the second can be difficult to apply, particularly where the servant’s tort is intentional. How can it be right to describe conversion by a servant of a fur which he has been told to clean (*Morris v. C.W. Martin & Sons Ltd.* [1966] 1 Q.B. 716) or deceit of his master’s client (*Lloyd v. Grace, Smith & Co.* [1912] A.C. 716) as a mode of doing an authorised act, when it is effectively the opposite of what he has been authorised to do? The problem is even more acute when the tort consists of trespass to the person. In *Trotman v. North Yorkshire County Council* [1999] L.G.R. 584 the Court of Appeal held the defendant Council not liable for a sexual assault by a teacher on a handicapped teenager committed to his care on a foreign holiday, on the ground that it was an independent act outside the course of employment. *Trotman* has now been overruled by a unanimous House of Lords in *Lister v. Hesley Hall Ltd.* [2001] 2 W.L.R. 1311, where it was held that the proprietors of a school for children with emotional and behavioural difficulties were vicariously liable for the systematic sexual abuse of two teenage boys by the warden of a boarding house.

In their Lordships’ view, the key to the matter is to be found in a further passage in *Salmond*: “a master . . . is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them”. They approve
the test of close connection applied by the Supreme Court of Canada in Bazley v. Curry (1999) 174 D.L.R. (4th) 45 and Jacobi v. Griffiths (1999) 174 D.L.R. (4th) 71 (noted by Cane, (2000) 116 L.Q.R. 21), whilst declining to express views on the policy considerations propounded by the Supreme Court. The critical issue is whether the connection between the work and the tort is sufficiently close or whether the job has merely provided the opportunity to commit the tort (as in Heasmans v. Clarity Cleaning Co. Ltd. [1987] I.C.R. 949 where using telephones to make calls while cleaning them was held to be outside the course of employment). In Lister, the warden’s job was to take care of the boys and supervise them outside school hours, and the abuses occurred when he was in charge of them. As Lord Hobhouse points out, if a groundsman employed by the school had committed similar acts, they would have been outside the course of employment because he was not required to have anything to do with the boys.

Despite its more expansive appearance, the close connection test will probably lead to a different result from the mode test in only a handful of cases; doubtless there will still be difficult borderline situations, and as Lord Steyn says, “Matters of degree arise”. The following guidelines for application of the close connection test emerge from Lister:

1. As Diplock L.J. explained in Ilkiw v. Samuels [1963] 1 W.L.R. 991, the job must be identified in broad terms, rather than being dissected into its component activities.

2. This approach can be used in prohibition cases such as Rose v. Plenty [1976] 1 W.L.R. 141. The milkman’s job was to deliver milk. In defiance of instructions, he took the claimant on his float to help him to deliver milk, and his injury of the claimant through negligent driving was closely connected with his job. (Contrast Twine v. Bean’s Express Ltd. (1946) 175 L.T. 131—not discussed in Lister—where the job of delivering parcels merely provided the opportunity to injure a lift-taker.)

3. There is no special rule for bailment, but where a servant has been instructed to clean/repair/carry bailed goods, his misappropriation of those goods is likely to have a close connection with his job (as in Morris v. Martin), because the employer assumes responsibility for the goods and performs its duties through its servant.

4. The same principle applies where, as in Lister, the employer assumes responsibility for people and entrusts the performance of its duties to a servant: “The liability of the
employers derives from their voluntary assumption of the relationship towards the [claimant] and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant” (per Lord Hobhouse).

Lord Hobhouse goes further than the other Lords by saying that “the fundamental criterion . . . is the comparison of the duties respectively owed by the servant to the [claimant] and to his employer”. Whether such a comparison will necessarily resolve the matter is debatable: to be sure, the warden in Lister owed a duty to the claimants and to the employer to take care of the claimants, but in Rose (as in Twine) the servant owed the claimant a duty to drive him carefully, but did not owe his employer a duty to drive the claimant carefully, and did not owe the claimant a duty to deliver the milk.

C.A. HOPKINS

DEFAMATION, THE JURY AND THE PURSUIT OF JUSTICE

In the law of defamation, the jury is “the constitutional tribunal” of fact (J.C.C. Gatley, Libel and Slander, 9th ed. (London 1998), pp. 889–890). The jury’s occupation of this position is usually traced back to Fox’s Libel Act 1792. While confined in terms to criminal trials, the 1792 Act is regarded as declaratory of the common law (see Sir Martin Nourse, “The English Law of Defamation—Is Trial by Jury Still the Best?”, in B.S. Markesinis (ed.), The Clifford Chance Lectures, vol. I, Bridging the Channel (Oxford 1996), ch. 4). One way in which to explain the jury’s role in defamation trials can be found in the ideal of institutional justice. This ideal specifies that institutions should, in order to be legitimate, adequately accommodate the views of those in the society where they operate (G. Cupit, Justice As Fittingness (Oxford 1996), ch. 5). There is, however, reason to regard defamation law’s commitment to institutional justice as qualified. Support for this view can be found in Grobbelaar v. News Group Newspapers Ltd. [2001] 2 All E.R. 437. In Grobbelaar, a unanimous Court of Appeal overturned a jury’s findings of fact on the ground that they were perverse and unreasonable. This decision appears ground-breaking since the Court was unable to point to domestic authorities in which the same step had been taken.

The claim in Grobbelaar arose when The Sun newspaper published a series of articles alleging that Bruce Grobbelaar (a
celebrated goalkeeper in professional soccer) had taken bribes to fix matches. The allegations, which were made in sensational terms, were based primarily on covert video recordings of meetings between Grobbelaar and an associate, Vincent. In these meetings, Grobbelaar confessed to taking money from another individual in return for fixing matches. Grobbelaar also accepted money from Vincent pursuant to a proposal that he should fix future matches. Subsequently, Grobbelaar was prosecuted for corruptly attempting to influence match outcomes. The jury could not agree a verdict. A retrial followed. Grobbelaar was acquitted on one count and a not guilty verdict was entered on a second (when the jury was unable to reach a verdict). Thereafter, Grobbelaar brought libel proceedings against The Sun. While accepting that he made the confessions reported, Grobbelaar claimed he was fabricating them in order to bring Vincent to justice. The jury found for Grobbelaar and awarded him £85,000 in compensatory damages.

The defendant newspaper appealed on two grounds: first, that the trial judge was wrong to rule that the defence of qualified privilege was unavailable to it, and secondly, that the jury’s rejection of the defence of justification was perverse and unreasonable. The Court of Appeal decided that The Sun’s reports did not fall within the qualified privilege defence even as expansively glossed by the House of Lords in Reynolds v. Times Newspapers [2001] 2 A.C. 127. This was because the reports, inter alia, prejudged Grobbelaar’s guilt and, hence, were not in the public interest. The appeal succeeded on the second ground. While extremely reluctant to overturn the jury’s verdict, the Court did so for two reasons. First, the charge of corruption could be proved on the balance of probabilities since Grobbelaar had accepted bribes. Hence, the jury behaved irrationally in rejecting the defence of justification. Secondly, lies, inconsistencies, and improbabilities rendered Grobbelaar’s account of his conduct “incredible” (per Simon Brown L.J.). Moreover, the Court stated that upholding the jury’s verdict would be an “affront to justice”. While not specific on the point, the Court was clearly invoking corrective justice, which specifies that only those who have wrongfully inflicted harm on others should compensate them. This is clear from Simon Brown L.J.’s description of Grobbelaar’s damages award as “unmerited”. Moreover, corrective justice provides a normatively attractive ground for the Court’s decision since it is the ideal of justice to which the law of defamation is centrally committed. This being so, it can be argued that the Court decided to qualify defamation law’s long-standing commitment to institutional justice
only when doing so was necessary to maintain its more fundamental commitment to corrective justice.

Even if it is accepted that corrective justice can provide a reason for limiting defamation law’s commitment to institutional justice, there are grounds for doubting that the Court should have acted on it in Grobbelaar. Relevant here is the judge’s direction to the jury at trial which (according to Parker L.J.) conflated two meanings of “corruption”; first, the view urged on behalf of The Sun, according to which taking a bribe is, in itself, corrupt, and secondly, the view advanced by counsel for Grobbelaar, according to which corruption consists in actual match fixing. The trial judge’s conflation of these meanings prompted Parker L.J. to remark that the jury had been presented with a “somewhat confusing” account of the law. Further, Simon Brown L.J. identified this direction as enabling counsel for Grobbelaar to convince the jury (in the light of expert testimony) that the goalkeeper had not “thrown” games and, hence, was not corrupt. These observations provide a basis for suggesting that the Court should have identified the judge as having misdirected the jury. This suggestion is, however, open to the objection that the jury would seem to have regarded Grobbelaar as innocent of corruption in both of the above senses. The Court of Appeal found support for this view in the jury’s sizeable damages award. Making the large assumption that the Court was correct on this point, its decision is defensible given its conclusion that the charge of corruption could be proved by reference to the bribes accepted by Grobbelaar.

Where jury-based decision-making is perverse there is plainly reason to qualify defamation law’s commitment to institutional justice. The question whether such qualification is justified in Grobbelaar is now to be addressed by the House of Lords when the case goes to their Lordships on appeal. If the above analysis is correct, the beginnings of an answer to this question can be found in defamation law’s commitment to corrective justice.

RICHARD MULLENDER

NO COMMON LAW ACTION FOR UNFAIR DISMISSAL

In view of the restrictions inherent in the law on unfair dismissal, in relation to both the parameters of making a claim and the maximum amount of damages, it is not surprising that in Johnson v. Unisys Ltd. [2001] 2 W.L.R. 1076 the House of Lords was confronted with an attempt to circumvent the statutory system. Mr.
Johnson was summarily dismissed in circumstances which were held to amount to an unfair dismissal, and received the maximum amount of damages. Unfortunately for Mr. Johnson, who had been diagnosed with a stress-related illness before, he suffered a mental breakdown, and has since been unable to find employment. He claimed that the manner of his dismissal amounted to a breach of the implied duty of mutual trust and confidence; this argument was rejected by the judge at first instance, the Court of Appeal ([1999] I.C.R. 809) and, on different grounds, the House of Lords.

Delivering the judgment of the Court of Appeal, Lord Woolf M.R. had held that the claim was barred by the authority of *Addis v. Gramophone Co. Ltd.* [1909] A.C. 488, which established the rule that damages are available only for the financial consequences of a wrongful dismissal itself, but not for the manner of that dismissal. In contrast, the House of Lords distinguished *Johnson* from *Addis*. Lord Hoffmann (with whom Lords Bingham and Millett expressly agreed) differentiated between cases where the breach of contract consists only of a failure to give notice of termination, and cases in which there has been a separate breach of an implied term, and concluded that in the latter situation a common law action was certainly conceivable. However, he was of the opinion that the implied term in question could not be the obligation of mutual trust and confidence, as this applied only to the maintenance of an existing relationship, and could not be extended to its termination. Instead, he introduced the possibility of an implied duty to exercise the right to dismiss in good faith. After having thus acknowledged the theoretical possibility of the claim, however, Lord Hoffmann went on to reject comprehensively its practical application. He observed that to allow a common law claim to circumvent the unfair dismissal legislation would be contrary to the intention of Parliament, and would raise a number of significant problems, including the need to differentiate between the effects of the manner of the dismissal and those of the dismissal itself. Perhaps most importantly, policy considerations which had been incorporated into the unfair dismissal legislation could not be enforced by the common law. Lords Hoffmann, Millett and Nicholls accordingly concluded that the existence of this legislation rendered incompatible a parallel development in common law.

Lord Hoffmann presents a forceful argument in favour of non-intervention by the courts. The current system may not be perfect, but it provides a fair solution in the majority of cases, in relation to both the procedure and the remedy available. However, it is equally important that the law should be sufficiently flexible to accommodate exceptional cases, where the damage suffered by the
employee significantly exceeds the statutory maximum award. It is submitted that the implied term of mutual trust and confidence is capable of providing precisely this flexibility, and in this respect the majority speeches are regrettably limiting.

Lord Steyn alone regarded the existence of a separate common law remedy as not only possible, but necessary, since “the statutory system was . . . always only capable of meeting the requirements of cases at the lower end of seriousness”. He also argued that there was no reason why the implied duty of mutual trust and confidence could not be applied to the termination of an employment relationship. The obligation had, after all, been developed in the context of constructive dismissal claims, and there was no need to create an artificial distinction between direct and indirect dismissals.

In his treatment of Addis, Lord Steyn also went further than his brethren. He argued that the headnote did not accurately reflect the majority opinion in the case, and that even if it did, it should now be departed from—had, in fact, already been departed from in Mahmud v. Bank of Credit and Commerce International SA [1998] A.C. 20. However, in conclusion he acknowledged the evidentiary problems faced by Mr. Johnson, and rejected the claim on the basis of causation.

There can be no doubt that this is a case involving great personal hardship, and it is likewise clear that the scope for unfairness has only been reduced, not eliminated, by the increase in the maximum award for unfair dismissal. Their Lordships’ awareness of this problem is clearly visible, yet in the final analysis the majority opted for an orthodox, policy-based approach. It is submitted that the issues of causation and remoteness would have provided for a sufficient limitation of claims, while the purposive interpretation of trust and confidence adopted by Lord Steyn would have ensured that employees are treated with a minimum amount of respect during all stages of the employment relationship. It remains to be seen how this decision will affect the future application of the implied term, in relation both to dismissals and to cases of continuing employment.

The application of Addis, meanwhile, appears to have been further restricted. Lord Steyn’s interpretation of the case seems to receive support from Lord Millett, and it is now authoritative that there is a distinction between the situation in Addis and that in Mahmud. In addition, Lord Hoffmann held that, contrary to established law, matters such as distress and damage to reputation should be included in the statutory award. This clearly reflects an increasing recognition of the psychological dimension of employment, and as such is to be welcomed. Overall, however, the
decision in Johnson must be regarded as, at best, a missed opportunity.

V.K. SIMS

ESTOPPEL BY REPRESENTATION AS A DEFENCE TO RESTITUTION: THE EXCEPTION PROVES THE RULE?

The recognition of the defence of change of position in Lipkin Gorman v. Karpnale Ltd. [1991] 2 A.C. 548 was a landmark for the law of restitution. In the ten years which have followed Lipkin Gorman, courts and academics have been involved in two, closely related, tasks: first, a description of the content and nature of the defence of change of position; and, secondly, an analysis of the relationship between change of position and other defences to restitution. An important aspect of the latter task has been the fundamental re-examination of the role of estoppel by representation as a defence to restitution. Two recent cases in the Court of Appeal, Scottish Equitable plc v. Derby [2001] 3 All E.R. 818 and National Westminster Bank plc v. Somer International (UK) Ltd. [2001] Lloyd’s Rep. Bank. 263, indicate that, although estoppel by representation remains a defence, the practical effect of the defence will often be much more limited than had been previously understood.

Estoppel by representation provides a defence where: (i) the claimant has represented to the defendant that the latter is entitled to the enrichment received; and (ii) the defendant acts to his detriment in reliance upon this representation. As traditionally understood, an estoppel by representation prevents a claimant from relying upon facts which are inconsistent with his representation: the claimant is estopped from asserting that the defendant is not entitled to the enrichment; and, therefore, the claimant’s action for restitution fails entirely. The principal authority for this proposition is the Court of Appeal decision in Avon County Council v. Howlett [1983] 1 W.L.R. 605.

The most significant feature of the traditional view of estoppel by representation is that any detrimental reliance by the defendant which is more than de minimis leads to a complete defence. For example, a defendant will have a complete defence to a claim for recovery of a mistaken payment of £1,000 if he has given away £200 to a charity in reliance on the claimant’s representation that he is entitled to the £1,000. By contrast, change of position applied to the same facts would provide a defence only to the extent of the
defendant’s detrimental reliance; and the defendant would be required to repay £800 to the claimant. This difference in the effect of estoppel by representation and the effect of change of position on identical facts has prompted some commentators to question whether the more generous defence offered by estoppel by representation is justifiable in the light of the recognition of change of position. The question was directly raised in each of the two recent Court of Appeal cases.

In *Derby* the claimant had made a mistaken payment of around £172,400 to the defendant and represented that the defendant was entitled to this sum. In reliance on this representation, the defendant spent a sum of around £9,600 on modest improvements to his family’s style of life. This left a sum of £162,800. The claimant claimed this sum from the defendant as money paid under a mistake of fact. At trial Harrison J. rejected the defendant’s pleaded defences of change of position and estoppel by representation; and awarded the claimant the entire £162,800: see [2000] 3 All E.R. 793.

On appeal the defendant argued that, having acted in detrimental reliance upon the claimant’s representation, he had a complete defence to the claimant’s claim by virtue of an estoppel by representation. In rejecting this argument the Court of Appeal was forced to consider in detail the judgments in *Avon County Council*. There the Court of Appeal had applied the traditional view of estoppel by representation and granted the defendant a complete defence, notwithstanding that his detrimental reliance was less than the value of his enrichment. However, the Court of Appeal in that case expressed unease about this result and suggested that, although estoppel by representation would normally operate to provide a complete defence, there could be circumstances where such a result would be inequitable or unjust and where a court might therefore limit the defence. Slade L.J. suggested ([1983] 1 W.L.R. 605, 624–625) that an exception to the general rule might arise where the sums sought to be recovered were so large as to bear no relation to any detriment which the recipient could possibly have suffered. Noting that it could not overrule *Avon County Council*, the Court of Appeal in *Derby* considered that the case before it fell “comfortably within the exception recognised” by the Court in *Avon County Council* and, in particular, the exception stated by Slade L.J. Having regard to the size of the claim (£162,800), the defendant’s limited detrimental reliance did not justify a defence beyond the sum of £9,600.

The result in *Derby* can be accommodated within the statements of principle in *Avon County Council* with relative ease. Three
months later, a differently constituted Court of Appeal in *Somer International* was presented with a more difficult problem. The claimant had paid the sum of US$76,708 to the defendant and represented that the defendant was entitled to this sum. In reliance on this representation the defendant had acted to its detriment by despatching goods. The value of its detrimental reliance was US$21,616. The claimant brought proceedings to recover the entire US$76,708. At trial the defendant was ordered to repay the sum of US$55,092 (being the difference between the sum received and the defendant’s detrimental reliance). On appeal the defendant argued that it was entitled to a complete defence by virtue of estoppel by representation. In particular, it argued that it had acted to its detriment in relation to a very significant proportion of the enrichment received; and therefore this was not a case where the Court could apply any exception to the normal rule that estoppel by representation acted as a complete bar to recovery.

All three members of the Court of Appeal in *Somer International* were reluctant to allow the defendant a complete defence. Two reasons for this reluctance were articulated. First, it is often a matter a chance whether or not a material representation is made in any particular case. It is unsatisfactory that the extent of a claimant’s recovery should depend upon such a matter of fortune. Secondly, the rule that estoppel by representation leads to a complete defence is based upon its historical origin and technical status as a rule of evidence. Strict application of the rule of evidence appears to leave the defendant with a windfall. Both observations found support in Lord Goff’s recognition in *Lipkin Gorman* ([1991] 2 A.C. 548, 579) that, in many cases, “estoppel is not an appropriate concept to deal with the problem”. However, the Court of Appeal considered itself bound by *Avon County Council* and by prior authorities to regard estoppel by representation as a rule of evidence which operates to provide a complete defence.

In order to avoid a result which it regarded as unattractive, the Court of Appeal was forced to recognise and apply a more general exception than had been stated and applied in *Derby*: a defendant cannot rely upon estoppel by representation as a complete defence where it would be “unconscionable or inequitable” to permit the recipient of money to retain a balance in his hands. The Court regarded it as unconscionable and inequitable for the defendant in the case before it to seek to retain a substantial sum of money (US$55,092) in circumstances where its detrimental reliance was not related to that sum at all. On this basis, the appeal was dismissed and the defendant was ordered to repay the sum of US$55,092.
Although the general exception recognised by the Court had been tentatively foreshadowed in *Avon County Council*, this was its first unequivocal recognition and application by the Court of Appeal.

The results in *Derby* and in *Somer International* cannot be faulted. The defendant in each case was rightly prevented from retaining a windfall in circumstances where this would have been inequitable. However, the court in *Somer International* was forced to engage in legal sleight of hand to reach this result. Although ostensibly endorsing the traditional rule whereby estoppel by representation operates as a complete defence, the court recognised and applied an exception which will probably deprive the traditional rule of any significant role in the future. In this regard, it went much further in its application of the exception than the Court of Appeal in *Avon County Council* had been prepared to go. This cannot fail to influence future cases. If the detrimental reliance of the recipient of an enrichment is less than the value of the enrichment received, it is unlikely that any court below the House of Lords will now award a complete defence: anything more than a defence to the extent of the defendant’s detrimental reliance appears to be “unconscionable or inequitable”. This provides a satisfactory resolution to the practical problems faced in such cases. However, from an intellectual viewpoint, it is unsatisfactory: lip-service is being paid to a rule of law, but the exception to the rule almost entirely undermines the rule. As the Court of Appeal recognised, the difficulty arises from the historical status of estoppel by representation as a rule of evidence and can only be resolved by the House of Lords. Unfortunately, it appears that neither *Derby* nor *Somer International* will be taken beyond the Court of Appeal. It is to be hoped that the House of Lords will soon be given the opportunity to examine the true nature and role of estoppel by representation as a defence to restitution. At that stage, earlier suggestions for resolution of the intellectual conundrum (see, e.g., P.A. Key, “Excising Estoppel by Representation as a Defence to Restitution” [1995] C.L.J. 525) may fall for consideration. In the interim, the two recent Court of Appeal decisions have done much to make estoppel by representation more palatable.

**Paul Key**

**Banker’s Liability for Post-Petition Dispositions**

Once a petition to wind-up a company has been presented, a balance must be struck between two competing interests. On the
one hand, the allegedly insolvent company must be allowed to continue trading until the court has had an opportunity to examine the bien-fondé of the petition; on the other hand, the company’s directors must be prevented from dealing with the corporate assets in a way detrimental to the interests of the general creditors. This balance is struck by the Insolvency Act 1986, s. 127, which provides that, upon the granting of a winding-up order, any “dispositions” of the company’s property in the period following the presentation of the petition are retrospectively avoided, unless the court orders otherwise. The courts have, however, had considerable difficulty in applying this provision to the post-petition operation of a company’s current account and, in particular, have failed to adopt a consistent approach to the potential liability of a bank for continuing to operate such an account. The Court of Appeal addressed this problem in Hollicourt (Contracts) Ltd. v. Bank of Ireland [2001] 2 W.L.R. 290.

A petition was presented for the compulsory liquidation of Hollicourt (Contracts) Ltd. Despite being advertised, the petition went unnoticed by those at the Bank of Ireland who were responsible for Hollicourt’s current account. As a result, the bank continued to honour cheques drawn on that account, which was, at all relevant times, in credit. Following the granting of a winding-up order, Hollicourt’s liquidator sought a declaration that all post-petition withdrawals from the company’s account were void pursuant to Insolvency Act 1986, s. 127, and an order requiring the bank to re-credit the account. As it was common ground between the parties that there had been a void “disposition” in favour of the payees of the cheques, and as no validation order was sought, the only issue was whether the liquidator was entitled to any relief against the bank. At first instance, Blackburne J. held that Hollicourt had made a “disposition” in favour of the bank and ordered the bank to re-credit Hollicourt’s account with any sums that the liquidator was unable to recover from the payees of the cheques. The bank appealed on two grounds: first, that there had been no “disposition” of Hollicourt’s property in its favour within the meaning of section 127 and, secondly, that the banker-customer relationship between itself and Hollicourt was unaffected by the avoidance of the “disposition” in favour of the payees of the cheques. Mummery L.J. (Gibson and Latham L.JJ. concurring) allowed the appeal on both grounds and reversed the judge’s order.

Both grounds of appeal concerned the proper construction of section 127. On the first ground, Mummery L.J. held that there had been no “disposition” in favour of the bank as a “disposition” could only take place in favour of a party that received the
company’s property for its own benefit. His Lordship’s conclusion follows from the well-established principle that, in honouring a cheque, a bank merely acts upon its customer’s instruction to debit its account with the face value of the cheque (Westminster Bank v. Hilton (1926) 43 T.L.R. 124). As the bank merely acts as agent in paying over its customer’s money to third parties, it does not receive any of that property for itself but merely adjusts the account entries between itself and its customer to reflect any debits. To this extent, the rather tentative suggestions to the contrary by Buckley L.J. in Re Gray’s Inn Construction Co. Ltd. [1980] 1 W.L.R. 711, 715–716 must now be considered wrong. With respect to the second ground of appeal, his Lordship concluded shortly that, as section 127 only avoided transactions falling within the definition of “disposition”, it did not have the effect of retrospectively invalidating the bank’s mandate to honour duly presented cheques. His Lordship’s conclusion in this respect is consistent with previous authority holding that a bank’s mandate is terminated only from the moment when a winding-up order is granted (National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd. [1972] A.C. 785).

The decision in Hollicourt is largely to be welcomed. First, Mummery L.J. came to the only conclusion that was logically consistent with the assumption upon which both the parties and the court had proceeded, namely that the liquidator was entitled to recover the face value of the cheques from their payees. If Mummery L.J. had reached the contrary conclusion and ordered the bank to re-credit its customer’s account, it would have followed that the bank would have paid the payees of the cheques with its own money, rather than that of its customer. In these circumstances, the payees would not have been liable under section 127 because they would not have received any property of the company. Secondly, his Lordship’s conclusion has brought English law into line with the position that has existed for some time in respect of the Australian equivalent to section 127. The Australian courts have held that the only “disposition” of a company’s property occurs when the cheque is issued to the payee, because it is at that point that the company transfers a potentially valuable chattel, whereas the honouring of a cheque is merely the process whereby the value inherent in the instrument is realized by converting it into another form (see In re Loteka Pty. Ltd. [1990] 1 Qd. R. 322). Thirdly, by introducing a principle of beneficial receipt to determine when a bank will be liable under section 127, Mummery L.J. has replaced “the uncertain, if not confused” state of the law with a principle capable of introducing coherence into
this area. Just as the principle of beneficial receipt absolved the bank of liability for honouring cheques drawn on an account in credit in *Hollicourt*, so too will it in future absolve banks of liability if they honour cheques drawn on an overdrawn account. This is the conclusion that Lightman J. reached recently in *Coutts & Co. v. Stock* [2000] 1 W.L.R. 906. Furthermore, the application of this same principle must lead to the conclusion that a bank will not be liable under section 127 for collecting cheques paid into a customer’s account which is in credit: as Judge Rich Q.C. concluded in *Re Barn Crown Ltd.* [1995] 1 W.L.R. 147, when it collects a cheque, a bank acts as agent for its customer and receives neither the cheque nor its proceeds for its own benefit. As a result, after *Hollicourt*, a bank will only be liable under section 127 when it collects its customer’s cheques into an overdrawn account. As a bank will use the proceeds of the cheque to discharge its customer’s overdraft, it will receive those proceeds for its own benefit. The decision in *Re Gray’s Inn Construction Ltd.* must remain correct, on this point at least.

There is, however, a point of some concern that arises out of the *Hollicourt* decision. Section 127 is silent as to the remedial consequences of avoiding a disposition. As a result, one must look for guidance to the general law which, according to Mummery L.J., enables the liquidator to obtain restitution of a disposition on the ground that the disponee has been unjustly enriched at the company’s expense. If this is the correct analysis of the liquidator’s cause of action, as it must be, it may enable a disponee of the company’s property to resist the liquidator’s claim, under section 127, on the ground that the disponee has changed its position. This defence would appear to be available to the disponee, in addition to seeking a validation order. Whilst a disposition will only generally be validated if it can be shown that the company has received a benefit from the disponee which is equivalent in value to the alienated property, it is not necessary to demonstrate any such benefit in order to invoke a change of position defence. A disponee would, therefore, be able to defeat a liquidator’s claim by relying upon payments which it has made to third parties with no connection to the insolvent company, and from which the company has derived no benefit. The availability of such a defence could seriously undermine the usefulness of section 127 in protecting the integrity of the insolvent estate. Maybe it is time for section 127 to be amended to make explicit the consequences of avoiding a disposition, in order to avoid such a result.

Christopher Hare
FIXED AND FLOATING CHARGES

The Privy Council decision in *Agnew v. Inland Revenue Commissioner* [2001] B.C.C. 252 (on appeal from the New Zealand Court of Appeal in *Re Brumark Investments Ltd.*) decides that where a charge over the uncollected book debts of a company leaves the company free to collect and then to use the proceeds for its own benefit in the ordinary course of business, the charge is inevitably a floating charge and not a fixed charge, whatever the debenture might say. The court’s reason for this, in short, was that it makes no commercial sense to separate a book debt from its proceeds and so, if the company can use the proceeds at will, then the charge on the debt itself must be a floating charge.

The decision is the last in a long line of cases endeavouring to distinguish between fixed and floating charges. The distinction is important in common law countries which have the universal fixed and floating charge because of the weaknesses of floating charges compared to fixed charges. The most important of these weaknesses are, typically and subject to detailed local variations:

1. A floating charge ranks after certain taxes and employee wages and benefits up to limits;
2. A floating charge created by an insolvency company is liable to be set aside except, essentially, to the extent of new money lent at the time of the charge (a particular problem for group guarantees where the guaranteeing subsidiary does not receive new money);
3. A floating charge has weak priority against execution creditors, landlords’ distress, set-offs, possessory liens and the like; and
4. In the UK, there is no adequate protection for floating charge assets on an administration and the administrator can subordinate the floating charge to new money to finance the administration under section 19(5) of the Insolvency Act 1986. Presently the holder of virtually universal security including a floater can block the administration, but the Government has signalled that it intends to remove this veto.

The battle by the banks to convert their floating charges over book debts into fixed charges really began in earnest in the 1970s when the enlargement of tax and employee claims seriously eroded realisations from an insolvent company’s book debts. The pendulum swung back and forth according to the degree of blocking on the company’s account until the ingenious debenture in
the case of *In re Bullas* [1994] 1 B.C.L.C. 449. Here, the draftsman’s separation of the uncollected book debts (fixed charge) and the proceeds of the book debts (floating charge) was upheld by the Court of Appeal. It is this decision which *Agnew* has struck down on the basis that book debts are essentially their proceeds and therefore if the company can deal with the proceeds freely, *e.g.* by using them to pay its trade liabilities, then the charge on the collected book debts must be a floating charge. The result is that the Crown and the crew come first, the various devices are ruled out of order and that is the end of that.

Or is it? One problem arises in relation to assignments of large contracts in major financings, *e.g.*:

1. Project finance where typically the banks have a charge over the construction contract, the concession, the supply contract and the off-take contract for, say, the supply of electricity;
2. Aircraft and ship finance where the financier has an assignment over the lease or charterparty; and
3. Securitisations where the bondholders have charges over the receivables, the sale contract and the administration contract.

These arrangements often involve large amounts and the routine and central role of the revenue-producing contracts is of old lineage, *e.g.* the ship charter.

Generally the proceeds from these contracts are paid into a charged bank account and there is a “waterfall” clause whereby the proceeds from the main contract can be used by the chargor first for payment of operating costs, then debt service and then sometimes payments into reserve accounts, with the surplus being at the free disposal of the company. The effect of this is that, although there is a block of sorts, the company can commonly use proceeds of the main contract or lease to pay trade and operating costs until a default. Obviously the company must be free to do this.

If therefore *Agnew* holds that, wherever the company has a right to use the proceeds of the contract once in the bank account for defraying its ordinary liabilities, the charge is inevitably a floating charge, then this would be an odd result. The effect would be that English law does not allow a specific fixed assignment by way of security of a large revenue-producing contract in these circumstances; the floating charge is floating over the contract itself with all the attendant disadvantages of floating charges which should not sensibly apply to this instance.
Agnew does not enlarge on this type of situation: it is true that the decision applies to “book debts”, but book debts are contractual. Therefore financial markets may still be back to the making of fine and uncertain distinctions about the degree of bank account blocking which is enough to prevent a charge from being a floating charge.

It would perhaps have been possible to have it both ways, i.e. to preserve the Crown and crew priority for book debts and also to maintain the specific charge, if it were admitted that the right to deal is not the only badge of the floater—there is another badge, i.e. it is a charge over a generic class of assets which are not specifically and individually identified. But reintroducing the doctrine of specificity back into the law of security interests is unattractive.

The irony is that the Crown preference is about to go and that Agnew is now irrelevant in New Zealand, which has overhauled its personal property security on the lines of the US and most Canadian provinces. England should consider doing the same, but even these personal property security statutes need a radical re-think.

PHILIP R. WOOD

SHAMS, PRETENCES, SUBTERFUGES AND DEVICES

The statutory security of tenure conferred upon the tenants of private residential property has long been (to mix two metaphors) a fertile battle ground, with landlords and their legal advisers showing great ingenuity in devising agreements designed to circumvent the provisions of the legislation. Most famously, of course, there was the loophole of disguising the lease as a mere licence to occupy, which was effectively closed off by the House of Lords in Street v. Mountford [1985] A.C. 809. It is perhaps surprising that although security of tenure was first introduced as long ago as 1920, landlords are still able to come up with new devices in the attempt to ensure that they can regain possession of their property whenever they wish. One such device was the recent subject of consideration by the Court of Appeal in Bankway Properties Ltd. v. Pensfold-Dunsford [2001] 1 W.L.R. 1369.

The plan was disconcertingly simple. The original landlord (a company by the name of Artesian Competitor plc) granted to the appellants, Mr. Pensfold-Dunsford and Mr. Leech, what was expressly stated to be an assured tenancy made pursuant to the
Housing Act 1988. The tenancy was to run for an initial period of one year from 15 February 1994, being intended thereafter to continue from year to year, with the tenants apparently enjoying indefinite statutory protection. The initial rent was £4,680 per annum, payable by monthly instalments of £390, but the lease contained a rent review clause entitling the landlord to increase the rent annually by the rate of inflation, by 10%, or to the current open market rent, whichever was the greater. To this wholly unexceptional rent review provision, however, was added the stipulation that as from 11 February 1996 the rent was to rise to £25,000 per annum. This figure was presumably chosen as being the maximum rent permissible under an assured tenancy (Housing Act 1988, Schedule 1, para. 2(1)), but it was clearly a wholly unrealistic rent for what was an ordinary, small flat in Brighton. It was also quite obviously well beyond the means of the tenants, who were known by the landlord to be reliant upon housing benefit. Thus the landlord purported to reserve the right, as from a date less than two years after the grant of the tenancy, to increase the rent to a figure which would make it impossible for the tenants to afford to remain in possession of the property. In all probability they would be expected to exercise their express right to terminate the tenancy by giving 14 days’ notice; failing this, the landlord would be able to seek a mandatory order for possession under Ground 8 (Housing Act 1988, Schedule 2) on the basis of the rent arrears which would surely quite quickly ensue. It looked like a simple and foolproof mechanism for circumventing the long term security of tenure which is the usual concomitant of an assured tenancy.

His Honour Judge Kennedy Q.C. in the Brighton County Court certainly thought so. When Bankway Properties took over the reversion and exercised the controversial rent review power, and the tenants inevitably fell into arrears, the judge granted possession of the flat and gave judgment for outstanding rent in excess of £12,000. The tenants appealed.

This was not an example of a “sham” as defined by Diplock L.J. in Snook v. West Riding Investments Ltd. [1967] 2 Q.B. 786, where both parties have a common intention of misleading third parties or the court by creating rights and obligations other than those which the document appears to suggest. The tenants had never read the lease and were unaware of the contested clause, so could not be said to have shared such a common intention. The judge at first instance also distinguished the present situation from the kind of “pretence” outlined by Lord Templeman in Antoniades v. Villiers [1990] 1 A.C. 417. In that case the landlord had never really intended to exercise the purported power to introduce
additional occupiers to share a one-bedroomed flat with the tenant couple, whereas here the rent review provision was intended for use and was used. Rather than a sham or pretence, the judge described it as being an unconcealed and open “device”, allowing the landlord legitimately to acquire possession within the terms of the Housing Act. In the Court of Appeal Pill L.J. agreed that the rent review clause was a device, and not a “subterfuge” involving an element of disguise. Arden L.J. also adopted the term “device”, although she did see the clause as entailing some form of deception, with what was masquerading as a provision for increase of rent being in substance an attempt to reserve a right to obtain possession effectively on notice. Whatever the terminology, both members of the Court of Appeal then parted company with Judge Kennedy by ruling the device to be impermissible and allowing the tenants’ appeal.

An argument that the rent review clause had never been effectively incorporated into the tenancy agreement was summarily rejected by both Arden and Pill L.JJ. The appellants had signed the lease, and although they had never read the document, the landlords had done sufficient to draw the disputed clause to their attention and they were bound by it.

The ground upon which Pill L.J. struck down the rent review provision was that of inconsistency. The lease indicated expressly that it was creating an assured tenancy, a form of tenure to which Parliament has accorded long-term security for the tenant; moreover, all the other terms of the agreement contemplated a lengthy tenancy. The main purpose of the agreement was thus to give rise to an assured tenancy enjoying the protection of the Housing Act 1988; a clause allowing the landlord to increase the rent to a manifestly unaffordable level and thereby to regain possession within two years of the grant of the lease was, in his Lordship’s judgment, inconsistent with and repugnant to that purpose.

Arden L.J. allowed the appeal not only on the basis of inconsistency but also on the ground (which she saw as closely related) that this was an improper attempt to evade the mandatory framework for security of tenure laid down for assured tenancies by the legislature. The Housing Act clearly contemplates that an assured tenant who pays the rent genuinely reserved in the lease should not be deprived of possession. The rent review clause in this agreement, her Ladyship ruled, had the effect of preventing the tenants from paying the real rent “by a provision for payment of a sum which was never expected to be paid and which [was] not on
its true analysis rent at all” (p. 1384). It therefore offended against the scheme of the Housing Act and was unenforceable.

The Court’s laudable willingness to scrutinise attempted evasion of statutory protection may however prove to be of limited lasting value, at least as far as the security of residential tenants is concerned. The context in which the lease was granted to Mr. Pensfold-Dunsford and Mr. Leech has subsequently changed. The reason why the original landlord in this case chose to grant an assured tenancy, rather than the more flexible assured shorthold tenancy which could at that time have been created upon service of notice, was in order to take advantage of the tax benefits of the Business Expansion Scheme, which has since been discontinued. Moreover, any tenancy of a dwelling-house granted on or after 28 February 1997 will take the form of an assured shorthold tenancy unless the agreement stipulates otherwise; under such a tenancy the landlord has the right to obtain possession simply by giving two months’ notice (Housing Act 1988, s. 21). The Court of Appeal may have shut a stable door, but Parliament has meanwhile dismantled the greater part of the stable.

Rosy Thornton

Fraud, Trusts and Equities

Mr. and Mrs. Collings were the unremarkable registered proprietors of their house, until they had the misfortune to deal with Mr. Lee. Lee purported to act for them in finding a purchaser for the house, and he found a Mr. Styles. Mr. and Mrs. Collings then executed a transfer of the house to Styles in consideration of £250,000, but “Styles” was simply an alias used by Lee, and no part of the £250,000 was ever paid to them. The net result, therefore, was that Lee fraudulently procured the transfer of the house from Mr. and Mrs. Collings to himself, for no consideration. Once registered as proprietor of the house, Lee mortgaged it to the Leeds Permanent Building Society and took the mortgage proceeds. Mr. and Mrs. Collings remained in actual occupation of the house throughout. When Lee’s fraud came to light, Mrs. Collings sought rectification of the register, to reinstate her as proprietor of the house free of the mortgage. (Her husband had died in the meantime, and she had acquired his rights by survivorship.) The Court of Appeal upheld her claim: Collings v. Lee [2001] 2 All E.R. 332.
It was common ground that registration of the transfer effectively vested the legal estate in Lee, even though he had procured the transfer by fraud. That must be right. Registration itself confers the legal title (Land Registration Act 1925, s. 69(1); *Morelle Ltd. v. Wakeling* [1955] 2 Q.B. 379 at p. 411); indeed, registration of a forged transfer is still effective to vest the legal estate (*Argyle B.S. v. Hammond* (1984) 49 P. & C.R. 148). Consequently, Lee could grant a mortgage to the Leeds (Land Registration Act 1925, ss. 18, 25), and he did so.

Against this background, counsel for Halifax plc, successor to the Leeds, submitted that Mrs. Collings had no rights which bound the mortgagee, and so she could not sustain her claim for rectification. His reasons were as follows. When Lee granted the mortgage, Mr. and Mrs. Collings only had an unexercised right to set aside the transfer by which they conveyed the house to him. This was a “mere equity”, not a proprietary interest capable of binding the Leeds, and hence Halifax.

Counsel for Mrs. Collings first argued that her equity to set aside the transfer bound Halifax by virtue of section 70(1)(g) of the Land Registration Act 1925 (protection of the rights of those in actual occupation of land etc.). There was no question that Mr. and Mrs. Collings had been in actual occupation of the house at the relevant times, and the Leeds had certainly made no enquiries of them, so their “mere equity” would bind the Leeds (and hence Halifax) if it were a proprietary right, in principle capable of affecting third parties. At a late stage, however, proceedings took a different turn. It was alleged that Mr. and Mrs. Collings had the full equitable, beneficial interest in the house when the Leeds took its mortgage; that this interest bound the Leeds (and Halifax) by reason of section 70(1)(g), and that Mrs. Collings was therefore entitled to reclaim the legal estate in the house, free of the mortgage. The Court of Appeal accepted this argument.

According to Nourse L.J. (at p. 336), with whom Mummary and Rix L.JJ. agreed, Mr. and Mrs. Collings retained their beneficial interest in the house because they “did not intend to transfer the property to the first defendant [Lee] and they did not intend to transfer it for no consideration. The first defendant acquired the property without their knowledge and consent and in breach of his fiduciary duty to them.” The cases cited by Nourse L.J. in support of his conclusion concern the situation where equity responds to a fiduciary’s wrongful transfer of his principal’s property by imposing a trust over the property in favour of the principal (subject always to any applicable defences). Yet the relevant fiduciary, Lee, did not transfer the house on behalf of Mr.
and Mrs. Collings: he duped them into causing a transfer of the house themselves. With respect, therefore, the cases cited by Nourse L.J. were not applicable to the facts of the case before him.

Nevertheless, the conclusion reached by the Court of Appeal can be supported fully. Mr. and Mrs. Collings held legal title to their house as trustees for themselves: that is the result of the imposition of a trust where the legal estate in land is vested in more than one person. Registration of the transfer they signed undoubtedly divested them of their legal estate, and vested it in Lee, notwithstanding his fraud. However, Mr. and Mrs. Collings did not overreach their beneficial interest in the trust; nor did Lee’s mortgage to the Leeds. Consequently, the interest continued to subsist in relation to the house, and it bound the mortgagee by reason of Land Registration Act 1925, s. 70(1)(g), so entitling Mrs. Collings to her remedy. A little more detail may be useful.

Whatever the relevant documents said, Mr. and Mrs. Collings transferred their legal estate to Lee for no consideration; consequently, he was bound by their beneficial interest: Land Registration Act 1925, s. 20(4). (If clauses 28 and 29 of the Land Registration Bill, currently before Parliament, were applied to the transfer, they would produce the same result.) For different reasons, Lee did not overreach Mr. and Mrs. Collings’s interest in the house when he granted the mortgage. Although he had power at law to create the mortgage, he was a sole trustee for Mr. and Mrs. Collings, and consequently did not have power to subordinate their beneficial interest to the mortgage (Law of Property Act 1925, s. 2). Their interest therefore bound the mortgagee by reason of section 70(1)(g).

In short, the Court’s conclusion is best explained by the failure of successive trustees to overreach the beneficial interest in a trust asset, with the consequence that the interest bound a purchaser of the asset, in accordance with the relevant rules of priority. For completeness, it should be added that Mr. and Mrs. Collings never validly consented to the subordination of their rights.

The Court found it unnecessary to decide “the more general question whether a mere equity, such as a right to avoid a transfer of registered land, which, though procured by fraudulent misrepresentation, is otherwise valid and effective, does or does not fall within section 70(1)(g)” (per Nourse L.J. at p. 337). Though the Court heard powerful argument to the contrary, it is submitted that such an equity is a proprietary right capable of falling within section 70(1)(g). Similar rights have been held to fall within section 70(1)(g): see Blacklocks v. J.B. Developments (Godalming) Ltd. [1982] Ch. 183 and generally Megarry & Wade, The Law of Real Property (6th ed. by C. Harpum), at para. 6–052. Further, as a
matter of general law, a vendor’s right to rescind a conveyance for fraud has been held capable of affecting third parties: see generally Meagher, Gummow & Lehane, *Equity: Doctrine & Remedies* (3rd ed.), at paras. 429–435. Finally, such an equity will undoubtedly be treated as a proprietary interest for the purposes of the new land registration legislation: see clause 114 of the Land Registration Bill, which restates the present law for the avoidance of doubt, and paras. 5.32–5.36 of *Land Registration for the Twenty-First Century* (Law Com No. 271).

The arguments advanced by Halifax would also produce a startlingly unattractive distinction between cases where co-owners are defrauded of their legal title to land, and cases where a sole beneficial owner is similarly defrauded. If Mrs. Collings had originally held legal title to the house as sole beneficial owner, she would not have had a separate equitable interest in the house. If Lee had then defrauded her of her legal title, she would have acquired an equity to rescind the transaction, but no more. If the arguments advanced on behalf of Halifax were correct, that equity could not have bound it. In other words, if those arguments were correct, Mrs. Collings only succeeded because she happened to be co-owner of the house at the time of Lee’s fraud: as joint owners of the legal estate in their house, Mr. and Mrs. Collings necessarily held it on trust, and as beneficiaries of that trust, they had a full equitable interest in the house, which could and did bind a mortgagee. The simple solution to this anomaly is to recognise that a mere equity can bind third parties. The Land Registration Bill adopts this solution, as noted above. A more radical solution would be to assimilate the equity to rescind and the trust raised in favour of a defrauded party, though this might be much less radical than it appears at first sight: in the circumstances where an equity to rescind has already been accorded the status of a proprietary right, there is not much to distinguish it from a beneficial interest (see “Dispositions Involving Fiduciaries: The Equity to Rescind and the Resulting Trust” in *Restitution and Equity* (LLP, 2000, eds. Birks and Rose)).

**Richard Nolan**

**Fiduciary Liability and Contribution to Loss**

Having made a successful takeover bid for Western United, Kia Ora found that it had paid $25.7m in cash and issued 67.9m S1 shares in return for Western United shares worth only $6.4m. Kia Ora successfully sued several former directors. The High Court of
Australia’s decision in *Pilmer v. Duke Group Ltd. (in liq.)* (2001) 180 A.L.R. 249 concerns aspects of the liability of Kia Ora’s accountants, Nelson Wheeler, for providing a report stating that the price proposed for the Western United shares was fair and reasonable. The report was prepared incompetently and Nelson Wheeler were held liable by the Full Court of the Supreme Court of South Australia for breach of contract, negligence and breach of fiduciary duty. The High Court allowed an appeal by Nelson Wheeler.

The judgments raise a number of interesting issues, including whether Kia Ora’s share issue was a compensable loss. This note focuses on issues raised by the claim that Nelson Wheeler was liable for breach of fiduciary duty.

McHugh, Gummow, Hayne and Callinan JJ. considered there was no fiduciary relationship between Nelson Wheeler and Kia Ora. Kirby J. disagreed. A couple of issues seem to have been important to the majority’s conclusion. Although Kia Ora was relying on Nelson Wheeler to prepare the report competently, Nelson Wheeler “were not guiding or influencing Kia Ora in the sense discussed in the cases dealing with fiduciary relationships” (p. 271; para. 75). This seems to hint at fiduciary duties arising where “advice” is provided, as distinct perhaps from mere “information”. That distinction was raised in *South Australia Asset Management Corporation v. York Montague Ltd.* [1997] A.C. 191, 214 regarding causation in professional negligence cases and has been criticised in that context as unworkable (O’Sullivan, [1997] C.L.J. 19, 20–21).

The issue of whether the basic undertaking is to provide advice or information does not determine whether it must be provided subject to a fiduciary duty of loyalty. The majority’s references to advice being provided in a fiduciary “sense” suggest recognition of this, but do little to help understand what “sense” is meant.

Also relevant for the majority was the proposition in *Breen v. Williams* (1996) 186 C.L.R. 71, 113 that fiduciary duties are prescriptive rather than prescriptive. This merits caution. First, no authority was provided for it in *Breen* or *Pilmer*; indeed, it appears to conflict with the express references to a (positive) fiduciary duty of disclosure in *Daly v. The Sydney Stock Exchange Ltd.* (1986) 160 C.L.R. 371, 377 & 385. The prescriptive/prescriptive dichotomy appears to have originated in Finn’s academic writing on fiduciary duties (Finn, “The Fiduciary Principle” in Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989), pp. 1, 28–29) but is gaining support both in Australia and England (*Attorney-General v. Blake* [1998] Ch. 439, 455—not discussed on appeal; [2001] 1 A.C. 268; Nolan, (1997) 113 L.Q.R. 220; Abadee, (2001) 29 A.B.L.R. 33). Secondly,
its application is not as straightforward as might be supposed: a clear distinction between prescriptive and prescriptive duties may exist in some cases, but many situations could potentially be classified as involving duties of either kind. It is not clear that the point was necessary to the decision in either Breen or Pilmer. Nor is it clear that Breen precluded the finding of fiduciary liability in Pilmer, as Kirby J.’s (dissenting) view of the fiduciary duty owed by Nelson Wheeler in Pilmer was clearly prescriptive: they were obliged not to accept the retainer (p. 285; paras. 131–132). Finally, even Finn accepts that duties of disclosure can properly exist in fiduciary law where fiduciary loyalty is at issue (Finn, op. cit., p. 25). The dichotomy can provide a useful guide in determining whether a particular duty is fiduciary as most, but not necessarily all, fiduciary duties are prescriptive. However, it is dangerous to treat it as a talisman: it does not identify the reason for the existence (and hence the nature) of fiduciary duties. Many other duties are prescriptive as well—it is the reasons for the proscription which identify the differences between duties and which require attention.

Pilmer also considers the availability of “contributory fault” as a response to claims for breach of fiduciary duty. In Nationwide Building Society v. Balmer Radmore (Introductory Sections) [1999] Lloyd’s Rep. P.N. 241, 281, Blackburne J. held contributory fault unavailable where the breach of fiduciary duty involved conscious disloyalty. This leaves undecided its availability where the fiduciary breach did not involve intentional or conscious wrongdoing.

The majority did not need to consider this issue, having already concluded that there was no fiduciary duty or breach, although they made it clear that they thought Astley v. Austrust Ltd. (1999) 197 C.L.R. 1 (holding contributory negligence unavailable in contract claims) indicated severe conceptual difficulties with the argument that it should apply to breach of fiduciary duty. Kirby J. considered the issue more closely and also concluded that contributory fault is unavailable in the fiduciary context. The issue, however, remains unsettled for other jurisdictions. The prevailing English view on the application of the contributory negligence legislation to contract claims differs from that adopted in Astley (Forsikringsaktieselskapet Vesta v. Butcher [1989] A.C. 852), but even if one accepts Astley’s statutory interpretation regarding the availability of contributory negligence in contract claims, the majority decision in Astley explains neither (a) why equity should not develop its rules by analogy with the statutes (Day v. Mead [1987] 2 N.Z.L.R. 443, 451), nor (b) why a principal’s contribution to her own loss is not reflected in equity’s approach to causation.
Blackburne J. noted in *Balmer Radmore* that his conclusion against contributory fault did not render the principal’s conduct irrelevant as there may still be issues of remoteness or causation to contend with. Contributory negligence does not require the plaintiff to be in breach of a duty of care owed to the defendant; rather, it is concerned with issues of causation: was the plaintiff’s failure to take reasonable care of her own interests a legally contributing cause in bringing about the loss suffered? Causation is not a matter of pure logic; rather, it involves policy judgments concerning the appropriate allocation of legal responsibility for loss suffered following certain conduct. It therefore depends heavily on the policy reasons underlying the rules in respect of which responsibility is being allocated.

As the majority had not found a breach of fiduciary duty in *Pilmer*, their judgment lacks that sort of analysis. Kirby J. commented that equity has not hitherto held a principal bound to protect himself against his fiduciary and that, traditionally, more is required of a fiduciary than merely taking reasonable care. This allows the principal to act quite unreasonably and simply rely on the fiduciary not to harm his interests. Other analyses are available. In *Canson Enterprises Ltd. v. Boughton & Co.* (1991) 85 D.L.R. (4th) 129, 161, McLachlin J. accepted that the high level of fiduciary duty justifies adopting a measure of compensation which ensures that fiduciaries are “kept up to their duty”, but also suggested that if the principal acts wholly unreasonably then the losses stemming from that conduct will not be recoverable from the fiduciary. This is not necessarily inconsistent with the high standards expected of fiduciaries, especially when it is recalled that fiduciary law will provide allowances for work done in breach of fiduciary duty (*Boardman v. Phipps* [1967] 2 A.C. 46). The relevant policy issues require closer consideration.

MATTHEW D.J. CONAGLEN

CONSTITUTION OF TRUSTS—A NOVEL POINT

Though it is unusual for a point of law to be decided by distinguishing a case apparently regarded as virtually having the authority of holy writ, that occurred in *T. Choithram International SA v. Pagarani* [2001] 1 W.L.R. 1 (P.C.).

It is trite law to state that an express trust is constituted in either of two ways, that is to say, by a settlor’s transferring title to property to trustees to be held by them on trust for an indicated
beneficiary or charitable purpose, or for him to declare himself trustee of property for such person or purpose. A mere intent to benefit another without having done the job properly in one way or the other will not suffice to constitute a trust, the worthiness of the intended beneficiary or purpose notwithstanding: Milroy v. Lord (1862) 4 De G. F. & J. 264 and Jones v. Lock (1865) L.R. 1 Ch. App. 25. The facts of Choithram v. Pagaran “are novel and raise a new point . . . the case falls between” the two situations above (per Lord Browne-Wilkinson at p. 11).

Choithram Pagaran (TCP), an immensely wealthy man, made generous provision for his wife and children, and intended to devote the remainder of his wealth to charity. He executed a trust deed establishing a philanthropic charitable foundation of which he appointed himself one of the trustees. He stated orally that he gave all his wealth to the foundation, and resolutions were adopted by companies controlled by him that the trustees of the foundation were the holders of certain assets. Documents reciting that TCP held other property on the trusts of the foundation were prepared, and instructions issued from him that further assets be vested in the foundation, but TCP had signed none of the documents at the time of his death, nor were his instructions implemented until after it. But on the day before his death, TCP had said to his daughter “I have given up everything and feel very happy now. What I was wanting to do I finally did it.”

The plaintiffs claimed and the Court of Appeal of the British Virgin Islands held that no effective gift of the relevant assets had been made to the foundation and that, accordingly, they were held on trust for TCP’s estate since, although TCP had intended to make immediate absolute gifts “to the foundation, [he] had not vested the gifted property in all the trustees of the foundation”. Thus he had neither effectively vested the property in the trustees as such, nor did his words of gift render him a trustee “because they made no reference to trusts”. And “the court will not give a benevolent construction so as to treat ineffective words of outright gift as taking effect as if the donor had declared himself a trustee for the donee”. In other words, the Court of Appeal decided the matter on the basis that “equity will not assist a volunteer” or “perfect an imperfect gift”.

In allowing the appeal, the Judicial Committee of the Privy Council, whilst accepting the well-known maxims, added that “equity will not strive officiously to defeat a gift”. And, on the “novel” facts of the case, since
the foundation has no legal existence apart from the trust declared by the foundation trust deed . . . the words “I give to the foundation” can only mean “I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed”. Although the words are apparently words of outright gift, they are essentially words of gift on trust (per Lord Browne-Wilkinson at p. 12).

Thus, since TCP was a trustee of the foundation, he had effectively constituted himself a trustee for the donee; the trust being completely constituted, it “bit” on the property and the donee’s status as a volunteer became irrelevant. TCP could not validly have denied that he was a trustee for the purposes of the foundation. Further, “in the absence of special factors [unspecfied] where one out of a larger body of trustees has the trust property vested in him he is bound by the trust and must give effect to it by transferring the trust property into the names of all the trustees”. Contrary dicta by Sir John Romilly M.R. in *Bridge v. Bridge* (1821) 16 Beav. 315, 324 were expressly disapproved.

The decision in *Pagarani* is correct on its facts and is to be welcomed (though it may, possibly, give rise to a degree of uncertainty). And “though equity will not assist a volunteer, it will not strive officiously to defeat a gift” is likely to become a classic dictum alongside the more conventional remarks of Turner L.J. in *Milroy v. Lord* and of Lord Cranworth in *Jones v. Lock*.

Perhaps the maxim that “equity will not assist a volunteer” is occasionally churned out as a formula a bit too readily and as a cloak for the avoidance of thought. For it often will do so (in addition to such doctrines as donatio mortis causa and the extension of *Strong v. Bird* (1874) L.R. 18 Eq. 315 in *Re Ralli’s W.T.* [1964] Ch. 288). It does so in virtually every instance of a completely constituted trust, where a beneficiary will seldom have given consideration, and also according to the principle in *Re Rose* [1952] Ch. 499. There, failure to transfer title to the assets by the donor, whose intent was clear, was owing to no omission on his part but to omission on the part of a third party.

Perhaps the maxim could be adjusted in the following sense: “equity will not assist a volunteer if, in doing so, it would repair the consequences of a would-be donor’s folly”. Had the volunteer been assisted in *Milroy v. Lord* or in *Jones v. Lock*, such folly would have been repaired. In doing so in *Re Rose* it was not. More generally, *Choithram v. Pagarani*, with *Re Rose*, shows a willingness on the courts’ part to depart from strict legal formalism and, in that sense, is in line with the approaches of Lord Wilberforce in *McPhail v. Doulton* [1971] A.C. 424 concerning certainty of objects

JOHN HOPKINS

TOBACCO ADVERTISING: IF YOU MUST, YOU MAY

In *Germany v. European Parliament and Council* (Case C-376/98, judgment of 5 October 2000) the European Court of Justice held that Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products ([1998] O.J. L 213/9), the legality of which had been challenged in various earlier cases (e.g., Cases T-172/98 and T-175/98 to T-177/98 *Salamander AG* et al. v. *European Parliament and Council*; Case C-74/99 *The Queen and Secretary of State for Health ex parte Imperial Tobacco Ltd. and Others*), was invalid.

The Directive, like previous approximation measures relating to tobacco products, was adopted by qualified majority voting as an internal market measure, on the basis of Articles 95, 47(2) and 55 EC. Harmonising the rules on advertising and sponsoring of tobacco products was meant to eliminate national regulatory differences deemed to impede the functioning of the internal market; according to Article 3 of the Directive, all forms of advertising and sponsoring of tobacco products were to be banned in the Community. Germany, which was outvoted when the Council adopted the Directive, argued that the Community was not competent to adopt such a measure, at least not on the legal basis that was chosen.

In its judgment, the Court first stressed that the national measures to be harmonised by the Directive were “to a large extent” public health measures, and that, as contended by Germany, the EC Treaty explicitly excludes harmonisation in the field of public health. It nonetheless pointed out that such exclusion did not mean that harmonising measures based on other Treaty provisions could not have an impact on public health, since the latter must form a constituent part of the Community’s other policies. At the same time, the Court insisted that the legal basis should not be determined to “circumvent the express exclusion of harmonisation” under Article 152(4) EC. It therefore undertook to verify whether the conditions for recourse to Articles 95, 47(2) and 55 had been fulfilled.
According to the Court, Article 95, read in conjunction with Articles 3(1)(c) and 14 EC, clearly provides for the adoption of measures which specifically aim at “improving the conditions for the establishment and functioning of the internal market”. Dismissing the Parliament’s, Council’s and Commission’s contention, the Court found that the express wording of those provisions and the principle of attributed powers embodied in Article 5 EC prevent Article 95 from acting as a general power for the Community to regulate the internal market. Rather, the measure to be adopted on such legal basis must “genuinely” have as its object the improvement of the conditions for the establishment and functioning of the internal market. Hence, the “mere finding of disparities between national laws” and “abstract risks” of obstacles to free movement are insufficient to justify the use of Article 95. The emergence of such obstacles must be “likely” and the measure in question must be designed to prevent them. Similarly, the Court considered that the distortion of competition to be eliminated by a measure based on Articles 95, 47(2) and 55 must be “appreciable”, i.e. not “remote and indirect”, otherwise the powers of the Community legislature would be practically unlimited. Referring again to the principle of attributed powers, the ECJ held that the Community legislature could not rely on Articles 95, 47(2) and 55 to eliminate the “smallest” distortions of competition.

In the light of these considerations, the Court examined the content of the Directive to check whether it pursued the objectives stated by the legislature. Acknowledging potential obstacles as regards movement of periodicals, magazines and newspapers containing tobacco advertising, the Court considered that, “in principle”, a Directive prohibiting advertising in such media could be adopted on the basis of Article 95 to ensure free movement of press products. This, however, did not apply to “numerous” types of advertising media, such as parasols, ashtrays and spots in cinemas for which, the Court found without elaborate reasoning, that prohibition could “in no way help to facilitate trade”. It was further held that the Directive did not ensure the free movement of products which are in conformity with its provisions, particularly because the Member States could still adopt stricter requirements to guarantee the health protection of individuals while the Directive did not contain an express free movement clause. It concluded that the measure did not contribute to eliminating obstacles to the free movement of goods and services. The Court equally found that it did not remove distortions of competition, either in the advertising or in the tobacco products sector. It thus held, as did the Advocate
General, that Articles 95, 47(2) and 55 could not constitute an appropriate legal basis for the Directive.

This judgment is significant for three main reasons. First, it clarifies the scope of Article 95 and refines the purpose and function of Community internal market powers. The Community legislature cannot rely on Article 95 simply because actual or potential divergences in national rules are found. It is only insofar as such disparities restrict interstate-trade in goods and/or services or imply an appreciable distortion of competition, and if harmonisation actually improves the establishment and functioning of the internal market, that the Community may legitimately harmonise on the basis of Article 95. The latter condition is subject to judicial review. The Court verifies the legislature’s motivation by looking both at the actual content of the measure and at the nature of national disparities to be eliminated. It thus asserts its own control over Community powers in the field of the internal market, to prevent any misuse or abuse of Treaty mechanisms by the Community institutions and Member States.

Interestingly, it is the Court, which initially played an active role in providing a dynamic interpretation of Treaty provisions, that is now acting as the moderator of Treaty institutions’ and Member States’ over-enthusiasm about the scope of Community competences. By ensuring that the balance of powers is preserved, it emphasises the function to which it aspires, that of a Supreme Court of the Union’s constitutional order.

Secondly, the case nevertheless makes clear that Community internal market powers have not been undermined altogether. On the one hand, the Court ensures that Treaty provisions are not used to circumvent the Treaty prohibition of harmonisation as regards public health. In doing so, it acts as the guardian of the limits to Community action as it did earlier in its Opinion 2/94 on accession of the Community to the European Convention on Human Rights, in the Grant or even in the Airport Transit Visa cases. On the other hand, by acknowledging that harmonisation measures could still have an impact on public health provided they are genuinely justified by the needs of the internal market, the Court gives its blessing to previous harmonisation measures adopted particularly as regards tobacco, and further keeps open the possibility for the Community to be more active in areas where it is not prima facie competent to be so. The Court does not follow the “centre of gravity” argument presented by Germany but, more generally, it suggests that the definition of competence cannot be strictly defined ratione materiae or rationae personae. Such definition may depend inter alia on the relevance of the measure in the broader context of
the internal market. It is in this perspective that the Court considered that the ban on advertising of tobacco products in periodicals, magazines and newspapers could be based on Article 95. The Commission is currently working on proposals for a new Directive in that sense.

Hence, by emphasising the limits of the Community’s scope of action by reference to the principle of attributed competence, the Court seems to uphold “the constitutional division of powers between the Community and the Member States” (AG Opinion, para. 4). At the same time, it preserves the Community’s ability to adopt harmonisation measures touching upon various fields of prima facie national competence, provided two conditions are fulfilled: the measure is genuinely necessary to promote the internal market, and—although it is not yet clear if the Court makes it a formal obligation—the measure must expressly ensure free movement of products which conform to its provisions.

Thirdly, the judgment highlights the schizophrenic attitude of the Member States towards the principle of attributed powers. The process leading to the adoption of the Directive illustrates how, on the one hand, Member States increasingly choose to deal at the Community level with various social demands to the point of being sometimes overzealous, while, on the other hand, they remain essentially focused on their national interests in other circumstances, particularly in the context of Treaty reforms. The judgment underlines the tension between Member States qua States negotiating international treaties in Intergovernmental Conferences and Member States qua essential parts of the daily Community legislature developing the acquis communautaire (see De Burca, CELS Occasional Paper No. 5). The judgment can therefore be seen as an appeal to Member States and Treaty institutions for a more coherent approach to Community mechanisms and raison d’être.

Christophe Hillion

TAKING CHILDREN ABROAD: HUMAN RIGHTS, WELFARE AND THE COURTS

One of the more drastic results of marital breakdown can occur where a mother decides to leave the country permanently and relocate with a child. Such cases can pose an acute dilemma where, as in Payne v. Payne [2001] 1 F.L.R. 1052, the father has enjoyed substantial contact with the child which is bound to be severely curtailed (if not entirely destroyed) by the mother’s relocation on
the other side of the world. Here the mother, a New Zealander, had been ordered by a New Zealand court to return the child to England, following her “wrongful retention” there, under the Hague Convention which governs international child abduction. In the present proceedings she sought leave to return home to her original family with her four-year-old daughter. The father had substantial staying contact, which was sufficiently extensive that it might almost be termed “time-sharing”, and he countered with an application for a residence order. It was not in dispute that the child had an exceptionally good relationship with the father and with the paternal relatives in Newmarket. The mother, who by this time had grown to loathe her home in London, was adamant that she could only provide the child with a happy and secure upbringing if allowed to return to New Zealand. The father unsuccessfully opposed her application in the Cambridge County Court but appealed on the basis that the settled principle applied by the courts was in breach of the European Convention on Human Rights and in conflict with the Children Act 1989. The essence of the argument was that the Convention enshrined a right of contact between parent and child as an aspect of respect for family life under Article 8 and that the Children Act also required much greater significance to be attached to the preservation of such contact.

The principle under attack dates back to the decision of the Court of Appeal in Poel v. Poel [1970] 1 W.L.R. 1469 and has been applied consistently ever since. At its most basic, it is that leave should generally be granted where the mother’s proposal to relocate is genuine, practical and reasonable and not a surreptitious attempt to cut off the father’s contact with the child. The application of the principle has usually resulted in the mother obtaining leave, even where the result is very harsh from the father’s perspective (as it was, for example, in Re H (Application to Remove from Jurisdiction) [1998] 1 F.L.R. 848), though there have also been some noteworthy cases where leave has been refused (see, for example, Tyler v. Tyler [1989] 2 F.L.R. 158 and MH v. GP (Child: Emigration) [1995] 2 F.L.R. 106).

Mr. Payne argued that the effect of this case law was to create an unwarranted presumption in favour of leave which was in breach of the father’s right of contact. Dismissing his appeal, the Court of Appeal emphasised that the overriding and determining factor in these cases was the welfare of the child. It had never been the courts’ intention to elevate the “reasonable proposal” principle into a legal presumption though it remained, quite properly, a factor of “great weight”. In the Court’s view there was nothing in the
jurisprudence of the European Court which prevented the application of the welfare principle in these cases. Particular reliance was placed on the European Court’s decision in Johansen v. Norway (1996) 23 E.H.R.R. 33 in which it held that “particular weight should be attached to the best interests of the child … which may override those of the parent”. Thorpe L.J. also drew attention to the mother’s own right of mobility protected by Article 2, Protocol 4 to the Convention, yet to be ratified by the UK.

The Court acknowledged that it was necessary to engage in a balancing exercise attaching appropriate weight to adult interests. It recognised, however, the danger of creating a presumption that the interests of the primary carer were compatible with the child’s best interests. It also found it necessary, in the light of the recent decision of the European Court in Glaser v. United Kingdom [2000] 1 F.L.R. 153, to revise the earlier view of Buxton L.J. in Re A (Permission to Remove from Jurisdiction) [2000] 2 F.L.R. 225 that it was doubtful whether private law children cases fell within the purview of the Convention at all. On the facts it concluded that the child’s welfare demanded that leave be upheld. The judge had rightly found that the effect of the mother being forced to stay in England would be devastating and that “her unhappiness, sense of isolation and depression would be exacerbated to a degree that could well be damaging to the child”.

This is a decision which will incense some fathers’ pressure groups but which, it is argued, is correct—at least in its conclusion if not in its reasoning. The mistake which is sometimes made is of assuming that rights are absolute and that interference with them is simply not allowed. On the contrary, all “Convention rights” are qualified and are susceptible to being displaced by other rights and interests with which they conflict. In essence such interferences with rights need only be proportionate to be lawful (see especially Article 8(2)). It is therefore not inconsistent with the notion that fathers have contact rights, arising from respect for family life, for the Court to conclude that the combined claims represented by the mother’s Convention rights (to mobility and, although not articulated by the Court, respect for her private life under Article 8) and the child’s best interests outweighed any right this particular father might have. It should also be remembered that this was a case of a mother wishing to return to her original home. The outcome of the balancing exercise may well be different where the mother has no previous connection with the proposed country of permanent residence. Such a case would be likely to provide more of a test of the impact of the Convention on current judicial practice than did Payne.
Less satisfactory is the Court’s obvious reluctance (demonstrated in other cases such as that of the conjoined twins (Re A. (Conjoined Twins: Medical Treatment) [2001] 1 F.L.R. 1)) to engage with the issues in terms of rights, rather than through the traditional balancing of interests, and its insistence that the Human Rights Act 1998 has left untouched the supremacy of the welfare principle. One aspect of this approach is the apparent assumption by the Court that any Convention rights which the child herself might have had were subsumed in, or coterminous with, the notion of welfare or best interests as determined by the Court itself. Thorpe L.J. wholly fails in his judgment to recognise that there might be a distinction between the two concepts. Dame Elizabeth Butler-Sloss P. does recognise that the child has Convention rights but makes no attempt to define what these might be.

Defining the content of children’s Convention rights is not likely to be an easy matter. Yet there would be something approaching unanimity among theorists that the notion of “rights”, whatever it may mean, is not synonymous with the notion of “welfare”. Indeed, some have gone so far as to draw a sharp distinction between protecting children and protecting their rights. Is it too fanciful to suggest that one of the child’s own Convention rights here might have been a right of contact with her father? If so, the Court’s treatment of the contact issue leaves something to be desired. It is not clear on the face of the report what provision, if any, was made for future contact between the father and child, save that it was found that “the father who has a close relationship with his daughter would be able to afford to visit her or have her to visit him two or three times a year”. It is worth pondering whether this is an adequate response to what is described in the United Nations Convention on the Rights of the Child, Articles 7 and 8, as the child’s right “to know and be cared for by his or her parents” and “to preserve his or her … family relations”. Article 9(3) of that Convention also provides that States parties must “respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”. It is regrettable that the Court of Appeal did not address the question of continuing contact between the father and the child with greater urgency in the light of these international obligations.

Andrew Bainham