CASE AND COMMENT

ACCESS TO INTERNATIONAL JUSTICE IN THE LEGALITY OF USE OF FORCE CASES

Much international litigation has been spawned by the Balkan crisis, and the latest instalment comes in the form of eight judgments rendered by the International Court of Justice (“ICJ”) on 15 December 2004 in the Legality of Use of Force cases. In these judgments, the ICJ upheld the preliminary objections of the respondent States and ruled that it had no jurisdiction to entertain Serbia and Montenegro’s claims.

The Federal Republic of Yugoslavia (“FRY”), as it was then known, instituted separate proceedings on 29 April 1999 against each of Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States. In its application, it argued that in the course of the NATO intervention in Kosovo in the Spring of 1999, the respondents had violated, inter alia, the prohibition on the threat or use of force, the obligation of non-intervention, and the obligation to protect the civilian population and civilian objects in wartime (see, e.g., Serbia and Montenegro v. Belgium, para. 1). On 2 June 1999, the ICJ rejected the FRY’s requests for the indication of provisional measures, and also decided to remove two of the applications from the list, finding that it “manifestly lacked jurisdiction” in those cases (Legality of Use of Force (Yugoslavia v. Spain) [1999] I.C.J. Rep. 761, 773–4; Legality of Use of Force (Yugoslavia v. United States) [1999] I.C.J. Rep. 916, 925–6). The eight other cases, however, remained on foot.

At the time it commenced proceedings, the FRY—claiming to be the successor State to the Socialist Federal Republic of
Yugoslavia (“SFRY”)—relied on the following grounds of jurisdiction: Article IX of the Genocide Convention (in each of the cases); Article 36(2) of the ICJ Statute (in the cases against Belgium, Canada, the Netherlands, Portugal, and the United Kingdom); and two bilateral treaties (in the cases against Belgium and the Netherlands). Internal political upheaval in the FRY subsequently led to its admission to the UN on 1 November 2000 and its accession to the Genocide Convention on 12 March 2001. This saw a significant alteration in its attitude to the question of the ICJ’s jurisdiction. Whereas the FRY (renamed “Serbia and Montenegro” on 4 February 2003) had previously positively asserted that the ICJ had jurisdiction, it now merely asked that the ICJ “decide on its jurisdiction” (Serbia and Montenegro v. Belgium, paras. 23–4).

This unusual formulation provoked the respondents to argue that the cases should be removed from the list by summary decision. A number of different arguments were made by the respondents in this regard. First, it was suggested that Serbia and Montenegro had effectively discontinued the cases; the ICJ rejected this (Serbia and Montenegro v. Belgium, paras. 31–2). Second, it was argued that the ICJ had an ex officio power to remove the cases from its list; the ICJ agreed that it had such a power, but held it could only exercise this power in certain situations, which did not include the present case (Serbia and Montenegro v. Belgium, para. 33). Third, it was put to the ICJ that there was agreement between the parties on a “question of jurisdiction that was determinative of the case”, as Serbia and Montenegro did not dispute that prior to November 2000, it was not a member of the UN or the Genocide Convention. The ICJ also rejected this argument, noting that the question to be determined was not one of consent, but whether Serbia and Montenegro was entitled to seise the ICJ at the time when it instituted proceedings in 1999 (Serbia and Montenegro v. Belgium, paras. 34–8). Fourth, it was implied by some of the respondents that the approach adopted by Serbia and Montenegro was influenced by the ongoing ICJ proceedings between Bosnia and Herzegovina and Serbia and Montenegro. The ICJ similarly dismissed this objection, holding that it could not decline to entertain a case “simply because ... its judgment may have implications in another case” (Serbia and Montenegro v. Belgium, para. 40). Fifth, it was suggested that any dispute concerning rights and obligations under the Genocide Convention had disappeared, and moreover, that Serbia and Montenegro should be estopped from pursuing any action under that convention. The ICJ gave these objections short shrift, holding
that it was clear that the dispute on the merits persisted, and that Serbia and Montenegro could not be held to have “forfeited or renounced” its right of action (Serbia and Montenegro v. Belgium, paras. 43–4).

The ICJ then turned to the question of its jurisdiction. It first addressed the question whether the FRY had been entitled to institute proceedings before the ICJ. Under Article 35(1) of its Statute, the ICJ is only “open to the States parties to the present Statute”; it followed that the ICJ could “exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it” (Serbia and Montenegro v. Belgium, para. 46). Having observed that it had not previously been required to determine the legal status of Serbia and Montenegro, the ICJ embarked on a lengthy recapitulation of the events relating to its legal position vis-à-vis the UN between 1992–2000 (Serbia and Montenegro v. Belgium, paras. 54–79). Previously, the ICJ had noted the “legal difficulties” posed by the stance taken by the Security Council, General Assembly and Secretary-General with regard to the FRY, and had referred to its status as “sui generis” (Application of the Genocide Convention [1993] I.C.J. Rep. 3, 14; Application for Revision, judgment of 3 February 2003, para. 71). In the present case, the ICJ again described the FRY’s position within the UN during this period as “highly complex”, “ambiguous”, and “open to different assessments” (Serbia and Montenegro v. Belgium, para. 64). However, the ICJ concluded that this uncertainty was brought to an end by the FRY’s admission to membership of the UN on 1 November 2000. This event clarified the previous legal situation, as the FRY’s membership “did not have, and could not have had, the effect of dating back to the time when the [SFRY] broke up and disappeared”; further, the ICJ held it was clear “that the sui generis position of the Applicant could not have amounted to its membership” in the UN (Serbia and Montenegro v. Belgium, para. 78). Accordingly, Serbia and Montenegro was not, at the time of institution of proceedings, a State party to the ICJ Statute; consequently, the ICJ was not open to it under Article 35(1) (Serbia and Montenegro v. Belgium, paras. 79, 91).

The ICJ then considered whether Serbia and Montenegro could nonetheless have access to it under Article 35(2), which stipulates in relevant part that “the conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council”. The question here was whether the Genocide Convention
was a “treaty in force” under Article 35(2), and whether the ICJ’s jurisdiction might be founded on this basis. The ICJ noted that there were two possible interpretations of the phrase “treaties in force”: it could refer either to treaties in force at the time of entry into force of the ICJ Statute, or to treaties in force at the time of commencement of proceedings (Serbia and Montenegro v. Belgium, para. 101). After reviewing the travaux préparatoires of the provision, which dated from the Statute of the ICJ’s predecessor, the Permanent Court of International Justice (“PCIJ”), the ICJ held that Article 35(2) was “intended to refer to treaties in force at the date of the entry into force of the new Statute” (Serbia and Montenegro v. Belgium, para. 113). This, then, excluded Serbia and Montenegro from having access to the ICJ under the Genocide Convention, which entered into force in 1951.

Finally, the ICJ addressed the argument made in the applications against Belgium and the Netherlands that its jurisdiction might be founded on the basis of bilateral agreements conferring jurisdiction on the PCIJ and dating from 1930 and 1931 respectively. Here the question was whether Article 37 of the ICJ Statute, which preserves and transfers the jurisdiction of the PCIJ to the ICJ, was of any assistance to Serbia and Montenegro. The ICJ held that it was not, as this provision only operates “as between the parties to the present Statute”, thus excluding Serbia and Montenegro (Serbia and Montenegro v. Belgium, paras. 115–26; Serbia and Montenegro v. Netherlands, paras. 114–25). Accordingly, the ICJ held that it lacked jurisdiction.

While the ICJ was correct to uphold the respondents’ preliminary objections in the Legality of Use of Force cases, its reasoning is, concordant with the FRY’s position within the UN from 1992–2000, not free from legal difficulties. For in basing its decision on its jurisdiction ratione personae, the ICJ’s approach is inconsistent with its orders in the FRY’s requests for provisional measures, where it preferred to rule that it lacked prima facie jurisdiction ratione temporis or ratione materiae. Furthermore, the ICJ’s finding that Serbia and Montenegro was not a member of the UN prior to 1 November 2000—and that the ICJ was not open to it—directly contradicts its finding in another case that the FRY’s admission to the UN in 2000 “cannot have changed retroactively the sui generis position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court” (Application for Revision, judgment of 3 February 2003, para. 71). This was noted by seven judges who saw fit to append a joint declaration, in which they also lamented the ICJ’s statement that in rendering the judgment, it did
not need to consider implications for other litigation (joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, para. 10). In addition, the ICJ’s decision to rule on the application of Article 35(2) was highly unusual, given that Serbia and Montenegro did not invoke this provision; the ICJ’s approach to this issue was described in the joint declaration as “astonishing” (joint declaration, para. 11; see also separate opinion of Judge Higgins, para. 18). While the outcome in the Legality of Use of Force cases is the right one, the ICJ would have done well to find less problematic grounds on which to base its decision.

CHESTER BROWN

PROPORTIONALITY AND DISCRIMINATION IN ANTI-TERRORISM LEGISLATION

PART 4 of the Anti-terrorism, Crime and Security Act 2001 (the ATCS Act) allowed the Home Secretary to certify a person as a suspected international terrorist. If subject to immigration control, the person could then be detained pending removal from the UK. If there was no country to which the person could be sent without being at risk of death, torture or inhuman or degrading treatment, section 23 authorised indefinite detention. The government purported to derogate under Article 15 of the ECHR from the right to liberty under Article 5 and made an order under section 14 of the Human Rights Act 1998 to make the derogation effective in municipal law. In A and others v. Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 W.L.R. 87, detainees claimed that the derogation was not justified by Article 15, and that indefinite detention of people subject to immigration control constituted unlawful discrimination on the ground of nationality or immigration status contrary to Article 14 taken together with Article 5. Of the nine Law Lords (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell) a majority agreed, quashing the derogation order and declaring section 23 of the ATCS Act to be incompatible with Articles 5 and 14.

Their Lordships assumed that the detention needed to be justified under Article 15(1) of the ECHR as a measure strictly required by the exigencies of a public emergency threatening the life
of the nation and consistent with the UK’s other obligations under international law. They accepted that after the terrorist attacks on the USA on 11 September 2001 the Al-Qaeda threat amounted to a national emergency. Eight of them (Lord Hoffmann dissenting) accepted (not without significant hesitation) that the emergency could be said to threaten the life of the nation. However, seven Law Lords (Lord Walker of Gestingthorpe dissented and Lord Hoffmann did not express a view) held that the detention was not strictly required by the exigencies of the situation and so was not protected by Article 15(1). They also held that section 23 violated Article 14 by treating people differently in the enjoyment of their right to liberty on the ground of their nationality or immigration status without a rational and objective justification. The choice of immigration legislation as the vehicle for the measure did not justify singling out those suspected international terrorists who were subject to immigration control when they were not objectively more dangerous than those who, having a right of abode in the UK, were not subject to immigration control. The right to liberty is too fundamental and indefinite deprivation of it without a criminal conviction too serious to be easily justifiable.

It was unprecedented for UK judges to adjudicate on the legitimacy of measures adopted in good faith on national security grounds. The deportation of Iraqis during the first Gulf War just over a decade earlier had attracted no such scrutiny: see R. v. Secretary of State for the Home Department, ex parte Cheblak [1991] 1 W.L.R. 890 (C.A.). The Human Rights Act 1998 and well publicised weaknesses in the evaluation and use of intelligence material by the Secret Intelligence Service and the Government in seeking to justify the second Gulf War combined to ensure that heightened scrutiny where human rights are engaged, long proclaimed but rarely effectively implemented (see for example Bugdaycay v. Secretary of State for the Home Department [1987] A.C. 514 (H.L.); R. v. Ministry of Defence, ex parte Smith [1996] Q.B. 517, C.A.), would henceforth be a reality.

The majority also adopted a more demanding proportionality test than had hitherto been employed in the UK. They accepted that before a balancing of rights and interests was needed there had to be a rational connection between the measures adopted and the legitimate aim of combating international terrorism. They held that indefinite detention of foreign (but not British) suspected international terrorists without charge failed this part of the proportionality test, for two reasons. First, the government considered that some British suspected international terrorists were as dangerous as the foreigners who could be detained under the
ATCS Act, yet had regarded detention as unacceptably draconian, other means of controlling their activities being considered adequate. Secondly, the detainees were free to leave the country at once if they could find countries that would accept them, and the government had given undertakings to continue to seek safe countries to which they could be removed. The majority did not think that it could be necessary to detain some dangerous people indefinitely if on the one hand others who were equally dangerous were left at large; and if detention of some was essential for national security (a notion that can include the security of the UK’s allies: *Secretary of State for the Home Department v. Rehman* [2003] 1 A.C. 153 (H.L.), setting them at large on condition that they went abroad was not rationally related to combating international terrorism.

Finally, the discussions of the role of the judiciary in this field are of great importance. Lord Bingham (at [42]) firmly asserted the judicial prerogative of upholding the rule of law in human rights cases: “I do not ... accept the distinction which [the Attorney General] drew between democratic institutions and the courts .... [T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state.” In the same vein (at [33]) he rejected an undertaking that the Attorney General offered that the detention powers would be used only against people suspected of contact with Al-Qaeda: “It is not however acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking”. The Law Lords did not consider case law from other jurisdictions to be a safe guide when deciding on the intensity of review if the constitutional contexts and texts of the legislation are significantly different: see for example Lord Hope of Craighead (at [131]). The discussion of these matters and of the related question of the appropriate intensity of judicial review in such cases repays careful study.

For all these reasons, although the measures have been replaced with the Prevention of Terrorism Act 2005 the decision, perhaps the most powerful judicial defence of liberty since *Leach v. Money* (1765) 3 Burr. 1692 and *Somerset v. Stewart* (1772) 20 St. Tr. 1, will long remain a benchmark in public law.

David Feldman
COMMERCIAL statements occupy a precarious position within the general framework of free speech laws. Judgments involving commercial expression are sporadic and, since such speech is perceived to be of less value to society than political or artistic speech, it accordingly receives diminished protection from the courts (see Munro, [2003] C.L.J. 134). Despite an express acknowledgement that Article 10 ECHR does protect commercial speech (Markt-Intern Verlag GmbH and Klaus Beerman v. Germany (1989) 12 E.H.R.R. 161), the degree of protection afforded to such statements is heavily qualified. A wide margin of appreciation is conferred on the national authorities to restrict commercial speech, especially on the grounds of promoting market competition (Jacubowski v. Germany (1994) 19 E.H.R.R. 64) and regulating advertising standards (Casado Coca v. Spain (1994) 18 E.H.R.R. 1). Another significant basis to justify sweeping restrictions on commercial statements has now been advanced by the High Court, namely public health.

R. (on the application of British American Tobacco UK Ltd. and five others) v. Secretary of State for Health [2004] EWHC 2493 (Admin) marks the first occasion that the UK courts have been called upon to examine substantively the protection offered to commercial speech. This application for judicial review was brought by six companies involved in the tobacco industry, challenging the legality of the Tobacco Advertising and Promotion (Point of Sale) Regulations 2004, adopted pursuant to the Tobacco Advertising and Promotion Act 2002. Section 2 of the Act prohibits the advertising of tobacco products in the UK, under pain of criminal sanctions, subject to a ministerial discretion in section 4 to permit limited publicity under certain circumstances, duly elaborated in the 2004 Regulations. In essence, the Regulations allow advertisements to be placed on websites and also at the point of sale of tobacco products, provided that such publicity is restricted to a gantry or display unit, does not exceed an A5 surface area and incorporates a bold health warning comprising some thirty per cent of the entire advertisement. Although approved by Parliament, the Regulations have yet to come into force and are provisionally scheduled to do so in December 2005.

The applicants objected to the Regulations on a number of grounds, principally that the government placed such disproportionate restrictions on tobacco advertising that the “very essence” of their commercial free speech had been compromised, thereby infringing Article 10 ECHR. The restrictions were defended
on the basis that it was necessary to impede freedom of commercial speech in this instance in order to address a significant and pressing risk to public health and that, moreover, the national authorities enjoy a wide area of discretion.

McCombe J. noted that the case law of the European Court of Human Rights has traditionally permitted commercial speech to be regulated in a far more robust manner than political or artistic expression. Given that this position has become entrenched within Article 10 jurisprudence in recent years, the applicants must have considered it unlikely that the High Court would deviate from the Strasbourg line. Therefore, in the absence of sympathetic case law closer to home, they largely based their submissions on US authority where commercial speech, although seen as secondary in the hierarchy of First Amendment rights, nevertheless enjoys a significant degree of protection (Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council Inc. (1976) 425 U.S. 748; Central Hudson Gas & Electric Corporation v. Public Services Commissioner of New York (1980) 447 U.S. 557). In particular, the applicants emphasised the decision in Lorillard Tobacco Co. v. Riley (2001) 533 U.S. 525, in which overzealous restrictions on tobacco advertising in Massachusetts were annulled for being “unnecessarily broad”, given that they constituted a de facto ban on the promotion of lawful (if ultimately harmful) products.

Although McCombe J. found this authority to be instructive, he was nevertheless unswayed by the reasoning of the US Supreme Court, and resisted the temptation to adopt a First Amendment stance in dealing with an issue that has already been comprehensively addressed by the European Court of Human Rights. The decision in Lorillard Tobacco was distinguished from the present case on the basis that it largely concerned the complicated balancing act that the Supreme Court must often perform between the competing interests of Federal and State legislation, and was therefore unsuitable as a direct guide for the UK courts in this particular instance. Moreover, McCombe J. was reluctant to import the Supreme Court’s interpretation of commercial speech rights, since “it was dealing with the United States Constitution rather than our Convention”. This highlights the limitations inherent in borrowing ideals from the Supreme Court, especially since the First Amendment is hardly an exact template of the freedom of speech rights guaranteed under the ECHR, which are diluted by a series of qualifications absent from the US Constitution. Refusing the application, McCombe J. therefore held that the national authorities enjoyed a wide degree of discretion in protecting public health and that, in pursuing this
objective, freedom of commercial speech must necessarily be subject
to restrictions and restraints with which (the need to ensure
proportionality notwithstanding) the courts should not readily
interfere.

Ultimately, the decision in British American Tobacco is rather
unsurprising, given the wide margin of appreciation traditionally
granted to States under Article 10 to regulate commercial
statements. Although freedom of commercial expression had not
previously been examined by the UK courts, McCombe J. has
essentially confirmed the suspicions of many free-speech lawyers in
that commercial speech is protected in and of itself, but must defer
to the restraints deemed necessary by the national authorities in the
pursuit of an objective of overriding public importance. That said,
this application has examined a novel ground for restricting such
statements, and the decision will undoubtedly prove instructive for
the European Court of Human Rights in deciding future litigation
on this issue, which is likely to occur given the controversy
generated by the impending EU-wide restrictions on tobacco
advertising. In this regard, the decision in British American Tobacco
provides a further reason for a restrictive approach to the
regulation of commercial speech.

Richard Caddell

“BACK DOOR SENTENCING”: IS RECALL TO PRISON A PENAL PROCESS?

While much effort has gone into training judges and advocates in
the intricacies of the new sentencing regime introduced in the
Criminal Justice Act 2003, and implemented in large measure in
April 2005, it is refreshing to see the House of Lords turn its
attention to what might be considered an area of equal importance:
executive recall to prison, or “back door sentencing”. The Parole
Board’s Annual Reports reveal the huge increase in recall cases in
recent years: from 2,457 in 2000–01, to 9,031 in 2003–4, for
example. The prison population is thus increasingly shaped by
those who re-enter by the “back door”.

The facts of the two cases before the House of Lords in
R. (Smith) v. Parole Board; R. (West) v. Parole Board [2005]
UKHL 1, [2005] 1 W.L.R. 350 were not untypical. Justin West was
released at the halfway stage of his three-year sentence for affray
on 6 August 2001, subject to the standard licence conditions. Ten
days after his release, he had allegedly assaulted his former partner
in a hostel, but the victim would not confirm the incident. He then
failed to keep an appointment with his supervising officer, and on 22 August the Home Secretary revoked his licence, under section 39(2) of the Criminal Justice Act 1991. He was arrested on 24 August and returned to prison. The Home Secretary referred the case to the Parole Board under section 39(4)(b) and his solicitors made written representations urging an urgent oral hearing to be attended by witnesses whose evidence should be heard on oath. The Parole Board rejected these representations in a letter of 2 October and Mr. West remained in prison until 9 May 2002.

The Parole Board’s decision was unsuccessfully challenged in the High Court and the Court of Appeal. The majority of the Court of Appeal concluded that Article 6 of the European Convention on Human Rights (the right to a fair trial) had no application because of “the critical fact that when a parole licence is revoked and its revocation is subsequently confirmed this is solely with a view to the prevention of risk and the protection of the public and not at all by way of punishment” (Simon Brown L.J.). Only Hale L.J. recognised, in her dissenting judgment, that “to the person concerned it is experienced as punishment, whatever the authorities may say”. However, the House of Lords (Lords Bingham, Slynn, Hope, Walker and Carswell) decided unanimously that he should have been allowed an oral hearing:

In his representations against revocation the appellant West offered the Board explanations, which he said he could substantiate, of his failure to keep an appointment with his probation officer and of the incident at his ex-partner’s hostel. The Board could not properly reject these explanations on the materials before it without hearing him. He admitted spending one night away from his approved address, staying (he said) with a cousin. While this was a breach of his licence conditions, it is not clear what risk was thereby posed to the public which called for eight months’ detention. His challenge could not be fairly resolved without an oral hearing and he was not treated with that degree of fairness which his challenge required (per Lord Bingham)

The other case was that of Trevor Smith, who was released on licence from a six and a half-year extended sentence for rape on 7 November 2001, which was his “non-parole date”, the date on which he was entitled to be released. Having tested positive for cocaine whilst living in a probation hostel, he was moved at his request to another hostel, but again tested positive to cocaine, and three days later to cocaine and opiates. His probation officer referred the case to the Parole Board under section 39(1) of the Act of 1991. The Board supported the recommendation that he should be recalled, which he was, on 4 February 2002. Smith made written
representations under section 39(3), but these were rejected in a letter which explained that his drug use presented too great a risk to public safety. His original application for judicial review was turned down. At an oral renewal of the application, he was granted permission to seek judicial review, but only in relation to Article 6 and the common law. The case was listed before a third judge who refused to allow him to rely also on Article 5 (right to liberty). He appealed against that refusal, and the Court of Appeal (led by Lord Woolf C.J.) ordered that he be permitted to rely on Article 5, as well as Article 6 and common law. The Court also ordered that the case be heard in the Court of Appeal, where Kennedy and Brooke L.JJ. and Holman J. held that Mr. Smith had no right to an oral hearing, and that there was no objective need for an oral hearing, as there was no dispute on the primary facts. Smith was eventually released on 3 December 2003, having served 22 months during the period of recall.

The House of Lords also unanimously allowed this appeal:

The resort to class A drugs by the appellant Smith clearly raised serious questions, and it may well be that his challenge would have been rejected whatever procedure had been followed. But it may also be that the hostels in which he was required to live were a very bad environment for a man seeking to avoid addiction. It may be that the Board would have been assisted by evidence from his psychiatrist. The Board might have concluded that the community would be better protected by encouraging his self-motivated endeavours to conquer addiction, if satisfied these were genuine, than by returning him to prison for 2 years with the prospect that, at the end of that time, he would be released without the benefit of any supervision. Whatever the outcome, he was in my opinion entitled to put these points at an oral hearing. Procedural fairness called for more than consideration of his representations, on paper, as one of some 24 such applications routinely considered by a panel at a morning session. (per Lord Bingham)

Much of the analysis in the House concerns the relationship between the appellants' common law and their Convention rights. Their Lordships agreed that the common law demanded, in these cases, an oral hearing: "the prisoner should have the benefit of a procedure which fairly reflects … the importance of what is at stake for him, as for society" (per Lord Bingham). Lord Hope explicitly identifies the breach of Article 5(4). Controversially they appear to conclude that recall is not a punishment, and that therefore the criminal due process rights of Article 6 are not engaged (though Lord Bingham thought it unnecessary to resolve this question). Lord Hope adds that Article 6 civil rights are not
infringed by proceedings of this kind so long as the individual has access to the domestic courts to assert his right to liberty. Doubtless these conclusions will be challenged, but there are more fundamental points to question: is the Parole Board really “an independent and impartial tribunal”? Who should bear the burden of proof before the Parole Board? (And is the Parole Board adequately resourced for the inevitable flood of applications?)

The statutory provisions and subordinate rules governing the release, licensing and recall of prisoners have, as Lord Bingham points out, been the subject of “ceaseless change” over the past 10–15 years. Under sections 254 and 255 of the Criminal Justice Act 2003, in force for all prisoners subject to licence conditions on or after 4 April 2005 irrespective of the date of their offence, recall becomes more obviously an executive decision. This removes the previous anomaly whereby the Parole Board both advised on recalls and acted as an appeal body against those same recalls. It is time that lawyers, both academic and practising, paid much closer attention to the fairness (or otherwise) of these “back door sentencing” decisions.

NICOLA PADFIELD

CONSPIRACY AND RECKLESSNESS

In 1977, Parliament tried to codify conspiracy, and made a hash of it. (For the unedifying tale of how this happened, see Sir Derek Hodgson in Reshaping the Criminal Law (essays in honour of Glanville Williams, edited by Peter Glazebrook, 1978).)

One of the doubtful points the Criminal Law Act 1977 leaves open concerns the mental element for the offence. It arises where the offence D allegedly conspired to commit can be committed recklessly: in particular, with recklessness as to some circumstance, like the absence of consent, or the fact that money handled represents the proceeds of a crime. In such a case, is D guilty of conspiracy if he was reckless, as he is for the completed offence? Or for conspiracy must the prosecution go further, and prove he was intentional (i.e., that he did not just suspect, but knew)? In two recent cases, two differently constituted divisions of the Court of Appeal have reached opposite conclusions on this point.

In R. v. Sakavickas and another [2004] EWCA Crim 2686, [2005] 1 W.L.R. 857 the defendants were prosecuted for conspiring to commit an offence of money-laundering under section 93A of the Criminal Justice Act. This provision (now replaced by the Proceeds
of Crime Act 2002) created an offence where a person “enters or is otherwise concerned in an arrangement” enabling another person to retain control of money, “knowing or suspecting that” this person has been engaged in criminal conduct. Convicted after a two-and-a-half month trial, the defendants appealed because the judge had directed the jury that the defendants were guilty if they knew “or suspected” that the money in question was “hot”. The prosecution, they said, had chosen to charge them not with the substantive offence, but with conspiracy to commit it (obtusely, by the way—since making an agreement was in fact the actus reus of the complete offence). And for conspiracy, unlike the completed offence, suspicion was not enough and actual knowledge must be proved. This argument the Court of Appeal rejected: if recklessness would do for the completed offence, it would for conspiracy as well.

In *R. v. Harmer* [2005] EWCA Crim 1 the defendant had been tried and convicted for conspiracy to commit some different money-laundering offences—all, like those in *Sakavickas*, now superseded by the 2002 Act. For these offences, the defendant was guilty if he stored or handled money “knowing or having reasonable grounds to suspect” that it derived from crime.

The Court of Appeal quashed the conviction for a number of reasons. The one that concerns us here was that the prosecution had put its case, not on the basis that the defendants knew the money they were handling derived from crime, but on the explicit basis that they had “reasonable grounds to suspect”. Put on this basis, said the Court of Appeal, the prosecution for conspiracy was bound to fail, because for conspiracy to commit an offence nothing less than intention (*i.e.*, knowledge) of the facts that make the conduct criminal will do: and this is so even where, as here, some lesser mental element, such as recklessness or negligence, is enough to make the defendant liable for completed offence. This they held without reference to *Sakavickas*—a case by then decided, but not yet reported.

So which court got it right?

Central to this question is section 1(2) of the Criminal Law Act 1977, which is as follows:

Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will
exist at the time when the conduct constituting the offence is to take place.

The main purpose of this inelegant provision was, as every criminal lawyer knows, to make sure that where A and B agree to commit an offence of strict liability, their agreement constitutes a conspiracy only where they have mens rea: thereby preserving the position that the common law had reached, after some hesitation, in R. v. Churchill (No. 2) [1967] 2 A.C. 224. The effect of this subsection is, at the very least, to provide that where the substantive offence is one of strict liability, conspiracy is committed only where the alleged conspirators “intend or know” the relevant facts. In such a case, not only is strict liability excluded: even recklessness is not enough. But if this is so here, then (as Sir John Smith and other commentators have pointed out) intention or knowledge should be required a fortiori if the offence in question is not a strict liability offence, but one where negligence or recklessness is required. This common sense result needs no straining of the language, because the opening words of the subsection can be read as covering not only strict liability offences, but all offences where the defendant can be convicted on the basis of a mental state that falls short of actual knowledge. In the light of this, Harmer is to be preferred to Sakavickas.

In favour of the view that recklessness should be enough, it is possible to argue an analogy with attempt. Here, the courts decided long ago that where the completed offence can be committed with recklessness as to some surrounding circumstance, like absence of consent, a reckless defendant can be convicted of attempt: R. v. Khan [1990] 1 W.L.R. 813. It would be neat and tidy, it could be said, if the rule were uniform across all the inchoate offences.

But the analogy is not a good one. Conspiracy, unlike attempt, is an offence that risks stretching the long arm of the law a bit too far. The actus reus is minimal: a defendant is guilty merely because he agreed with someone to commit an offence, irrespective of whether anything was later done to implement it. If such a potentially oppressive offence can be justified at all, it is only where the acts agreed to are particularly dangerous and the persons involved are particularly wicked. For this reason, there is a strong case for restricting the offence of conspiracy to cases where the alleged conspirator is fully aware of all the facts that go to make his intended conduct criminal.

J.R. Spencer
DAMAGES FOR LOST CHANCES: LOST FOR GOOD?

Straight after Chester v. Afshar [2005] 1 A.C. 134 (noted at p. 32 above) comes another important decision on the liability of doctors: Gregg v. Scott [2005] UKHL 2, [2005] 2 W.L.R. 268. This is a big case even in the most literal sense: the Law Lords’ speeches, all of the highest quality, extend to 54 printed pages.

The issue was the liability of a doctor who negligently misdiagnoses a patient suffering from a serious illness (in this case, a rampant type of cancer) for which the chances of successful treatment are already small: and by the time he is correctly diagnosed later, they have shrunk still smaller. In such a case, is the patient entitled to damages for the reduced chance of a successful cure? The orthodox view, as derived from the House of Lords decision in Hotson v. East Berks Area Health Authority [1987] A.C. 750, is “No”. Where the claimant can show that his chances of recovery if treated early were better than even, we say that he has proved his loss on the balance of probabilities and is entitled to full compensation, calculated on the assumption that, but for the defendant’s negligence, he would have been cured. But if his initial chance of recovery was only 50 per cent or less, we say that he has failed to prove his loss and so gets nothing. By application of this rule, Mr. Gregg lost at first instance and, by a majority, in the Court of Appeal (see [2003] C.L.J. 253). In the House of Lords his arguments to the contrary convinced Lord Nicholls and Lord Hope, but not Lord Phillips, Baroness Hale or Lord Hoffmann. So by a majority he lost again, and the orthodox position is affirmed.

For Lord Nicholls, dissenting, the main reason for accepting a “lost chance” claim in such a case is the fact that the existing rule produces results that seem so arbitrary:

The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. In both cases the doctor was in breach of his duty to his patient. In both cases the patient was worse off. He has lost something of importance and value. But, it is said, in one case the patient has a remedy, in the other he does not. This would make no sort of sense .... It cannot be right to adopt a procedure having the effect that, in law, a patient's prospects of recovery are treated as non-existent whenever they exist but fall short of 50%.

Outside the medical context, he reminded us, the law admits claims for loss of less-than-evens chances in many well-known situations. To allow such claims in medical cases calculated on a percentage basis derived from medical statistics might do less than perfect justice, because the underlying problem is a causal link that may or
may not exist, but which cannot be proved or disproved conclusively. In reality, it might mean that some claimants would get too much because for them the initial failure to treat did not in truth affect the outcome (although we do not know this), whilst others got too little because for them it really did (although we do not know that either). But, said Lord Nicholls, the courts should be prepared to “adapt their process so as to leap an evidentiary gap when overall fairness plainly so requires”: as indeed the House of Lords spectacularly did in *Fairchild v. Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32—the case about negligent exposure to asbestos, and resulting mesothelioma. Similar reasoning was adopted in his long and careful speech by the other dissentient, Lord Hope.

The reasons that moved the majority to reject the claim were more diverse.

For Lord Hoffmann, the key obstacle was the difficulty that Lord Nicholls recognised, but felt that he could live with: the problem of allowing a claim on a percentage basis for a “lost chance” when in reality the doctor’s negligence may have caused some claimants to lose everything, but others nothing. In principle, a tortious claimant must show that the cause of his harm was the wrongful conduct of the defendant. If he cannot do this, then in principle his claim must fail; and it is no answer for him to say “but proof here is impossible”. Certain exceptions to this are acceptable, but they should be limited, and capable of precise definition. That was so in *Fairchild*, but, said Lord Hoffmann, the exception the claimant wanted here was potentially much wider and clear limits could not be placed upon it.

For Lord Phillips, the main problem was not so much the principle of allowing a lost chance claim based on medical statistics as the practical difficulties of dealing with it. In each case, justice would require the court to make a serious attempt to adjust the statistics to take account of the detailed information that is known about this particular claimant. Here, for example, a problem arose because Mr. Gregg, contrary to the initial prognosis, had bucked the statistical trend and was still alive when his case was heard by the House of Lords—so that, as Lord Phillips put it, “The likelihood seems to be that Dr. Scott’s negligence has not prevented Mr. Gregg’s cure, but has made that cure more painful”. In the light of these difficulties, which Lord Phillips explained in detail and at length, it was better for the law to remain as it is. “A robust test which produces rough justice may be preferable to a test that on
occasion will be difficult, if not impossible, to apply with confidence in practice.”

For Baroness Hale, a key problem with allowing a “lost chance” claim in cases where the claimant’s initial chance of recovery was poor, was the impact she thought this would necessarily have on claims where the initial chance of recovery was good. At present, where the negligent misdiagnosis deprived the patient of a chance of recovery that was 51 per cent or better, he gets full compensation, calculated on the basis that he would have recovered. But a law which allowed the patient to claim full damages where he lost a good chance of recovery, and reduced damages where he lost a bad one, would be both unfair to doctors, and logically inconsistent. In her view, introducing “lost chance” claims where the chance of recovery was low would therefore mean we must stop giving full compensation in “good chance” cases, and reduce the damages in any case where the claimant’s initial chance of recovery was less than certain. For this reason, among others, she—unlike Lord Nicholls—embraced Tony Weir’s theory that “lost chance” damages are acceptable in the context of claims for financial loss, but not personal injuries.

In closing the door on “lost chance” claims in negligent misdiagnosis cases, two of the majority left it ajar—if only slightly—for claims framed in other ways. Lord Phillips said that a claimant who could not show on the balance of probabilities that if treated in good time he would have recovered might still be able to show, on the balance of probabilities, that the need for painful and invasive treatment would have been avoided: in which case a claim for pain and suffering would succeed. And Baroness Hale said that although Mr. Gregg failed in his claim for a lost chance of a full recovery, he might still have had a modest claim in respect of the “lost years” if he could have shown that his median life expectancy had been reduced.

All this contrasts sharply with Chester v. Afshar where House of Lords, by a majority, applied the rules of causation very strictly against a surgeon who had failed to warn a patient about the risks inherent in an operation. In doing so, they stressed the need to “vindicate” patients whose doctors failed to treat them with due care. How come this argument, which carried the day in Chester v. Afshar, failed to do so here? The cases are logically distinguishable, of course—but a different spirit clearly animates the two decisions. The main reason for this, I suspect, is that a claimant-favourable decision in Gregg v. Scott would have had a far greater practical impact on the working of the law. The facts in Chester v. Afshar were unusual, and unlikely to recur. But the scenario in Gregg v.
Scott, by contrast, is commonplace, and if Mr. Gregg had won this would have opened the door to very many claims. As Lord Hoffmann said, “It would have enormous consequences for insurance companies and the National Health Service”.

J.R. Spencer

LIABILITY FOR LOST FUTURE BUSINESS IN CONTRACT

As Lord Emsworth’s second son Freddie knew, there is money to be made in selling dog biscuits (P.G. Wodehouse, Blandings Castle). Life, of course, imitates art, and in Jackson v. Royal Bank of Scotland plc [2005] UKHL 3, [2005] 1 W.L.R. 377 the House of Lords had to consider a bank’s liability to customers engaged in just such a line of profitable business. The defendant bank disclosed confidential information about the business activities of the claimants (who were importers of dog chews from Thailand) to the claimants’ principal customers. These purchasers were so incensed by the size of the claimant importers’ mark-up, disclosed by the bank in breach of its duty of confidence, that they terminated their relationship, with “disastrous consequences” for the claimants’ business. The claimants sued the bank for the losses consequent on its disclosure of the commercially sensitive information. The learned judge found a substantial chance that the claimants’ business relationship with the dog chew aficionados would have lasted for a further four years had it not been for the bank’s revelations, and with appropriate (and increasing) discounts for hypothetical vicissitudes, he awarded damages accordingly. The Court of Appeal, however, held that an additional limit was imposed by the well known test of remoteness of damage in Hadley v. Baxendale (1854) 9 Exch. 341. Accordingly, “the cut-off point for the bank’s liability was the end of such period as was within the reasonable contemplation of the bank at the time of breach”, and this was held to be one year only, rather than four.

The House of Lords decided that this was wrong. Once it had been found as a fact that the loss of business over a four-year period was reasonably foreseeable at the time of contracting, there was no justification for limiting those losses according to what the defendant bank might have foreseen at the time of breach. The remoteness test in contract is applied at moment of formation, and not breach. “Extraordinary” losses (beyond the “naturally foreseeable”) will be recoverable if the defendant had knowledge of
the particular circumstances relevant to them at the time of contracting, since as Lord Hope of Craighead remarked, “the assumption is that the defendant undertook to bear any special loss which was referable to those special circumstances. It is assumed too that he had the opportunity to seek to limit his liability under the contract for ordinary losses in the event that he was in breach of it.” The defendant’s knowledge in fact serves to expand and not to limit his liability. Thus, the Court of Appeal’s reliance upon the bank’s expectations to limit liability for what had been naturally foreseeable was quite mistaken. As Lord Hope pointedly observed, the bank had failed to stipulate for a clause limiting its liability for loss of business to any particular period. Therefore, as counsel submitted, the Court of Appeal’s decision “cut across the rules in Hadley v. Baxendale, which allocated risk between the parties at the time of the contract when they were still in a position to make provision for it in their bargain if they wished to do so”.

Just so. Jackson is a salutary reminder of the rules of remoteness of damage in contract, and their coherence with wider Freedom of Contract ideas. The parties’ knowledge at the time of concluding the contract is the key question. It determines what they can reasonably be taken to have foreseen, and for which the law will deem them to have assumed responsibility, upon contracting. Such an approach would sit uneasily with the tort of negligence, where the paradigm case is a complete stranger running down the victim in the street. The remoteness test is cast in terms of what was, objectively speaking, foreseeable at the time of the breach. It would make no sense to consider the tortfeasor’s special knowledge about the victim’s circumstances, when typically they will have had nothing to do with one another, prior to the incident complained of. Res inter alios acta.

The House of Lords has apparently adopted a more demanding test as to the degree of foresight of consequences required in contract, compared to the reasonable foreseeability test in tort: The Heron II [1969] A.C. 350. However, Scarman L.J. once described the difference as “semantic, not substantial” (H. Parsons (Livestock) Ltd. v. Uttley Ingham Ltd. [1978] Q.B. 791). Sir Thomas Bingham M.R. said in the Banque Bruxelles Lambert case [1995] Q.B. 375 that “Somewhat different language has been used to define the test in contract and tort, but the essence of the test is the same in each case . . . whether, at the date of the contract or tort, damage of the kind for which the plaintiff claims compensation was a reasonably foreseeable consequence”. This is the preferable interpretation. Nevertheless, the attention paid to the
parties’ knowledge remains quite distinct in contract and tort, in the way explained above.

What, however, if the parties to a negligence action are not total strangers? By definition, for liability to arise vis-à-vis pure economic loss, there must have been an “assumption of responsibility” by the defendant, upon which the claimant relied. Lord Mustill has forcefully argued that “mutuality” is the hallmark of duty of care in this context, lamenting its absence and dissenting in White v. Jones [1995] 2 A.C. 207. This is surely correct; indeed, there is a distinctly contractual flavour to the very phrase “assumption of responsibility”, especially given that modern English contract law grew out of the action on the case for assumpsit. It follows that the contractual approach to remoteness should be adopted in such cases. We might, accordingly, doubt the readiness in Henderson v. Merrett Syndicates [1995] 2 A.C. 145 to apply the more favourable tort rules on limitation of actions, given liability concurrent with contract. The approach to remoteness suggested above is reminiscent of Lord Denning M.R.’s distinction between physical and economic loss in Parsons v. Uttley Ingham, above. Physical damage is paradigm tort, whereas to recover economic loss requires a relationship “equivalent to contract”—or indeed straightforwardly contractual. The relevant rules should apply in each case.

Jonathan Morgan

YOUR FLEXIBLE FRIEND?

The Consumer Credit Act 1974, section 75(1) (“CCA 1974”) establishes a regime of connected lender liability. This provision applies when a financial institution (or “creditor”) provides finance to its customer (or “debtor”), by means of a “debtor-creditor-supplier agreement”, for the purchase of goods or services from a third party (or “supplier”). Its effect is to render the creditor jointly and severally liable to the debtor for any losses caused by the supplier’s misrepresentation or breach of the underlying supply contract. The creditor may, however, seek an indemnity from the supplier in respect of its liability to the debtor (CCA 1974, section 75(2)). In Office of Fair Trading v. Lloyds TSB Bank plc [2004] EWHC 2600 (Comm), [2005] 1 All E.R. 843, the OFT sought declarations clarifying the extent to which CCA 1974, section 75(1) rendered card-issuing banks liable to their customers for breaches of supply contracts financed by credit card. Two distinct issues arose.
The first issue was whether “four-party” credit card transactions, like their “three-party” counterparts, constituted “debtor-creditor-supplier agreements” as required by CCA 1974, section 75(1). Whilst a “three-party” transaction involves direct contractual relationships between cardholder and supplier, between cardholder and card-issuer and between card-issuer and supplier, the card-issuer in a “four-party” transaction does not assume any contractual obligation to reimburse the supplier directly for goods or services supplied to the cardholder. This is because the issuer in a “four-party” credit card transaction employs the services of a “merchant acquirer”, whose role includes recruiting suppliers to the card network in question and reimbursing them for any supplies to the cardholder. Under such an arrangement, the card-issuer’s only obligation is to reimburse the merchant acquirer. Gloster J. concluded, however, that this difference did not prevent “four-party” transactions satisfying the three requirements for a “debtor-creditor-supplier agreement”. These requirements are that the cardholder’s purchases be “financed” by his agreement with the card-issuer (CCA 1974, section 11(1)(b)), that there exist “arrangements between” the card-issuer and the supplier (CCA 1974, section 12(b)) and that the card-issuer does not hold himself out as willing to pay “suppliers in general” (CCA 1974, section 187(3)).

As to the first requirement, Gloster J. concluded that there were a number of ways in which the card-issuer could “finance” the underlying supply contract other than by undertaking a direct obligation to reimburse the supplier. Accordingly, any form of financial accommodation provided by the card-issuer which enabled the cardholder to obtain goods or services on credit would suffice. This clearly occurred in “four-party” arrangements. As regards the second requirement, Gloster J. held that, even in the absence of a direct contractual relationship, there could be an “arrangement” between the card-issuer and the supplier if there was a sufficient mutuality between the obligations undertaken by each of them. The requisite mutuality would apparently exist when one party fulfilled its obligations in the expectation that the other party would do likewise. Gloster J. held that this occurred in a “four-party” credit card transaction where both the card-issuer and supplier were subject to the rules and settlement processes common to all participants in the particular card network. Finally, the third requirement was satisfied as the card-issuer was only prepared to deal with suppliers who had a subsisting agreement with a member of the credit card network.

As the distinction between “three-party” and “four-party” credit card transactions is somewhat technical, Gloster J.’s robust
approach to CCA 1974, section 75(1) is to be welcomed. Indeed, the same approach has now been adopted in relation to “five-party” credit card arrangements (Governor and Company of the Bank of Scotland v. Alfred Truman [2005] All E.R. (D) 306). Given that both types of transaction operate in an identical manner and perform essentially identical functions, most consumers would not appreciate the distinction between them. It is only fair, therefore, that consumers receive the same protection irrespective of the type of transaction involved. Indeed, any other conclusion would create arbitrary and anomalous gaps in the scheme of consumer protection. Equally, given that card-issuers in “four-party” transactions are able to exercise control over which suppliers are admitted to their card network through the screening and monitoring processes carried out by the merchant acquirer and are able to eject rogue suppliers from that network, there is little unfairness in imposing connected lender liability upon them.

The second issue concerned the application of CCA 1974, section 75(1) when a consumer used his credit card to pay a supplier pursuant to an agreement which constituted a “foreign transaction”, namely a cardholder-supplier agreement which was wholly concluded abroad, was governed by a foreign law and involved the supply of goods or services abroad. Gloster J. denied that card-issuers would be liable in such circumstances. The justifications for this conclusion are unconvincing. First, Gloster J. stressed that one consequence of imposing connected lender liability in respect of “foreign transactions” would be that CCA 1974, section 75 would operate extra-territorially, as card-issuers would be entitled to claim an indemnity from foreign suppliers in respect of breaches of contract or misrepresentations committed abroad. As Parliament had failed to indicate whether that provision applied beyond the purely domestic sphere, Gloster J. construed it in accordance with the presumption that legislation is not intended to have extra-territorial effects (Clark v. Oceanic Contractors Inc. [1983] 2 A.C. 130). Undue weight appears to have been given to this extra-territoriality principle, which is merely a rule of construction that may be ignored in appropriate cases (Air-India v. Wiggins [1980] 1 W.L.R. 815). It will usually be disappplied if the legislation is not of a penal or revenue nature (Dicey & Morris, The Conflict of Laws, 13th ed. (2000), para. 1–034). Indeed, it has been stressed that, in construing the CCA 1974 specifically, a court should bear in mind that consumer protection is the underlying purpose of that legislation (McGinn v. Grangewood Securities Ltd. [2002] EWCA Civ 522). The policy of maximizing consumer protection by construing CCA 1974, section 75(1) purposively

should outweigh the desire to avoid any possible extra-territorial effects of that provision. Accordingly, it should be construed as applying to “foreign transactions”.

Secondly, Gloster J. suggested that CCA 1974, section 75(1) could not apply to a cardholder-supplier agreement which constituted a “foreign transaction” because it would be governed by a foreign law of which CCA 1974 formed no part. With respect, this focuses on the wrong relationship. Given that CCA 1974, section 75(1) is concerned with the relationship between card-issuer and cardholder, its application should be determined by the law applicable to that relationship rather than the cardholder-supplier relationship. As this will be domestic law, CCA 1974, section 75(1) should apply even in respect of “foreign transactions”. Even if Gloster J. was correct to focus on the law applicable to the cardholder-supplier agreement, her approach assumes that that law will invariably be foreign. This overlooks the fact that, as against the supplier, the cardholder will often be entitled to rely upon the law of his habitual residence, either because it governs their relationship (Rome Convention 1980, Art. 5(3)) or because it contains mandatory rules which apply regardless of the applicable law (Rome Convention 1980, Art. 5(2)).

Thirdly, Gloster J. considered that, if CCA 1974, section 75(1) applied to “foreign transactions”, card-issuers would encounter difficulties in seeking indemnities from foreign suppliers, as these would not be amenable to English jurisdiction. This overlooks the possibility of the card-issuer joining the supplier as a third party to any domestic proceedings commenced against it by the cardholder, whether that supplier is domiciled within the EU (Council Regulation 44/2001, Art. 6(2)) or not (CPR Part 6.20(3)). Indeed, it seems odd to accord greater importance to the card-issuer’s possible jurisdictional difficulties in pursuing the foreign supplier than to those that will otherwise be encountered by the cardholder in pursuing the same party. It is surely in the context of foreign supply transactions, that a cardholder needs the protection afforded by CCA 1974, section 75(1) most. The usual suggestion that such protection would expose card-issuing banks to a flood of claims is as unconvincing as ever.

These criticisms aside, there remains one particularly troubling aspect to the OFT decision. This is the fact that the declaration in that case was limited to situations involving “foreign transactions”. Whilst Gloster J. suggested that CCA 1974, section 75(1) would remain inapplicable in circumstances where the supply contract was only partly concluded abroad or where the goods were only despatched abroad, a number of issues were left open. In
particular, it is unclear whether CCA 1974, section 75(1) applies when the cardholder-supplier agreement does not possess all the characteristics of a “foreign transaction”. Equally, the possible relevance of other factors, such as the situs of the goods or the currency of payment, remains uncertain. Given the extent to which credit cards are used to finance purchases abroad or over the internet, much clearer guidance is required.

CHRISTOPHER HARE

CONFLICTING DUTIES OWED BY SOLICITORS ACTING FOR MULTIPLE CLIENTS

Mr. Bromage persuaded Mr. Hilton to purchase a property, develop it and then sell the developed property to Bromage. Bromage paid a deposit but failed to complete, and so Hilton rescinded. Barclays Bank, which had lent Hilton money so that he could realize the development, enforced its security and sold the property, leaving a shortfall. Hilton’s attempts to obtain redress from Bromage proved fruitless when legal aid was withdrawn. Throughout the transaction, Hilton had been represented by a solicitor (Mr. Scott) from the firm Barker Booth & Eastwood (“BBE”). Bromage was also represented, by a partner in the same firm (Mr. Gorman). Gorman terminated BBE’s representation of Hilton when Hilton told Scott that he wished to rescind the contract with Bromage. BBE had not informed Hilton that Bromage had earlier been made bankrupt. Nor had BBE informed Hilton that they had defended Bromage, unsuccessfully, against prosecution for fraudulent trading and various bankruptcy offences and that Bromage had only recently been released from prison when he first approached Hilton. Nor had BBE informed Hilton that BBE had lent the entire deposit to Bromage so as to clothe Bromage with the appearance of wealth.

Unsurprisingly, Hilton sued BBE for damages. Very surprisingly, the High Court and Court of Appeal awarded him no such damages. In Hilton v. Barker Booth & Eastwood [2002] EWCA Civ 723, [2002] Lloyd’s Rep. 500, the Court of Appeal held that BBE should not have acted for Hilton, and were liable to him for breach of contract in having failed until too late to refuse to act. However, the court did not consider that BBE were obliged to disclose Bromage’s history to Hilton, as this was confidential and was therefore impliedly excluded from their retainer. Damages were therefore assessed by comparing Hilton’s position with the position
in which he would have found himself had BBE refused to act for him. Another firm of solicitors would probably not have known of Bromage’s chequered past, nor of BBE’s involvement in supporting Bromage’s appearance of wealth, and so BBE’s breach of contract was found to have caused Hilton no loss!

The House of Lords has now set this straight in *Hilton v. Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 W.L.R. 567. The essence of the decision is straightforward. Having agreed to act for Hilton, BBE were obliged to inform him of Bromage’s background. It was clearly relevant to the transaction: Hilton would never have entertained the transaction with Bromage had he been told. It was a matter of public record and so not legally confidential. And there was no basis in the legal tests for implication of terms into contracts on which one could imply a term into Hilton’s retainer that BBE would not disclose such information. The House of Lords accepted that it would have been a breach of duty *vis-à-vis* Bromage for BBE to reveal such facts, not because they were legally confidential but because it would have “peremptorily frustrated” the proposed contract with Hilton, which would not have been in Bromage’s best interests. Hence, BBE owed a duty to Bromage to keep quiet, and owed a duty to Hilton to reveal all. BBE complied with the duty owed to Bromage and, in doing so, breached the duty owed to Hilton. As the House of Lords has here confirmed, it is never a defence to a claim for breach of contract for a defendant to assert that he had an inconsistent duty owed to another: that “is his own fault” (*Moody v. Cox & Hatt* [1917] 2 Ch. 71, 81; see also *North & South Trust Co. v. Berkeley* [1971] 1 W.L.R. 470, 486).

Hilton’s claim was for breach of contract. However, it could also have been for breach of fiduciary duty. A number of points of interest arise in this context. First, the House of Lords has approved Millett L.J.’s view in *Bristol & West Building Society v. Mothew* [1998] Ch. 1, 16–17 that “not every breach of duty by a fiduciary is a breach of fiduciary duty” (at [29]).

Secondly, acting with a potential conflict between the duties they owed to Hilton and to Bromage respectively was a clear breach of fiduciary duty (*Mothew*, pp. 18–19). A conflict can, however, potentially be resolved with fully informed consent. This would have required BBE to explain clearly that they might not be able fully to perform their obligations to Hilton (*Clark Boyce v. Mouat* [1994] 1 A.C. 428, 435), and also to reveal their personal interest in the loan to Bromage. It might be arguable that such consent could alter the contractual duties BBE owed to each consenting party so that both could be performed (see, e.g., *Queensland Mines Ltd. v.*...
Hudson (1978) 18 A.L.R. 1, 10; Movitex Ltd. v. Bulfield [1988] B.C.L.C. 104, 118. Alternatively, the consent might simply lift away the fiduciary prohibition on acting for two parties with inconsistent interests, without altering the underlying duties owed to each party in contract and in tort. On any view, however, BBE had not made full disclosure of all material facts and so Hilton had not given fully informed consent, nor would he probably have given that consent had BBE made full disclosure of the relevant facts.

Thirdly, if a claim had been made for breach of fiduciary duty, rather than breach of contract, what remedy might have been awarded? It was patently too late to enjoin BBE from acting for Hilton. Could equitable compensation be awarded for the breach of fiduciary duty? The relevance of the question seems greatest in a situation where contributory negligence might be argued as a basis for reducing an award of damages in contract (Forsikringsaktieselskapet Vesta v. Butcher [1989] A.C. 852). The chances of this happening in Hilton were non-existent, but other cases might not involve such “particularly shocking” conduct on the defendant’s part. This raises the still unsettled question whether contributory fault is available as a defence in claims for breach of fiduciary duty (see Snell’s Equity (31st ed., 2005), para. 7–140), but also the question of what loss flows from the breach of fiduciary duty in such situations, given “liability [for breach of fiduciary duty] is not unlimited. There is no equitable by-pass of the need to establish causation” (Swindle v. Harrison [1997] 4 All E.R. 705, 733; see also Target Holdings Ltd. v. Redfers [1996] 1 A.C. 421, 432, 434).

MATTHEW CONAGLEN

EUROPEAN COMMUNITY LAW AND ENGLISH LAW

In PPL v. DTI [2004] EWHC 1795 (Ch), [2005] 1 All E.R. 369, the claimant was a company limited by guarantee. Its membership included over 3000 record companies that owned or were exclusive licensees of copyright in sound recordings. Under authority of the members the claimant was entitled to grant licences to play the recordings in public and to collect and distribute to the members payments made in respect of such licences.

Sections 67 and 72 of the Copyright, Designs and Patents Act 1988 provide that the unlicensed playing of recordings as part of the activities of a club or where the audience has not paid for
entrance to the place where they are played does not amount to infringement of copyright. This means that the claimant has no claim in respect of such playing. However, in the contention of the claimant—a contention with which the Crown does not agree—those sections are incompatible with a Council Directive (the “rental directive”, Directive 92/100/EEC, OJ 1992 L346, 61), which should have been implemented by 1 July 1994. This was not done in time, and when Regulations intended to implement the Directive were introduced in November 1996 nothing was done about either section of the Act.


Early in the proceedings, Lawrence Collins J. ordered that two preliminary questions be tried, namely, first, whether the claims were barred by limitation and, secondly, whether their pursuit constituted an abuse of process: the claimant had proceeded by action, not by judicial review. These questions came before Sir Andrew Morritt V.-C. They fell to be answered on the hypothesis that the claimant had established the liability of the Crown that it alleged.

**Limitation**

It was not disputed that the claim was founded on tort, the tort being breach of statutory duty (Article 8(2) of the Directive and section 2(1) of the European Communities Act 1972). The limitation period was thus six years from accrual of the cause of action. If, therefore the claimant’s cause of action accrued once and for all on the date when the Directive should have been implemented, the claim was out of time. However, as for other breaches of statutory duty, a “Francovich” breach is not actionable *per se* ([27]), but only on the occurrence of damage, and the failure to implement the Directive was a continuing breach. It followed that a fresh cause of action accrued on each occasion that damage occurred and that the claimant could recover for all damage suffered within the six years preceding the issue of the claim form.

In seeking to avoid this conclusion, counsel for the Crown argued *inter alia* that since nothing had happened after the date set for implementation of the Directive, all the damage was
attributable to the original breach on that date. To this the Vice-Chancellor replied, in part, that the fact that nothing further occurred after that date, “is the complaint not an answer to it” ([24]).

Abuse of Process

Both parties agreed that the claim could have been brought either by action or by judicial review, but the Crown maintained that because the claim turned on failure to implement the Directive by repealing or amending the two sections of the 1988 Act, it was inherently a public law claim so that the court had jurisdiction to strike out the action as an abuse of process. Given the different periods of limitation and the control capable of being exercised by the court on judicial review, the Crown argued that the action should be struck out.

The claimant contended for the diametrically opposite conclusion. In the absence of any post-action conduct on its part of which complaint could legitimately be made, the court, it argued, could not strike out an action that had been properly commenced within the limitation period.

The Vice-Chancellor accepted neither extreme position. As explained by Lord Woolf C.J. in *Clark v. University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988, [33]–[38], since introduction of the Civil Procedure Rules, the old rule in *O’Reilly v. Mackman* [1983] 2 A.C. 236 has become much more flexible, so that, while it is not an abuse in itself to start proceedings within the limitation period, delay in doing so can be taken into account in deciding whether the commencement of proceedings is an abuse of process. This led the Vice-Chancellor to an examination of what had taken place between promulgation of the Directive and the commencement of the action—long and elaborate discussions between the claimant and the Government and some lobbying. He concluded that there was nothing in the features of the case relied on by the Crown to suggest that the court should treat the action as an abuse of process.

Finally, in a delightful twist to the argument, the Vice-Chancellor observed that *Francovich* subjects Member States to an obligation under Community law to compensate individuals who suffer loss and who satisfy the conditions identified by the ECJ. That creates a right in the individual, which is not discretionary. So, if the claimant’s counsel abandoned the claim for a declaration (a discretionary remedy), which he was willing to do, the claim was not one for which judicial review was even available. CPR, 54.3 (2) (not referred to by either counsel) provides that “A claim for
judicial review may include a claim for damages but may not seek damages alone”.

Permission to appeal in this case was granted. Provided that the Court of Appeal knows a good thing when it sees one, however, the Vice-Chancellor’s judgment will continue to show how Francovich claims are to be slotted into the structure of English law. The determination of liability may not always be easy, given two of its conditions in particular, namely, that the breach of Community law was sufficiently serious, and that there was a manifest and grave disregard by the Member State of its obligation. Nevertheless, once these conditions are satisfied, then ordinary tort law, not public law, takes over. So far as limitation is concerned, section 2 of the Limitation Act 1980 applies directly, not by analogy as suggested by one writer ([18], [23]), and, so far as judicial review is concerned, proceedings by way of action are not only in order, but the only correct procedure, provided that the claimant seeks only damages. European Community law is indeed part of English law.

J.A. JOLOWICZ

TAX WRONGLY PAID—BASIS OF RECOVERY—LIMITATION

At all relevant times Advance Corporation Tax (“ACT”) was payable on company dividends, at a rate of 25%. An exception applied to companies within the same group: a group income election could be made, and if the Revenue accepted it as proper, then ACT ceased to be payable. However, UK statute confined group income elections to cases where the parent company was resident in the UK (Income and Corporation Taxes Act 1988, section 247). Accordingly the claimants in IRC v. Deutsche Morgan Grenfell Group plc [2005] EWCA Civ 78, [2005] S.T.C. 329, a UK subsidiary of a German parent, did not make such an election, and paid ACT. Then the European Court of Justice held that section 247 was contrary to EU law—an election ought to have been available to the claimants and others similarly situated (Case C-410/918 Metallgesellschaft/Hoecht [2001] S.T.C. 452). While there was no doubt that UK corporation tax was ultimately payable, nonetheless the payments of ACT should not have been made, and an effective national remedy for recovering lost interest should be available.

However, limitation and other defences entail a careful consideration of the precise basis of recovery. The payments in
issue here were made in October 1993, February 1995 and January 1996. The Advocate-General in *Metallgesellschaft*/*Hoecht* issued an opinion against the Revenue in September 2000. The claim form was issued in the following month, in respect of some but not all of the payments. The ECJ’s ruling came in March 2001. In August 2001, the claim form was amended to cover the 1993 payment; an amendment to cover the 1995 and 1996 payments followed in August 2002. Were these claims made too late? A claim under the principle in *Woolwich Equitable Building Society v. IRC* [1993] A.C. 70, that tax unlawfully demanded is recoverable, must be made within six years of the payment. A claim for mistake is also subject to a six-year limit, but time does not begin to run until the claimant “discovered the … mistake … or could with reasonable diligence have discovered it” (Limitation Act 1980, section 32). The express statutory provision for mistaken overpayment of tax (in *Taxes Management Act 1970*, section 33) is inapplicable on these facts.

When, then, were the claims barred? Various issues arose, most of which involved a precise characterisation of the liabilities in issue. The Court of Appeal focused on the leading cases on the *Woolwich* principle and mistake, and particularly on Lord Goff’s opinions in *Woolwich* and in *Kleinwort Benson Ltd. v. Lincoln City Council* [1999] 2 A.C. 349. Indeed, Buxton L.J. found it necessary to remind himself that Lord Goff’s opinions in those cases are not statutes (at [265]).

*Settled law defence*

The Court rejected any defence that the payments had been made under a settled understanding of the legal position. *Kleinwort Benson* decided that there was no such defence in relation to private transactions, and while that case left the position open as to public law cases, it was undoubtedly hostile to the defence, recognition of which was left to Parliament.

*When was the claim made?*

The claim for the 1993 payment was clearly outside the six-year period. As to the later payments, proceedings had been started within the six-year period; however, the amendment to include them specifically took place outside it. Were these claims within the six-year limit? A majority of the court (Rix L.J. dissenting) held that they were. The original claim clearly alleged the illegality of the ACT regime as it applied to the claimant, and claimed for payments made under it; the subsequent amendment did not make
a new claim, but simply provided detail of the payments demanded back.

Was there a relevant mistake?

It was conceded by counsel for the Revenue that there was a mistake on the facts: if the law had been properly understood, the taxpayer would have made a group election, and the payments would not have been made. Nonetheless, they argued, it was not accurate to say that the payments were mistaken. No group election having been made, ACT was payable, and so the payments were not made under a mistake. The court rejected this, relying particularly on the testimony of the taxpayer company’s Head of Taxation that “[j]ust because another taxpayer challenged the law did not mean that I could or should ignore it”. Accordingly, if the principle of recovery for mistake was applicable, then a relevant mistake could be found.

The overlap between the Woolwich principle and mistake

Ultimately, however, the court ruled that recovery for mistake was irrelevant. The Woolwich principle and the various statutory provisions on the recovery of wrongly-paid tax formed a complete code on the subject: recovery for mistake, while of great importance outside that area, was not applicable in tax cases. The existence of two “separate and distinct regimes”—one for tax cases and one for other cases—was expressly recognised by Lord Goff in Kleinwort Benson ([1999] 2 A.C. at 382), and avoided the “unsatisfactory” application of a limitation period turning on when the mistake could have been discovered (Jonathan Parker L.J., at [207]. In the former regime, the vice to be cured was ultra vires action; in the latter, it was mistake; the two needed to be kept apart (Buxton L.J. at [284]).

Conclusion

For those academic writers who have expressed dissatisfaction with the very idea of “liability for mistake”—which includes the late Peter Birks as well as the present writer—the case is yet another illustration of the ineptness of the concept. The Revenue’s concession, that some sort of mistake existed, was unfortunate. It is evident that the taxpayer company understood the essentials of their situation—namely that the UK’s law was open to challenge, but that the success of that challenge would not be known for a while—and they paid on that basis. So if recovery is available “mistake” has nothing to do with it, any more than it did in Woolwich itself. More generally, the conceptual difficulties in saying
whether any large organisation is ever “mistaken” cannot have any satisfactory answer in the current state of the law. Attributing any mental state to a corporation is a legal fiction; without some guidance as to how this fiction is to be applied, the answers given are bound to be somewhat random.

Nonetheless, the court had no option but to proceed as if liability for mistake were part of the law: the issue was how broad the principle is, not whether it exists (Buxton L.J. at [274]). Indeed, statute requires it: Limitation Act 1980, section 32 is currently interpreted as applying only where liability depends on mistake. That is not an inevitable interpretation—nothing in the literal wording of section 32 gives any particular doctrinal significance to mistakes—but until the section is tackled more directly, arguments over the common law merely beat the air. Indeed, the sharp line that Deutsche Morgan Grenfell draws between tax cases and other cases has now been confirmed by statute: Parliament has acted to exclude the Limitation Act provisions from tax cases (Finance Act 2004, section 320).

STEVE HEDLEY

TAXATION—COMPOSITE BUSINESS TRANSACTIONS—SIMPLY CONSTRUCTION

Two recent House of Lords decisions have clarified the law. In Barclays Mercantile Business Finance Ltd. v. Mawson (Inspector of Taxes) [2004] UKHL 51, [2005] S.T.C 1, the Judicial Committee of the House of Lords were invited to provide definitive guidance on the principles of construction first applied by the House in W.T. Ramsay Ltd. v. IRC [1982] A.C. 300. As the Committee so rightly observed, and as the case notes in this journal over the years have so clearly shown (not least that on the lower court decision in the present case [2003] C.L.J. 272), those principles have been discussed and explained in numerous cases but these attempts at clarification only raised fresh doubts and further appeals (at [26]). The result in Barclays is an opinion of the Committee to which all members of the Committee contributed (at [1]). It is a welcome—and generally predicted—decision in favour of the taxpayer. Its importance is that it provides definitive guidance as to what the courts should and should not do when applying these principles.

The facts may be briefly repeated. An Irish company, BGE, had built a pipeline. BGE sold the pipeline to the taxpayer, BMBF, for £91.3m. BMBF leased the assets back to BGE for a period of 31 years; BGE then granted a sub-lease onwards to its UK subsidiary.
BMBF claimed a capital allowance in respect of the £91.3m spent on the basis that the money had been spent on the acquisition of an asset, the pipeline, for use in its business of finance leasing. If this were all that had happened, the Revenue would not have disputed the claim. However, BMBF had created a network of complex money flow obligations around the simple finance deal. BMBF argued that the purpose of these arrangements was to ensure that the sums due from BGE during the 31-year period of the lease would actually come through. So its primary concern in drawing up arrangements was to protect the Bank’s position and so ensure that it met the capital adequacy rules laid down by the UK banking regulatory authorities.

The Revenue argued that if one looked at the scheme as a whole, the effect of these arrangements was to provide BMBF with so much protection that the sums spent fell outside the scope of the relevant provision (Capital Allowances Act 1990, sections 24(1), now Capital Allowances Act 2001, section 11(4)). On the Revenue view, BMBF’s expenditure either (a) was not incurred on the provision of machinery and plant, or (b) was not incurred for the purposes of BMBF’s trade, or (c) was not “incurred” at all.

The Revenue argument invoked the composite transaction approach stemming from Furniss v. Dawson [1984] A.C. 474, in which the House of Lords had developed the principle first applied by the House in W.T. Ramsay Ltd. v. IRC. Lord Brightman said:

"First, there must be a pre-ordained series of transactions; or, if one likes, a single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e., business) end... Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax—not “no business effect”. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. ([1984] A.C. 474, 527)"

The facts as just set out seemed to the Revenue to lie snugly within the words of Lord Brightman’s test. However, the definitive guidance provided by the Committee is that it was not enough simply to show that the facts fell within those words. That was too simple because it elided the two steps necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction answered to the statutory description and secondly, to decide whether the transaction in question did so. So Lord Brightman’s test was not a rule to be applied rigidly from above to all avoidance transactions; it was simply an example of the modern way of interpreting and applying statutes (at [36]).
Although the Committee did not say so at this point, this approach had been clear, at least since 2001, when the House had decided *MacNiven (Inspector of Taxes) v. Westmoreland Investments Ltd.* [2001] UKHL 6, [2001] S.T.C. 237. Unfortunately, Lord Hoffmann had made some remarks in that case about a distinction between commercial concepts and legal concepts which had raised fresh doubts and further appeals—including the one in this case. That distinction, which had assumed the status of Holy Writ for some judges and practitioners, is quietly dismissed as being either a truism or as the very negation of purposive construction (at [38]). Fortunately, Lord Hoffmann was a member of the Committee so we need not anticipate a rebuttal in a later case or law journal.

Applying that approach the Committee held that, when construing this provision of the Capital Allowances Act, the only person on whom the court should concentrate was the finance lessor (BMBF). The statutory requirements were concerned entirely with the acts and purposes of the lessor. They agreed with Carnwath L.J. in the Court of Appeal that there was nothing in the statute to suggest that “up-front finance” for the lessee was an essential feature of the right to allowances. The statutory test was based on the purpose of the lessor’s expenditure, not the benefit of the finance to the lessee (HL at [42]). Hence BMBF won.

The decision of the Committee is commendably brief. There is little discussion of the older case law, with just eight cases mentioned out of the 29 cited. No decision is overruled; those mentioned are explained as examples of the latest approach to the new approach first adopted in *Ramsay* (at [35]). The decision brings clarification at the level of principle; the courts are to interpret the words of the statute in context and purposively and are to resist the urge to create further rules of their own. There is therefore to be less intellectual chaos than at some points over the last 20 plus years. Certainty is another matter; the interpretation and application of statutes is a matter of opinion and so can give rise to divergent views (at [27]). So the succinct summary of the case is less chaos, more uncertainty.

Although the Committee decided the *Barclays* appeal in favour of the taxpayer, it would be a mistake to assume that *Barclays* indicates a pro-taxpayer bias. This is shown by a second decision by the (identically constituted) Committee given on the same day, *IRC v. Scottish Provident Institution* [2004] UKHL 52, [2005] S.T.C, 15 reversing [2003] S.T.C 1035. The case turns on one aspect of the composite transaction doctrine. In the passage from *Furniss v. Dawson* (above) Lord Brightman had referred to “a pre-ordained
series of transactions; or, if one likes, a single composite transaction’, but did not decide how one determined whether the series was preordained. That point was resolved in Craven v. White [1989] A.C. 398, where the House, in its anxiety to provide some certainty after Furniss v. Dawson, restricted the concept to a situation in which at the time of the first transaction it was “practically certain” that the other(s) would follow. Scottish Provident concerns the application of the practical certainty test and reverses both the Special Commissioners and the Court of Session, who had decided in the taxpayer’s favour.

The case involved a scheme with cross options designed to take advantage of a gap in the transitional rules surrounding the introduction of the regime for taxing financial instruments which came into force in April 1996. In order to give the cross options some reality, the taxpayer inserted another provision giving different rights by reference to a particular price movement. For the Special Commissioners the chance of the price movement occurring was similar to an outsider winning a horse race; while it was small, it was not so small that there was no reasonable or practical likelihood of its occurring; outsiders do sometimes win horse races. The Judicial Committee held this to contain an error of law. It was wrong to say that the realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction. The Committee therefore decided in favour of the Revenue, adding the following paragraph with a flourish:

[23] We think that it would destroy the value of the Ramsay principle of construing provisions … as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-Ramsay devices. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned.

Tax lawyers cannot complain of their life being too quiet.

JOHN TILEY
In Case 281/02 Owusu v. Jackson (judgment, 1 March 2005), the claimant, gravely injured in a swimming accident while renting the defendant’s house in Jamaica, sued in England. The defendant, domiciled in England under Article 2 of the 1968 Brussels Convention (now Council Regulation 44/2001), was subject to English jurisdiction, but sought a stay on the basis that Jamaica was the forum conveniens. This posed a fundamental question, referred by the Court of Appeal to the Court of Justice. When competence derives from Article 2, are national procedures for declining jurisdiction available if the alternative forum is that of a non-Member State? The Convention alone allocates jurisdiction between the courts of EU States. But did it matter that the alternative court was Jamaican?

The Court of Justice said no. Article 2 jurisdiction is unqualified, save as stipulated in the Convention, which says nothing about declining jurisdiction in favour of proceedings in non-Member States. And the uniform application of the Convention would be impaired, its goal of procedural certainty frustrated, if Article 2 were subject to national law. The counter-argument, that declining jurisdiction in such cases is outside the Convention’s scope, was rejected: the Convention engages whenever domicile confers jurisdiction.

Owusu endorses an expansionist view of the reach of the European procedural regime. And it challenges the assumption, axiomatic to English courts, that only by allocating proceedings to the natural forum is procedural efficiency and justice ensured. But it also has significant practical consequences. Proceedings against English domiciliaries are frequent, the category embracing all persons resident, or corporations formed or controlled, in England. No longer can they repel litigation concerning their activities abroad, however tenuous its links with England; no longer can a court reject cases which it would be more efficient (and just to both parties) to try abroad. The discretionary exercise of jurisdiction, cornerstone of the English approach, is now confined to cases where the defendant is present (not domiciled) in England, and cases of extraterritorial service of process under CPR r.6.20. And the much-debated decision in Re Harrods (Buenos Aires) Ltd. [1992] Ch. 72, is overruled.

The crux of the decision in Owusu is, however, controversial. It is uncertain whether the Convention properly applies in such cases, and recourse to national law prevented. It applies only if thereby its objectives would be served. The Court concluded that they
would, because one such objective, the harmonisation of European civil jurisdiction, would be impaired if national law qualifies jurisdiction conferred by the Convention. But, arguably, the primary, defining purpose of the Convention is the mutual enforcement of judgments between Member States—harmonised jurisdiction being required only to that end. This view, seemingly compelled by the language of the Convention’s Preamble, and by Article 220 of the EC Treaty (Article 293 EC) would ensure the opposite result to that in Owusu. To decline jurisdiction in favour of proceedings in a non-Member State leaves the Convention’s primary objective untouched, because in that event no judgment, enforceable under the Convention, could ever be obtained.

The decision also leaves important questions unanswered. Owusu concerned an English-domiciled defendant. But suppose the defendant is domiciled in another Member State, and the English court has jurisdiction under Article 5 of the Brussels regime, perhaps over a contractual obligation performed in England (under Article 5(1))? Superficially, the logic of Owusu applies equally. But the case is materially different. A defendant’s domiciliary court is inherently an appropriate forum (if not that which is most appropriate), giving credence to the position adopted in Owusu itself. But this is not true of a court seised under Article 5, with which a defendant inevitably lacks any personal connection. Moreover, to stay proceedings in favour of a non-Member State in such a case still permits a claimant to sue in the defendant’s domiciliary court, preserving access to the Convention’s primary ground of jurisdiction (and its regime for the enforcement of judgments), as a stay in a case like Owusu does not.

Again, the Court was concerned only with a bare plea of forum non conveniens, as advanced in Owusu. It declined to speculate on whether stays are legitimate in other circumstances, and in particular on the possible effet réflexe of the Brussels regime, whereby a court might decline jurisdiction in favour of non-Member States on grounds reflecting those mandated where another Member State’s courts have overriding jurisdiction. The theory of effet réflexe warrants a stay where there is agreement to the jurisdiction of the alternative court, or proceedings pending there, or any ground for deferring to its exclusive jurisdiction (perhaps over immovable property there)—echoing what are now Articles 23, 27, 28 and 22 of Regulation 44/2001.

The omission is serious and perplexing. Only if the réflexe theory stands is there any justification after Owusu for staying proceedings in favour of trial in a non-Member State, because the Convention itself provides no explicit rules for this purpose. And, if
no such justification exists, the argument for preserving the powers of national courts to stay proceedings becomes compelling. For, if none exists, denying a role for national law denies access to any mechanism for enforcing foreign jurisdiction agreements, avoiding parallel proceedings, or respecting another court’s exclusive competence. This is counter-intuitive, and defeats the Convention’s policy of ceding jurisdiction to a foreign court in such circumstances, which argues for preserving national law in cases like Owusu. How, then, could the Court have proceeded sensibly without first confirming that the réflexe theory holds? Far from being moot, as the Court supposed, the question was fundamental. As it is, if the theory is ultimately rejected in some future case, Owusu will have comprehensively removed any means to defer to the courts of non-Member States where the defendant is English domiciled.

Owusu is highly significant, practically and conceptually. It enhances the role of the Community jurisdiction regime, and diminishes the ability of Member States to regulate access to their courts. But it is cause for unease that such an important decision should be intellectually so unsatisfying, its consequences so uncertain, and potentially unsustainable.

Richard Fentiman

CONFLICT OF LAWS—TORT—QUANTIFICATION OF DAMAGES—SUBSTANCE OR PROCEDURE?

The Court of Appeal in Harding v. Wealands [2004] EWCA Civ 1735, [2005] 1 All E.R. 415 was given facts that probably have featured in an examination in conflict of laws. The majority of their Lordships came to a conclusion which is undoubtedly right, but which few law students would have felt emboldened to put forward. The English claimant and the Australian defendant had been living together in England for around eight months. They went on holiday to visit the defendant’s family in New South Wales, where the claimant was injured by the defendant’s negligent driving. Proceedings were commenced in England by service on the defendant and liability was conceded by the defendant’s insurers. The only outstanding question was the determination of damages.

The New South Wales Motor Accidents Compensation Act (“MACA”) 1990 imposed a number of rules relating to the damages recoverable in car accidents. These included capping the maximum a claimant could recover for non-economic loss (a
statutory cap), preventing an award of damages for the first five days of loss of earning capacity (so there was no liability for damage for those five days), and a prescribed discount rate for future economic loss (a rule on quantification). Were these rules to be ignored as being ones of the quantification of damages, characterised as procedural and to be referred to English law qua lex fori? Or, were these substantive rules to be applied as part of the applicable law? Was the applicable law that of the place where the injury occurred in accordance with section 11 of the Private International Law (Miscellaneous Provisions) Act 1985? Or were the issues exceptionally to be referred to another substantially more appropriate law by section 13? Elias J. had applied the exception to hold that English law applied substantively owing to the parties’ pre-existing relationship, so MACA rules were not applicable.

Waller L.J. gave the majority judgment on the matter of the applicable law. He disagreed with Elias J. to hold that the applicable law was that of the place where the accident occurred. The exception in section 13 did not apply as the tortfeasor was an Australian national, was driving with a New South Wales licence, and was insured in New South Wales. Despite the parties having strong connections with England through their pre-existing relationship and residence here, the connections with the place of the accident made it unlikely that it would be substantially more appropriate to apply English law. The exception in section 13 will now probably only be available when there is no, or extremely little, connection with the place of the accident. Conversely, the exception is unlikely be available when there is some connection with the place of the accident despite strong connections to another country.

Waller L.J. then turned to the question of the damages, on which he dissented. He accepted the orthodox view that the availability or not of heads of damage is a substantive matter, but the actual quantification of those damages is procedural. He characterised all the MACA rules as procedural, following his own decision in *Roerig v. Valiant Trawlers Ltd.* [2002] EWCA Civ 21, [2002] 1 W.L.R. 2304. He declined to follow Mason C J.’s powerful reasoning in dissent in the Australian High Court case of *Stevens v. Head* (1992) 176 C.L.R. 433 which was adopted by the majority of that court in a federal context in *John Pfeiffer Pty Ltd. v. Rogerson* (2000) 203 C.L.R. 503.

In stark contrast, Arden L.J. was prepared to follow the Australian cases, even though the principles have heretofore been limited there to federal torts. She gave effect to the “guiding principle” in *Pfeiffer v. Rogerson* that “laws that bear on the
existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws”. She also accepted Mason C.J.’s corollary argument for a very narrow interpretation of procedure, as a wide interpretation would denature the purpose of choice of law. Therefore “rules which are directed at governing or regulating the mode or conduct of court proceedings are procedural and all other provisions or rules are to be classified as substantive”. Under that analysis, the MACA rules were all substantive and referred to the applicable law, here New South Wales law. Aldous L.J. agreed with Arden L.J. Importantly, he pointed out that the resorting to a procedural classification of much of the quantification of damages would lead to inappropriate forum shopping. Claimants would be able to identify a law to govern their rights but come to England to obtain a better result as to damages than would be available abroad. That matter might be answerable by *forum non conveniens*. However, as the facts of this case show, the doctrine is not failsafe and would not be available where the Brussels I Regulation operates to allocate jurisdiction.

Although this author agrees wholeheartedly with the majority as a principled solution to a complex problem, there are difficulties with this aspect of the case. First, the issue of precedent. The reasoning and the result are a departure from the orthodox view adopted in *Roarig v. Valiant Trawlers Ltd.* They contradict clear findings in earlier cases, such as the opinions of Lord Pearson and Lord Guest in *Boys v. Chaplin* [1971] A.C. 354. Technically, it could be argued that the Court of Appeal’s decision in *Roarig v. Valiant Trawlers Ltd.* was obiter as the Court had held that English law was the substantive law. One could also argue that the Private International Law (Miscellaneous Provisions) Act has replaced the common law rules, but section 14 preserved the procedure/substance distinction and the Law Commission’s report reiterated the established view of quantification of damages as procedural. Secondly, there are occasions on which the rules of the substantive law on damages give rise to a remedy which is unavailable in English courts, exemplified by *Hulse v. Chambers* [2002] 1 W.L.R. 2386. Greek law, the applicable law, would have provided for payment by instalments, open to subsequent review. Although in *Harding v. Wealands* it was a relatively simple matter to take advice on MACA and apply it to assess a lump sum for damages, to do the same with the Greek law in *Hulse v. Chambers* would be impossible while remaining faithful to Greek law. This leads to the third problem, which is a pragmatic one. Moving to a substantive characterisation of rules regarding assessment of damages involves
more reliance on foreign law. In many cases, liability is established under both English and foreign law without needing to prove foreign law. The cheapest way to establish quantum of damage is then to rely simply on English rules. That is still possible by default, if neither party raises the foreign law, but inevitably these cases will become more expensive. More seriously, the English rules on proof of foreign law can lead to unpredictable and unsatisfactory results. Nevertheless, it cannot be better to emasculate the choice of law rule rather than improve the proof of law rules.

Despite the criticisms, the case is to be welcomed.

**PIPPA ROGERSON**

**TO WHAT EXTENT DOES AN AGREEMENT TO ARBITRATE EXCLUDE THE BRUSSELS REGULATION?**

In *Through Transport Mutual Insurance Association (Eurasis) Ltd. v. New India Assurance Co. Ltd.* [2005] 1 Lloyd’s Rep. 67 the Court of Appeal was asked to consider the extent to which the Council Regulation (EC) 44/2001 (“the Regulation”) applies to a dispute alleged to fall within an arbitration clause, and in doing so had to consider two recent Court of Justice decisions, C-116/02 *Erich Gasser* and C-159/02 *Turner v. Grovit*, in the context of an arbitration agreement.

Goods were shipped to Finland for transport on to Moscow under a through transport bill of lading issued by the carrier, BMO. When the container was lost in transit, the seller made a claim against the defendant insurer, as a result of which the defendant became entitled to exercise the seller’s rights against BMO. BMO was a member of the claimant mutual insurance association (“the Club”). The Club rules contained a clause providing for arbitration in London. When BMO went into liquidation, the defendant sued the Club in Finland under the Finnish Insurance Contracts Act 1994.

The Club sought a declaration from the English court that the defendant was bound to pursue its claim in arbitration and an injunction restraining it from pursuing its claim in Finland. Moore-Bick J. granted both applications. Following the decision of Aikens J. in *Navigation Maritime Bulgare v. Rustal Trading Ltd. (The Ivan Zagubanski)* [2002] 1 Lloyd’s Rep. 107, he held that the proceedings were within the arbitration exception (Article 1(2)(d)) and so outside the scope of the Regulation.
The defendant appealed on three grounds:

1. As the court first seised, it was for the Finnish court and not the English court to decide whether the proceedings were within the arbitration exception (“the lis pendens point”).

2. If, contrary to that primary submission, it was open to the English court to decide the question, the Court of Appeal should hold that *The Ivan Zagubanski* was wrongly decided and that the proceedings were outside Article 1(2)(d) and therefore within the scope of the Regulation (“the arbitration point”).

3. In any event, no anti-suit injunction should have been granted (“the injunction point”).

The first two grounds were rejected but the appeal succeeded on the injunction point.

The *lis pendens* point

The Court of Justice in *Erich Gasser* held that the *lis pendens* provisions in Article 27 of the Regulation trump an exclusive jurisdiction agreement under Article 23. Accordingly, where there is a dispute over the scope of an exclusive jurisdiction agreement, the decision of the court first seised rather than that of the chosen forum prevails. The first question before the Court of Appeal was whether the same principle applies to arbitration agreements. Although the Court of Appeal recognised that there was “force in that submission”, it held that it did not. In *Erich Gasser* it was common ground that the claims in both courts were within the Convention. There was a “crucial distinction” in this case, where the question before the court was whether the claim in England was within the Regulation or not.

The Court of Appeal relied on the fact that in *Marc Rich & Co. AG v. Societá Italiana PA (The Atlantic Emperor)* [1992] 1 Lloyd’s Rep. 342, the Court of Justice proceeded on the basis that it is open to the court in which the issue of whether the arbitration exception applies to consider that question, even if it is the court second seised. However, in that case, the contrary was not argued. In the questions referred, it was simply assumed that it was open to the English court to decide the Article 1(2)(d) issue.

It is by no means clear that, if it were addressed to this issue directly, the Court of Justice would agree. The Court of Justice has consistently held that the court first seised is always in the best position to decide on its own jurisdiction and should be trusted to do so. Why should the fact that its jurisdiction depends on the
validity or application of an arbitration agreement make any difference to that general approach? The consequence of *Erich Gasser* is, of course, that the party allegedly in breach of an arbitration agreement is able to choose the forum in which the scope of that clause will be decided. But if that is a result the Court of Justice is prepared to accept against a party with the benefit of an exclusive jurisdiction agreement, it is hard to see why it should view a party with the benefit of an arbitration agreement any differently.

The arbitration point

Having decided that it could decide whether the proceedings were within the arbitration exception, the Court of Appeal confirmed the analysis of Aikens J. in *The Ivan Zagubanski* (which followed the reasoning of the Court of Justice in *The Atlantic Emperor*), and held that proceedings in the English courts for (i) a declaration that an arbitration clause bound the defendants, and (ii) an injunction to restrain proceedings in breach of that agreement, fall within Article 1(2)(d) because the principal focus of those proceedings is “arbitration”.

The injunction point

According to its decisions on the first two points, the question before the Court of Appeal as to the applicability of the arbitration agreement was excluded entirely from the scope of the Regulation. It is not surprising, therefore, that the court held that it did have jurisdiction to grant an anti-suit injunction restraining the Finnish proceedings. On the same basis that the court distinguished *Erich Gasser* on the lis pendens point, it held that *Turner v. Grovit* did not apply. There the Court of Justice held that the English court could not grant an anti-suit injunction to restrain proceedings in Spain alleged to constitute an abuse of the process of the English court. The importance of mutual trust and the undesirability of reviewing the basis of jurisdiction of the courts of another contracting State were inconsistent with the grant of an anti-suit injunction. The Court of Appeal was happy to proceed on the basis that as the contracting parties had excluded arbitration in its entirety from the scope of the Regulation, the same considerations did not apply. Again it is far from clear that the Court of Justice would agree. Having decided that the arbitration agreement did not apply, the Finnish court had proceeded on the basis that it had jurisdiction to try the case. The fact that the English court disagrees and thinks that the arbitration clause does apply does not
seem to be a reason the Court of Justice is likely to accept for ignoring the decision of the Finnish court.

Although the Court of Appeal held that there was jurisdiction to grant an anti-suit injunction, it reversed the judge’s decision and held that, on the facts, such an injunction should not have been granted.

LOUISE MERRETT

SUPERSIZED SPEECH—MCLIBEL COMES TO STRASBOURG

The “McLibel trial”, the longest trial in English legal history, has finally come to Strasbourg. In its decision Steel and Morris v. UK, App. No. 6841/01 (judgment of 15 February 2005), the European Court of Human Rights has assessed English law concerning libel. Interestingly, it found that illegitimate restrictions on free speech may stem not from State prohibition, but from lack of State aid.

The applicants, a part-time bar-worker and an unemployed postman, were sued for libel by McDonald’s, the fast-food giant. Using private investigators, McDonald’s found out that a Greenpeace leaflet accusing it of “McCancer, McDisease and McGreedy” was distributed by the applicants. After a lengthy trial, heard unusually by a judge alone, the judge found that M had participated in the production of the leaflet, and that both S and M had participated in its distribution. He found that some of the allegations contained in the leaflet were untrue (that McDonald’s caused starvation, destroyed rainforests, forced tribes off their lands, lied about use of recycled paper, knowingly sold unhealthy food, and prevented unionisation of workers) and some were true (that McDonald’s exploited children through its marketing, that it paid low wages, and that it promoted its food as having nutritional value that it did not possess). The judge awarded McDonald’s through its US and UK corporate entities together, £60,000.

M and S were refused legal aid, which, under the Legal Aid Act 1988, was unavailable for defamation proceedings, so they largely represented themselves. Today, under the Access to Justice Act 1999, defamation proceedings would still be excluded from legal aid funding (Schedule 2, paragraph 1(a)(f)), subject to the possibility of special authorisation by the Lord Chancellor (section 6(8)).

The applicants claimed in the European Court that the unavailability of legal aid violated their rights under Article 6(1) of
the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to fair trial) and under Article 10 (freedom of expression).

The Court found that the denial of legal aid violated Article 6(1), as it contributed to an unacceptable inequality between the applicants and McDonald’s as litigants. The Court reiterated the principle it laid down in previous decisions, that there is no absolute right to receive legal aid, and its necessity for a fair trial must be assessed in each case. In reaching its present decision, the Court considered the complexity of the trial, the disparity between the parties, and the stake for the applicants—in this case the applicants’ defence of their right to free speech. Although very different from matters in which previously the Court found legal assistance to be necessary for a fair trial—the determination of important family rights—the protection of free speech, which the Court called a Convention right of considerable importance, weighed in favour of recognising a right to legal aid, other circumstances considered.

The Court also accepted the Article 10 claim. It viewed the breadth of the free speech right of public campaigners as similar to that of journalists: both are important contributors to the public debate, and both, although allowed a degree of hyperbole, must provide accurate factual information. The Court left to the margin of appreciation of the States the decision whether to allow companies to sue for defamation. It viewed open debate about business practices as important, but also saw a legitimate interest in protecting commercial success of companies from harm to reputation. But the interest in free speech requires that a State which allows companies to sue for defamation must provide procedural means to ensure “equality of arms”. The Court viewed the choice with which the applicants were faced—either withdrawing the leaflet and apologizing to McDonald’s, or having to prove the truth of the allegations without legal aid—as breaching Article 10.

The Court found that the amount of damages itself, although modest compared to some recent awards in English cases, contributed to the breach of Article 10, as it was disproportional to the low incomes of the applicants.

It is suggested that, in view of the decision, the Lord Chancellor should publish a direction to the Legal Services Commission, under Article 6(8)(a), to fund legal aid in relation to defamation in cases where a meaningful exercise of freedom of speech is involved.
A change in legal aid provision would start to redress the imbalance highlighted by the Court, but is it enough? Possibly, the ability of corporations to sue for libel, recognised in English law (South Hetton Coal v. North-Eastern Association Ltd. [1894] 1 Q.B. 133), should be re-examined. While the European Court allowed this within the margin of appreciation of the State, the underlying reasoning of the decision should serve as a call for a reassessment of English law in light of the Human Rights Act.

Protection of human dignity is sufficiently important to silence speech; protection of commercial reputation is not. In Derbyshire CC v. Times [1993] A.C. 534, the House of Lords explained why local authorities should not be able to sue for libel, stating that it is of public importance that a governmental body should be open to “uninhibited public criticism”. This would seem to hold equally true for large commercial corporations. They, no less than the government, control the marketplace of ideas. They are powerful public actors, impacting upon people’s lives, and should be open to the same kind of criticism as governmental bodies.

If corporations could not sue for libel, the tort of injurious falsehood would still be available when knowledge of the falsehood or an improper motive could be established. This would answer the legitimate need to protect companies from rivals who try to cause harm to their business by spreading false information about them. At least, the adoption of the more limited 1975 Faulks Committee suggestions, that companies should not be able to sue for libel without showing financial loss or likely financial damage, should be considered.

The Court’s determination that conformity of damages with Article 10 must be assessed, not only in relation to extent of the injury, but also in relation to the defendant’s income and resources, presents a challenge to English law. Currently, the resources of the parties are taken into account in awarding exemplary damages, but not in the award of compensatory damages (John v. MGN Ltd. [1997] Q.B. 586). The English courts already consider the involvement of the right of free speech as a reason for reducing the size of libel damages: a court’s power, under section 8 of the Courts and Legal Services Act 1990, to substitute another award where a jury has awarded “excessive” damages, must be construed in a manner consistent with Article 10 (Rantzen v. Mirror Group Newspapers [1994] Q.B. 670). The defendant’s income could be seen as one factor in the consideration of the conformity of the damages with Article 10.

The European Court has decided that the outcome of current English law is a breach of fundamental rights. This situation should
be rectified, both by change in the provision of legal aid, and by examination of other possibilities of redressing disparity in such cases.

A. Scolnicov