Given the importance of the case, it is unsurprising that the House of Lords should reach so rapid a decision in *R. v. Director of Public Prosecutions, ex p. Kebilene* [1999] 3 W.L.R. 972 (on appeal from the Divisional Court, noted at (1999) 58 C.L.J. 468). It will remembered that the Divisional Court granted a declaration that the D.P.P.’s decision to continue his consent to prosecutions under the reverse onus provisions of the Prevention of Terrorism Act 1988 (P.T.A.) was unlawful. According to the lower court, these provisions were in irreconcilable conflict with Article 6(2) of the European Convention on Human Rights which provides that: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

The House of Lords agreed with the Divisional Court in holding that the defendants had no legitimate expectation that the D.P.P. would exercise his discretion in accordance with the Convention and (with the exception of Lord Hobhouse of Woodborough) that section 29(3) of the Supreme Court Act 1981 did not prevent the court from reviewing the decision to prosecute. However, the House unanimously allowed the D.P.P.’s appeal on the ground of the common law presumption that the court will not judicially review a decision to prosecute unless there are exceptional circumstances, such as dishonesty or bad faith. The rationale for the presumption appears to be to provide the most effective remedy to the defendants and, more importantly, to avoid disruption to the criminal process. The appropriate forum in which to raise their challenge would therefore be at trial and on appeal rather than by
halting the prosecution and invoking the supervisory jurisdiction of the High Court.

The House did not question the power of the Divisional Court to examine the legality of the advice upon which the Director had proceeded, but differed from the lower court on the appropriate conclusion to be drawn from it. Lord Steyn (with whom Lords Slynn of Hadley and Cooke of Thorndon agreed) left open the question of whether it was possible to eliminate the apparent incompatibility between the P.T.A. and the Convention through interpretation. Lord Hope of Craighead felt that further guidance was needed having regard to the importance of the issues raised by the appeal, the likelihood of similar challenges to reverse onus provisions in other legislation and the need to advise bodies such as the Scottish Parliament which are already bound by those Convention rights contained in the Human Rights Act 1998. Lord Hope therefore set out a structure for analysing whether reverse onus provisions could be interpreted in a manner consistent with Article 6(2) rights. His Lordship’s scheme requires the court to examine whether Parliament intended to shift the persuasive or the evidential burden, whether the presumption of guilt is mandatory or discretionary, whether the onus is reversed in relation to an essential element of the offence or merely an exception or proviso, how much evidence is required of the prosecution before the burden is shifted and the appropriate balance between the interests of the individual defendant and those of society generally. In relation to this last factor, his Lordship noted the singular nature of terrorist crime and “the threat which … [it] … poses to a free and democratic society” (at 1000B).

The length and complexity of this analysis, in the face of apparently incompatible statutory norms, reveals how seriously at least some members of the House of Lords wish domestic courts to take the obligation to interpret legislation “so far as it is possible to do so” in conformity with Convention rights (Human Rights Act, s. 3). This fits well with Lord Hope’s statement that “incorporation of the European Convention … into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary” (at 988E). However, it would be misleading to suggest that the tenor of Lord Hope’s speech was entirely in favour of judicial activism. One area of controversy concerning the incorporation of the Convention is whether it is legitimate for domestic courts to adopt the concept of the “margin of appreciation” from Strasbourg doctrine. The better view is that this notion is confined to the jurisprudence of supranational legal bodies when confronted with an issue to which
the domestic legal systems within the relevant international legal order give too diverse a range of responses to permit the formulation of a uniform rule. Lord Hope correctly rejects incorporation of the margin of appreciation, but does introduce the notion of “the discretionary area of judgment” which he defines as:

questions of balance between competing interests and issues of proportionality … where … difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. (at 994A-B)

Although the P.T.A. is soon to be replaced by a permanent Act, the courts are unlikely to be able to avoid this issue for long. The Terrorism Bill presented to the House of Commons on 2 December 1999 contains provisions in Clauses 55 and 56 which substantially replicate the old law. Interestingly, the Home Secretary felt able to preface the Bill with a statement of its compatibility with Convention rights.

IVAN HARE

HUMAN RIGHTS IN THE HOUSE OF LORDS: WHAT STANDARD OF REVIEW?

The applicants in R. v. Secretary of State for the Home Department, ex p. Simms [1999] 3 W.L.R. 328 were convicted murderers whose applications for leave to appeal had been refused but who continued to protest their innocence. To this end they gave interviews to investigative journalists, hoping that this would ultimately result in their cases being referred back to the Court of Appeal. However, paragraph 37 of the Prison Rules 1964 provides that professional visits by journalists to prisoners should not generally be allowed and that any journalist wishing to visit a prisoner qua relative or friend must undertake not to publish anything disclosed during the visit. Paragraph 37A stipulates that if, exceptionally, a journalist is permitted to make a professional visit, he must undertake to abide by any conditions prescribed by the prison governor. In the instant case the prison authorities, pursuant to a Home Office policy directing prison governors to impose a blanket ban on all visits by journalists in their professional
capacity, refused to permit further visits unless paragraph 37 undertakings were forthcoming. Their Lordships accepted the applicants’ argument that this constituted unlawful interference with their entitlement to free expression.

Lord Hoffmann explained that, “In the absence of express language or necessary implication to the contrary, the courts … presume that even the most general words were intended to be subject to the basic rights of the individual”. Moreover, this “principle of legality applies to subordinate legislation as much as to Acts of Parliament”, meaning that both the Rules and the enabling legislation (viz. the Prison Act 1952) had to be “presumed to be subject to fundamental human rights”. Hence, although the Rules—properly construed—were not ultra vires the Act, the policy of completely prohibiting interviews was ultra vires the Rules.

An interesting counterpoint is provided by Brind [1991] 1 A.C. 696, which concerned a challenge to the legality of a prohibition on live television interviews with representatives of proscribed terrorist organisations. Their Lordships rejected the contention that statutory discretions should be construed as being subject to implied limits based on fundamental rights. They went on to hold that, because the right of free speech did not form such a limit on the Home Secretary’s discretion, the substance of his policy could be challenged only on the ground that it was Wednesbury unreasonable (albeit that, as Sir Thomas Bingham M.R. made clear in Smith [1996] Q.B. 517, 554, “[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable”). More intensive forms of judicial control—such as objective justification and proportionality—were rejected.

Simms appears to adopt a very different approach. Lord Hoffmann’s comments, cited above, clearly demonstrate that human rights were held to form implied limits on the Home Secretary’s powers. It is also arguable that these constraints were enforced through more rigorous forms of judicial control than the relatively deferential Wednesbury principle. Although Lord Hobhouse applied that test, he said that the policy was also disproportionate. Lord Steyn mentioned the unreasonableness doctrine as well, but almost, it seems, as an afterthought: his primary concern was undoubtedly the justifiability, not the reasonableness, of the policy; hence he remarked that “only a pressing social need can defeat freedom of expression”. This prompts three comments.

First, the speeches in Simms are very unclear as to whether the Wednesbury test (adapted to the human rights context) or a proportionality test was being applied. This is unfortunate,
particularly in light of the recent judgment of the European Court of Human Rights in *Smith and Grady v. United Kingdom* (*The Times*, 11 October 1999), according to which *Wednesbury* furnished inadequate protection of human rights for Convention purposes because its application “effectively excluded any consideration … of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the … aims pursued”. It is apparent from this that the *Wednesbury* and proportionality tests furnish different levels of protection, and it is therefore important that our courts make it clear which principle is being applied.

Secondly, if *Simms* is to be regarded as a departure from *Wednesbury*, this is problematic in itself. Domestic decisions such as *Brind* and *Smith* are predicated on the idea that *Wednesbury* represents the appropriate constitutional balance between executive autonomy and judicial intervention, and that any fundamental shift in that balance should result from parliamentary legislation, not judicial activism. *Simms*, however, appears to suggest that *Wednesbury* may legitimately be departed from even in the absence of legislative intervention (given that the key provisions of the Human Rights Act 1998 are not yet in force) but does not explain why, contrary to the earlier authorities, this is now thought to be appropriate. The courts must not only be clear about which test they are applying: they must also explain the constitutional reasoning on which their decisions are founded.

Thirdly, there is one way in which it may be possible, at least to some extent, to rationalise *Simms*. Lord Steyn, in particular, emphasised that the applicants wished to establish and exercise a right of free expression “for the purpose of obtaining a thorough investigation of their cases as a first step to possibly gaining access … to the Court of Appeal”. This is highly significant since, in a number of cases (*e.g.* *Leech* [1994] Q.B. 198; *Witham* [1998] Q.B. 575), a particularly interventionist approach has been adopted to the protection of what is now characterised as the “constitutional right” of access to the courts. Such cases treat the right as a direct fetter on discretionary power, interference with which must be justified to the court’s satisfaction rather than merely be reasonable.

It could be argued that *Simms* forms part of that line of case law, leaving mainstream authorities like *Brind* undisturbed. But this, too, is unsatisfactory: although it is entirely proper that considerable weight is attached to access to justice, it seems odd that it should trigger a higher level of protection than rights—like free expression—which are of at least equal importance. Even if *Simms*
is characterised as one of the exceptional access to justice cases, this fails to explain why, in the first place, the exception exists.

It is undeniable that the standard of protection currently afforded by English administrative law to fundamental rights is lamentably unclear. The leading authorities which limit the courts’ role to Wednesbury review have not formally been departed from, yet more rigorous forms of control now operate in some areas. Although it would be misguided to suppose that the Human Rights Act 1998 will instantly resolve the confusion which presently besets this area, it will at least supply our courts with a welcome opportunity to begin articulating a more coherent and comprehensible approach to human rights review—and not before time.

MARK ELLIOTT

PRIVACY AND THE GAY RIGHT TO FIGHT

In the course of rejecting a domestic challenge to the Ministry of Defence’s policy of discharging all personnel found to be of homosexual orientation, members of the Divisional Court and the Court of Appeal hinted strongly that the rule was likely to be condemned in Strasbourg (R. v. Ministry of Defence, ex p. Smith [1996] Q.B. 517, noted at (1996) 55 C.L.J. 179). This prediction was proved correct when the same applicants took their cases to the European Court of Human Rights (E.C.H.R.) in Lustig-Prean and Beckett v. U.K. (Applications 31417/96 and 32377/96) and Smith and Grady v. U.K. (Applications 33985/96 and 33986/96), 27 September 1999, The Times, 11 October 1999.

The applications were originally adjourned by the E.C.H.R. pending the outcome of a reference by the Divisional Court to the European Court of Justice (E.C.J.) in a case involving a challenge to the policy on the ground of its alleged incompatibility with the Equal Treatment Directive (Council Directive 76/207). After a ruling by the E.C.J. in an unrelated case that the Directive did not prohibit discrimination on the ground of sexual orientation (Case C-249/96 Grant v. South West Trains Ltd. [1998] I.C.R. 449), the present applications were allowed to proceed.

The gravamen of all the challenges was that the applicants’ discharges from the armed forces and the investigations which preceded them constituted an unjustified interference with their right to respect for their private lives under Article 8. The Government accepted that the applicants’ rights to privacy had
been violated, but argued that the interference was necessary in the interests of national security and/or public safety. The argument was that the presence of overtly homosexual service personnel would have an adverse effect on morale and on the operational effectiveness of the armed forces. An important strand of this defence was the report of the Ministry of Defence’s Homosexual Policy Assessment Team (the H.P.A.T.) which was established after the Court of Appeal’s decision in *ex p. Smith* and which concluded in favour of retaining the policy in its present form.

The E.C.H.R. was unpersuaded by both the methodology used and the conclusions drawn in the H.P.A.T.’s report. The report was criticised for its lack of independence from the Ministry, the limited nature of its sample group, the absence of a guarantee of anonymity for respondents and for the partiality of some of its questions. Of its conclusions, the Court held (at para. 89): “the perceived problems which were identified in the H.P.A.T. report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely on the negative attitudes of heterosexual personnel towards those of homosexual orientation”. In the absence of “concrete evidence to substantiate the alleged damage to morale and fighting power”, the Court was not satisfied that the issue could not be more appropriately dealt with by means of codes of conduct, such as those the armed forces had already established to deal with the elimination of gender and racial discrimination and harassment. All applicants therefore succeeded in establishing a violation of Article 8. Claims under the non-discrimination provision of Article 14 were held to raise the same issues as determined by the Court in its decision on Article 8 and so were not considered.

The applicants Smith and Grady made three additional claims. First, they argued that the investigation and discharges constituted degrading treatment in violation of Article 3. Second, they alleged that the policy required them to remain silent about their sexuality in a manner which violated their right to freedom of expression under Article 10. While refusing to rule out the possibility of such claims in all cases, the Court rejected the applicants’ arguments on both of these grounds: the conduct complained of did not reach the minimum level of severity required to constitute a violation of Article 3, and privacy, not freedom of expression, was held to be the essence of the applicants’ claim, making a decision on Article 10 unnecessary. The applicants’ third argument was successful and was based on Article 13, which requires the High Contracting Parties to provide an effective remedy before a national authority for the violation of Convention rights. Despite the Court of
Appeal’s decision that the supervisory jurisdiction in domestic law requires closer scrutiny where the impugned governmental action involves the violation of fundamental rights, the Strasbourg Court held that judicial review was an inadequate remedy in these circumstances.

[T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court’s analysis of complaints under Article 8 of the Convention. (para. 138)

This ruling is significant because it provides further refutation of the notion, popular in some judicial circles, that review on the ground of proportionality is essentially the same as that based on the more familiar test of irrationality. As the Court makes plain, the Convention requires the national court to deal with the substance of the claim and not merely with whether the respondent’s view of the appropriate balance between the right and its limitation is tenable. Although the Human Rights Act 1998 does not incorporate Article 13 into English law, it is clear that if domestic courts wish to fulfil Parliament’s intention of avoiding the expense and delay of Strasbourg proceedings, judicial review for the alleged violation of Convention rights will have to become much more rigorous.

The Ministry of Defence is presently conferring with its Chiefs of Staff on the formulation of a new code of sexual conduct which will apply equally to heterosexuals and homosexuals. The new policy will join the Armed Forces Discipline Bill as further evidence of the impact of Convention rights on the military. The case does not quite mark the end of the matter because, although the E.C.H.R. held that the question of just satisfaction for the applicants was not yet ready for decision, the Government is likely to have to pay substantial damages to those affected by the policy in the past. Such claims will be numerous and substantial: for example, between 1991 and 1996 some 30 officers and 331 persons of other rank were discharged or dismissed on grounds of their homosexuality. More broadly, it remains to be seen if the case will act as a catalyst for claims brought against other public authorities by homosexuals who have suffered disadvantage at work. The present cases were unusual in that the investigative process included
detailed questioning about the applicants’ sexual preferences and practices and searches of their personal belongings which were described by the Court as “of an exceptionally intrusive character”. Similarly, the Court emphasised the absolute nature of the ban (which took no account of the applicants’ exemplary service records) and the difficulty the applicants encountered in transferring essentially military skills to the very different arena of civilian life after their discharges. Against these considerations one must set the fact that the applicants succeeded despite the broad margin of appreciation conceded to the U.K. by the Court on defence matters, and that the applicants entered the armed forces fully aware of the existence and terms of the policy.

IVAN HARE

INSANITY AND MENS REA

QUESTION: “D, who is mentally ill, believes that he is Jesus Christ. He breaks down P’s front door and belabours him with a snooker cue, in the deluded belief that P is about to crucify him. Having been subdued by five police officers, D is eventually tried on indictment for aggravated burglary and affray. What is his criminal liability?”

Answer (from any first-year undergraduate): “It seems that because of his mental illness, D either did not appreciate the nature and quality of his acts, or did not understand that they were wrong. At the time in question he therefore seems to have been insane under the M’Naghten rules. Thus the jury should find a special verdict of ‘not guilty by reason of insanity’ as provided for by section 2(1) of the Trial of Lunatics Act 1883. This verdict will enable the judge to make one of the various orders open to him under section 5 of the Criminal Procedure (Insanity) Act 1964. The most likely disposal in this case will be a hospital order, possibly subject to restriction.”

It is therefore astonishing to learn that when this very case did indeed end up in the Crown Court recently, the trial judge accepted the defence submission that the proper verdict was not the special verdict, but a simple acquittal—which produces the result that the accused goes free. The defence position was that the Crown is only entitled to a special verdict where it can show that, but for his insanity, the defendant would be guilty. And this, they said, means that in such a case the prosecution must prove that the defendant not only committed an actus reus, but also that he did so with C.L.J. Case and Comment 9
mens rea. Where he lacks mens rea—even through insanity—he is entitled to an acquittal. This argument, which turns the previous learning on insanity upside down, the trial judge accepted reluctantly, because he thought he was bound to do so by the decision of the Court of Appeal in Egan [1998] 1 Cr.App.R.121.

Egan was not a case about the “special verdict” and insanity at the time of the alleged offence. It concerned what happens after the defendant is found “unfit to plead” because of his insanity at the time of trial. Under section 4A of the Criminal Procedure (Insanity) Act 1964, the next step after a finding of “unfit to plead” is a decision by a jury on whether the defendant “did the act or made the omission charged against him as the offence”, and if the answer is “yes”, the judge has then the same powers of dealing with the defendant as after a special verdict of “not guilty by reason of insanity”. In Egan, the Court of Appeal had said that a finding that the defendant “did the act or made the omission charged against him as the offence” involves a finding of mens rea as well as actus reus. The judge who tried the soi-disant Jesus Christ assumed that Egan also applied to the special verdict of “not guilty by reason of insanity”.

Unsurprisingly, the resulting acquittal in the Jesus Christ case was followed by an Attorney-General’s reference to the Court of Appeal, whose decision is reported as Attorney-General’s Reference (No.3 of 1998) in [1999] 2 Cr.App.R. 214. Still less surprisingly, the Court of Appeal condemned the trial judge’s ruling. After a careful review of the history of the verdict of “not guilty by reason of insanity”, it said that, in order to obtain a verdict of “not guilty by reason of insanity”, the prosecution must prove “the ingredients which constitute the actus reus of the crime”. If the Crown can do this, it “is not required to prove the mens rea of the crime alleged, and apart from insanity, the defendant’s state of mind ceases to be relevant”. The earlier decision in Egan, the Court said, was probably wrong even as regards the ingredients of a finding under section 4A of the Criminal Procedure (Insanity) Act, and even if it were right, it did not decide the point in relation to the special verdict of “not guilty by reason of insanity” under section 2(1) of the charmingly-named Trial of Lunatics Act 1883.

A few weeks later another Court of Appeal—this time with the Lord Chief Justice presiding—cast yet further doubt on Egan. In Antoine [1992] 2 Cr. App. R. 225 the point at issue was whether, once a defendant on a murder charge has been found “unfit to plead”, he can then attempt to raise the defence of diminished responsibility. In other words, when the jury is deciding under section 4A of the Criminal Procedure (Insanity) Act whether the
defendant “did the act or made the omission charged”, can it be asked to say (in effect) “yes, he did the act charged, in that he killed the victim; but because of his state of diminished responsibility this was the actus reus of manslaughter, not murder”? The Court of Appeal ruled that no such invitation could be put to the jury. In the course of reaching this decision the Court once again considered Egan. It did not formally overrule it, because it felt that Egan was not concerned with the precise issue now before it: but it made it very plain that it thought that it was incorrect.

At one level the Attorney-General’s Reference (No. 3 of 1998) is an unexciting decision, because it merely reaffirms that the law is as everyone had previously imagined. At a different level, however, it provokes two important reflections. The first is how easy it is for even the Crown Court to get a basic point of criminal law astonishingly wrong. The second reflection is how bizarre it is that, when this happens and causes a visibly dangerous defendant to be wrongly acquitted, the resulting proceedings in the Court of Appeal always leave the improperly obtained acquittal intact. As the law now stands, the most the Court of Appeal can do when hearing an Attorney-General’s reference brought following an acquittal is to wring its judicial hands about the error in the court below, and express the hope that the same mistake will not be made again—however obviously wrong the acquittal was, and however dangerous the offender.

Some weeks ago, this rule of criminal procedure was called into question in a public lecture given by Lord Morris, the present Attorney-General. The fact that the defendant in the case the subject of this note “walked free”—with or without his snooker cue—adds strength to Lord Morris’s argument that the Court of Appeal should sometimes have the power to set aside an acquittal.

J.R. SPENCER

NUISANCE, LOCAL AUTHORITIES AND NEIGHBOURS FROM HELL

One of the most difficult current problems for tort lawyers is the extent to which the normal rules of tort, developed over decades of litigation between private individuals, should apply in undiluted form to local and other public authorities. Most individuals have never seen a child drowning in a puddle or about to walk off a cliff, and would not hesitate to help them if they did, but public authorities, empowered by Parliament, are faced every day with the delicate and expensive task of protecting others from harm. It has
become all too apparent, as the courts (domestic and European) grapple with the thorny question of when a common law duty of care should exist in the context of the careless exercise of, or failure to exercise, statutory powers, that the ordinary rules of negligence liability need considerable refinement to operate sensibly in such a political field. Moreover those difficulties and differences do not disappear merely because a tort other than negligence is involved, and this has been amply illustrated in three recent cases, each involving actions against local authorities in the tort of nuisance.

In the first case, Hussain and another v. Lancaster City Council [1999] 2 W.L.R. 1142, the claimants, Malazam Hussain and Linda Livingstone, owned a freehold shop and residential property on the defendants’ notorious housing estate. For several years, the claimants had endured racially motivated attacks, harassment and abuse of a most horrific kind, ranging from intimidation and verbal threats to assault, firebomb attacks and other criminal damage, perpetrated by a number of identifiable people. Many of the culprits were council tenants living on the estate, but others (including at least one of the ringleaders, an itinerant of “no fixed abode”) were merely temporary visitors. The police were unable to contain this campaign of abuse. The perpetrators usually dispersed once the police were called, only to return later; moreover when, exceptionally, a prosecution for criminal damage or breach of the peace did succeed, nothing more severe than binding over orders or moderate fines was imposed. No doubt, potential witnesses who could have helped secure more serious convictions were themselves too intimidated to come forward.

The claimants therefore brought an action in nuisance and negligence against the council, claiming damages and injunctive relief. In negligence, their claim was based on the council’s alleged failure to exercise its statutory powers (in its capacity both as housing association and as highway authority) so as to prevent council tenants, their visitors and those using the public highway on the estate from committing the acts of harassment. In nuisance, the gist of the claimants’ case was similar: they alleged that, having failed to take effective steps to avert acts of nuisance committed by its tenants and their visitors, the council had adopted or continued the nuisance and thus was liable for it. The council applied to have the statement of claim struck out as disclosing no reasonable cause of action and succeeded before the master, but the action was reinstated on appeal to a judge. The council appealed in turn to the Court of Appeal.

The Court of Appeal unanimously allowed the appeal and struck out the claim. Hirst L.J. gave the principal judgment,
retaining the structure of the claimants’ pleadings and arguments by dealing separately with nuisance and negligence. In passing, it is worth noting that the case law is not as neatly divided as this nor, as will be seen, should it be. Although nuisance liability is imposed on the creator of the nuisance irrespective of negligence (since it is no defence that all reasonable care was taken to avoid the nuisance), where (as here) the claim is against someone other than the perpetrator, namely the occupier of land from which the nuisance emanates, negligence is a requirement for liability in nuisance. As Lord Goff said in Cambridge Water Co Ltd. v. Eastern Counties Leather plc [1994] 2 A.C. 264 “... in respect of a nuisance which has arisen through natural causes, or by the act of a person for whose actions the defendant is not responsible ... the applicable principles in nuisance have become closely associated with those applicable in negligence”.

The court first decided that there was no prospect of liability in nuisance for two reasons, the first based on the “scope” of the tort and the second on “the ambit of responsibility of landlords for their tenants’ acts of nuisance”. So far as its scope is concerned, Hirst L.J.’s surprising conclusion was that the essence of nuisance is that “the defendant’s use of the defendant’s land interferes with the plaintiff’s enjoyment of the plaintiff’s land”, but here, although the acts of harassment unquestionably interfered with the plaintiffs’ enjoyment of their land, “they did not involve the tenants’ use of the tenants’ land and therefore fell outside the scope of the tort”. This proposition, part of the ratio decidendi of the case, is extremely controversial. Elsewhere, nuisance is universally defined simply as unlawful interference with the plaintiff’s enjoyment of his property, whether or not it derives from the defendant’s use of his property. This accords with the elementary principle that it is the creator of a nuisance who is primarily liable for it, while the occupier of land from which it emanates might also be liable if he continued or adopted the nuisance (in other words, if he was at fault). Of course the perpetrator and the occupier will usually be one and the same person, but where they are not and, for example, a trespasser has caused the nuisance or where a nuisance emanates from activities in a public place, such authority as there is suggests that the perpetrator is nonetheless liable.

This was not, however, the only basis on which the nuisance claim was rejected. Hirst L.J. was on much more orthodox territory when he examined the extent of landlords’ liability for nuisance, concluding that landlords are not liable for the acts of their tenants unless they have expressly authorised the nuisance or impliedly authorised it by letting for a purpose which necessarily involves a
nuisance. The absence of any such authorisation was the ground on which the plaintiffs’ claim failed in *Smith v. Scott* [1973] Ch. 314, in which a local authority landlord had housed a disruptive homeless family next door to the plaintiffs’ home. Moreover this strict rule had not been in any way modified by the later decision of the Court of Appeal in *Page Motors Ltd. v. Epsom and Ewell Borough Council* (1983) 80 L.G.R. 337, in which a local authority was held liable for the damage and nuisance caused to the plaintiffs’ property by gipsies, who had squatted for several years on adjoining land belonging to the authority. That case, Hirst L.J. explained, could be distinguished on the basis that the local authority deliberately chose not to take proceedings against the gipsies, providing them instead with water, skips and other services, “thus in effect adopting the gipsies’ nuisance”.

So looking just at nuisance principles, the claim was struck out for two reasons, one considerably more orthodox than the other. To that straightforward list of nuisance arguments, the court could have added a third: since *Hunter v. Canary Wharf Ltd.* [1997] A.C. 655, it is clear that for all forms of private nuisance, including intangible interference, “the action is not for causing discomfort to the person but for causing injury to the land”. This in turn justifies the “hyper-sensitive plaintiff” restriction on nuisance liability, which usually means that a plaintiff using his property in a particularly sensitive way cannot render the defendants’ activities a nuisance, if the average person would not be disturbed by them, since this sort of interference has no effect on the value of the land. The tragic facts of *Husssain* illustrate a level of personal victimisation and harassment, targeted at the claimants themselves, which cannot remotely be regarded as a tort against the value of the claimants’ land: if they had moved to another part of the estate, the harassment would no doubt have moved with them.

In truth, the essence of the claimants’ complaints was that the local authority had the power to prevent criminal acts of harassment and damage, but unreasonably failed to use those powers. Hirst L.J. had no hesitation in rejecting the claimants’ arguments that the imposition of a duty of care would be fair, just and reasonable, citing Lord Browne-Wilkinson’s words in *X v. Bedfordshire County Council* [1995] 2 A.C. 633 that “the courts should proceed with great care before holding liable those who have been charged by Parliament with the task of protecting society from the wrongdoings of others”.

This brief conclusion conceals an extremely complex problem. On the one hand, decisions as to how to manage problem tenants, prevent criminal harassment and control improper use of the
highway are often discretionary political decisions, and as such are properly regarded by private law courts as non-justiciable. On the other hand, the European Court of Human Rights disapproves of this sort of immunity (see Osman v. United Kingdom [1999] B.H.R.C. 293), and in its shadow, the House of Lords in Barrett v. Enfield London Borough Council [1999] 3 W.L.R. 79 (decided since Hussain) has become more cautious about striking out cases against public authorities on the basis either that discretionary decisions were involved or that a duty of care would not be just, fair and reasonable. In addition, as Lord Hutton recognised in Barrett, the central issues in claims of this kind will often indicate not “no duty”, but “no fault”—the reasonableness of the local authority’s response given the delicacy and difficulty of the problem, its limited resources and other priorities—and views differ as to whether in such a case it is fairer to give claimants the chance, or spare them the futility, of a full trial.

The former view prevailed in Lippiatt and another v. South Gloucestershire Council [1999] 3 W.L.R. 137. Here the claimants were tenants of a large farm situated on either side of a main road. The defendant council owned a narrow strip of land immediately adjacent to the road, having purchased it many years before with a view to straightening the road, but the work had never been carried out and the strip was vacant. In 1991, a large number of travellers took up residence on the strip without the council’s permission. The travellers caused a considerable nuisance to the claimants: they obstructed and trespassed onto the claimants’ fields, depositing rubbish, animals and excrement, stole and damaged the claimants’ property, animals and crops, and assaulted the claimants’ families and employees. In 1993 the claimants brought proceedings against the council, once again on the basis that, having failed to prevent the nuisance, the council could be said to have adopted it, and sought damages and an injunction compelling the eviction of the travellers. No separate claim in negligence was made. The claim for an injunction was overtaken by events, when the council obtained a court order evicting the travellers in 1994, but the claimants still wanted damages to compensate for their three years of misery.

The case came up for trial just two weeks after the Court of Appeal’s judgment in Hussain had been delivered. In the light of that new precedent, the council made a preliminary application at the start of the trial that the statement of claim should be struck out, as in Hussain, as disclosing no reasonable cause of action, on the basis of the decision in Hussain that nuisance must involve the defendant’s use of the defendant’s land. The issue of whether the authority had adopted or continued the nuisance was not argued at
this stage. At first instance the judge accepted that Hussain was applicable and struck out the action, noting that here (unlike the Page Motors case) the acts of the travellers took place on the claimants’ property (indeed, strictly they were better described as acts of trespass, but this technical point was not taken). The Court of Appeal reversed this decision, distinguishing Hussain in tones of some scepticism.

First, it was noted that in Hussain the perpetrators’ conduct “was not in any sense linked to, nor did it emanate from, the homes where they lived”, whereas here the allegation was that the travellers congregated on the authority’s land and used it as a “base” for their activities. So the nuisance in this case was the “presence” of the travellers on the authority’s land, with their disposition to commit acts of vandalism. Fine, save that it is not entirely clear why these features did not also apply in Hussain, particularly since the perpetrators in that case were clearly using the public highway, again owned and controlled by the local authority, as the base from which to launch their activities. But Sir Christopher Staughton observed, “we need not rule on that today”. Secondly the court noted that, so far as adoption is concerned, the nuisance in this case was caused not by tenants but by trespassers, the assumption being that landowners have greater powers to control and remove their trespassers than their tenants.

As a decision solely on the scope of the tort of nuisance, this is orthodox and sensible. Once again, however, the complexity lies in the status of the defendants (quite unlike private landowners with no reason not to evict travellers as quickly as legal process permits) and the reasonableness of their decision to adopt a tolerant stance towards their local “traveller” problem, at the expense of the livelihood and property of the claimants. And this problem is no less complex merely because the claim is framed in nuisance rather than negligence.

In contrast, the decisions of the local authority in the final case of the recent trio, Southwark London Borough Council v. Mills and others [1999] 4 All E.R. 449, were clearly reasonable and, the House of Lords considered, gave rise to no remedy for the aggrieved claimants. The claimants were tenants in flats converted and let by the defendant local authority. Owing to inadequate soundproofing, everyday sounds from one flat could be heard in the adjoining flat, making life intolerable for the occupants. Proceedings were brought against the landlord on two grounds, breach of its leasehold covenant for quiet enjoyment and authorisation of a nuisance, but both were rejected by a unanimous House of Lords.
First, their Lordships stressed that the significant feature of the landlord’s covenant for quiet enjoyment (meaning “without interruption” not “without noise”) in a lease is that it is prospective only. So a landlord could be liable for disturbing the tranquillity of a flat which was perfectly insulated when it was let, but here the flats were let with the inherent defect of poor soundproofing. As Lord Millett explained, “An undesirable feature of the flat was its propensity to admit the sounds of the every day activities of the occupants of adjoining flats. The landlord covenanted not to interfere with the tenant’s use and enjoyment of a flat having that feature.” Put another way, a landlord gives no warranty as to the condition or fitness of leasehold property and the covenant for quiet enjoyment cannot be used to create such a warranty by the back door.

The nuisance action was likewise doomed. A landlord cannot be liable for authorising the nuisance of his tenants if what the tenants were doing was not itself a nuisance, and here all the tenants had been doing was making such noise as is inevitably generated by modern living (coughing, flushing lavatories, watching television and so on). As Lord Hoffmann explained, “If the neighbours are not committing a nuisance, the council cannot be liable for authorising them to commit one”.

Overall, their Lordships made it quite clear that tortious liability of any kind would be inappropriate in a case such as this. Of the numerous statutes regulating the state and condition of residential leasehold premises, none imposes any obligations as to soundproofing, and the courts will not do what Parliament chooses not to do. Nor will they enlarge the scope of contractual warranties beyond the terms of the landlord’s covenants in a lease. Private sector tenants have no need of extra protection: after all, they can simply opt not to rent unpleasantly noisy premises. For the recipient of local authority housing for whom market forces offer no help, the law of tort will not enhance the quality of the accommodation provided. For, as Lord Millett explained, the council’s decision not to soundproof the offending flats was an entirely reasonable decision of political priorities: “Its budget for 1998–1999 for major housing schemes was under £55m... The borough-wide cost [of installing soundproofing] could be of the order of £37m. The relevant local residents association has considered that the installation of sound insulation is not a priority need.” Whether you cry nuisance or negligence, either way it is difficult to find a clearer example of a policy decision which should
be non-justiciable in the private law sphere, and which was in any event entirely reasonable.

JANET O'SULLIVAN

INTERPRETING CONTRACTS—THE PRICE OF PERSPECTIVE

When a court seeks the meaning of a written contract, it meets a barrier on the outskirts of the document, a barrier imposed by the parol evidence rule. Traditionally, if a court wants to go beyond the barrier for a wider perspective of what the document might mean, it requires a permit on one or more of three grounds. The first is “technicality”: that, although the words appear clear, they have a technical meaning that is not apparent without seeking extrinsic evidence. The second is “ambiguity”: that the words are not clear and the ambiguity must be resolved from a wider perspective. The third is “absurdity”: that a literal reading is not just unreasonable but unworkable or absurd and that that reading must be avoided by taking once again a wider perspective. The perspective is one which takes in the purpose and background (also called the matrix) of the document.

It was no more than the third ground that seems to have been in the mind of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1385 (H.L.), when he said this: if it can be shown that one interpretation completely frustrates the object of the contract, “to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found”. However, some years later the thoughts of Lord Wilberforce, not for the first time, were “reinterpreted”. In 1997 in *Investors Compensation Scheme Ltd. v. West Bromwich BS* [1998] 1 W.L.R. 896, 912 (H.L.) Lord Hoffmann surprised us, not for the last time, by referring to “the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce”, with the result that almost all “the old intellectual baggage of ‘legal’ interpretation has been discarded”. In particular (p. 913), the “meaning of words is a matter of dictionaries and grammars; the meaning of a document ... is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even ... to conclude that the parties must, for whatever reason, have used the wrong words or syntax.”
The question now is to what extent the words of Lord Hoffmann will be given the literal effect which he, apparently, was ready to deny to the contractual wording of others. If his words are taken entirely literally, the traditional barrier on the outskirts of a written contract has been largely dismantled. Since Investors, however, the Hoffmann “school” of what Lord Lloyd (dissenting, p. 904) called “creative interpretation” has seen some enrolments but little creativity. Although in Ham v. Somak (4 February 1998) the Court of Appeal seemed to take little notice at all, it was more attentive more recently in MDIS v. Swinbank [1999] Lloyd’s Rep. I.R. 516. In MDIS the operative clause of a liability policy required the insurer to “indemnify the Assured … against any claim for which the Assured may become legally liable … alleging: (a) Neglect Error or Omission …” (emphasis added). The policy also excluded claims “resulting from”, inter alia, fraud by employees. The insured settled a claim which alleged negligence but made no mention of fraud. The insured’s action to recover the amount of the settlement from the insurer failed because there had been fraud.

Peter Gibson L.J., dissenting, put a literal interpretation on the policy, and concluded (p. 526) that, the possibility of fraud not having been alleged, the insurer should pay. The majority, however, read the words in the background, first, of legal precedent and, second, of the “danger” that a well informed third party claimant might be tempted to be “economical with the truth”: to frame his “allegation” with a selective presentation of the facts so as to ensure that the insurer paid, even when a more complete account of the facts would reveal a defence. (See Hayden v. Lo & Lo [1997] 1 W.L.R. 198, 204 per Lord Lloyd (P.C.).) The decision in MDIS, however, offers little more than formal support for the Hoffmann school. The background of legal precedent, mainly the judgment of Devlin J., as he then was, in West Wake Price & Co. v. Ching [1957] 1 W.L.R. 45, 53–54, was “well known amongst insurance lawyers and indeed brokers for many years” (p. 522 per Clarke L.J.) and easily available to the court; so was the tailoring of claims. That was also true of the background information in Investors itself and some other such recent cases; see, e.g., Kumar v. AGF [1999] Lloyd’s Rep. I.R. 147. Not so Kingscroft v. Nissan (No. 2) [1999] Lloyd’s Rep. I.R. 603, however, in which the hearing lasted from 14 April to 28 May 1999. An appreciable time had to be spent looking at the background to reinsurance transactions although, the case being complex, it is difficult to know exactly how much.

The background quest is important and controversial. Sir Christopher Staughton wrote in this journal ([1999] C.L.J. 303,
307), with reference to the Hoffmann “school”, that it was “hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation”. In *National Bank of Sharjah v. Dellborg* (C.A. 9 July 1997) Saville L.J., as he then was, also objected on grounds of cost. He then raised a further objection, that

the position of third parties (which would include assignees of contractual rights) does not seem to have been considered at all. They are unlikely in the nature of things to be aware of the surrounding circumstances. Where the words of the agreement have only one meaning, and that meaning is not self evidently nonsensical, is the third party justified in taking that to be the agreement that was made, or unable to rely on the words used without examining (which it is likely to be difficult or impossible for third parties to do) all the surrounding circumstances? If the former is the case, the law would have to treat the agreement as meaning one thing to the parties and another to third parties, hardly a satisfactory state of affairs. If the latter is the case, then unless third parties can discover all the surrounding circumstances and are satisfied that they make no difference, they cannot safely proceed to act on the basis of what the agreement actually says. This again would seem to be highly unsatisfactory.

To take the “teaching” of Lord Hoffmann at face value is to forget the lessons of the past. Indeed, it is not clear that that was what he intended. In *Investors* (p. 912), he did say that the background might include “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”. However, he also required “that it should have been reasonably available to the parties”. Presumably, what is “reasonably available” to large litigants may not be “reasonably available” to others. The outcome may also depend on the resources of the court, resources of knowledge and awareness about the value of what the background is likely to reveal and about how much time and money will have to be spent to get it. The judge was always more than just a technician. Now, it seems, he has become a director or research.

MALCOLM CLARKE
BANKERS’ REFERENCES AND THE BANK’S DUTY OF CONFIDENTIALITY: 
WHEN PRACTICE DOES NOT MAKE PERFECT

It is a well-established principle that banking practice will be taken into account by the courts. The principle makes good sense when examining the rights and duties which arise between the banks themselves, for they are the very architects of such practice. It is open to closer scrutiny when banking practice is relied on to mould the relationship between a bank and its customer who has no control over, and may be totally unaware of, the relevant practice. To say, as Willes J. did in *Hare v. Henty* (1861) 10 C.B.N.S. 65, 77, that “[a] man who employs a banker is bound by the usage of bankers” is potentially misleading. This half-truth was recently exposed by the Court of Appeal in *Turner v. Royal Bank of Scotland plc* [1999] 2 All E.R. (Comm) 664, where it was held that a bank could not rely on banking practice to imply its customer’s consent to the use by the bank of confidential information in order to give other banks references about his creditworthiness.

Mr. Turner held personal and business accounts at the Royal Bank of Scotland (“the Bank”). Between 1986 and 1989 the Bank responded in unfavourable terms to a number of status enquiries made by another bank about Mr. Turner’s creditworthiness. On each occasion the Bank made use of confidential information about the state of his accounts when formulating its response. Mr. Turner later started proceedings against the Bank, claiming damages for breach of its implied contractual duty of confidentiality. The Bank did not dispute that it owed Mr. Turner a duty of confidentiality in respect of his accounts, but argued that this was a qualified duty which did not apply when disclosure was made with the customer’s express or implied consent. As Mr. Turner was unaware of the practice of giving bankers’ references, and so could not have given his express consent to disclosure, the Bank relied on implied consent. The Bank contended that, at the relevant time, it was the general practice of banks in the ordinary course of business to respond to status enquiries from other banks by giving information about the creditworthiness of their customers. It argued that every customer opening an account with a bank must be taken to have agreed to this practice, whether he actually knew of it or not, and to have authorised the bank to give references to third party inquirers based on information that would normally be confidential.

The Court of Appeal rejected the Bank’s arguments on implied consent and upheld the decision of the trial judge in favour of Mr. Turner. Sir Richard Scott V.-C., delivering a judgment with which Thorpe and Judge L.JJ. agreed, distinguished between banking
practice which operates as “no more than a private agreement between banks” and banking practice which constitutes an established usage contractually binding on a bank’s customer even if the customer is unaware of it. If the practice is to bind the customer it must be “notorious, certain and reasonable and not contrary to law”, which is the established test for implying a term into a contract through custom or usage (Cunliffe-Owen v. Teather and Greenwood [1967] 1 W.L.R. 1421, 1438–1439). The Vice-Chancellor could find no evidence that the practice of providing bankers’ references on a customer’s creditworthiness was notorious (i.e., sufficiently well-known) among ordinary members of the public who open bank accounts, and in this particular case there was even evidence of a policy on the part of the Bank to keep customers in the dark about the practice. If the practice was not notorious it could not constitute an established usage binding on Mr. Turner. Furthermore, the Vice-Chancellor held that banking practice which deprives a customer of substantive rights, in this case his right to confidentiality, could only be relied on by the bank where the customer knew of and assented to the practice (citing Barclays Bank plc v. Bank of England [1985] 1 All E.R. 385, 391). The stress here is on the unreasonableness of the practice, not simply the fact that it lacks notoriety.

This decision has done much to clarify an area of legal uncertainty. The implied consent theory, although advocated by many (see, e.g., Paget’s Law of Banking, 11th ed. (1996), p. 124), has attracted criticism (see, e.g., Chorley’s Law of Banking, 6th ed. (1974), p. 24). The theory is particularly difficult to justify in the case of personal (i.e., non-business) customers, who are generally unaware of the practice of answering status enquiries (a point made by the Younger Committee on Privacy in 1972). However, many business customers are just as ignorant of this practice, and it can only be a matter of time before the courts reject the implied consent theory in relation to them as well. It is interesting to note that in Turner the Court of Appeal focused solely on Mr. Turner’s status as a personal customer and ignored that fact that he also held a business account at the Bank.

Banking practice has changed since the late 1980s. In 1989 the Jack Committee recommended the introduction of legislation requiring banks to give their customers “a clear explanation of how the system of bankers’ opinions works, and to invite them to give or withhold a general consent for the bank to supply opinions on them in response to enquiries”. However, the Government rejected the idea of legislation in favour of dealing with the matter as part of a voluntary code of banking practice. Paragraph 4.5 of The
Banking Code (3rd rev. ed., 1998), which applies only to personal customers, provides that a bank must now inform its customer if a bankers’ reference about him is requested and requires the customer’s consent in writing before it is given.

In Turner, Sir Richard Scott V.-C. stated (obiter) that paragraph 4.5 of the Code merely reflects the existing common law obligations of banks and does not set new standards. If this is true, the common law requires more than the Jack Committee recommended, for the Code demands express customer consent every time a status enquiry is made. This goes too far. Bankers’ references serve a useful commercial function which could be undermined if customer consent is required in each case, for the customer, having been put on notice of the enquiry, might seek to influence the terms of the reference.

Richard Hooley

A MERRY-GO-ROUND FOR THE MILLENIUM

It is good to enter the new millennium knowing that some things never change: despite the reforming zeal of our enthusiastic legislators, property law continues to provide scope for profitable litigation. Indeed, a cynic, remembering the mythical hydra, might think that for every legislative clarification, at least two new problems emerge—but in keeping with a seasonal spirit of optimism, this note will not labour the additional difficulties created by the relevant statutory reform.

Yaxley v. Gotts [1999] 2 F.L.R. 941 concerned a “gentleman’s agreement”, words which throw into disrepute any notion of gentle honour, but which warm the cockles of a Chancery lawyer’s heart. Mr. Yaxley and Mr. Gotts, old friends, orally agreed that Mr. Gotts would buy a large, dilapidated house, and that Mr. Yaxley would convert it into flats, would act as the managing agent and would own the ground floor. Mr. Gotts, or at least his son, duly purchased the house in question; Mr. Yaxley spent long hours converting the property and then managed it as agreed. The harmony was shattered when, three years later, Mr. Gotts junior barred Mr. Yaxley from the premises, and denied him any interest in the ground floor. Thus the proceedings began.

When the case came before the county court judge, there was much conflicting evidence as to what had been agreed, and His Honour Judge Downes devoted much of his judgment to determining this. He favoured Mr. Yaxley’s version of events and
held that Mr. Yaxley was entitled to the ownership of the ground floor by virtue of a proprietary estoppel. Mr. Gotts junior was directed to execute a lease of the ground floor, for a term of 99 years free of ground rent, in Mr. Yaxley’s favour.

Rather surprisingly, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that a contract for the sale of land can only be made in writing, was not mentioned during the hearing; it subsequently formed the basis of an appeal by Mr. Gotts. His counsel, quoting from *Halsbury’s Laws* that “the doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted to be invalid”, argued that the judge should not have used proprietary estoppel to give effect to the oral agreement, which was void under the 1989 Act. Thus the Court of Appeal (Beldam, Walker and Clarke L.JJ.) had to consider the relationship between section 2 and the doctrine of proprietary estoppel.

Section 2 was enacted largely at the behest of the Law Commission, which considered that the then subsisting law, embodied in section 40 of the Law of Property Act 1925, was obscure and uncertain. Readers will recall that under section 40, unless an oral contract for the sale of land was supported by written evidence, it was valid but unenforceable. Readers will also recall that the equitable doctrine of part performance could be invoked to rescue an otherwise unenforceable contract, and that this doctrine, which had been developed by the courts of equity as a response to the formalities requirement under the Statute of Frauds 1677, had provided fertile ground for litigation. It often caused difficulty and, in the opinion of the Law Commission, was best abolished. Section 2 was intended to be an entirely new provision, which would mark a radical change in the law by abolishing an obscure principle and by ensuring certainty in contracts relating to land.

All three members of the Court of Appeal gave reasoned judgments (of varying lengths) and they all decided that an agreement which was apparently invalidated by section 2(1) could still be enforced. Robert Walker L.J. placed reliance on section 2(5), which expressly saves constructive trusts from the scope of the formality requirement. He held that a joint enterprise constructive trust, as described in *Lloyd’s Bank v. Rosset* [1991] 1 A.C. 107, had been established, and that in this particular area there was no distinction between a constructive trust and a proprietary estoppel. In his opinion, section 2(5) allowed a limited exception, expressly contemplated by Parliament, for those cases in which a supposed
bargain had been so fully performed by one side, and the general circumstances of the matter were such, that it would be inequitable to disregard the claimant's expectations, and insufficient to grant him a restitutionary remedy.

Beldam L.J. considered it legitimate to take account of the relevant Report of the Law Commission (Law Com. No. 164) and its underlying policy. He was satisfied that the proposal to exclude the uncertainties and complexities of part performance did not affect the availability of other equitable remedies. He held that the provision avoiding oral contracts was insufficient to raise such a significant public interest that an estoppel would be excluded. Again, drawing strength from section 2(5), he thought that Mr. Yaxley should succeed, because he could equally well claim under a constructive trust or a proprietary estoppel. Clarke L.J. agreed. Thus the court in effect ordered the performance of the oral agreement between Mr. Yaxley and Mr. Gotts—not, of course, on the basis of the much-maligned and apparently abolished doctrine of part performance, but on the basis of a constructive trust or proprietary estoppel.

Once again, the difficulty of trying to simplify and clarify land law has been made apparent. People are such perverse creatures that they fail to consult solicitors before entering into agreements, and they also trust their fellow men. So if there is a nice, simple formality requirement, designed to promote certainty, some innocent will always fail to comply and some rogue will always try to take advantage. And then, of course, a strict application of the requirement begins to look unfair. This is why the Statute of Frauds was succeeded by the doctrine of part performance in the first place, and this is why the clear and precise doctrines of constructive trust and proprietary estoppel are now being used to enforce an oral contract. Of course, one could argue that we have proceeded full circle and beyond—but as promised, the point will not be laboured.

LOUISE TEE

THE NON-PROPRIETARY LEASE: THE RISE OF THE FEUDAL PHOENIX

Mr. Bruton occupied a flat by virtue of a written agreement with the Quadrant Housing Trust. The agreement specifically categorised itself as a “weekly licence” although it did give exclusive possession to Bruton. For its part, the Trust held the flat as licensee from the freehold owner, Lambeth Council, in order to pursue its charitable
housing aims of providing temporary and emergency accommodation. By virtue of section 32 of the Housing Act 1985, any grant of a lease by the Council to the Trust would have been ultra vires. Bruton accepted the “licence” from the Trust on this basis, but now alleged that he held the flat on a lease, giving security of tenure and triggering a repairing obligation for the Trust under section 11 of the Landlord and Tenant Act 1985 (implied repairing obligations for short term leases). The High Court had held that the agreement was a licence and this was confirmed by the Court of Appeal, with Millett L.J. noting that it was difficult to see how Bruton could have a lease when the Trust itself held no estate in the land out of which a lease could have been granted: [1998] Q.B. 834, 845. The House of Lords, unanimously, held that Bruton had a lease on a simple application of Street v. Mountford [1985] A.C. 809. The fact that the Trust held no estate in the land was neither here nor there: Bruton v. London & Quadrant Housing Trust [1999] 3 W.L.R. 150.

As to whether the agreement between Bruton and the Trust gave exclusive possession as a matter of law, so triggering a presumptive application of Street, Lord Hoffmann was happy to repeat the creed that it is the effect of the agreement that is vital, not the intention with which it was created because “one cannot contract out of a statute” (at p. 156). The relevance of this is unclear, as the definition of a lease is not found in statute, nor is it universally true that a statute cannot be displaced by genuine inter-party compromise (see Colchester Borough Council v. Smith [1992] Ch. 421), but this is a small matter given that all turns on the facts. Further, accepting that Bruton did enjoy exclusive possession, their Lordships decided that there were no “special circumstances” which might otherwise deny the existence of a lease. So, whereas in Westminster City Council v. Clarke [1992] A.C. 288 and Westminster City Council v. Basson (1990) 62 P. & C.R. 57, the provision of emergency housing by the Council was a ground for accepting the “licences” at face value, and in Gray v. Taylor [1998] 1 W.L.R. 1093 the charitable purposes surrounding the grant of occupation had the same effect, Quadrant Trust were not able to rely on either characteristic. Likewise, the fact that the Trust had genuine reasons for wishing to deny a lease was immaterial, even though in Jal Mehta v. Royal Bank of Scotland, The Times, 25 January 1999, the High Court thought this important in the context of a licence granted to an hotel occupier. Lord Hoffmann’s aside (at p. 156) that the law does not accept that the identity or type of landlord is relevant in determining the existence of a lease or licence is not
borne out by these cases, but this aspect of the decision in *Bruton* does no great violence to established principles.

This takes us to a much more contentious issue. Lord Hoffmann, with whom all their Lordships agreed, thought it immaterial that the Trust had no estate in the land out of which to grant a lease. Millett L.J. in the Court of Appeal had argued that Bruton could have no lease as Quadrant had no lease: *nemo dat quod non habet*. At first blush, this seems self-evident. How could a sub-occupier have a lease when the head occupier had no estate to give them? Lord Hoffmann has a deceptively simple answer. Apparently, the term “lease” designates the relationship of landlord and tenant; “it is not concerned with the question of whether the agreement creates an estate or other proprietary interest” (p. 156.). So there it is: “a lease may, and usually does create a proprietary interest” (at p. 156, emphasis added), but it need not do so. Here is the non-proprietary lease, being a beast that for the parties behaves like a lease—so as to trigger the intervention of section 11 of the Landlord and Tenant Act 1985 and, presumably, other statutes applicable to “leases”—but only for those parties. To the rest of the world, it must be a personal arrangement so that it does not bind a third party and so, for example, presumably does not fall within section 70 (1)(g) of the Land Registration Act 1925 as an overriding interest. Consequently the fact that the grantor (the Trust) has no estate out of which to grant a proprietary lease does not mean that it cannot grant a non-proprietary one.

This is difficult. Many would argue that it is inherent in the very nature of a lease that it is proprietary and that a “non-proprietary lease” is a contradiction in terms, otherwise better called a licence! Indeed, Lord Hoffmann continues, at p. 157, that “it is the fact that the agreement is a lease which creates the proprietary interest”. Quite. At its simplest, the question is whether a lease is always an estate in the land, a proprietary right. If it is, then the Trust cannot grant one, because it has no estate, and Bruton must lose. If it is not, then Lord Hoffmann and their Lordships are right and they have identified the continuing existence of a beast long thought extinct: the lease as pure personalty, not even a “chattel real”. Many readers might think that this conception, or re-discovery, should be explained with more reference to authority than is found in *Bruton* and with some help as to how the courts and parties are to distinguish between proprietary and non-proprietary leases in the future.

It is evident that there are difficulties with *Bruton*, at least on a literal reading of the leading judgment. Another view is that this case simply is concerned with the effect of section 11 of the
Landlord and Tenant Act 1985 for the parties to a contract, even though the section is applicable only if “a lease” exists between them. So, on a purely bi-party, contractual basis, their Lordships may be taking the view that the agreement between Bruton and the Trust could be described as a “lease” for the purposes of the application of section 11 and no other. In this sense, it is a matter of pure contract between Bruton and the Trust. This seems to be the approach of Lord Hope in his short concurring judgment and may well be behind Lord Hoffmann’s more general analysis. Yet, although the force of this is apparent when all the court is concerned with is a contractual dispute between two parties (that is, what does their contract add up to?), it ignores the fact that section 11 is triggered by a recognised legal concept (a “lease”), not merely a contractual arrangement having some of the characteristics of a lease. The simple answer given by Lord Hoffmann in fact requires a fundamental change in the way we currently view the leasehold estate.

Lord Hoffmann suggests that Millett L.J. put the cart before the horse by deciding that a lease must be an estate in the land. Another view is that Millett L.J. recognises that a “lease” has certain inherent characteristics, one of which is that it is an estate in the land springing from another estate in the land and, further, that a lease is a concept independent from the contract out of which it might have arisen. Indeed, we might suggest that the inherent difference between a lease as an estate in the land and a licence existing in contract is exactly the reason why Street v. Mountford and cases following go to such pains to draw a distinction. To many readers of Bruton, Lord Hoffmann’s explanation of why the contractual arrangement between Bruton and the Trust can be regarded as a lease, even though the Trust has no estate in the land, is actually an explanation of why it is a contractual licence.

MARTIN DIXON

A BANK’S ENTITLEMENT TO RECOVER THE PROCEEDS OF A FORGED CHEQUE

Bank of America v. Arnell [1999] Lloyd’s L.R. Bank. 399, an application for summary judgment heard before Aikens J., illustrates some of the obstacles that a bank must surmount to recover money paid out on a forged cheque purportedly drawn on its customer’s account. First, it must show a sufficient interest in the money to entitle it to sue. Secondly, if the payee of the cheque...
has passed the proceeds to another person, the bank must trace the
money to prove that the defendant received it. Thirdly, the bank
will typically have to prove the recipient’s fault in receiving the
money.

Bank of America was presented with a cheque drawn on the
account of its customer, Radisson, which had been forged by one
of Radisson’s employees. The payee was Bluepark, a sham
company incorporated by Arnell shortly beforehand. Arnell was
apparently its sole shareholder, though not one of its directors. The
Bank met the cheque, paying the proceeds through the clearing
system to Bluepark’s account. Arnell instructed Bluepark’s directors
to pay the funds to him by C.H.A.P.S. transfer. Once received, he
transferred about half the money to Haddon, a social acquaintance
who had agreed to launder the sum through her account. She then
returned this sum to him in cash. All trace of the money was then
lost.

The Bank eventually re-credited Radisson’s account. It sued
Arnell and Haddon for restitution of the value of the funds
received. At law, the Bank’s action was for money had and received
founded on its mistake in making the payment. The Bank failed,
owing to the impossibility of tracing its money at law (see B.,
below). In equity, it claimed that the recipients were constructive
trustees, either on the basis of knowing receipt, or by analogy with
Chase Manhattan N.A. v. Israel-British Bank Ltd. [1981] Ch. 105
because they received the proceeds of a mistaken payment.
Assuming that both grounds of equitable liability required proof
that the recipients were dishonest, Aikens J. held that the Bank
succeeded against Arnell but not against Haddon. Two aspects of
the case warrant particular attention.

A. The Bank’s title to sue

The Bank had to prove that the defendants were enriched at its
expense and that a recognised circumstance rendered their
enrichment unjust. The enrichment was at the Bank’s expense, not
Radisson’s. This was not simply because the Bank bore the loss. In
terms of the location of property interests and the law of agency,
the Bank paid with its own money. It had the legal and beneficial
title to the funds out of which it met the cheque. It made no
difference that the Bank initially debited Radisson’s account with
the payment. The chose in action representing the customer’s credit
balance was an asset wholly separate from that portion of the
Bank’s own funds which it paid to Bluepark under the forged
instructions.

Moreover, the mistake on which the Bank’s action depended
was made on its own behalf, not its customer’s. Because the cheque was forged, the Bank acted without any mandate from Radisson. It was not paying the money as an agent: Barclays Bank Ltd. v. W.J. Sims Ltd. [1980] Q.B. 677, 699–700.

B. Tracing

Aikens J. held that the common law claims must fail against both defendants. The value they received could not be identified with that in the Bank’s initial payment. He relied on the longstanding rule that the common law standards of identification do not allow value to be traced through a mixture. The Bank’s money was mixed when it passed through the payment clearing system.

An appellate court may one day investigate the questionable logic of this rule, which the recent work of Dr. Lionel Smith has exposed as unfounded (see his Law of Tracing (Oxford 1997)). More ambitiously, it might hold that the equitable standards for identification (for which mixtures and electronic payments present no problem) could be applied to prove the elements of a common law claim. Viewed as belonging to equity’s auxiliary jurisdiction, they might be applied when the common law standards of identification proved inadequate because the money being followed was mixed. The advantage for a claimant would be that the recipient’s common law liability would be strict, whereas receipt-based liability in equity still requires proof of fault.

But even equitable tracing was not straightforward for the Bank. Aikens J. accepted that funds are only traceable in equity if they were held subject to a fiduciary relationship. Granted, the relationship between Radisson and its employee who forged the cheque might have been fiduciary, and thus sufficient to have entitled Radisson to trace (Agip (Africa) Ltd. v. Jackson [1991] Ch. 547), but the bank was not privy to this relationship. Besides, the Bank had to prove that its own funds out of which it met the cheque were held subject to a fiduciary duty. Plainly they were not, since it would have held them beneficially on its own behalf. Accordingly, it resorted to the analogy with Chase Manhattan N.A. v. Israel-British Bank Ltd. to render Bluepark a fictitious fiduciary: mere payment of money by mistake constituted the recipient a trustee of the funds.

The other explanation offered for the prerequisite to tracing simply cannot be correct. Aikens J. accepted, rightly, that the directors of Bluepark owed fiduciary duties to their company. They abused them by complying with Arnell’s instruction to pay him the Bank’s money. This disposition would be void and Arnell could have been liable to Bluepark as a constructive trustee: Rolled Steel
Products Ltd. v. British Steel Corporation [1986] 1 Ch. 246. Accurate though this analysis may be, it would still not give the Bank any title to trace in equity. Bluepark’s directors owed fiduciary duties to their company, not to the Bank. Although it is not a condition of tracing that a fiduciary relationship subsist between the claimant and the defendant (e.g., Re Diplock [1948] Ch. 465), the claimant must still be the beneficiary of the relationship which entitles it to trace. Misapplied funds do not become traceable in equity simply because they happen to pass through the hands of a fiduciary somewhere along the chain of recipients. The entitlement cannot arise retroactively in this way. In the absence of a prior entitlement to trace, how would the claimant prove that it was a fiduciary who eventually received its money? The relationship must subsist before the misapplication or, as in Chase Manhattan, be brought into existence by the misapplication itself. As a prerequisite to the task of identifying misapplied value, the requirement of a fiduciary relationship is illogical and ripe for abolition. Till then, that illogicality is best not compounded.

D.M. Fox

MORTGAGEES AND RECEIVERS—A DUTY OF CARE RESURRECTED AND EXTENDED

When a chargee (a term which we can take for present purposes to include a mortgagee) appoints a receiver or takes other steps to enforce his security, the general rule is that self-interest prevails, so that neither he nor his receiver is required by the law to have any great concern for the interests of the chargor or any other person interested in the equity of redemption (such as the holder of a junior-ranking security) or a guarantor of the chargor’s obligations. This is well illustrated by Shamji v. Johnson Matthey Bankers Ltd. [1991] B.C.L.C. 36, C.A. (a chargee is under no duty towards the chargor in deciding whether to appoint a receiver), and Gomba Holdings U.K. Ltd. v. Homan [1986] 1 W.L.R. 1301 (a receiver’s duty of confidentiality vis-à-vis the chargee prevails over his duty to give information to the chargor).

The decision of the Privy Council in Downsview Nominees Ltd. v. First City Corporation Ltd. [1993] A.C. 295 is generally understood to have buttressed this view by restricting the duties of a chargee and his receiver to an obligation to act in good faith and a duty to use their powers for proper purposes—both duties being equitable in origin. The Privy Council categorically denied that this
was an area where any common-law duty of care based on *Donoghue v. Stevenson* [1932] A.C. 562, H.L., or *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, H.L., could be owed. Their Lordships were obliged, however, to add one qualification: the case of *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949, C.A., they said, “is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price, but is no authority for any wider proposition”.

The Court of Appeal in *Medforth v. Blake* [1999] B.C.C. 771 has now shown itself in no mood to follow the Privy Council down this road. The duty of care is alive and well, and is not confined to the conduct of the sale of the charged property.

Mr. Medforth was a pig-farmer in a substantial way of business, with an annual turnover of over £2 million. He had given charges over the business assets to his bank under the Agricultural Credits Act 1928, which we can regard as being all in all material respects equivalent to floating charges created by a company. In 1984 the bank put in receivers, who ran the business (at first at a profit, but later less successfully) until 1988, when Medforth was able to make new financing arrangements and the receivers were discharged. A year later, he brought these proceedings against the receivers alleging various breaches of duty, but by the time of the hearing only one remained in issue. This was an allegation that they had failed to request or obtain discounts on the feedstuffs bought for the pigs (which, as Medforth had frequently reminded them, was normal commercial practice). As the annual feed bill was some £1.2 million and the discounts available were between 7 and 10 per cent, the amount involved was substantial. He claimed that in failing to seek and obtain the discounts the receivers had been in breach of a duty of care owed to him, either at common law or in equity.

Both the trial judge and the Court of Appeal, on a preliminary point of law, held that there was a such a duty, over and above the duty of good faith (and/or proper purposes) which was central to the *Downsview* ruling. The judge had treated this duty—to manage the business with the standard of care of a reasonably competent receiver—as being incidental to the *Cuckmere* duty to use care in exercising a power of sale; but the Court of Appeal held that it was an independent duty, and said also that other duties might be owed in the circumstances of any particular case. The door is thus open—although maybe not the floodgates—to the extension of such a duty in a wider range of circumstances than was contemplated in *Downsview*. Scott V.-C. (who gave the only judgment) suggested that a failure to feed and water the pigs properly, or to inoculate
them in accordance with normal farming practice, might also give rise to liability, as no doubt would careless conduct which led to insurance on the charged property being invalid (Re D’Jan of London Ltd. [1993] B.C.C. 646).

Few would dispute that the receivers were rightly held to owe a duty of care on these facts. (An alternative case might, however, have been made that to have acted in reckless disregard of the chargor’s interests, as the receivers seem to have done, was inconsistent with a duty of good faith.) It is not easy, however, to accept the rather casual reasoning upon which their Lordships’ conclusion is based. Anything based on the common law having been given the thumbs-down by Downsview, Scott V.-C. was content to say that the duty of care “might as well … be referred to as a duty in equity”. On the strength of this, an award of damages could be decreed, without so much as blinking an eyelid. A duty of care, owed in equity, between parties not in a fiduciary relationship, leading to an award of damages? This is unfamiliar territory for those of us brought up on Maitland and Ashburner. One awaits the acerbic comments in the next edition of Meagher, Gummow & Lehane with eager anticipation. Equity, we now acknowledge, does recognise a duty on the part of a fiduciary to pay compensation to his beneficiary in limited circumstances, and it does, of course, have power to award damages in lieu of specific performance, etc.; but a self standing equitable duty of care remediable in damages is a novelty—surely, tort masquerading under a false label.

It would have been entirely appropriate to use (and, if necessary, develop) the familiar concepts of common-law negligence to deal with this situation, building on Cuckmere and reviving Standard Chartered Bank v. Walker [1992] 1 W.L.R. 1410, C.A. (where Lord Denning M.R. spelt out the duty of a receiver towards the debtor’s guarantor entirely on a common-law basis). Even so, there could be pitfalls ahead. A duty of care towards these other parties sits easily enough alongside a primary duty to the chargee where there is no potential conflict between the two. But (to return to the theme in our first paragraph), if there is even a hint of such a clash, the interests of the chargee have always to be paramount.

L.S. SEALY

THE KING IS DEAD: LONG LIVE THE KING

Character merchandising is big business and any case concerning its legal protection is bound to arouse considerable interest. This is
Certainly true of the recent Court of Appeal decision in *Elvis Presley Trade Marks* [1999] R.P.C. 567, where the character concerned was “the King” himself. Earlier, in the “Ninja Turtles” passing-off case, *Mirage Studios v. Counterfeit Clothing Co. Ltd.* [1991] F.S.R. 145, the High Court had apparently endorsed the view that the public’s awareness of merchandising practices means that it will assume that products carrying the likeness or name of a celebrity (real or fictional) will come from one “genuine” source. This decision, together with the provisions of the 1994 Trade Marks Act which swept away previous anti-trafficking provisions and liberalised the licensing regime, seemed, to many, to herald a new dawn for the protection of character merchandising. However, the *Elvis Presley* decision suggests that character merchandising in the UK will remain relatively unprotected compared to other jurisdictions.

The applicant, Elvis Presley Enterprises Inc. (Enterprises), the successor to Elvis Presley’s merchandising business, sought to register the marks “Elvis”, “Elvis Presley” and the signature mark, “Elvis A. Presley”, for toiletries. The application was opposed by Sid Shaw, “consummate salesman”, who had been trading in Elvis memorabilia since the 1970s. In the 1980s, Mr. Shaw had registered the mark “Elvisly Yours” for a range of goods including toiletries. The Registrar found in favour of Enterprises in relation to all three marks. His decision was overturned by Laddie J. in the High Court (*Elvis Presley Trade Marks* [1997] R.P.C. 543) and Enterprises appealed.

The Enterprises application, made before the introduction of the 1994 Act, fell to be judged under the 1938 Trade Marks Act. Nonetheless, the Court was clear that its judgment would remain relevant. Enterprises was unable to provide evidence that the marks had become factually distinctive through use. Hence, it needed to persuade the Court that the “Elvis” and the signature marks were “inherently” distinctive and that the “Elvis Presley” mark was “capable of distinguishing” (ss. 9 and 10 respectively). The Court took distinctiveness to mean the ability to distinguish one trader’s goods from those of others. In addition, Mr. Shaw contended that use of the marks would be liable to cause confusion and that they resembled his earlier mark registered in respect of the same goods (contrary to ss. 11 and 12).

In his leading judgment, Walker L.J. held that the marks “Elvis” and “Elvis Presley” lacked the requisite distinctiveness for registration. He applied Lord Parker’s well-known test, in *W. & G. Du Cros Ltd.* [1913] A.C. 624 at 634–635, and asked “whether traders are likely, in the ordinary course of their business and
without improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods". Such a situation would arise if the mark in question was either descriptive or commonplace. Following the precedent set by *TARZAN Trade Mark* [1970] R.P.C. 450, Walker L.J. held that by the date of the application, the words “Elvis” and “Elvis Presley” were so much a part of the language as to be descriptive of the goods rather than distinctive of their source, and it would be wrong to deny other traders the opportunity to use them. The public bought Elvis memorabilia because it carried his name or image—it wanted “Elvis soap” and “Elvis perfume”—and was indifferent to its trade origin. Or, as Walker L.J. paraphrased Laddie J., “The commemoration of the late Elvis Presley is the product, and the article on which his name or image appears...is little more than a vehicle” (p. 565). As to the signature mark, Walker L.J. held that while it was inherently distinctive, its registration would offend under section 11 since “Elvisly Yours” was also written in cursive script.

Relying in large measure on the “Ninja Turtle” judgment, counsel for Enterprises had argued that both in practice and in law there was now a “general rule” that a trader should not make unauthorised use of the name of a well-known person or character on his merchandise. Unauthorised use would also fail the Parker test, since the trader would not be acting “without improper motive”. While the Court did not question the “Ninja Turtle” judgment, as Laddie J. had done, it was held to apply only to its particular facts. According to Simon Brown L.J., to accept that the judgment had established a general rule that the public will automatically assume a trade connection between a character and merchandise bearing his name or likeness would be to create “a new character right”. The Whitford Committee had rejected such a step in 1977. Subsequent case law on character merchandising (primarily in passing-off) had not filled the breach. The Court rejected the assumption that only a celebrity or his successors may properly market or license his own character. Simon Brown L.J., for one, did not believe that “monopolies should be so readily created”.

The *Elvis Presley* decision, and in particular the Court’s refusal to accept the general assumption underlying the “Ninja Turtle” case, will disappoint those engaged in character merchandising. Under the new Trade Mark Act, as under the old, it will still be up to each applicant to persuade the Registry, or, indeed, the courts, that there is evidence of a sufficient connection in the public mind between the character and the source of the goods to which his
name or likeness is applied for the mark to be distinctive. Such a connection may be easy to establish and maintain where the character is new or not particularly well-known. It may be virtually impossible where the character is already a household name at the time of the application, as with the King or, to take another “royal example”, Diana, Princess of Wales.

If the Elvis Presley decision has important practical implications for celebrities and those engaged in marketing their fame, it also addresses more fundamental questions concerning the production of intellectual property and access to it. It also suggests why post-modernists are so attracted to the study of trade marks. The successors to Elvis Presley sought exclusive ownership of his name and (by implication) his reputation. In rejecting their claim, the judgment appears to recognise a public sphere in which meaning is socially created and to which the public should have access. It is certainly true that the King sought fame in his lifetime. However, underlying the court’s approach is an assumption that it is the public which has endowed him with the celebrity which makes memorabilia carrying his name so popular. As a consequence, if the public wants to name its dogs or its goldfish “Elvis”, to take Laddie J.’s example, or to trade in Elvis memorabilia, it should be able to do so. According to the Court, at the time of the application, Elvis had become, in the words of counsel for Mr. Shaw, part of our “popular culture”. It follows from this decision that the Elvis of popular myth will remain firmly in the public domain.

JENNIFER DAVIS

REDUNDANT APPROACHES TO REDUNDANCY

The apparently straightforward definition of redundancy contained in section 139 of the Employment Rights Act 1996 has generated a disproportionate and confused body of case law. In essence, redundancy pay is payable in three situations: the business disappears (s. 139(1)(a)(i)); the workplace disappears (s. 139(1)(a)(ii)); the job disappears (s. 139(1)(b)). As far as the disappearing workplace is concerned, recent cases have shown the courts taking a more pragmatic approach. The old contractual test laid down in *UK Atomic Energy Authority v. Claydon* [1974] I.C.R. 128 (where, by my contract, can I be required to work?) has been replaced by the geographic approach (where, in practice, do I work?): *Bass Leisure Ltd v. Thomas* [1994] I.R.L.R. 104 (E.A.T.)
and *High Table v. Horst* [1997] I.R.L.R. 513 (C.A.). A similar pragmatism can be detected in the House of Lords’ ruling in *Murray v. Foyle Meats Ltd.* [1999] I.R.L.R. 562 concerning the third aspect of the definition of redundancy, the disappearing job (s. 139(1)(b)).

Section 139(1)(b) provides for redundancy payments where the “requirements of that business ... for employees to carry out work of a particular kind, ... have ceased or diminished or are expected to cease or diminish”. In developing their tests for redundancy, the courts placed much emphasis on the words “work of a particular kind” in the early case law. Under the notorious “function” test, an employee was not redundant if the essential tasks remained the same, even though other terms and conditions had changed. So the court found in *Vaux v. Ward* (1968) 3 I.T.R. 385 that there was no redundancy situation when the employers dismissed “middle-aged waitresses” and replaced them with young “bunny girls” because the work done by the bunny girls was not so different from that done by the older women. Subsequently, the function test was rejected in favour of the “contract” test which focused on the work the employee could be required to do by the contract. Only if all that work diminished was there a redundancy (*Cowen Carrier Ltd v. Haden* [1982] I.R.L.R. 314, as modified by *Johnson v. Peabody Trust* [1996] I.R.L.R. 387).

The contract and function tests placed much emphasis on a diminution in work being done rather than the diminution in the requirements for employees to do that work. The E.A.T. in *Safeway v. Burrell* [1997] I.R.L.R. 200 suggested that a rethink was necessary. Burrell was the manager of a petrol station. As a result of management reorganisation, Burrell’s post disappeared and was replaced by a lower grade, lower-paid post of petrol filling station controller. Burrell did not want the new post and was dismissed. The wing members applied the function test and said there was no redundancy. The chairman applied the contract test and said that, since the manager’s post was more responsible, that job had disappeared and there was a redundancy. The E.A.T. said that both approaches were flawed. It rejected the function test on the grounds that it focused too much on a diminution of the work to be done. It also said that the contract test was wholly wrong: the terms of the employee’s contract were irrelevant. The correct approach was to ask whether the employer’s requirements for employees to do work of a particular kind had ceased or diminished. The E.A.T. said that the statute required a three stage process:
(1) was the employee dismissed? If so,
(2) had the requirements of the employer's business for
employees to carry out work of a particular kind ceased or
diminished or were they expected to cease or diminish? If so,
(3) was the dismissal of the employee caused wholly or mainly
by the state of affairs indicated at stage 2?

Therefore, in Burrell the pendulum seems to have swung in the
opposite direction. Scant regard was paid to the words “work of a
particular kind” and the emphasis was placed on the individual.
This approach has been wholeheartedly endorsed by the Lord
Chancellor, who gave the leading speech in the House of Lords in
the Northern Ireland case of Murray.

In Murray the applicants were employed as meat plant
operatives. They normally worked in the slaughter hall, but their
contracts of employment required them to work elsewhere in the
factory and they had done so occasionally. When business declined
the applicants were made redundant, as the employer needed fewer
slaughterers. They claimed that their dismissal was unfair. The
employers argued diminution in the employer’s requirements for
employees to carry out work of a particular kind. According to
Lord Irvine of Lairg, the language of “para. (b) is in my view
simplicity itself. It asks two questions of fact. The first is whether
one or other of various states of economic affairs exists. In this
case, the relevant one is whether the requirements of the business
for employees to work in the slaughterhouse have diminished. The second question is whether the dismissal is
attributable wholly or mainly, to that state of affairs. This is a
question of causation.” Applying this two stage test, Lord Irvine
said first that the tribunal had found as a fact that the
requirements of the business for employees to work in the
slaughterhouse had diminished. Secondly, it had found that that
state of affairs had led to the appellants’ dismissal. “That in my
opinion is the end of the matter.” He then offered his support for
the analysis and conclusions in Burrell. He added that both the
contract test and the function test missed the point. The key word
in the statute was “attributable”, and there was no reason in law
why the dismissal of an employee should not be attributable to a
diminution in the employer's need, irrespective of the terms of his
contract or the function he performed.

Thus, the Lord Chancellor adopts a broad, practical approach
but in so doing effectively air-brushes the words “work of a
particular kind” from the face of the statute: the statute does not
say “there is a redundancy whenever a dismissal is attributable to a
diminution in the employer’s requirements for employees”, but that is the effect of the Lord Chancellor’s approach. The advantage of this approach is that bumped employees are now clearly redundant, provided the necessary causal link exists (cf. Church v. West Lancashire NHS Trust [1998] I.R.L.R. 4). The disadvantage of this broad definition of redundancy is, first, that it places more emphasis on defining “employees” in terms of their skills and characteristics, and second, that it makes it much harder for employees, like the applicant in Murray, who want to claim unfair dismissal (where the levels of compensation are much higher) on the grounds that there was no valid reason for dismissal (Rubinstein [1999] I.R.L.R. 505). This strategy has been unsuccessful in the past, since employers argue that the dismissal is justified for “some other substantial reason” in the alternative, and, after Murray, this claim is likely to be even less successful in the future.

Catherine Barnard

HOMOSEXUALITY AND THE LORDS: SHIFTING DEFINITIONS OF MARRIAGE AND THE FAMILY

In FitzPatrick v. Sterling Housing Association Ltd. [1999] 2 F.L.R. 1027 the House of Lords by a bare majority (Lords Hutton and Hobhouse dissenting) allowed in part the appeal of Martin FitzPatrick from the majority decision of the Court of Appeal (noted at (1998) 57 C.L.J. 42) to the effect that he was neither the spouse nor a member of the family of his deceased homosexual partner, John Thompson, for the purposes of the Rent Act 1977.

The House rejected Mr. FitzPatrick’s first submission, accepted by Ward L.J. in the Court of Appeal, that the words “living with the original tenant as his wife or husband” in Schedule 1, para. 2(2), as amended were wide enough to embrace a homosexual partnership, and instead affirmed the decision of the Court of Appeal in Harrogate Borough Council v. Simpson [1984] 17 H.L.R. 205. It was clear that in 1988 Parliament had accepted that the notion of being a “spouse” in this context was not confined to those who were legally married. The Housing Act 1988 amended the 1977 legislation to introduce the concept of the “deemed spouse”. So being unmarried, at least for these purposes, is clearly not fatal to being regarded as married. But, the House concluded, being of the same sex as the former partner is. The 1988 amendment was intended to be gender-specific and it was not
permissible to read “my same-sex partner” for “my husband” or “my wife”. Lord Slynn noted, however, that arguments based on discrimination between unmarried same-sex and unmarried opposite-sex couples may have to be considered when the Human Rights Act 1998 is implemented. In this respect it is worth noting that failure to qualify as a spouse, as distinct from a member of the deceased’s family, is of some significance since the former may succeed to a statutory tenancy while the latter may only succeed to an assured tenancy—the practical differences being that a statutory tenancy will be subject to rent control, and that a further transmission of the tenancy may occur in the case of the former but not in the case of the latter.

The majority, however, upheld the view of Ward L.J. that in the particular circumstances (which had involved some eighteen years of cohabitation during the last eight of which Mr. FitzPatrick had nursed Mr. Thompson around the clock) it could fairly be said that Mr. FitzPatrick was a member of Mr. Thompson’s family at the time of his death and for the relevant period of two years immediately preceding it. The majority speeches explored the flexibility inherent in the term “family” and the absence of a universal definition. The application of the term to relationships between two persons depended on the context. The majority accepted an approach to statutory interpretation which allowed the court to take account of the change in social attitudes. But it was not the meaning of the term “family” which had changed over time but rather the application of the term. As Lord Clyde put it, “… the meaning of the word ‘family’ in its sense of a group united by some tie or bond such as blood, marriage or personal affection may not have as a matter of language altered. What has changed are the precise personal associations to which the concept may now be applied.” Which associations, then, beyond the accepted family relationships arising through blood, affinity or adoption are today capable of qualifying for family membership? It is clear from the decision that mere membership of a common household is not enough. The test is best encapsulated in a passage from Lord Clyde’s speech which deserves extended citation:

It seems to me that essentially the bond must be one of love and affection, not of a casual or transitory nature, but in a relationship which is permanent or at least intended to be so. As a result of that personal attachment to each other characteristics will follow, such as a readiness to support each other emotionally and financially, to care for and look after the other in times of need, and to provide a companionship in
which mutual interests and activities can be shared and enjoyed together. It would be difficult to establish such a bond unless the couple were living together in the same house. It would also be difficult to establish it without an active sexual relationship between them or at least the potentiality of such a relationship. If they have or are caring for children whom they regard as their own they would make the family designation more immediately obvious, but the existence of children is not a necessary element. Each case will require to depend eventually upon its own facts.

The contextual limitations of this decision were emphasised by the majority. It was noted in particular that the European Court of Human Rights has thus far failed to accept that a homosexual relationship is within the scope of “family life” protected by Article 8 of the Convention and has adopted an interpretation of Article 12 which upholds a traditional heterosexual view of the right to marry and thus does not, for the present, support the right of homosexuals to marry. That the House was able in the context of the Rent Act to arrive at a definition of the family which may be inclusive of homosexual relationships demonstrates a point of monumental significance for the development of English family law in the twenty-first century: that, while the minimum guarantees enshrined in the European Convention must be upheld as a matter of rights, there is nothing to prevent domestic courts (as happened in this case) going beyond those minimum requirements to offer greater recognition or protection to individuals. The same is true, a fortiori, of the legislature. While Parliament is obliged to ensure that legislation is compatible with the Convention, there is nothing to prevent it from going further. Whether it should do so in relation to the corporal punishment of children is precisely the issue being debated at the present time (see note on A v. United Kingdom (Human Rights: Punishment of Child) at (1999) 58 C.L.J. 291).

In relation to homosexual partnerships the issues in this case are just the tip of the iceberg. The law in many jurisdictions has gone a good deal further than English law in according legal recognition to these relationships—much further indeed than the European Court of Human Rights has even dreamt of going. In North America the notion of discrimination based on sexual orientation has, unlike in Europe (as to which see for example the decision of the European Court of Justice in Grant v. South West Trains (1998) 1 F.L.R. 839), taken root (see for example the Supreme Court of Canada’s decision in Vriend v. Alberta [1998] S.C.J. No. 29 (Q.L.)). Meanwhile, several European countries have introduced “Registered
Partnership” legislation which essentially enables those in committed same-sex relationships, through the act of registration, to acquire for their relationships almost all the legal effects of marriage, the right to adopt children being the only substantial exception. Such legislation is under consideration in other jurisdictions, notably Germany. The Dutch have even gone so far as to contemplate legislation which, if enacted, would extend the right to marry to homosexuals. A separate Bill would tackle the adoption question. The United Kingdom is lagging well behind these developments and mere compliance with the European Convention would leave it trailing the field.

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

Andrew Bainham

**CHEATING THE PUBLIC REVENUE**

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

The various defendants in the two cases had sought to evade liabilities to pay tax by using various overseas companies to provide benefits for themselves. These companies did not appear to be liable to pay corporation tax because they were incorporated outside the jurisdiction, although they were in fact managed and controlled by some of the defendants who were resident in the United Kingdom and so should have been liable to tax here. Since the defendants tried to make it appear that the companies were not
controlled from within the jurisdiction, they were convicted of cheating or, in the case of some of the defendants, conspiring to cheat the public revenue. In rejecting their appeals against conviction the Court of Appeal clarified a number of features of the cheating offence.

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

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

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

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

Much of the Court’s analysis of the offence of cheating the public revenue and the notion of corporate residence is unobjectionable. The offence is probably the most important weapon in the Revenue’s armoury to deal with those who seek to evade their tax liability. Consequently, the Court adopted a distinctly robust approach to the definition of the offence, especially as regards liability for omissions and the manipulation of the notion of cheating. This might have been acceptable in the twentieth century to deter “cynical and deliberate tax evasion”, as the Court described it, but as we shift to the brave new world of the twenty-first century, judicial robustness must be tempered by the Human Rights Act. That Act will have a potentially important role for the substantive criminal law, particularly for the common law offences. For by Article 7 of the European Convention on Human Rights, nobody “shall be held guilty of any criminal
offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed”. It follows that if the common law offence is sufficiently uncertain that it is unclear whether the defendant had committed a crime at the time of acting or failing to act, then the defendant should not be convicted. The inherent fluidity of the common law offences may be inconsistent with human rights jurisprudence, and the solution will probably have to be their replacement by statutory offences which identify the ambit of the crime with greater precision. This might be particularly necessary in the tax context to prevent the offence of cheating the public revenue from becoming unworkable.

GRAHAM VIRGO

ANTISUIT INJUNCTIONS AND THE BRUSSELS CONVENTION

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

This approach is sound in principle:

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

(2) The principle of comity is not infringed. A persistent complaint against antisuit injunctions is that foreign courts should regulate their own proceedings. But, whatever its strength
elsewhere, this charge is irrelevant where such proceedings are an abuse of English process, an issue uniquely within an English court’s province. Relief is granted because the foreign proceedings harass a party before the English court who is entitled to its protection, not because they are vexatious per se.

(3) To rely upon abuse of process is no challenge to the Brussels Convention, which leaves intact the procedural rules of contracting States: Kongress Agentur Hagen GmbH v. Zeehaghe BV [1990] E.C.R. I-1860 (E.C.J.). The Convention is concerned with jurisdiction, not with the vexatious conduct of litigants; with competence, not with due process.

But the decision in Turner is problematic nonetheless. Why, for example, was abuse of English process relied upon at all? Unless used to enforce English jurisdiction agreements, antisuit injunctions are normally granted if foreign proceedings are in themselves vexatious or oppressive, a principle famously articulated in SNI Aérospatiale v. Lee Kui Jak [1987] A.C. 871 (P.C.). This principle was not relied upon in Turner, perhaps because it operates only if the English court is the natural forum, a possibly inappropriate requirement in cases involving the Brussels Convention, given that the allocation of jurisdiction under the Convention does not depend upon the doctrine of forum non conveniens. But the Court of Appeal raised no such objection in similar circumstances in Fort Dodge Animal Health Ltd. v. Akzo Nobel NV [1998] F.S.R. 222. And Aérospatiale could presumably have applied in Turner on the basis that the English court, having sole competence under the Convention, was automatically the appropriate forum.

Again, was the Court of Appeal truly concerned with whether the Spanish proceedings were an abuse of English process? The telling reference to Lonrho plc v. Fayed (No. 5) [1993] 1 W.L.R. 1489 suggests that the true basis of the court’s approach is that foreign proceedings not brought bona fide are an abuse of process whatever their impact on English proceedings. Certainly, the judgment is concerned more with whether the Spanish action was itself vexatious than with the integrity of the parallel English proceedings. This recalls the approach adopted in Aérospatiale, on which, conspicuously, the applicant had not relied. Indeed, it is tempting to see the reliance upon abuse of process in Turner as something of a disguise, as a vehicle for introducing Aérospatiale principles indirectly into a case involving the Brussels Convention, appropriately shorn of the problematic requirement that the English court should be the natural forum.

Of greater concern, the court accepted without pause that relief was also justified because the Spanish court had misapplied the
Brussels Convention by wrongly assuming jurisdiction, the English courts being first seised under Article 21. This is plausible where the English court has jurisdiction under Article 16, as in Fort Dodge, and defensible, if suspect, in cases involving Article 17: Continental Bank NA v. Aeokos [1994] 1 W.L.R. 588. But otherwise such intervention offends the principle that only a court whose jurisdiction is invoked may determine its competence under the Convention. Although dismissed without explanation in Turner, this principle was clearly articulated by the Court of Justice in Overseas Union Insurance Ltd. v. New Hampshire Insurance Co. [1991] E.C.R. I-5439. It is also reflected in Article 28, which forbids a court from denying recognition to judgments given in breach of the Convention’s rules of jurisdiction, implying that foreign courts alone are entitled to determine their competence.

Turner also provokes unease in more general ways. Perplexingly, Laws L.J. describes the English court’s jurisdiction in Turner as “exclusive”, although it depended not on Article 16, or on Article 17, but on Article 2. A mere solecism, perhaps. But did the Court of Appeal really suppose that the employment tribunal had exclusive jurisdiction sensu stricto, as in Continental Bank? If so, its approach to jurisdiction is seriously flawed—although it also becomes more explicable.

More remarkably, no consideration was apparently given in Turner to several arguments, and much relevant material, upon which the outcome surely depended. There is no reference to Article 28, nor to the decisions in South Carolina Insurance, Karoon or Fort Dodge, nor, more surprisingly, to the European Court decisions in Kongress Agentur and Overseas Union Insurance. True, the Court of Appeal’s conclusions concerning abuse of process are probably correct (although for stronger reasons than those provided), and the overall result may be unaffected. But the questions in Turner v. Grovit were more controversial, and the answers more readily discernible in authority, than the Court of Appeal apparently assumed. It is certainly striking that such an important decision rests on such insecure foundations.

RICHARD FENTIMAN

LEGAL ADVICE PRIVILEGE: A MATTER OF SUBSTANCE

The doctrine of legal professional privilege comprises two categories. The first, “legal advice” privilege, protects communications between client and lawyer for the purpose of
eliciting or giving legal advice. The second category, known as “litigation” privilege, concerns communications between a lawyer and a non-party, or a client and a non-party, if made predominantly in respect of litigation, criminal or civil, whether pending or contemplated, and whether in England or elsewhere. An example of this second category is a confidential “sounding” by a client or lawyer of a potential witness.

*General Mediterranean Holdings S.A. v. Patel [1999] 3 All E.R. 673 (Toulson J.)* concerns only the legal advice category. This litigation concerned GMH’s acquisition of shares in companies owned by Patel. GMH alleged that Patel had fabricated an appearance of financial buoyancy (“the bills of exchange scam”). Patel, who was advised by M, a firm of solicitors, denied this. However, just before trial, Patel admitted the fraud and the case then settled. GMH applied for a wasted costs order of £500,000 against Patel’s solicitors.

The solicitors, anxious to avoid this burden, contended that a new rule allowed them to disclose to the court details of privileged material passing between them and its client, Patel, during a criminal investigation of the bills of exchange scam. This rule, appearing in Civil Procedure Rules 1998 (“C.P.R.”), Part 48, r. 7(3), states:

For the purposes of this rule, the court may direct that privileged documents are to be disclosed to the court and, if the court so directs, to the other party to the application for an order.

However, M’s attempt to divulge privileged secrets was opposed both by Patel and by the Law Society, which intervened in the litigation. Toulson J. agreed with these objections. He held that the new rule is invalid because it lies beyond the delegated law-making powers conferred upon the Rule Committee by the Civil Procedure Act 1997.

Under this Act, the new Rule Committee’s law-making powers include rules which “modify the rules of evidence as they apply to [civil] proceedings” (schedule 1, paragraph 4). The former Supreme Court Rule Committee’s competence was confined to matters of “practice and procedure”. In *Re Grosvenor Hotel (No. 2) [1965]* Ch. 1210, C.A., Lord Denning M.R. and Salmon L.J. held that “practice and procedure” did not include matters of “evidence”, or *a fortiori* matters of substantive law.

The 1997 Act’s promoters miscalculated if they hoped that the additional phrase “modify the rules of evidence” would enable the Rule Committee to tinker with the various privileges, including
legal advice privilege. The distinction between substantive law and adjectival law (procedure and evidence) was emphasised in the Grosvenor case, which concerned public interest immunity, formerly known as “Crown Privilege”. Salmon L.J. thought that this privilege involves not just matters of “evidence” but also of “substantive law”. This dictum served as a warning that the Rule Committee, even brandishing its slightly widened powers contained in the 1997 Act, would be overstretching itself if it ventured to override legal advice privilege, as by enacting C.P.R. 48.7 (3), quoted above.

Toulson J. held that legal advice privilege has a substantive application because it creates a tie of confidentiality between lawyer and client, an equitable obligation which can be remedied by injunction and damages. This is illustrated by the recent discussion of injunctions to prevent lawyers from acting in litigation against former clients, and of the imperfection of “Chinese Walls”, in H.R.H. Prince Jefri Bolkiah v. KPMG [1999] 2 W.L.R. 215, 225, H.L., per Lord Millett, noted by T. Petch, [1999] C.L.J. 485. Indeed, three Commonwealth supreme courts have also noted the substantive dimension of the legal advice privilege: the House of Lords in R. v. Derby Magistrates’ Court, ex p. B [1996] A.C. 487, 507; the High Court of Australia in Carter v. Northmore Hale Davy & Leake (1995) 183 C.L.R. 121, 132, 159–160; and the Supreme Court of Canada in Descoteaux v. Mierzwinski (1982) 141 D.L.R. (3d.) 590, 601–603. These decisions go further and emphasise that a client’s right to consult a lawyer regarding his or her legal rights is a fundamental aspect of justice.


Finally, the judge considered some rules of construction. He noted the rule that, in the absence of express language or necessary implication, general legislative words do not derogate from fundamental rights of the common law (p. 691, citing R. v. Secretary of State for the Home Department, ex p. Simms [1999] 3 W.L.R. 328, 341, H.L.). This rule of construction is applied with special vigour when the primary statute contains general words which delegate to a Minister or statutory body a power to promulgate secondary legislation (p. 692, citing R v. Secretary of State for the Home Department, ex p. Leech [1994] Q.B. 198, 211–
There is also a strong presumption against Parliament intending a statute to operate to impair an existing substantive right (ibid., noting Bennion, Statutory Interpretation (3rd edn., 1997), pp. 235–242).

A final point concerns litigation privilege. Toulson J. was not directly concerned with that second species of legal professional privilege, although he discussed it briefly (pp. 693G–694C). Could the Rule Committee lawfully introduce a rule requiring a party to disclose even unused witness material or expert reports (cf. the ominous comments of Scott V.-C. in Secretary of State for Trade & Industry v. Baker [1998] Ch. 356, 363–364, 366–370, C.A.)? This is hardly an instance of a fundamental right. But is it decisive that the communication is confidential? The point might prove a nice one.

N.H. Andrews

PROCEDURAL ANOMALIES

For centuries, English criminal procedure regarded the “surprise witness” as a legitimate weapon, for the prosecution as well as the defence. In a case in 1823 Park J. complained that the defendant had seen the depositions in advance of trial. “The prosecutor or his solicitor might have access to them, but not the party accused. For what would be the consequence if the latter had access to them? Why, that he would know everything which was to be produced in evidence against him—an advantage which it was never intended should be extended towards him . . .” (J.F. Stephen, History of the Criminal Law of England (1883), vol. I, p. 228).

During the nineteenth century this attitude changed, to the extent that the defendant acquired the right to advance notice of the evidence the prosecution proposed to call against him in cases that were to be tried on indictment. However, this change did not apply to summary trial in the magistrates’ courts, where the prosecutor could still spring evidential surprises on him.

This mattered little in the days when summary trial was reserved for truly trivial cases, but as the jurisdiction of the magistrates’ court was gradually extended, so it began to matter more. During the 1970s and 1980s, there was public pressure to extend “advance disclosure” to summary trial. To this the Government reluctantly gave way, in 1977 promoting legislation that eventually led to the Magistrates’ Courts (Advance Information) Rules 1985, which are still in force. These give the magistrates’ court defendant some
rights, but ones markedly inferior to those he has in trials on indictment. On summary trial, the defendant has a limited right to be informed about the prosecution case where he is accused of an “either-way offence”, and if it is a purely summary offence, no right to advance disclosure whatsoever.

Initially the debate about disclosure centred on the duty of the prosecution to inform the defence of the evidence that it proposed to use at trial. In the 1980s, it began to centre around a slightly different matter: the duty (if any) of the prosecution to tell the defence about the material it had gathered in the course of the enquiry, and which it did not intend to use because it suggested that the defendant was innocent. In the case of Judith Ward [1993] 1 W.L.R. 619, the Court of Appeal ruled that the prosecution must in principle tell the defence about such “unused material”, and give them access to it. This new judge-made rule was codified (and also restricted in certain ways) by the Criminal Procedure and Investigations Act 1996.

The new duty on prosecutors to share “unused material” applies across the board: not only to proceedings on indictment, but also to all shapes and forms of summary trial, including the summary trial of purely summary offences. And this, in combination with the grudging Magistrates’ Courts (Advance Information) Rules already mentioned, gives rise to an extraordinary paradox. In summary trials of purely summary offences, the Criminal Procedure and Investigations Act 1996 now requires the prosecutor to share with the defence the evidence that he does not intend to use, but the Magistrates’ Courts (Advance Information) Rules still allow him to keep from the defence the evidence he does!

This remarkable anomaly was publicly exposed in R. v. Stratford JJ., ex p. Imbert [1992] 2 Criminal Appeal Reports 276. The defendant, following an incident in a public lavatory, was prosecuted for offences of threatening behaviour and assault on the police—both of which are summary only. The Crown Prosecution Service, relying on the Magistrates’ Courts (Advance Information) Rules, refused to give the defence access to the statements of the prosecution witnesses. In response to this, the defence asked the magistrates to stay the prosecution as an abuse of process, and when the justices refused, sought judicial review of their refusal. Before the Divisional Court, the defence argued that the prosecutor was now obliged to tell the defence the evidence he intends to call in every type of case. This must be so, he said, for two reasons. The first was that the prosecutor’s right to refuse to disclose the evidence he intends to call had been in some way overridden by his new duty to disclose “unused material”. The second was that his
refusal contravened the defendant’s right to a “fair trial”, as guaranteed by Article 6 of the European Convention on Human Rights.

The Divisional Court rejected both arguments. The first failed because, as the court observed, giving advance notice of the evidence you intend to use is one thing, and sharing the evidence you do not intend to use is another; thus later legislation on the second does not repeal or qualify earlier legislation on the first. The other argument failed because the commodity that Article 6 of the Convention protects is not advance disclosure, but “fair trial”. A trial is not a fair one if the defendant is denied the chance to meet the case against him; but even if the prosecution hides the evidence until the day of trial, the court can still ensure the defendant has a fair trial by ordering an adjournment to give him a proper opportunity to meet the case. As Buxton L.J. said, “The case might of course have to be assessed again once the trial had been completed, and its whole conduct fell to be reviewed. But that is a very different matter from saying that the Convention forbids that stage ever being reached.”

Although a defeat for this particular defendant, this decision is in a limited sense a victory for defendants generally. Whilst rejecting the defendant’s case that he had a right to see the statements, the Divisional Court said that it would be good practice for the CPS to disclose them voluntarily on request—and it hoped that in future it would do so.

If the CPS heeds this sensible advice, the anomaly this case exposes will no longer matter. However, the face of English criminal procedure will still be disfigured by it. And this sort of muddle will continue to be made, I believe, as long as English criminal procedure remains in its present chaotic state of non-codification. If all the major statutory rules on criminal procedure could be just brought together in one single statutory text, as was done in Scotland in 1975, legislative blunders of this sort might be noticed before they are committed.

J.R. Spencer