Mr. J.W.A. Thornely

The Journal records with regret the death on 10 August 2000 of Mr. J.W.A. Thornely, who was Book Review Editor from 1960 to 1984 and a member of the Editorial Committee for many years. He gave to the Journal unstintingly of his time, and he will be remembered with affection and gratitude by his many pupils and friends in both branches of the legal profession as well as by many readers of the Journal and by his friends and colleagues in the Faculty of Law at Cambridge.

CASE AND COMMENT

PREROGATIVE AND PRECEDENT: THE PRIVY COUNCIL ON DEATH ROW

As a result of previous appeals to the Privy Council from death row, many Caribbean States are in a difficult position. If they proceed to execution before the applicant has exhausted all possible avenues for seeking clemency, they may violate due process rights; if they delay the death penalty for too long, execution will constitute inhuman treatment. The latest and most significant of the recent decisions is Lewis & others v. Attorney-General of Jamaica [2000] 3 W.L.R. 1785.

All the applicants had been sentenced to death for murders committed in Jamaica. After exhausting their domestic remedies, they petitioned the United Nations Human Rights Committee (UNHRC) and, subsequently, the Inter-American Commission on Human Rights (IACHR). Before these bodies had delivered their opinions (and in accordance with the Governor-General’s policy),
the respondent Attorney-General proposed that the applicants should be executed. Under the Constitution of Jamaica the prerogative of mercy is exercised by the Governor-General, but the latter is required to follow the recommendation of the Jamaican Privy Council (the JPC). The applicants alleged before the Privy Council in London that the Attorney’s decision, and the process which led to it, violated their procedural and substantive rights.

Logically, the first question was whether the Board could review the exercise of the prerogative at all. Two previous Privy Council decisions had held that the prerogative of mercy was a personal and non-justiciable discretion (de Freitas v. Benny [1976] A.C. 239 and Reckley v. Minister of Public Safety and Immigration (No. 2) [1996] 1 A.C. 527 (noted at (1996) 55 C.L.J. 401)). For the majority, Lord Slynn of Hadley required “strong grounds” to justify any departure from fully-reasoned decisions of the Board, but found such grounds in the importance of the issue for the condemned man and in the absence of any sound arguments to the contrary.

The applicants’ first actual challenge related to the procedure adopted by the JPC. The JPC considered whether to recommend the exercise of the prerogative on the basis of a report from the trial judge and such other information as they might require from the Governor-General, but without disclosing this material to the applicants or soliciting their representations. Indeed, in general applicants were not even informed when their cases would be considered. While emphasising that the ultimate decision on the merits remained that of the Governor-General, Lord Slynn held that both common law and the right to “the protection of the law” under Article 13 of the Jamaican Constitution required that the condemned man should have sufficient notice of when the JPC would consider his case to permit his advisers to prepare representations, and that he should see all the documents which would be before it. In addition, the JPC was required to take account of the condemned man’s written representations along with the reports on the case of any international human rights bodies, and to provide reasons if they departed from the recommendations contained in such reports.

The protection of the law under Article 13 was also held to be relevant to the second claim. The applicants argued that to execute them before the UNHRC and the IACHR had considered their cases would violate Article 13. The Board began by attaching the same meaning to the term “protection of the law” as it had applied to provisions requiring due process in other Constitutions. Lord Slynn then accepted that unincorporated treaties do not normally
create individual rights which can be enforced before domestic courts. However, his Lordship proceeded to hold that from the time that Jamaica allowed individual petitions to the UNHRC and the IACHR, the applicants became entitled under Article 13 and at common law to complete the petition procedure and to obtain the reports of the relevant bodies before their case for mercy was determined by the JPC. This aspect of the decision marks a significant departure from previous understandings of the relationship between municipal and international law. It is all the more surprising since the orthodox position had been affirmed in two recent Privy Council decisions which the Board in this case declined to follow (Fisher v. Minister of Public Safety and Immigration (No. 2) [2000] 1 A.C. 434 and Higgs v. Minister of National Security [2000] 2 A.C. 228).

The Board also broke new ground in its decision on the relevance of prison conditions to the enforcement of the death penalty. Previous Privy Council authority (Thomas v. Baptiste [2000] 2 A.C. 1 and Higgs, above) had made it clear that even detention in conditions which were unlawful would not render the subsequent execution unconstitutional unless the conditions objectively aggravated the death sentence and were different from the treatment endured by other prisoners. Moreover, earlier Boards had held that there were more suitable remedies than commutation of sentence to deal with the often appalling conditions in Caribbean prisons. The majority of the Board in Lewis rejected this line and stated themselves to be disturbed that the applicants’ challenges on this point had not been adequately investigated by the lower courts. While paying lip-service to the approach in Thomas and Higgs, the majority appeared to favour the view (previously articulated in powerful dissents by Lord Steyn in those decisions) that because of the prohibition on inhuman and degrading treatment in Article 17 of the Constitution, the State can forfeit its right to carry out the death sentence through its treatment of death row prisoners. In any event, since five years or more would have elapsed between the imposition of the death penalty and the lawful determination of their applications by the JPC, the Board commuted all the sentences to life imprisonment.

Lewis is revealed as an exceptionally important case which immensely enhances both the procedural and substantive rights of death row inmates and demonstrates an unusual willingness to depart from existing authority. The method by which this has been achieved is, however, extremely controversial. Few are likely to lament the demise of Reckley (No. 2), which was an unjustified perpetuation of pre-GCHQ thought on the reviewability of the
prerogative. But the Privy Council has also produced a significant modification of dualist concepts of sovereignty. For the first time, the Board has clearly accepted that the content of domestic legal rights can be altered by the exercise of the prerogative involved in treaty ratification or, to put it another way, that “due process of law . . . can convert the base metal of executive action into the gold of legislative power” (per Lord Hoffmann, in dissent). This question has also arisen before other leading courts. A majority of the Supreme Court of Canada has recently held that the values reflected in international human rights law may inform the contextual approach to statutory interpretation and judicial review (Baker v. Canada (MCI) (1999) 174 D.L.R. (4th) 193). This result was described by Iacobucci J. (in dissent) as giving “force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament”. If that result is considered objectionable in relation to statutory provisions, how much more so where it affects the content of the Constitution?

IVAN HARE

EC DIRECTIVES AND MISFEASANCE IN PUBLIC OFFICE

In Three Rivers District Council and others v. Bank of England [2000] 2 W.L.R. 1220, the House of Lords answered two questions. What are the defining conditions of the tort of misfeasance in public office? What was the potential liability of the Bank of England under an EC directive relating to the exercise of its supervision over a credit institution? The questions had been raised as preliminary legal questions before further trial of the issues arising in the proceedings.

The proceedings related to the collapse of the Bank of Credit and Commerce International (BCCI) in 1991, the principal cause of that collapse being fraud by persons at a senior level in BCCI. The plaintiffs, depositors with UK branches of BCCI, claimed that, since the Bank of England could have known of the true situation in BCCI, the Bank and certain of its senior officials had committed the tort of misfeasance in public office, and had been in breach of EC law, by acting in bad faith in licensing BCCI in 1979 as a deposit-taking institution, by failing to revoke that licence, and, in general, by failing to exercise appropriate supervision over BCCI.

This was the first occasion on which the House of Lords has had to determine the requirements of the tort of misfeasance in
public office, the last substantial consideration of the matter having been the decision of the Court of Appeal in Bourgoin SA v. Ministry of Agriculture, Fisheries and Food [1986] Q.B. 716. The House was accordingly constrained to establish the defining conditions of a tort, that is to say, of a legal structure designed essentially to regulate bilateral legal relations, but adapting the hallowed and arcane categories of tort law to the very different legal situation of the abuse, or abusive non-use, of powers conferred on public authorities in the public interest.

It was common ground between the parties to the proceedings that the Bank and its officers were holders of public office and that they had acted in exercise of public office. To constitute misfeasance in public office, the public officer must have acted in bad faith, in the sense that he acted in the knowledge that he was acting in excess of his powers or in reckless indifference to the illegality of his acts. Following the approach of Clarke J. at first instance, the House decided that, when there is no actual intention to injure a particular plaintiff, it need not be shown that the public officer must have foreseen that his action would cause damage to any particular person, if he should have known that his action would probably injure the plaintiff or a person of a class of which the plaintiff was a member. Damages can be recovered in respect of consequential economic loss, within the limits set by the conditions of the tort relating to the public officer's state of mind.

Consideration of the public officer’s state of mind raises problems, especially in respect of ministers and departments of central government whose decisions are made collectively, involving many minds and with the assistance of many specialist legal advisers. The situation in the Bourgoin case was highly unusual in that the Ministry must have known that it did not, as a matter of EC law, have the power to use its powers in the way that it did, and there was surprisingly strong evidence of bad faith. However, even in that case, it may be that the Government were acting in what they considered to be the public interest, albeit on the basis of what others would regard as legal and political misjudgments.

If misfeasance in public office did not tenuously exist as an historical survival, it is doubtful whether anyone would invent it, at least in the form of a tort. Had the House of Lords, in the Three Rivers case, conceived of the matter as essentially a public law problem, it might have avoided the pseudo-subjective elements of the definition, requiring instead that there should have occurred a flagrant and aggravated abuse, or abusive non-use, of a public power causing actual and quantifiable loss to particular persons or classes of persons.
The House sought to strike a balance between redressing the consequences of unlawful behaviour and, in Lord Steyn's words, allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions. Perhaps, from a more characteristically public law perspective, one might say that the decision of the House reflected an unspoken concern that the courts should not, by way of the tort of misfeasance in public office, take on themselves the role of an ombudsman, a parliamentary committee, or an organ of public opinion in reviewing even egregious acts of maladministration, official incompetence, or bad judgement. It is to be hoped that a similar reticence will inspire the application by the courts of the Human Rights Act 1998.


The central focus of the discussion in the House of Lords, as in the Court of Appeal, was the question whether the legislative intention of the Directive was to confer rights on individuals: rights to the benefit of the level of banking supervision provided for in the Directive, and hence a right to assert the liability of the Bank of England under Community law if it failed to provide that supervision, and a right to claim damages under Community law for loss arising from that failure, whether or not the requirements of the tort of misfeasance in public office were satisfied as a matter of English law. The House of Lords affirmed the decision of the Court of Appeal (Hirst and Robert Walker L.JJ., Auld L.J. dissenting), holding that the EC directive did not confer on individuals the rights claimed by the plaintiffs. The EC aspect of the case was fully discussed only in the opinions of Lord Hope of Craighead and Lord Millett.

The proceedings in the case seem to have been based on certain rather surprising assumptions about the direct effect of EC directives and about liability for breaches of Community law. The controversial jurisprudence of the European Court on the so-called direct effect of directives does not mean that a directive may have direct effect, within the national legal order, when that seems to be the legislative purpose of the directive, or that there is a direct effect of directives identical to that of provisions of the Community treaties or of an EC regulation. The Court itself has called it an analogous form of effect. Also, the Court's jurisprudence does not
mean that violation of a particular provision in a directive, which is found to have an effect analogous to direct effect, necessarily gives rise to a right of action and remedy in a person affected by that violation. The legal effect of a directive in national law is much more complicated than that.

The central purpose of a directive such as the First Banking Directive is to create a level playing-field, to avoid what one might call predatory over-legislating or predatory under-legislating by the member States, both of which may be a form of disguised restriction on trade or of discrimination on the ground of nationality. The former means that the national law makes it exceptionally difficult for non-nationals to carry on a particular economic activity in another member State. The latter confers an improper advantage on nationals by imposing minimal legislative or regulatory requirements. It is for this reason that some directives allow the national legislator to go beyond the terms of the directive, while others allow the national legislator to refrain from incorporating all the possibilities allowed by the directive. The idea is to establish a settled core of uniform law, leaving other matters to be decided as a matter of national public policy. The Community public interest in co-ordinated banking law is served by the First Banking Directive. The national public interest in the protection of creditors is served by the national law implementing the Directive.

The net result is that it is the implementing national law, not the directive, which is applicable in the national legal order. It is for this reason that Article 249 of the EC Treaty (formerly Article 189 of the EEC Treaty) defines a directive as setting out “the result to be achieved” by the implementing national law. This is reflected in section 2(1) of the European Communities Act 1972, which provides that an “enforceable Community right” is a right which is to be given legal effect “without further enactment”.

Directives, unlike regulations, thus essentially establish legal relations among the member States, their due implementation being overseen primarily by the Commission and, if necessary, by the Court of Justice. But, to the dismay of some commentators and some national courts, the Court has held that, in very exceptional circumstances, an individual may rely on the provisions of a directive in national legal proceedings.

To arrive at that result, complex conditions must be satisfied, the most fundamental of which is that there should have been a failure by a member State to implement the directive in national law, or to implement it properly, within the time-limit set by the directive itself for its implementation. It must then be shown that
the relevant provision in the directive in question has certain characteristics of precision and completeness, and that it is, in general terms, suitable to be relied on by an individual litigant. Thirdly, it must be shown that the directive is being invoked against a defendant who is the defaulting State or an emanation of it, a test which becomes more and more difficult to apply as more and more constitutionally anomalous agencies are created which are neither fully under the control of the government nor fully independent of it. The Court has also allowed for the possibility that, in certain circumstances, even a properly implemented directive may be referred to, for example to assist in the interpretation of the national implementing law, perhaps even in so-called horizontal cases, where the parties to the proceedings are non-State persons.

The Court’s whole doctrine of direct effect, whether of treaty provisions or of directives, is open to criticism. Twenty years ago, an exceptionally authoritative commentator (Pescatore, (1981) 8 E.L.R. 155–177) argued that the doctrine of direct effect was unnecessary and that courts should simply decide, in the case of every legislative form of Community law, whether a particular provision conferred a right on the person claiming that right, a task which is the routine task of all courts in relation to the many different forms of national legislation. It is possible to hope that the doctrine of direct effect may ultimately wither away.

There is a general principle of EC law that all necessary remedies must be available under national law to ensure that Community law is effectively enforced. But it follows from the nature of directives considered above that there is no rule of EC law requiring a general remedy under national law to enforce a member State’s liability for breach of its obligations under a directive. The Becker decision of the Court of Justice (Case 8/81; 1982 E.C.R. 53), considered at length in both the Court of Appeal and the House of Lords and referred to as a “liability” case, was not a case on liability for breach of Community law. It was a paradigm case on the legal effect of directives, in which the Court ruled that a taxpayer could not be obliged to pay tax which was payable under German law but which would not have been payable if an EC directive had been properly implemented in German law.

The Francovich decision of the Court (Joined Cases C-6/90 & C-9/90; 1991 E.C.R. I–5357), also much discussed in the Three Rivers decisions, established a new form of liability, referred to as State liability. It requires a member State to compensate those who have suffered loss or damage from a violation by that State
of its obligations under Community law, including loss or damage caused by a failure to transpose a directive properly in national law. Once again, the question of what is the “State” is a difficult one, especially in a constitutional system, such as that of the United Kingdom, where there is no constitutional conception of the State.

However, a Francovich action is not merely a general remedy in damages for breach of obligations owed by a member State to the plaintiff. There are cases, such as the Factortame case (C-48/93; 1996 E.C.R. I–1029), where an EC Treaty provision which has direct effect has been violated by the member State, so that the plaintiff can rely on the Community law provision in asserting the liability of the member State for what it has done in the realm of national law. But it is not necessary to show that the plaintiff had Community law rights correlative to the member State’s Community law duty, other than the right to bring a Francovich action. Francovich is, as it were, a public law remedy in Community law, not merely a quasi-tort action.

In Francovich itself, where the defendant was the Italian Republic, the Court had ruled that the relevant provisions of the directive in question did not have direct effect, despite the failure to transpose the directive into Italian law, but it went on to rule that the claimants had been harmed by the absence in Italian law of the salary-guarantee scheme, for employees of an insolvent company, which would have existed if the directive had been duly transposed. In the Dillenkofer case (Cases 179–180/94; 1996 E.C.R. I–4845), also relied on in the opinions in the House of Lords, the Court ruled, not on whether the provisions of the directive had direct effect, but on whether the result to be achieved by the directive, that is, its proper transposition into German law, would have given to individual travellers the right, under German law, to a refund in the event of the insolvency of a package-tour company.

The House of Lords summarily dismissed the possibility of seeking a preliminary ruling from the European Court, on the ground that the matter was acte clair, despite the fact that the problem of the nature and effect of the directive had been a central issue in the case, and much intellectual effort had been devoted to that difficult matter. Provisions of the First Banking Directive have been the subject of preliminary rulings by the Court on two occasions.

However, as in its approach to the direct effect of directives, here also the House of Lords may be ahead of its time. Every legislative act and every decision of a court is an acte obscur, at least as soon as its meaning and effect are put in issue in legal
proceedings. It is the everyday task of courts to find and analyse legal obscurities and to resolve them. The time must come when national courts simply treat Community law as an integral part of national law and do their best to interpret it, unless, in a particular case, the task seems to exceed the limits of their normal interpretative practices and competence. To refer questions of interpretation routinely to the European Court is to alienate the Community legal system from the national systems.

It is possible to hope that preliminary rulings may also wither away, or even be abolished so far as the older member States are concerned, leaving the possibility for the European Court to review exceptionally important or dubious national court decisions, using a sifting process similar to the *certiorari* system of the US Supreme Court, and leaving national courts under the obligation, in the excellent wording of section 3(1) of the European Communities Act 1972, to apply “the principles laid down by and any relevant decision of the European Court”.

PHILIP ALLOTT

STAYS AND THE EUROPEAN CONVENTIONS—END-GAME?

May an English court, having jurisdiction under the Brussels or Lugano Convention, decline to entertain proceedings on the basis that a court in a non-Contracting State is the *forum conveniens*? Many would doubt it—can national law oust jurisdiction conferred by the Conventions? But the Court of Appeal famously decided otherwise in *Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72. The Conventions, it concluded, are designed to harmonise the jurisdictional rules of Contracting States only to the extent necessary to facilitate the enforcement of judgments between such States, their primary concern. That objective is unaffected if a case is eventually tried in a non-Contracting State, so stays in such cases are permitted. The House of Lords in *Harrods* referred the point to the European Court of Justice, but the case was settled, creating uncertainty about the correct solution, yet leaving all courts but the House of Lords bound by the Court of Appeal’s decision.

Hints of unease have occasionally surfaced (see *Haji-Ioannou v. Frangos* [1999] 2 Lloyd’s Rep. 337). But, despite its unpromising provenance, English courts have seldom questioned the *Harrods* principle, nor sought to cabin its scope. A recent example of such deference is *Ace Insurance SA v. Zurich Insurance Co.* [2000] 2 Lloyd’s Rep. 423, where the defendant sought a stay of English
proceedings on the basis that the courts of Texas were more appropriate. Longmore J. granted a stay, and resisted the attempt by the claimant’s counsel to distinguish Harrods. It was irrelevant that the defendant was domiciled in Switzerland, a Lugano Convention State, and not in England, as the defendant had been in Harrods. The Convention could not have contemplated any discrimination between defendants according to their origin.

Nor was Longmore J. convinced by counsel’s ingenious attempt to demonstrate that a stay was impossible in such a case because a conflict between Contracting States might ensue. Switzerland, counsel argued, had an interest in the outcome, because the Swiss authorities would prefer to apply the straightforward provisions of the Lugano Convention to the enforcement of any foreign judgment eventually obtained against the defendant. Longmore J. apparently treated this argument as one of fact, not principle, never addressing whether the Lugano Convention could have contemplated such a potential conflict. Robustly, he found no evidence that difficulties would actually arise were the Swiss courts eventually required to enforce a Texas judgment under their traditional rules (if a stay was permitted), rather than an English judgment under the Lugano Convention (if it was not).

Given the difficulty of discerning the elusive requirements of the European Conventions, it is unsurprising that courts should cleave so readily to the compelling logic of the Harrods principle, at the risk of oversimplifying matters of somewhat greater complexity. But two recent decisions suggest that the decision in Harrods may soon be reconsidered, and the controversy surrounding it finally resolved.

In Lubbe v. Cape plc [2000] 1 W.L.R. 1545, the defendant, domiciled in England under Article 2 of the Brussels Convention, argued that proceedings in the South African courts would be more appropriate. The House of Lords held that England was the forum conveniens, making it irrelevant to enquire whether a stay was compatible with the Convention. But, significantly, as Lord Bingham indicated, they would certainly have referred the point to the Court of Justice, had it affected the outcome. The matter was not acte clair, Harrods notwithstanding.

Lubbe makes Harrods insecure. But the challenge posed by Group Josi Reinsurance Company SA v. UGIC [2000] 3 W.L.R. 1625 is potentially more direct. There the Court of Justice held that a court has jurisdiction under Article 2, notwithstanding that the claimant is domiciled in a non-Contracting State. Although at first sight innocuous (even obvious), this proposition may perhaps be read as implicitly hostile to the Harrods principle. Arguably, it embraces the wider proposition that the courts of Contracting
States may not surrender their competence under the Convention on the ground that the case lacks an appropriate connection with the forum. It may suggest that the Convention’s provisions concerning jurisdiction must be understood literally, not to be qualified save as the Convention expressly permits, a position fatal to the Harrods approach since stays in favour of non-Contracting States are not provided for.

It is doubtful, however, whether Group Josi establishes so broad a principle, however elastic the language of the Court of Justice. The question, restricted in scope, was whether a court has jurisdiction if a claimant is domiciled in a non-Contracting State, not (as in Harrods) whether proceedings may be stayed where jurisdiction exists. Nor were the arguments of principle and policy central to the Harrods problem considered—unsurprisingly if they were irrelevant to the issues involved. Nor need the arguments underlying Group Josi have wider implications. No doubt a claimant’s origins are irrelevant to a court’s competence, an uncontroversial conclusion readily discernible from the terms of the Convention itself. But such straightforward textual considerations have no bearing on whether the Convention prevents a stay in cases resembling Harrods, on which the Convention is notoriously silent.

Even champions of the Harrods principle might thus endorse Group Josi. Indeed, so far from suggesting a solution to the Harrods problem, the decision merely begs the question—a court might have jurisdiction over local domiciliaries whatever the claimant’s origins, but is it compelled to entertain proceedings if a trial in a non-Contracting State is more appropriate?

Whether Harrods was correctly decided is an intractable question, the answer depending as much on policy as on doctrine—does the decision subvert the objectives of the Conventions; what are those objectives? Many would agree with the position adopted in Harrods, the purpose of the Conventions being unaffected by granting a stay. Others would contend that the Conventions govern exclusively once they confer jurisdiction, which makes Harrods illegitimate since they provide no mechanism for declining proceedings in favour of non-Contracting States. Others would favour an intermediate position. One possibility is that stays should not be granted against claimants domiciled in Contracting States. The Preamble to both Conventions provides that those established in such States should be protected, perhaps entitling them to sue thereunder without obstacle. Moreover, for EU countries, bound by the Brussels Convention, disputes involving EU domiciliaries arguably concern the regulation of the internal market, involving
clear community interests—in a way in which disputes involving non-EU claimants do not.

Which solution is correct remains unclear. But Group Josi may offer guidance as to the fate of the third, intermediate option. Although the issue was not directly in point, the Court of Justice was apparently hostile to any attempt to define the scope of the Brussels Convention by reference to the claimant’s origins. Jurisdiction is conferred under the Brussels Convention notwithstanding that the claimant is domiciled in a non-Contracting State. Awkwardly, perhaps, this may have the effect of sharpening the terms of the Harrods debate, forcing a stark choice between the two more extreme solutions to the problem. Certainly, this may be the case if Longmore J. was correct to conclude in Ace that the defendant’s domicile is equally irrelevant.

Whatever the doubt about Group Josi’s true import, the decision in Harrods has clearly become vulnerable since Lubbe and Group Josi. Group Josi may warrant a re-examination of the Harrods principle, even presumably at first instance, for how could any court defer to the authority of a decision whose basis in principle may have been undermined? Together with Lubbe it may prompt not only the House of Lords, but also the Court of Appeal, to refer the issue to the Court of Justice when it next arises.

But this forensic framework is itself problematic. It was assumed in Lubbe that the Harrods question only arises once a court concludes that the forum conveniens is abroad. If a trial in England is appropriate it becomes unnecessary to ask whether a stay is legitimate in principle because the outcome would be unaffected; whatever the answer the case would proceed. Such an approach is attractively pragmatic, but conceptually unsatisfying—how can a court properly ask whether it should stay its proceedings when it is unclear whether the question is even permissible? Intriguingly, the House of Lords in Harrods endorsed the opposite approach, referring the question of principle to the Court of Justice before enquiring as to the forum conveniens. Given this conflict of procedural strategies at the highest level, the problem of when the Harrods question arises may itself become a feature of future proceedings.

However the debate unfolds, Lubbe and Group Josi have significant practical implications. Defendants can no longer rely with confidence upon Harrods to preserve the doctrine of forum non conveniens, while claimants may now commence English proceedings with enhanced prospects of success. More importantly, prospective litigants must now reflect on the perils of launching (or defending) proceedings in cases such as Harrods, which may well
progress to the Court of Justice, and which promise to be costly, complex, and profoundly unpredictable in their outcome.

Richard Fentiman

Choice of Law—Notice of Assignment

It is not often that those of us who toil in one of the remotest vineyards of legal academe are rewarded. Choice of law questions over intangible property rarely seem to trouble the courts, though there are many issues of considerable intellectual interest which also raise hugely important practical implications. Maybe the area is just too difficult or perhaps all concerned are crossing their fingers that the harsh winds of a judgment will not rock the vine and bruise their fine crop (illustrated by angst following *Macmillan Inc. v. Bishopsgate Investment Trust plc* (No. 3) [1996] 1 W.L.R. 387). Questions such as the way in which notice must be given to an insurer when the benefit of the policy is assigned must be an everyday practicality. The consequences of giving notice improperly ought to keep some people awake at night. When so much business is done cross-border it seems astounding that the choice of law rule is almost untouched by judicial pronouncement since *Le Feuvre v. Sullivan* (1855) 10 Moo. P.C. 1; 14 Eng. Rep. 389, *Lee v. Abdy* (1886) 17 Q.B.D. 309 and the like over one hundred years ago. *Raiffeisen Zentralbank Österreich AG v. Five Star General Trading LLC* [2000] 1 All E.R. (Comm) 897 raised precisely this issue. Is the notice to be given in the manner required by: (i) the lex fori; (ii) the law of the contract of assignment of the benefit of the insurance; (iii) the lex situs of the policy; or (iv) the law of the contract of insurance? Is this question proprietary or contractual?

This latter question confuses the matter rather than clarifies it. An answer is necessary, apparently because the choice of law rule differs. If the issue is proprietary then we use the proprietary choice of law rule. If it is contractual then the contractual choice of law applies. Where there are two contracts in point (the original one of insurance and the contract of assignment of that original contract), there is a temptation to muddle them. We should use a “proprietary” classification to remind us that there are some issues about the assignment which are more like real property questions. So the proprietary classification merely distinguishes the issues (a) relating to the effect of the assignment on the insurer’s obligations and (b) which affect other persons not party to either the original contract or the contract of assignment—third parties in
real property language—from (c) the purely contractual questions, for example, of invalidity of the contract of assignment. Those latter questions can only arise between the parties to the contract concerned and are answered by the law applicable to that particular contract (be it the original contract or the assignment).

Matters become more confusing when the assignee is seeking to enforce the contract of insurance; or when there are two possible assignees, both seeking to enforce the contract. These raise “proprietary” issues as in (a) and (b) above respectively. The particular question which arose in Raiffeisen for the court’s decision was whether notice to the insurer must be given in the form which satisfies English law or in the form which satisfies some other law. Also, what was the effect on the insurer of giving notice in that particular form? In Raiffeisen the assignee had done what is sufficient under English law, whereas the assignor’s creditors claimed to be more entitled to the proceeds of insurance as the assignee’s notice had not satisfied the more stringent requirements of French law. The insurance company was French but the contract of insurance was governed by English law. The assignee sought a declaratory judgment that it was entitled to the proceeds. The insurer only wanted (reasonably) to pay once and be discharged. Put thus, it seems self-evident that the law governing the contract of insurance must decide the issue. It is only that law which can be identified by all persons interested in the matter (insurer, assignor, assignee and third parties) and it is only that law which can give the insurer discharge of its obligations. But there is elderly case law suggesting alternative solutions.

First, Le Feuvre v. Sullivan suggested that the manner in which notice to the insurer is to be given is somehow a matter for the lex fori. This is at first sight astounding to a modern conflicts lawyer. However, if one notes that the object of the form of notice in English law is to enable the giver of notice to enforce the contract without joining the assignor, the use of the lex fori is explicable but not correct. Notwithstanding the procedural form of the rule, it has substantive effects outside the mere administration of cases in court. The rule therefore must be classified as substantive. Secondly, the question cannot be referred to the contract of assignment of the insurance; partly because if there are two assignments, each governed by a different law, a justifiable choice of one or other law would be impossible; and partly because the insurer should be able to tell in advance what form of notice should suffice, and it has no control over the choice of law of the assignment. Thirdly, the use of the lex situs to answer the question of the form of notice is ridiculous. Macmillan Inc. v. Bishopsgate
Investment Trust plc (No. 3) can be distinguished on any number of grounds—it concerned shares in a company, there was no question of notice to be given and the issues related to the priority of the competing equitable and legal interests in the shares. Intangible property is different from tangible or immovable property in its very nature. It arises out of some legal obligation (in this case a contractual obligation to pay) which is a creature of the applicable law of the contract. It is only that law which, absent insolvency of the insurer, can discharge the insurer’s obligations. To refer the question of the form of notice to the place of the insurer’s residence, which is the lex situs (Kwok v. Commissioner of Estate Duty [1988] 1 W.L.R. 1035), does not make the lex situs more attractive. Adding to that the rule that where the insurer has more than one residence, the lex situs is the place of performance of the contract of insurance, does not improve matters. These rules make the lex situs difficult to identify and it may change with the residence of the debtor. In property questions the ease and certainty of locating the governing law is crucial. That leaves the fourth and correct solution. The form of notice and the effect that notice to the insurer has must be resolved by application of the law governing the contract of insurance. The insurer can then know in advance of assignment what to require, the assignees can know what the effect of giving or failing to give notice might be, and other third parties can investigate the situation to see if there is any value in being second or later assignee. That is also the answer suggested by Article 12(2) of the Rome Convention, as enacted in the Contracts (Applicable Law) Act 1990.

Fortunately, in Raiffeisen Longmore J. came to the same conclusion. Regrettably, at first he was sidetracked down the proprietary classification route, led there by counsel’s argument that the Rome Convention does not cover property matters. In the end, he decided that whether it does or not is irrelevant, and that Article 12(2) in terms applied to the question of notice. This is undoubtedly right. Article 12(2) provides: “The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor’s obligations have been discharged”. The requirement of the form of notice to the debtor (insurer in this case) falls with the “conditions under which the assignment can be invoked against the debtor”. Article 12(2) may not cover every “proprietary” question (such as the effect of insolvency) but it certainly should cover most issues. For example, the effect of clauses in a contract forbidding assignment or only
allowing assignment with the consent of the debtor insurer clearly comes within Article 12(2). So too does the issue whether the assignee has to join the assignor to the action to enforce the original contract, as this is also a matter of invoking the assignment against the debtor. Also, it would be nonsensical to answer the question which of two apparently effective assignments should take priority by the application of any law other than the law governing the original contract. This is a strictly “proprietary” question, but if the effect of each assignment on the debtor is to be determined by the law governing the original contract, the solution of which assignment takes priority must follow. Let us hope that this rule will take root and mature nicely. The contrary decision of the Dutch Supreme Court in Brandsma qq v. Hansa Chemie AG (1997) (noted by Struycken [1998] LMCLQ 345) that the issue of the effect of the assignment on the debtor should be answered by Article 12(1) (i.e. by the law governing the assignment) must be allowed to wither and die.

Pippa Rogerson

STATE IMMUNITY OUTSIDE THE STATE IMMUNITY ACT

Is the State Immunity Act 1978 the sole basis for deciding on State immunity? It is and it is not. This seemingly self-contradictory reply is due to the fact that, on the one hand, any proceedings directly or indirectly against a foreign State must be brought under the 1978 Act while, on the other, certain provisions of that Act might paradoxically render the Act itself inapplicable and therefore entail recourse to rules outside the Act for settling the issue of State immunity. This is amply illustrated by the decision of the House of Lords in Holland v. Lampen-Wolfe [2000] 1 W.L.R. 1573, which involved a claim for defamation brought by a US university professor teaching international relations at a US military base in England as part of an education programme provided by her university under a commercial agreement with the US Government. The claim was brought against the education services officer at the base, who had written a memorandum listing serious complaints about the plaintiff’s performance and questioning her professional competence. The US Government claimed immunity on the defendant’s behalf.

Part I of the 1978 Act incorporates a general rule of State immunity with a number of specific exceptions. However, section 16(2) of that Act provides that Part I “does not apply to
proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom . . .”. The first step, naturally, was to interpret this provision, for if its requirements were met, then the case would fall outside the scope of the Act. Lord Hope thus proclaimed that State immunity in English law was “the subject of two separate regimes”, namely the 1978 Act and the common law, which applied “to all cases that fall outside the scope of Part I of the Act”.

1. Section 16 (2)

This “somewhat curious provision” (per Lord Millett at p. 1584) gives effect to Article 31 of the European Convention on State Immunity 1972, which provides that “Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces . . .”. Whereas Article 31 is a saving clause that keeps State immunity with regard to armed forces unaffected by the provisions of the Convention, section 16(2) disapplies both the immunity and the exceptions, leaving the position of foreign armed forces in the UK outside the 1978 Act and to be governed by the common law. Lord Millett took the view that this might not have been Parliament’s intention but instead might have been the result of mistakenly employing the drafting technique of Article 31. Parliament might even have assumed that any proceedings falling within section 16(2) would necessarily be covered by immunity at common law.

The central concepts to be interpreted were “by or in relation to” and “armed forces”. As for the characterisation of the acts of writing and publishing the memorandum by the defendant in his capacity as education services officer at the base, Lord Hope considered them as either done “by or in relation to” or “in relation to” the US armed forces. For Lord Clyde, though it was not unreasonable to hold those acts as done “by” the armed forces, it was preferable to take a broad approach and to regard them as done “in relation to” the armed forces. Lord Millett, while declaring his inclination to hold the acts as done “by” the armed forces, said that it was unnecessary to decide this because he was satisfied that the acts had been done “in relation to” the US armed forces, since the memorandum had been concerned with the quality of educational services supplied to members of the armed forces and had been written and published by the defendant in the course of his official duties to supervise and monitor the supply of those services.

The term “armed forces” was defined as not limited to military personnel but including the civilian component. It was a matter for
each State to decide how best to organise its own armed forces and related services. For an overseas military base to be as self-contained as possible, the State might need to provide services that were not strictly military in character.

Such a broad interpretation seems to suggest that the phrases “by or in relation to” and “armed forces” are not restrictive terms of art. Therefore it is only a matter of appreciation to look for some minimum connection between the disputed acts and the foreign armed forces so as to build a *prima facie* case that the proceedings fall outside the 1978 Act and are to be resolved at common law.

2. *The common law*

English courts maintained a doctrine of absolute immunity until the landmark cases of *The Philippine Admiral* [1977] A.C. 373 and *Trendtex* [1977] Q.B. 529, which adopted a restrictive doctrine of immunity, whereby a foreign State enjoys immunity for governmental or sovereign activity (*acta iure imperii*) but not for private or commercial activity (*acta iure gestionis*). In making such a distinction, Lord Wilberforce held in *I Congreso del Partido* [1983] 1 A.C. 244 that the commercial nature rather than the sovereign purpose of the relevant act was decisive and that, in order to identify the relevant act, the whole context of the claim must be considered.

Their Lordships expressly declared that they would follow this nature-context principle. In the present case, the overall context was held to be that of the provision of educational services to military personnel and their families at the military base, the maintenance of which was plainly a sovereign activity. Though the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university, or the educational programme itself for that matter, hardly seemed an act *iure imperii*, the provision of education, which was designed to strengthen the quality and efficiency of the armed forces or to ease their transition to civilian life on retirement from active service, was part of the process of maintaining forces and associated civilians on the base to serve the needs of the US military authorities, and this was enough to make the disputed acts sovereign.

Therefore the standard of education that the US afforded its servicemen and their families was a matter within its own sovereign authority, and so accordingly was the act of writing the memorandum in the course of the supervision of the education programme. This reasoning is similar to that in *Littrell v. USA*
(No. 2) [1995] 1 W.L.R. 82, where the Court of Appeal held that the operation of a military hospital, although no doubt requiring much the same skills as the operation of a civilian hospital, was a recognised military activity. The standard of medical care that the US afforded its own servicemen was thus a matter within its own sovereign authority.

In other words, because the provision of education served a military/sovereign purpose, it and related acts assumed a sovereign character. Thus, despite their declared intention that only the nature of the activity in question should be considered, their Lordships actually adopted in essence a purpose test. In this the decision very much resembles a similar holding by the Canadian Supreme Court in USA v. Public Service Alliance of Canada (1992) 91 D.L.R. (4th) 449, where the purpose test was explicitly adopted.

3. *The European Convention on Human Rights*

The plaintiff also argued that a denial of jurisdiction would infringe her right of access to court for the determination of civil rights as required by Article 6 of the European Convention on Human Rights 1950. On this their Lordships held that Article 6 did not preclude a State from granting immunity to a foreign State as required by international law. Article 6 should be applied within the framework of municipal judicial systems but did not otherwise confer on contracting States adjudicative powers that they did not possess.

On the whole the case contains no surprises. It confirms the holding in *Littrell v. USA* (No. 2) and closely follows *I Congreso’s iure imperii/iure gestionis* distinction. Yet it is the first decision by the House of Lords to apply the common law as a separate basis for dealing with post-1978 Act situations. The case throws much light on the complicated problem of the *iure imperii/iure gestionis* distinction. In particular, it shows that it is sometimes difficult to decide upon the nature of a particular activity without reference to its purpose. Moreover, in pinpointing the relevant act for decision, the House encountered the same perplexing issue that it had in *Kuwait Airways Corporation v. Iraqi Airways Co.* [1995] 1 W.L.R. 1147.

XIAODONG YANG
THEFT OR SHARP PRACTICE: WHO CARES NOW?

The House of Lords has upheld, by a majority, the decision of the Court of Appeal in *Hinks* [2000] 3 W.L.R. 1590 (noted (1999) 58 C.L.J. 10), giving a positive answer to the certified question: “Whether the acquisition of an indefeasible title to property is capable of amounting to an appropriation of property belonging to another for the purposes of section 1(1) of the Theft Act 1968”.

The appellant had persuaded a somewhat simple-minded man to make her the “gift” of a quite considerable sum of money. No deception was alleged to have been employed, and so far as the civil law was concerned, the “gift” might well have been a perfectly valid transaction; the question was never determined by the jury, because it was deemed to be irrelevant by the trial judge. But the decision of the House of Lords is to the effect that she was properly convicted of theft however that question might have been answered. So, it would seem, a person may become the indefeasible owner of property and nevertheless be accounted a thief of that very same property, and by the very act of acquiring the ownership of it.

The House does not elaborate what the immediate practical consequences of such a ruling might be. Is the thief required (or might she be) to make restoration of the property or of its proceeds? If so, how can title be said to be “indefeasible” in any meaningful sense, or in the sense used in the question certified? What is the impact of the decision for the purposes of the law of contract? Is a contract dishonestly entered into (dishonesty, it must be remembered, being a question of fact for the jury) to be discounted so far as the underlying civil transaction is concerned? There is not the hint of an answer to these obvious questions in the speech of the majority (Lord Steyn, with whom Lords Slynn and Jauncey express themselves to be in agreement).

These not inconsiderable practical consequences aside, it might be asked whether there are any principles at stake, and why it matters that the House reached the conclusion that it has. Principles there certainly are, and they are cogently identified by Lord Hobhouse (dissenting) in the following passage:

The reasoning of the Court of Appeal depends upon the disturbing acceptance that a criminal conviction and the imposition of custodial sanctions may be based upon conduct which involves no inherent illegality and may only be capable of being criticised on grounds of lack of morality. This approach itself raises fundamental questions. An essential function of the criminal law is to define the boundary between what conduct is criminal and what merely immoral.
Not the least dispiriting feature of the majority speeches is their failure to engage with the issues thus identified. In the face of the difficulties (practical and theoretical) to which the majority conclusion will lead, a series of banalities is offered in place of answers: “one must retain a sense of perspective”; “in such cases a prosecution is hardly likely”. These “men of the real world” responses would be the more convincing if they helped to resolve the practical questions posed earlier in this note. But they do not. We now have no idea when a contract might be said to be tainted because a person at the bad end of a bargain alleges dishonesty on the part of the other party.

Equally dispiriting is the claim that the issues were fully canvassed and adequately resolved in *Gomez* [1993] A.C. 442. A brief perusal of the dissenting speech of Lord Hobhouse is enough to demonstrate the hollowness of this claim. Perhaps the most telling remark of all, though, is the observation that: “Given the jury’s conclusions, one is entitled to observe that the appellant’s conduct should constitute theft, the only available charge”. The emphasis, it may be said, is in the original, and is tantamount to saying that the jury can, in these matters, do more or less as it likes.

Briefly put, the criticism of the majority decision is that it leaves the law failing to perform a basic function of identifying with some precision what constitutes the *actus reus* of theft, by treating as criminal behaviour that lacks any element of manifest criminality. At its outer reaches, theft becomes something akin to a “thought crime”. The familiar assertion is made that “the purposes of the civil law and the criminal law are somewhat different. In theory the two systems should be in perfect harmony. In a practical world there will sometimes be disharmony between the two systems.” Is it not, though, at least one role of our highest court to eliminate these differences when that can easily be done? If the civil law is content to say that, in a given situation, no violation of a property interest has occurred, why should the criminal law conclude any differently?

This is the starting-point for Lord Hobhouse, who points out that the prosecution case from the start was that the defendant had “coerced or unduly influenced” her victim to part with his money. That being so, the transaction was vitiated, and it was quite unnecessary to cause such an enormous breach between the criminal law and the civil. Lord Hobhouse also recognises the principles at stake, when he says that “… to treat otherwise lawful conduct as criminal merely because it is open to disapprobation would be contrary to principle and open to the objection that it
fails to achieve the objective and transparent certainty required of
the criminal law by the principles basic to human rights”.

There is a strong hint that the issues raised by this case and the
series of related decisions cannot simply be wished away as the
House seems to hope. They are too fundamental for that.

A.T.H. Smith

PROVOCATION: MUDDYING THE WATERS

In Smith [2000] 3 W.L.R. 654 the House of Lords by a bare
majority affirmed the decision of the Court of Appeal (noted at
(1999) 58 C.L.J. 7) and in doing so resolved a long-standing
dispute as to which characteristics of the defendant are relevant
when determining whether the reasonable person would have lost
self-control and killed the victim (the objective test of provocation).
Two distinct lines of authority had developed. First, a group of
House of Lords and Privy Council cases had recognised that a
characteristic would only be relevant where it affected the gravity of
the provocation. Secondly, a line of Court of Appeal cases had
recognised a wider test, whereby a characteristic would also be
relevant if it affected the defendant’s ability to exercise self-control.
The House of Lords has now confirmed the latter test. Consequently, in Smith itself the defendant’s severe depression was
relevant because it made him less able to exercise self-control.

The main argument for rejecting the gravity of provocation test
was that it contradicted the statutory definition of provocation in
the Homicide Act 1957, section 3 of which states that “the jury
shall take into account everything both done and said according to
the effect which, in their opinion, it would have on a reasonable
man.” Since the provision emphasises that the jury can take into
account “everything”, it was not considered appropriate for the
judge to direct that the jury should only be concerned with
characteristics which relate to the gravity of the provocation. But, if
this argument is taken to its logical conclusion, it means that the
jury could take into account all characteristics of the defendant,
which would undermine the objective test completely. For that
reason the majority recognised that the judge should advise the jury
that there are certain characteristics which should be disregarded.
The majority identified some of these characteristics, but did not
identify any clear rationale for doing so. Such characteristics
include jealousy, tendency to violent rages and tantrums.
Presumably these are excluded because they would undermine the
rationale of the objective standard of self-control completely. But if this is correct, why was the defendant’s depression considered to be relevant? Perhaps this can be justified on the basis that the depression could be diagnosed by medical experts, whilst the other characteristics are simply emotional traits which are too vague and are incompatible with ordinary standards of self-control. If this test founded on definable characteristics is adopted it follows that, for example, battered woman syndrome would be relevant because it is a condition which is medically recognised. Although obsessive personality has previously been treated as relevant (Dryden [1995] 4 All E.R. 987), Lord Hoffmann in Smith considered that it was incompatible with the objective test and so should be excluded, although he did not provide any rationale for doing so.

The majority further held that the value of the image of the reasonable man has been compromised and is now misleading, as is reflected by Morhall [1996] 1 A.C. 90 where the jury were asked to consider whether the reasonable person who was endowed with the unreasonable characteristic of being addicted to solvent would have killed. Consequently, the majority held that the judge should no longer refer to the notion of the reasonable person when directing the jury and should instead refer to, as Lord Hoffmann put it, “a characteristic of the accused … which affected the degree of control society could reasonably have expected of [the accused] and which it would be unjust not to take into account”. This rejection of the notion of the reasonable person is hard to justify for a number of reasons. First, the reasonable man is specifically referred to in section 3 of the Homicide Act 1957, which surely must mean that any judge who uses such language could not be misdirecting the jury. Secondly, the reasonable person standard is found in other areas of the criminal law, such as duress, so why should it be rejected here? Finally, the reasonable person is a useful peg on to which the relevant characteristics of the defendant can be hung. Surely jurors would find it easier to consider what the reasonable person would have done, rather than what society reasonably expects and whether it would be just to take the characteristic into account.

The decision in Smith is open to two objections. First, the replacement of the gravity of provocation test with emphasis instead being placed on the effect of the characteristic on the ability to exercise self-control means that the objective test of provocation is being watered down so that it is no longer a standard of self-control. Rather, this test now exists simply to weed out those defendants who are excessively pugnacious or excitable. Virtually any other characteristic which affects the ability to exercise control
will be taken into account. It follows that, as the objective test is qualified to share more of the defendant’s characteristics, it will become easier for defendants to plead the provocation defence successfully. This could be considered to be an unacceptable expansion of the defence. It does not, however, follow that the objective test is now irrelevant, for the jury is still required to consider whether it was reasonable for the defendant to have lost his or her self-control, although, with the emphasis on the peculiar characteristics of the defendant, it is more likely that the jury will consider that the loss of self-control was reasonable.

The second objection arises from the fact that in Smith the defence of diminished responsibility had failed, presumably because the defendant’s depression was considered not to be severe enough to constitute an abnormality of mind. But the success of the provocation defence makes it appear that the depression was being brought to the jury’s attention through the back door, so avoiding the burden of proof being placed on the defendant for purposes of establishing diminished responsibility. If a mental disorder does not satisfy the test of diminished responsibility, is it really appropriate then to treat such conditions as relevant for provocation? This was one of the main reasons why the minority considered that the defendant’s depression should not be treated as a relevant characteristic.

Even though the effect of Smith is to water down the objective test and apparently to compromise the defence of diminished responsibility, it does have one advantage, namely to increase the opportunity for the judiciary to avoid imposing the mandatory life sentence. If Smith is judged on this basis alone, then surely the majority reached the right decision. The provocation defence is justified as a concession to human frailty and this concession should be available to a killer suffering from a severe depressive illness who lacks the self-control of ordinary people. Even after Smith, certain aspects of the defence of provocation remain unsatisfactory, especially the identification of the reason why certain characteristics are considered to be relevant and others are excluded. But, because the approach of the majority expands the route for escaping from the unfortunate effects of the mandatory life sentence, the decision, although unprincipled, does secure appropriate results.

Graham Virgo
HOW OLD DID YOU THINK SHE WAS?

For at least a century and a quarter one of the most settled and invariable maxims of the criminal law, founded upon a decision of 15 judges in the Court for Crown Cases Reserved (Prince (1875) 2 C.C.R. 154; see, also, Robins (1844) 1 C. & K. 456), has been that the prosecution did not have to prove fault on the defendant’s part in respect of the element of age in statutory offences created for the protection of the young. Many statutes have been drafted (or amended), and thousands upon thousands of defendants have been convicted, on this basis. But no longer. For the Appellate Committee has decreed, without giving any reasons for doing so—there is just a bare assertion (B. v. D.P.P. [2000] A.C. 428, reversing a unanimous decision of a strong Divisional Court: [1998] 4 All E.R. 265)—that “an age-related ingredient of a statutory offence stands on no different footing from any other ingredient”, and that proof of fault (in the shape of the absence of a belief—reasonable or unreasonable—that the child is above the proscribed age) is required unless excluded by Parliament either expressly or by “necessary implication, … [that is, by] an implication which is compellingly clear” (Lord Nicholls). “Such an implication”, we are told, “may be found in the language used, the nature of the offence, the mischief sought to be prevented, and any other circumstances which may assist in determining what intention is to be attributed to Parliament when creating the offence” (ibid.). This is, of course, none other than the all too depressingly familiar litany of vague, overlapping criteria which from time out of mind has signally failed to compel from the judges predictable answers to the question whether, when Parliament has been silent on the point, a person must, if she is to be convicted of a given offence, be presumed to have been at fault in respect of all, or some, of its external elements. The reference to a silent legislature’s intention is to a fiction—a mere rhetorical device. There is, as everyone knows, only one sure and compelling guide: the express provision of a no-fault defence logically precludes a requirement to prove fault in regard to the matter to which it refers.

In B v. D.P.P. (which was occasioned by a grossly improper proposal repeatedly made by a 15-year-old boy to a 13-year-old girl on the top deck of a bus), however, the offence being considered was that of behaving indecently with or towards a child under 14 contrary to the Indecency with Children Act 1960, s. 1(1), which is without a no-fault defence. The conclusion that fault in respect of the child’s age (though not, presumably, in respect of the indecent nature of the behaviour) was required followed, therefore,
inevitably. For it had already been determined that neither the nature of the offence, nor the mischief it sought to prevent, were factors sufficiently compelling to exclude this requirement. The argument is transparently circular: which may be why the Law Lords, having concluded that there was nothing in the 1960 Act to displace “the common law presumption of mens rea”, nevertheless went on to offer reasons why it should apply. Which is all a bit odd, since the whole point of legal presumptions like this is that they stand until displaced: they should not need propping up. And the props employed were a bit odd too: the offence, it is pointed out, is one of great width embracing both the truly wicked conduct of the predatory paedophile, and the often innocuous sexual experiments of teenagers. Neither, it is said, deserve to be convicted if they believe, even unreasonably, that their attentions are directed at 14-year-olds! Yet both the predatory paedophile and the experimenting teenager who goes beyond sexy talk will, whatever their beliefs about the child’s age, commit or attempt to commit the equally serious offence of indecent assault on a child under 16. For both of them, the ambit of the indecency offence is, therefore, an irrelevance. If experimenting teenagers are to be protected from an over-intrusive criminal law this can only be done, as it is in many other jurisdictions, by restricting liability for so serious a crime to cases where there is a significant difference in age between the defendant and his—or her—“victim”.

But we are not, the Law Lords warn us, to jump to the conclusion that the same decision will invariably be reached for other crimes aimed at protecting the young. Though fault as to the age element is required for the offence of indecency with or towards a child under 14, “it is plain” (to Lord Steyn, but not, perhaps, to the rest of us) that unlawful sexual intercourse with a girl under 13 (a crime punishable with life imprisonment) will remain an offence of strict liability, and judgment is suspended (Lords Nicholls and Hutton) on the rule that is to govern indecent assaults on those under 16 (Sexual Offences Act 1956, ss. 14(2) and 15(2)) and abduction of girls under 16 (ibid., s. 20)—not to mention such offences as those of endangering children under 2 by exposing them to the elements (Offences against the Person Act 1861, s. 27), being drunk while in charge of a child who is apparently under 7 (Licensing Act 1902, s. 2); allowing a child over 4 but under 16 to frequent a brothel (Children and Young Persons Act 1933, s. 4); giving a child under 5 any intoxicating liquor (ibid., s. 10); exposing a child under 12 to the risk of burning (ibid., s. 11); encouraging the prostitution of a girl under 16 (Sexual Offences Act 1956, s. 28); inciting incestuous intercourse with a girl under 16 (Criminal
Law Act 1977, s. 54); possessing an indecent photograph of a person under 16 (Criminal Justice Act 1988, s. 160); driving a motor vehicle with a child passenger who is under 14 and has not been “belted-up” (Road Traffic Act 1988, s. 15); permitting a child under 14 to ride a horse on a road without wearing protective headgear (Horses (Protective Headgear for Young Riders) Act 1990, s. 1); buying intoxicating liquor for consumption in a bar in licensed premises by a person under 18 (Licensing Act 1964, s. 169(3))—and so on, and so on. Vigilant defence advocates will have many opportunities to pick up and run with the torch lit by the Law Lords. With the bright-line rule abandoned, each offence will require examination to see whether the “language used”, though non-explicit, or “any other circumstances” justify the fiction that Parliament did or did not intend that fault as to age should be proved.

Reflection on that catalogue of offences may, moreover, give rise to doubts whether a belief that the young person is over the statutory age carries as much moral weight as the Law Lords suppose. For it is only the person who is aware of the detailed content of a particular criminal prohibition who is likely to have entertained any belief—reasonable or not—about the young person’s precise age so as to benefit from having made a mistake about it. She must first have been aware that it is only children over 4 who may not reside in brothels, or that it is only when the child of whom she is in charge is “apparently under 7” that she must not get drunk; that 14 is the relevant age for most sexual activity that falls short of physical contact, whereas it is 16 if she goes that far. And if she has given thought to the child’s precise age she will also have been aware that she was sailing close to the wind, or walking on thin ice—whichever metaphor is preferred. Such venturers deserve very little more sympathy than those without mistaken, albeit clear, belief as to the ages of the children they, too, risk harming. And, after all, ignorance, let alone a mistake, about these arbitrary legal rules, though entirely reasonable, would not excuse. So to say that “an age-related ingredient of a statutory offence stands on no different footing from any other” is, to put it mildly, simplistic. The judges of the Court for Crown Cases Reserved may have been wiser in their generation than the Law Lords in ours.

What difference will B v. D.P.P. make in practice? For offences of sexual abuse, not much, thought Lord Steyn, who considered the Prince rule “a relic from an age dead and gone”. For there would first have to be evidential material “supporting the possibility” that the defendant believed that the young person was
over-age before the prosecution was called on to prove that he did not. Lord Hutton, who considered the arguments for and against maintaining the Prince rule “almost evenly balanced”, was more perceptive. He admitted to being “conscious that the [present] decision … may make it more difficult to convict those who are guilty … and thus reduce the protection given to children”, and expected it to be reversed by legislation. He is surely right, for a defendant will be entitled to be acquitted if the jury or magistrates entertain any real doubt about whether he may not have believed the child was over the relevant age. Once a defendant becomes aware of the legal relevance of the “victim’s” age, a claim, bolstered by some mildly plausible, though not very good, reason, that he thought her to be over that age will be easy to make and difficult to rebut.

The difficulty will be of only temporary duration if the Home Secretary gets round to promoting a new statutory code of sexual offences along the lines recommended in his Review Group’s Consultative Paper Setting the Boundaries (Home Office, July 2000). B v. D.P.P. may provide the necessary stimulus. The Paper recommends the creation of separate offences of sexual abuse of children under, respectively, 13 and 16 by adults (i.e., those over 18), and of sexual activity by a person under 18 with a child under 16. These would embrace the indecency, the indecent assault and the unlawful intercourse offences of the present law. Sexual abuse of a child under 13 would be an offence of strict liability (or more accurately, perhaps, constructive liability—for if a child is in fact under 13 the defendant cannot but be aware that she may be under 16). The others would be subject to a defence, to be available in court only once, and then, it is tentatively suggested, only to those under 21 (a five- rather than the present eight-year differential for the unlawful intercourse offence is thought to be quite big enough), who can show that they honestly and reasonably believed that their “victim” was over 16, and had taken all reasonable steps to ascertain her age (paras. 3.5.10; 3.6.7–14; 3.9.13). This rule, the Paper convincingly argues, is the best way of resolving “the genuine tension between the interests of fairness to defendants with the wider interests of child protection” (para. 3.6.8). For as Sir Rupert Cross once memorably observed (in an article from which the Law Lords quote only selectively), “if the consent of young girls to the intercourse is immaterial, why should their statements with regard to their age provide an over-credulous accused with a defence? The requirement of reasonableness may at least do a little to ensure that men do not jump to conclusions they desire to reach” ((1975) 91 L.Q.R. at 551–552).
On the broader front, it is impossible to predict how influential the decision will be in curtailing the imposition of strict and constructive liability. Will it fare any better than Sweet v. Parsley [1970] A.C. 132 which it emphatically endorses, but which has, for the last 30 years, been accorded more prominence in the text books than in the courts? The similar endorsement given to Gladstone Williams [1987] 3 All E.R. 411 and Beckford [1988] A.C. 130 will certainly make it more difficult for courts to hold that “the common law presumption of mens rea” is satisfied by proof of carelessness, although disproof of that, rather than proof of knowledge or deliberate risk-taking, is overwhelmingly the modern legislative trend.

B v. D.P.P. shows how, with the materials of our criminal law now so voluminous, chaotic and contradictory, the Law Lords are left free to decide cases as the fancy takes them. So they may either refuse to bring some sense and order into antique and muddled law (as they did when confronted in Parmenter; Savage [1991] 4 All E.R. 968 with the provisions of the Offences against the Person Act 1861) or, as here, embark on a radical and liberal-minded reform of statutes governing sexual offences—an enterprise which, given the limitations inherent in judicial adjudication, will almost always be a good deal less satisfactory than the legislative reform for which every criminal lawyer in desperation prays.

P.R. GLAZEBROOK

ENTRAPMENT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

An acutely difficult question of principle arises when a person commits an offence because the police incite him to do so. For the civil libertarian, “undercover agents” (as the prosecution will seek to call them) usually go by another and nastier name: secret police. Even for authoritarians entrapment is of dubious value, because policemen find the crimes they have themselves incited particularly easy to solve—and if we condone entrapment too readily we risk having a police force which expends its energy on committing new crimes instead of solving old ones. But regrettably, the use of entrapment is something effective crime prevention occasionally requires.

In Nottingham City Council v. Amin [2000] 1 W.L.R. 1071 the courts were asked to look at entrapment in the light of the European Convention on Human Rights—in which respect it may well be the first of a series.
Hitherto, the English courts have held that entrapment is no defence in substantive criminal law. However, the fact that the defendant was tricked into committing the offence may be a factor mitigating sentence. And it may also trigger the use of the court’s discretionary powers: either to suppress the prosecution as an abuse of process, or (less radically) to exclude the evidence of the undercover agent under section 78 of the Police and Criminal Evidence Act 1984 because its use would make the trial “unfair”.

When discussing entrapment in the light of section 78, the higher courts have tried to lay down guidance as to when the use of entrapment (and hence of entrapment evidence) is proper. One factor that is repeatedly mentioned is the degree of police persuasion. Did they actively persuade a truly innocent person to commit an offence, or just team up with a would-be crook who was looking for someone to commit a crime with? Another is the gravity of the offence. The worse the crime, the more sinister the measures that the courts regard as legitimate to counter it.

The resulting law, unfortunately, is less than wholly clear. This is partly because the courts have sometimes invoked other factors. And it is partly because the appeal courts, pointing out that “every case is different”, are generally reluctant to second-guess the way first instance courts have exercised the discretion section 78 gives them. Some critics also find parts of it too prosecution-minded—notably Williams (1994) 98 Cr.App.R. 209, where the police parked a van in a street with the back door open to reveal what appeared to be cartons of cigarettes, arresting those passers-by who stopped to help themselves—and the Court of Appeal affirmed the resulting convictions.

As for Strasbourg, in Teixeira de Castro v. Portugal (1998) 28 E.H.R.R. 1 the Strasbourg Court decided that the applicant had been denied a “fair trial” as guaranteed by Article 6 of the Convention in a case where he had been entrapped into obtaining and supplying heroin by the Portuguese police. In so ruling, the Strasbourg Court stated its own list of factors which made the use of entrapment unjustified. One was its use against a person whom the police had no reason to suspect in advance of the “sting”. Another was the fact that the police had acted on their own initiative and not “as part of an anti-drug-trafficking operation ordered and supervised by a judge”—a requirement that would cause acute problems if applied literally to England, where the police routinely investigate without any supervision from either public prosecutor or judge. And a third factor was that the entrapment was all that the prosecution could produce against him.
In *Nottingham City Council v. Amin*, Mr Amin was prosecuted for plying his taxi for hire in a place where he was not licensed to operate. The offence occurred when two plain clothes officers saw him driving in the street and flagged him down, just to see if he would stop and pick them up. At trial he relied on *Teixeira de Castro v. Portugal* and invited the court to exclude the evidence under section 78 of PACE—stressing in particular the fact that the officers had no reason to suspect him in advance. The stipendiary magistrate excluded the evidence and the prosecution case accordingly collapsed.

The Divisional Court disagreed and sent the case back with a direction to convict. The *de Castro* decision, it said, “has to be understood in the context of the whole argument before the Court on that occasion and on the special facts of the case”. The real question, they said, is whether admitting entrapment evidence would deprive the defendant of his right to a fair trial—which in *de Castro*’s case it did, but in the present case it did not. (The defence was given leave to appeal to the House of Lords, but has decided to take the case no further.)

Lord Bingham C.J.’s judgment does not explain in any detail why the present case was distinguishable from *de Castro*. And yet it surely was—and here, if I may respectfully suggest, is why.

What Amin, unlike *de Castro*, was charged with was a regulatory offence existing (like many others) to control who can sell what, to whom, when, where and how. One characteristic of these offences is that—unlike selling heroin or stealing cigarettes—they attract trivial punishments and comparatively little social stigma. Indeed, English judges traditionally describe such public welfare offences as “not criminal in any real sense”. Another characteristic shared by many of them is that random test purchases by plain-clothes agents are the only effective way in which the law can be enforced. Irksome as these laws may seem to those who wish to buy or sell in circumstances where the law forbids it, they are needed to protect people’s health and safety, and to save them from being cheated. If they are not enforced, furthermore, honest traders who obey the law are driven out of business by the rogue ones.

Prosecution for these offences after random test purchases is surely far removed from the sort of evils of the police State that the authors of the Convention had in mind when they drafted the Convention against the background of Hitler’s Germany and Stalin’s Russia. Although in *de Castro* the Strasbourg Court said “The public interest cannot justify the use of evidence obtained as the result of police incitement”, to interpret the Convention so as
to make these laws practically unenforceable would surely be to devalue it and bring it into disrepute.

J.R. SPENCER

RESTITUTIONARY DAMAGES TO DETER BREACH OF CONTRACT

“The essence of contract is performance”. So argued Professor Daniel Friedmann in discussing the rationale of remedies for breach of contract ((1995) 111 L.Q.R. 628, 629). The House of Lords’ decision in Attorney-General v. Blake [2000] 3 W.L.R. 625 lends new support to this view. It holds that a claimant’s interest in performance of his contractual rights may, exceptionally, entitle him to recover restitutionary damages from the defaulting party. Measured by the defendant’s gain from the breach, rather than the claimant’s expectation or reliance loss, restitutionary damages transfer to the claimant the profit that the defendant makes by his wrong. Failing any other adequate remedy for the claimant, liability to restitutionary damages encourages the defendant to perform his duty by depriving him of the monetary incentive to commit a breach.

Blake was a former member of the Secret Intelligence Service (“SIS”) who had betrayed secrets to the Soviet Intelligence Union. After conviction and imprisonment, he escaped to the Soviet Intelligence Union. In 1989 he entered into a contract to publish his autobiography, which contained information about his activities as an intelligence officer. Such publication was a breach of his life-long contractual undertaking not to divulge any official information gained as a result of his employment. The House of Lords accepted that the breach caused serious damage to the SIS, but that its loss had no monetary value for which compensatory damages would lie. The Crown instead sought restitution of the profit that Blake stood to make from his breach, claiming the £90,000 in advance royalties which the publisher still owed to him. The Crown won in the House of Lords—the first successful common law claim to restitutionary damages for a pure breach of contract.

Three other possible grounds for recovering Blake’s profit had no foundation. First, the profit did not accrue from any breach of his duties as a fiduciary to the Crown. These ceased when he left the Crown’s employment. Secondly, Blake’s disclosure did not breach an equitable duty of confidence. Such a duty lasted only so long as the information remained secret, and the matters which Blake disclosed were by 1989 no longer confidential (see at first
instance [1997] Ch. 84, 91–93 per Sir Richard Scott V.-C.). Thirdly, the House of Lords rejected the public law ground of recovery that the Court of Appeal had formulated ([1998] Ch. 439, 459–465 per curiam). It had ruled that the Attorney-General, acting as a guardian of the public interest, could obtain the civil remedy of injunction to freeze the royalty payment, since Blake’s disclosure would have been an offence under section 1(1) of the Official Secrets Act 1989. The House held that this freezing order effectively confiscated Blake’s property without compensation, something which a court had no common law power to do.

The House affirmed that the primary aim of contract damages was to compensate for the lost benefits of the defendant’s performance ([2000] 3 W.L.R. 625, 635 per Lord Nicholls). The recovery of restitutionary damages was exceptional. It depended on establishing two main things: that the claimant had a legitimate interest in performance of the contract by preventing the defendant’s profit-making activity; and that compensatory damages or a specific remedy would not adequately protect the claimant’s interest in performance (pp. 638–639 per Lord Nicholls).

These questions require a court to decide what practical benefit the claimant intended to obtain by entering into the contract, and whether the loss of that benefit fell within a legally recognised kind of damage for which a compensatory award would lie. In Blake the benefit for which the Crown contracted was, presumably, exclusive control over releasing information gathered by the SIS and about its activities. Compensatory damages would have been an inadequate remedy. The loss of the benefit for which the Crown contracted was not in itself a legally recognised head of damage. Its interest in controlling disclosures did not have a market value for which damages in an expectation measure could readily be assessed. Moreover, there was no loss of opportunity to bargain with Blake to be paid a price for releasing him from his duty. Since the prevention of disclosure did not have a monetary value, no ground existed for calculating the value of the lost opportunity. Besides, it would have been too late for the Crown to have obtained a specific remedy to prevent a breach, so the opportunity was illusory. In this respect, Blake differed from Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. [1974] 1 W.L.R. 798. This was a decision of Brightman J. on the award of equitable damages in lieu of a mandatory injunction to remove houses built in breach of a restrictive covenant. He awarded damages for the value of the plaintiff’s lost opportunity to bargain for payment in return for the defendant’s release from the covenant. The House of Lords in Blake endorsed Brightman J.’s reasoning but did not treat the Crown as
having suffered a similar loss of opportunity. Given that the equitable claims and the failed public law ground of recovery could not avail the Crown, the only remaining way to protect its interest in performance of the contract was to award restitutionary damages.

It is right that restitutionary damages should be a remedy of last resort, only available when other remedies for protecting the claimant’s interest in performance of the contract are inadequate. The justification for awarding them is always weaker than for awarding expectation damages. Expectation damages are a kind of substituted performance which at least give the claimant the monetary value of the benefit for which he bargained. Restitutionary damages have no necessary correlation to the benefit that the claimant bargained to receive. Their deterrent effect is their strongest justification.

Restitutionary damages indirectly protect the claimant’s interest in performance by removing any financial incentive for the defendant to renege on his bargain. However, deterrence is a relatively weak justification when the damage done by the breach of contract has already happened and when the award of restitutionary damages was, from the start, a matter of discretion. Bright-line rules of liability which are formulated in advance are a stronger deterrent to breach. The more substantial protection which the award against Blake gave to the Crown’s interest in controlling disclosures of information was not to deter Blake himself but to deter other former spies from committing similar breaches of contract. The Crown’s interest was a continuing one.

DAVID FOX

LOSS ALLOCATION FOR MATERIALLY ALTERED CHEQUES

In the conjoined appeals Smith v. Lloyds TSB Group plc; Jones v. Woolwich plc [2000] 3 W.L.R. 1725 the Court of Appeal had the opportunity to consider the single issue of whether the true owner of a cheque or banker’s draft, which it was accepted had been “materially altered”, and so, subject to irrelevant exceptions, avoided within the terms of the Bills of Exchange Act 1882, s. 64, and subsequently converted, is entitled to damages equivalent to the face value of the instrument. In Smith the Insolvency Service drew a cheque crossed “account payee” in favour of the Inland Revenue, on behalf of the claimants, who were the joint liquidators of ILG Travel Ltd. An unknown third party stole the cheque, altered the payee’s name to “Joseph Smitherman” and paid it into an account
held in that name with the defendant, Lloyds Bank plc. The cheque was cleared before the fraud was discovered and the claimants sued the collecting bank for its conversion. The facts of Jones were in all material respects identical, save that the claim was brought against the paying bank in respect of a banker’s draft. Applications were made for the summary disposal of both cases. In Smith Blofeld J. struck out the claim against the collecting bank ([2000] 1 W.L.R. 1225), but in Jones Judge Hallgarten Q.C. awarded the claimants the face value of the draft. A unanimous Court of Appeal (Pill, Potter and Stuart-Smith L.J.J.) held that the claimants in both cases were only entitled to nominal damages.

In reaching that conclusion, Pill L.J., giving the principal judgment, approved the well-established principle that the value of a valid cheque is deemed equivalent to the amount shown on its face and that, as a result, the face value of such an instrument represents the *prima facie* measure of damages for its conversion (*Lloyds Bank Ltd. v. Chartered Bank of India, Australia and China* [1929] 1 K.B. 40, 55–56). In Smith, however, his Lordship declined to apply this principle to a materially altered cheque, which had been avoided by virtue of the Bills of Exchange Act 1882, s. 64, since it was merely a “worthless piece of paper”. This conclusion must be correct. As approved by his Lordship, the rationale for awarding the face value of a cheque as damages for its conversion stems from the fact that cheques “are potential instruments whereby the sums they represent may be drawn from [the drawer’s] bankers, and, if they get into any other hands than his, he will be the loser to the extent of the sums which they represent” (*Morison v. London County and Westminster Bank Ltd.* [1914] 3 K.B. 356, 379 *per* Phillimore L.J.).

This rationale can have no application to a cheque that is avoided by a material alteration, since the drawer’s bank will be discharged from its liability to pay against the presentation of the instrument. Furthermore, even if the drawer’s bank were to pay against the presentation of such an instrument, it would have no entitlement to debit that amount from its customer’s account, as that payment would have been outside its mandate to pay only upon the presentation of a genuine cheque. As a result, whether the drawer’s bank pays or not, the drawer will not have suffered any loss as a result of the collecting bank’s actions. This conclusion is of particular importance when one considers that the defence in the Cheques Act 1957, s. 4, is unlikely to be available to a collecting bank in respect of a materially altered cheque (*Slingsby v. District Bank Ltd.* [1932] 1 K.B. 44), and is entirely consistent with the previous authorities that had refused to impose liability on a
collecting bank in such circumstances, whether in conversion (
Slingsby v. Westminster Bank Ltd. [1931] 2 K.B. 583, 586 per
Finlay J.) or in negligence (Yorkshire Bank plc v. Lloyds Bank plc

The decision in Smith is not, however, without its difficulties.
First, there is no indication that the effect of that decision is limited
to situations involving alterations to the payee’s name; it would
appear to apply equally to other kinds of material alteration. If this
is correct, it will no longer be possible to argue that a cheque,
which has been materially altered by changing the figure shown on
its face, retains a value equivalent to the unaltered figure (see Brindle
Secondly, as Jones demonstrates, the reasoning in Smith is not
limited to cheques crossed “account payee”. This, therefore, raises
the question (unanswered in Smith) of how one determines the value
of a materially altered instrument that has passed through the
hands of a holder in due course, who can avail himself of the
proviso to the Bills of Exchange Act 1882, s. 64(1). Thirdly, it is
unclear whether the reasoning in Smith will preclude a drawer from
claiming the face value of a materially altered cheque, when the
paying bank is entitled to debit the drawer’s account because the
drawer’s negligence in drawing the cheque has facilitated the fraud
is submitted that Smith should apply in this scenario. Although the
drawer would have undoubtedly suffered a loss, it is difficult to see
why the negligent drawer should be placed in a better position than
the innocent drawer vis-à-vis the collecting bank. Fourthly, in the
interests of consistency, it is submitted that the Smith approach
should equally determine the measure of damages for the conversion
of cheques bearing a forged drawer’s signature. It has been
suggested elsewhere that this may not be the case (Chalmers and
these uncertainties, however, Smith should be welcomed as a clear
indication of where the losses should fall in a situation that is likely
to become increasingly common.

Christopher Hare

SALE OF GOODS—REMEDY OF REJECTION—HOW QUICKLY
IS THE RIGHT LOST?

While the precise time allowed for a buyer to reject faulty goods is
by no means clear, it has been understood to be short. A buyer
who thought in terms of weeks, rather than days, for effecting a return might easily find himself out of time. And while the Sale of Goods Act 1979 (as amended) now guarantees a reasonable opportunity for the inspection of the goods, there are some situations where buyers who have acted with complete circumspection might still find themselves unable to reject. It is therefore quite surprising (if, indeed, stronger expressions are not called for) to find rejection of goods permitted after more than a year had passed since delivery—and this in a case where the defect could readily have been discovered on the day of delivery: *Truk (UK) Ltd. v. Tokmakidis GmbH* [2000] 2 All E.R. (Comm) 594. While the case does not directly conflict with any prior precedent, it does indicate an important new departure, considerably more generous to buyers.

The German buyers (Tokmakidis) were in the business of selling specialised road recovery vehicles. With this in view they acquired an Iveco Ford Truck chassis, and agreed to buy lifting equipment from the English sellers (Truk), who were to fit it to the Ford chassis. Tokmakidis delivered their chassis to Truk in July 1995; Truk re-delivered it, now complete with underlift, in June 1996. Terms were payment after six months or whenever Tokmakidis re-sold the vehicle, whichever was the sooner. In fact, the goods were now defective because Truk had not complied with the Ford Iveco guidelines for installing lifting equipment of that sort, a serious matter as it meant that the vehicle would not be covered by the Iveco warranty. However, Tokmakidis made no inspection on taking re-delivery, and the error was first pointed out by a potential buyer in December 1996. After investigations and negotiations, Tokmakidis removed the underlift in July 1997, and formally rejected it. H.H. Judge Raymond Jack Q.C., sitting in the Bristol Mercantile Court, has now held that they were entitled to do so.

The Sale of Goods Act 1979, s. 35, as amended, provides that once the buyer’s right to reject has arisen, it is lost in three cases: first, where “he intimates to the seller that he has accepted” the goods; secondly, where “he does any act in relation to them which is inconsistent with the ownership of the seller”; and thirdly, where “the lapse of a reasonable time” occurs without a rejection. However, the first two grounds cannot apply until the buyer has been afforded “a reasonable opportunity of examining” the goods. The multiple references to reasonableness might trick the unwary into supposing that there was really only one period at work, namely a “reasonable time”. But the statute is more complicated. The time necessary for “a reasonable opportunity of examining” the goods constitutes the irreducible minimum period. However, the
right may survive further, at least until there is some unequivocal acceptance or act inconsistent with the seller’s ownership. As to the length of the full “reasonable” period for which the right may last, this can evidently be more extensive. While the time necessary for an inspection is relevant in determining this second, longer, period, it is by no means determinative. As Judge Jack commented, “the buyer’s interest is to be able to reject non-compliant goods whenever the defect appears; the seller’s interest is that, if the goods are to be rejected, they should be rejected quickly. The section as a whole aims to strike that balance.”

How was this applied to the facts of the case? As to the period from re-delivery to Tokmakidis until the discovery of the defect, a period of almost six months, Judge Jack stressed that it was irrelevant that the actual defect was easy to discover. The precise nature of the defect is irrelevant to the duration of the right: there is only one reasonable period for rejection, which is determined without reference to ease of discovery. This can often hamper buyers considerably, as in Bernstein v. Panson Motors [1987] 2 All E.R. 220, where the buyer of a car had no inkling of the defect in the engine until it seized up as he was travelling. It would not have been possible for the buyer to detect the defect before he actually did. None the less, since Rougier J. considered that a reasonable time had already expired, no rejection was possible. In Truk the same point cut the other way, for while the actual defect could easily have been detected at an early stage, there had been no reason for an immediate inspection. Where goods are bought for re-sale, it is not necessarily reasonable to expect an immediate inspection, and the length of the period should “at least take account of the period likely to be required for resale”. Here, where the price was not due for six months in the absence of re-sale, the “reasonable time” lasted at least until then.

As to the subsequent period, while it was true that Tokmakidis had not immediately rejected, they had made it clear to Truk that they were reserving their position pending investigations into the problem. Tokmakidis were not acting unreasonably, nor had Truk pressed them to act more quickly. Nor would Judge Jack accept that acts such as minor repairs to paintwork and continued searches for a buyer constituted acts “inconsistent with the ownership of the seller”. The legislation itself states that even re-sale is not in itself such an act, and so the case was not even close.

In the result, therefore, the case is a significant, not to say startling, innovation. Put shortly, while it still acknowledges the seller’s general interest in “being able to close his ledger reasonably soon after the transaction is complete”, none the less it takes this
from the realm of presumption and puts it squarely in the domain of fact. If as a matter of fact the seller did not seem in any great hurry to settle the matter, and cannot as a matter of fact point to any great inconvenience caused by delay, then no such urgency will be presumed. And if, in addition, the buyer had good reason, of which the seller was well aware, not to inspect the goods immediately, then there is no ground to suppose that the period allowed for inspection will be a short one.

Steve Hedley

UP THE CREEK: AN EXERCISE IN COMMON SENSE FROM THE COURT OF APPEAL

The recent decision in Chelsea Yacht and Boat Co. Ltd. v. Pope [2000] 1 W.L.R. 1941 may be considered a timely reminder from the Court of Appeal that real property law applies to real property and not to chattels. The wonder of the case lies in how this, hardly particularly profound, proposition came to require two appeals for its elucidation, and how the learned judges in the District and West London County Courts came, in their desire to tread nimbly through the thickets of a short point of statutory interpretation, to lose sight of the particular wood into which they had wandered.

The salient facts can be recited as follows. The claimants, Chelsea Yacht and Boat Co. Ltd., owned a houseboat, the Dinty Moore, moored on the River Thames in London. The bed of the Thames is owned by the Port of London Authority, who had granted a licence to the claimants for the use of various mooring facilities, including the maintenance of pontoons for the provision of services of water, gas, electricity, telephone and vacuum drainage to houseboats via plug-in or snap-on connections. The Dinty Moore was some 46 feet long and 11 feet wide, and was moored astern to a pontoon and the adjoining houseboats by a number of rope mooring lines. Further lines went to an anchor in the river bed at the foot of the embankment wall and to rings in the wall itself. The houseboat was also connected to the various services provided by the claimants. The houseboat rose and fell with the tide, and accordingly floated for six hours or so and was then aground for the following six hours.

The houseboat was let to the defendant on the terms of a written agreement dated 31 August 1993, which closely followed the form in the Encyclopaedia of Forms and Precedents, 5th ed., vol. 24 (1991) for the letting of a dwelling house. Presciently, the
Encyclopaedia precedes the form with a note observing (emphasis added):

*A houseboat is a chattel, and although the hiring of a chattel cannot strictly be termed a leasing*, an agreement for the hiring of a houseboat which will remain at the same mooring place may well follow the general form of an agreement for the tenancy of real property.

The claimants sought possession of the houseboat for failure to pay the rent and other breaches of the agreement. A preliminary issue arose, whether the letting of a houseboat is “the tenancy of a dwelling-house” for the purpose of Part 1 of the Housing Act 1988, *i.e.* an assured tenancy. District Judge Madge and, on appeal to the West London County Court, Judge Cotran held that it was. The claimants appealed, contending, first, that a houseboat is a chattel and is thus incapable of being the subject of a tenancy and secondly that in any event a houseboat is not a dwelling house.

In agreeing with the district judge, Judge Cotran said:

... the factors necessary to decide the preliminary issue ... were: (a) the terms of tenancy—use and removability; (b) the degree of permanence and movability/immovability; and (c) the nature of the structure and its use.... It seems to me that to argue that no houseboat can ever be protected is wrong. Certainly it is wrong if one considers the criteria that the case law has put forward. There has been no decision on a houseboat as such but there has been, in relation to a caravan and its mobility/immobility, and it makes not the slightest difference, as far as I am concerned, whether a houseboat lies on the land after removal from water or is attached to the river bed and/or floats for part of the day, so long as it is permanently immobile and let as such.

Regrettably, Judge Cotran did not expose the criteria put forward in the case law to sufficient scrutiny. *Makins v. Elson* [1977] 1 W.L.R. 221 was a tax case concerned with the issue of whether a capital gain arising on the disposal of a mobile caravan was exempt from capital gains tax by virtue of the principal private residence exemption then contained in Finance Act 1965 s. 29 (see now Taxation of Chargeable Gains Act 1992 s. 222). As observed by Tuckey L.J., that Act distinguished between a dwelling house and the land on which it was situated. Accordingly the question whether the caravan became part of the land did not arise, so *Makins v. Elson* was of no assistance. Counsel for the defendant also cited various rating cases where the occupiers of a hulk (*Cory v. Bristow* (1877) 2 App.Cas. 262), a landing stage (*Forrest v. Greenwich Overseers* (1858) 8 E. & B. 890) and *The Hispaniola* (*Westminster City Council v. Woodbury* [1991] 2 E.G.L.R. 173) were
all held to be in rateable occupation of land. These, together with
the community charge case of Stubbs v. Hartnell (1997) 74 P. &
C.R. D36, also concerning a houseboat on the Thames, only
illustrated, however, the circumstances in which a chattel becomes
rateable if it occupies land or is enjoyed with land, and accordingly
shed no light on the circumstances in which a chattel becomes part
of the land. For this reason neither Tuckey L.J. nor Morritt L.J.
found the various cases to be of any assistance.

As analysed by Tuckey and Morritt L.JJ., with both of whom
Waller L.J. agreed, the correct approach was that the Housing Act
only applies to the letting of land. The houseboat was a chattel and
not real property unless it had become part of the land by
annexure. This fell to be determined in accordance with the maxim
expressed in Minshall v. Lloyd (1837) 2 M. & W. 450 at 459 that
“quicquid plantatur solo, solo cedit”, or, in English, “whatever
is attached to the soil becomes part of it”. Both Tuckey and
Morritt L.JJ. had to the fore the recent formulation by the House of
Lords in Elitestone Ltd. v. Morris [1997] 1 W.L.R. 687 (noted at
[1997] C.L.J. 498) of the principle by which to test whether a
chattel has become part of the land. That case concerned a chalet
resting only by its own weight on concrete pillars set into the
ground, but which was connected to the usual services and which
could not be taken down and re-erected elsewhere, but only
removed by demolition. The House of Lords restored the Assistant
Recorder’s conclusion that it was part of the land, reasoning that a
house built in such a way that it could not be removed except by
destruction could not have been intended to remain a chattel and
must have been intended to form part of the realty.

In the instant case the houseboat rested periodically on the river
bed below it and was secured by ropes, and perhaps to an extent
by the conduits for the services, to other structures. As Tuckey L.J.
pointed out, it was difficult to see how attachments in this way to
the pontoons, the anchor in the river bed and the rings in the
embankment wall could possibly make the houseboat part of the
land, particularly since all these attachments could simply be
undone, enabling the houseboat to be moved quite easily without
injury to itself or to the land.

Tuckey L.J. summarised his conclusions thus:

... I conclude that the houseboat has not become part of the
land. I support this conclusion on the grounds of common
sense. It is common sense that a house built on land is part of
the land: see Lord Lloyd of Berwick in Elitestone Ltd. v.
Morris [1997] 1 W.L.R. 687, 692H. So too is it common sense
that a boat on a river is not part of the land. A boat, albeit
one used as a house, is not part of the same genus as real property.

Quite. What a pity, however, that to arrive at such a conclusion, two appeals, ultimately to the Court of Appeal, were required. This seems to have been the view of the House of Lords also, which at [2000] 1 W.L.R. 2469 refused leave to appeal. And what of Mr. Pope, who might be considered rather unfortunate inasmuch as the agreement entered into by him would plainly have been apt to confer an assured tenancy, had it been in no different form but in respect of land? Plainly he, or more pertinently his advisers, should have paid closer regard to the wise note in the Encyclopaedia, and saved him much trouble thereby.

Dominic Gibbs

BALANCING COMMERCIAL AND FAMILY INTERESTS UNDER TLATA 1996, S. 15


In 1986, six years after the separation of Mr. and Mrs. Shaire, Mrs. Shaire began a relationship with Mr. Fox. In 1987, a transfer of the former matrimonial home was executed by Mr. and Mrs. Shaire in favour of Mrs. Shaire and Mr. Fox. In consideration for this transfer, Mrs. Shaire and Mr. Fox paid Mr. Shaire £15,000 and Mrs. Shaire agreed to give up all other claims against Mr. Shaire for ancillary relief. A consent order in these terms was made in the divorce proceedings. Partly in order to pay Mr. Shaire the agreed £15,000, Mrs. Shaire and Mr. Fox raised the sum of £43,750 from the Chase Manhattan Bank by way of mortgage over the house.

After Mr. Fox died in 1992 it came to light that he had forged Mrs. Shaire’s signature on two further charges over the house. The court found that Mrs. Shaire had neither authorised nor known of the forged signatures; she was therefore not bound by these charges. The estate of Mr. Fox inevitably was, however, so the court had to (1) ascertain the beneficial interests of Mrs. Shaire and Mr. Fox; and (2) decide whether a sale should be ordered at the behest of The Mortgage Corporation (TMC), the claimant mortgagee.
In the absence of any express agreement, the court held that Mrs. Shaire owned 75 per cent. and Mr. Fox 25 per cent. of the equitable interest in the house. Neuberger J. reasoned that Mr. Shaire’s transfer of his 50 per cent. interest (then worth £36,000) for £15,000 involved “a large element of gift” and that “it was very unlikely that he intended all that gift to go to Mr. Fox”. Further, Mr. Fox had undertaken liability under the Chase mortgage for just under £22,000; a 25 per cent. interest in the house was worth a roughly equivalent amount. But Mrs. Shaire had undertaken an identical liability under the Chase mortgage and, as the court acknowledged, had given the additional consideration of compromising further ancillary relief. It is thus difficult to see why her interest under the transfer should not have been larger than that of Mr. Fox, or indeed why Mr. Shaire would have wished to make any gift to Mr. Fox. Mr. Fox had paid the instalments on the Chase mortgage, but as Neuberger J. noted, the idea that Mr. Fox shouldered the burden of the mortgages “would understandably be greeted by Mrs. Shaire with something of a hollow laugh”.

Given that Mr. Fox’s estate was effectively insolvent, TMC was in practice the owner of the 25 per cent. beneficial interest previously owned by the deceased. It was agreed that TMC was subrogated to the Chase mortgage in relation to Mrs. Shaire’s 75 per cent. share, since the moneys secured by the TMC mortgage had been used to redeem the Chase mortgage, to which she had consented. The extent of TMC’s charge over Mrs. Shaire’s interest in the house amounted to £34,240.

The court held that in deciding whether to order a sale it would be wrong totally to disregard earlier authorities, but that these should be treated with caution. Previously, save in exceptional circumstances, the voice of the creditor, whether a trustee in bankruptcy (as in In re Citro (a bankrupt) [1991] Ch. 142) or a chargee (as in Lloyd’s Bank plc v. Byrne [1993] 2 F.C.R. 41), prevailed over the interests of families in occupation. In applications by mortgagees under the new law, the court is required to take into account certain factors set out in section 15. The relevant factors in the present case were those in subsection (1) (the intentions of the settlor, the purposes for which the property is held, the welfare of any minor who occupies or might reasonably occupy the land as his home, the interests of any secured creditor) and subsection (3) (the circumstances and wishes of beneficiaries entitled to an interest in possession, or in case of dispute, of the majority). The section 15 factors are not exhaustive; there may be other factors in a particular case that the court can or should
consider. Once the relevant factors have been identified, the weight to be given to each is a matter for the court.

Neuberger J. used the law’s new flexibility to broker a solution for the two parties, both of whom were victims of the deceased’s deception. He rejected proposals that Mrs. Shaire pay any form of rent to TMC; TMC was in the business of lending on property, not of owning shares in property. He preferred instead the proposal that the house be valued and that TMC’s equity be converted into a loan, with Mrs. Shaire as sole owner then paying interest on that loan as well as on the subrogated Chase mortgage. Interest on the Chase portion of the loan would be by reference to Chase interest rates; on the converted 25 per cent. loan at 1 per cent. above base rate. If Mrs. Shaire could not meet this liability, the court would order a sale, but before doing so would require evidence as to the type of property which might be available with the money that would be realised on sale of the house.

The decision meets many of the judicial and academic criticisms levelled against the old section 30 and heralds a new flexibility of approach in which family and commercial interests can be balanced. Nevertheless, three additional points should be noted. First, since the TMC mortgage was registered, the action should probably have proceeded by an application by Mrs. Shaire for rectification (LRA 1925, ss. 34, 82(1)(d)). Second, Shaire involved an application by a secured creditor under section 14 of TLATA 1996. Where the applicant is a trustee in bankruptcy, the factors in section 15 do not apply (section 15(4)); instead, the relevant factors are those in the Insolvency Act 1986, s. 335A, as inserted by TLATA. After one year the statutory presumption arises in favour of the creditors’ interests, and In re Citro will still apply. And third, even if a court refuses to order a sale, it remains open to a claimant mortgagee to sue on the personal covenant to repay, thereby forcing the mortgagor into bankruptcy. In Alliance & Leicester plc v. Slayford & another [2000] 1 All E.R. (Comm) 1 the Court of Appeal held that it was open to a mortgagee, who had been met with a successful defence of undue influence by the wife of the mortgagor, to sue on the personal covenant, with a view as an unsecured creditor to bankrupting the mortgagor. Such actions are likely to increase; mortgagees enjoy cumulative remedies, and restrictions imposed on one remedy will no doubt impact on their recourse to others.

Mika Oldham
EQUALITY ON DIVORCE?

As Lord Nicholls observed, “Divorce creates many problems”. Not least of these is determining the basis on which property should be divided between divorcing spouses, a problem with which the House of Lords had to grapple for the first time in White v. White [2000] 3 W.L.R. 1571. The case required consideration of the principles which should guide exercise of the discretion under the Matrimonial Causes Act 1973 to make capital awards, in particular in so-called “big money” cases. But the decision invites discussion of issues extending beyond the concerns of the super-rich.

The Whites had been married for over 30 years. As well as raising three children, they had run a farming business, each contributing equally to its success. One of their farms, purchased in part with an interest-free loan from Mr. White’s father, was held jointly. The other, acquired partly thanks to Mr. White senior’s generosity, belonged to Mr. White alone, though the partnership farmed it. Each party had private pension assets. Needless to say, the net worth of the assets substantially exceeded the sums required to meet both parties’ housing and income needs.

An immediate clean break having been agreed, the dispute related to the basis on which the assets should be split. Several questions arose. What significance should be attached to the contributions made by the parties to the business and the family? Was Mrs. White entitled to an equal share of the assets? What were, and what was the relevance of, Mrs. White’s “reasonable requirements”?

It is a notable—and criticised—feature of the current law that it specifies no overarching principle or objective to guide the ancillary relief exercise. In the absence of explicit legislative guidance, Lord Nicholls’ leading speech unsurprisingly identifies fairness as the judicial lodestar. More specifically, he insists there is “no place for discrimination between husband and wife in their respective roles”. If one spouse acts as home-maker and child-raiser while the other goes out to work, and each in their different spheres contributes equally to the family, “then in principle it matters not which of them earned the money and built up the assets ... As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so.”

What constitutes such “good reason”? Perhaps the concept of “reasonable requirements”. This concept had come to dominate big money cases, a capital ceiling being set by applicants’ “reasonable requirements”, regardless of how small was the share of assets thereby allocated (e.g. Dart v. Dart [1996] 2 F.L.R. 286, though the
Court of Appeal expressed reservations about the concept’s influence. Lord Nicholls rejects that approach. It departs from the statute—financial needs are just one of several factors in the checklist, along with available financial resources and the applicant’s contributions to the marriage—and discriminates against home-makers. Where the parties have built up a fortune from scratch, each contributing in their different ways, then “where the assets exceed the financial needs of the parties, why should the surplus belong solely to the husband”? Whilst there will sometimes be grounds to cater only for the applicant’s needs—Lord Nicholls gives no guide as to what those grounds might be—mere absence of need does not justify that step. Nor, it seems, could the parties’ wealth being partly attributable to Mr. White senior’s generosity justify a large departure from equality, since it was through both parties’ efforts that his contributions had come to bear such fruit.

Where did that leave Mrs. White? The Court of Appeal ([1999] 2 W.L.R. 1213) had awarded her a two-fifths share, overturning Holman J.’s decision which, based on her “reasonable requirements”, would have required a transfer of assets from Mrs. White to her husband, leaving her with only one-fifth. The Court declined to award an equal share in view of Mr. White senior’s contribution to the parties’ wealth. Judging this decision to be within the appellate court’s discretion (Lord Cooke a little reluctantly), the House of Lords was restrained by Piglowska [1999] 1 W.L.R. 1360 from departing from that assessment. So in the event, Mrs. White was denied equality.

The affirmation of the equal value of home-makers’ contributions is welcome, Lord Nicholls’ dictum applying as much to “traditional” marriage partnerships as it does to the business/matrimonial partnership enjoyed by the Whites. But the equality principle enunciated by Lord Nicholls within the confines of the 1973 Act exerts limited formal influence—not a presumption or starting-point (as Lord Cooke might have it), but a mere “check” against which to evaluate decisions reached through straightforward consideration of the factors listed in section 25(2). This approach may be compared with jurisdictions which operate presumptions or even rules of equal division, accompanied by complex rules identifying the “matrimonial property” susceptible to that regime. The Ancillary Relief Advisory Group recently rejected the adoption in English law of such a scheme or the more nuanced Scottish approach, pending substantial research; those systems may achieve greater certainty, but may fail to provide appropriate results in individual cases. The Government has suggested some “guiding principles”, equality included, which might more firmly direct the
judges’ task than does Lord Nicholls’ equality “check” (Supporting Families (HMSO 1998)). But substantive reform is no longer under active consideration.

Should equality be given greater prominence in English law? Unless the welfare of dependent children is to lose its status as the first consideration, few cases will involve assets sufficiently extensive to do more than meet the children’s needs by securing accommodation for the primary carer, and, if assets permit, for the absent parent (M v. B (Ancillary proceedings: lump sum) [1998] 1 F.L.R. 53). Indeed, the primary carer may initially acquire much more than half of the assets. Equality may be at best a remote goal, postponed until the children’s independence. But even when there are no children, equal division remains problematic. Lord Nicholls appears to contemplate an actual assessment of the relative extent of contribution made by the home-making and bread-winning spouses, though their activities are arguably incommensurable. A simple rule of equal sharing avoids that difficulty, but invites obvious criticism unless accompanied by qualifying principles.

Even leaving those problems aside, recent research indicates that the economic effects of divorce may not in substance be equalised simply by equal property division (see Eekelaar and Maclean, “Property and Financial Adjustment after Divorce in the 1990s”, in Hawkins (ed.), The Human Face of Law (Oxford 1997)). As Lord Nicholls recognises, the home-maker may have conferred economic advantages on the respondent by freeing him to concentrate his efforts on career or business, but in doing so incurred personal economic disadvantage in the form of lost opportunity to develop independent earning capacity. Indeed, the greater earning capacity of the other spouse is often the most valuable “asset” created by the marriage. Unless the home-maker’s award reflects the value of that asset, the spouses will not leave the partnership as equals (Weitzman, “Marital Property: its Transformation and Division in the United States”, in Weitzman and Maclean, Economic Consequences of Divorce (Oxford 1992)). But it should not be forgotten that in the majority of cases there will not be enough capital to achieve that outcome on an immediate clean break. Periodical payments therefore assume some importance.

The wider significance of White may therefore lie in its understanding of the nature of the parties’ economic relationship within marriage. The decision arguably reflects what may be called an entitlement- or compensation-based theory of property division, in preference to a needs-based theory, and could support a new approach to periodical payments (Diduck and Orton, “Equality
and Support for Spouses” (1994) 57 M.L.R. 681, and texts cited above). The home-maker is not a needy supplicant seeking life-long private dependency simply on the basis that she was once married to the respondent, but a person legitimately claiming a return on her “investment” in the partnership and/or compensation for losses she has sustained in consequence. But if the claim is ultimately based on the economic dynamics of a relationship and its impact on the parties, should the law be concerned about the marital status of the parties at all?

JOANNA MILES

RESOLVING THE UNRESOLVABLE: THE CASE OF THE CONJOINED TWINS

In Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All E.R. 961 the Court of Appeal faced the impossible dilemma of having to decide whether to authorise a complex operation to separate Jodie and Mary, ischiopagus conjoined twins (joined at the pelvis). The condition of the babies was extremely rare, it being estimated that only about once in 100,000 births will monozygotic twins fail to separate completely. Even then, ischiopagus twins account for only about six per cent. of the total instances of conjoined twins. Another very rare peculiarity of the case was the certainty that the operation, if sanctioned, would quickly and inevitably bring about the death of the weaker twin, Mary. This was because the twins shared a common aorta. Mary’s own heart and lungs were severely deficient and incapable of oxygenating and pumping blood through her body. Her life was thus sustained only by the common artery and separation would necessarily involve clamping and severing this. It was equally clear that the effect of failing to attempt the separation would be the inevitable death of both twins within three to six months. The cause of death would be heart failure since Jodie’s heart would sooner or later fail. The parents, devout Roman Catholics, opposed the operation, believing that in God’s eyes the twins were equal and that one could not morally be sacrificed to save the other. The hospital took a different view. It believed that a successful operation could be performed which could give the stronger twin, Jodie, a reasonable prospect of a worthwhile life.

After an exhaustive examination of the principles of family and criminal law, the Court unanimously dismissed the parents’ appeal from the decision of Johnson J. in which he had granted a declaration that the operation might lawfully be performed. The
operation subsequently took place in Manchester. As anticipated, Mary died during the course of the operation while Jodie survived and is, according to the latest media reports, making good progress.

Despite the complexity of the arguments, the essential issues for the Court were straightforward. Applying first the principles of family law, this was an application under the inherent jurisdiction and therefore governed by the welfare principle which made the interests of both Jodie and Mary paramount. What then were the best interests of each twin? The majority found that they were irreconcilable, rejecting the judge’s approach which had characterised the proposed operation as the withdrawal of life-sustaining treatment from Mary and also in her best interests by analogy with the reasoning in the Tony Bland case (Airedale N.H.S. Trust v. Bland [1993] A.C. 789). The operation would involve invasive procedures on the body of Mary and would, as noted, lead quickly to her death. Accordingly, it would be a distortion to say it could be in her best interests. Although the conflict of interest between the children was acute (since life itself was at stake), the Court concluded that it could not abdicate from its responsibility to resolve it. As Ward L.J. put it: “If the duty of the court is to make a decision which puts Jodie’s interests paramount and that decision would be contrary to the paramount interests of Mary, then, for my part, I do not see how the Court can reconcile the impossibility of properly fulfilling each duty by simply declining to decide the very matter before it”. The only realistic course open to the Court was to choose the lesser of the two evils or the least detrimental alternative, while taking full account of the parents’ wishes. In this case the least detrimental alternative was to authorise the surgery which would give the chance of life to Jodie and thereby avoid the certain death of both twins.

Such a course of action could only be taken, however, if it would be lawful under the criminal law, and this question is examined at considerable length, especially by Brooke L.J. The Court was able to conclude quickly that Mary should be regarded as an independent person despite her pitiable condition of total dependence for life on her sister. The majority also took the view that the doctors would necessarily have an intention to kill her in the Woollin sense (R. v. Woollin [1999] 1 A.C. 82) that they would foresee her death as the certain consequence of the procedure. Robert Walker L.J. differed on this point, citing Lord Goff in Bland, being of the opinion that the doctors’ well-intentioned purpose in seeking to save Jodie would negate any criminal intent in relation to Mary’s death.
The majority thus had to find some justification for the positive acts which would otherwise amount to the murder of Mary. They found such justification, with great difficulty and after much agonising, in a rare application of the doctrine of necessity and, in the case of Ward L.J., in the notion of quasi self-defence. The Court noted that, historically, the courts had set their face against admitting the defences of necessity or duress on a charge of murder in order to uphold the sanctity of life principle. But in the “unique” circumstances of the case, in which Mary was already beyond help and effectively “designated for death”, the Court was prepared to find that this was a rare case of necessity. The three essential prerequisites were satisfied—the act was needed to avoid inevitable and irreparable evil, no more was proposed than was reasonably necessary for the purpose and the evil inflicted would not be disproportionate to the evil avoided. Ward L.J. was also much exercised by the consideration that, just as to operate would be to kill Mary, not to operate would assuredly kill Jodie. From this he constructed a case of quasi self-defence. In his words:

The reality here—harsh as it is to state it, and unnatural as it is that it should be happening—is that Mary is killing Jodie … How can it be just that Jodie should be required to tolerate that state of affairs?… I can see no difference in essence between … resort to legitimate self-defence and the doctors coming to Jodie’s defence and removing the threat of fatal harm to her presented by Mary’s draining her life blood.

The Court was at pains to stress that this was a wholly exceptional situation which would not justify any wider proposition that a doctor might actively kill a patient once it had been determined that the patient was in a terminal condition. The narrow ratio on the criminal question of lawfulness was expressed by Ward L.J. in the following terms. For an operation such as this to be lawful,

it must be impossible to preserve the life of X, without bringing about the death of Y, that Y by his or her very continued existence will inevitably bring about the death of X within a short period of time, and that X is capable of living an independent life but Y is incapable under any circumstances (including all forms of medical intervention) of viable independent existence.

The principles of family law which emerge from, or are restated by, this decision are not so easily confined to the unique facts of the case. Far from being unique, the two central questions with which the Court grappled may arise, and have arisen, in many children cases. The first is how a court should balance the
conflicting interests of two or more children. The second is the appropriate weight to be attached to parental views where these collide with what medical authorities and the court may think are, objectively, the best interests of the child. This latter question often arises, as it did here, where the life of a child is at stake.

The answer which the Court of Appeal has now given to the first question is a better answer than that previously given by the courts, which have hitherto been inclined to dodge it. Where it has previously been considered by the House of Lords (in Birmingham City Council v. H (A Minor) [1994] 2 A.C. 212) and by the Court of Appeal (in Re T and E (Proceedings: Conflicting Interests) [1995] 1 F.L.R. 581), both have taken refuge in the narrow justification that the child whose welfare should be paramount is the child whose upbringing is the subject of the application. In the present case the Court of Appeal could not escape with this convenient technicality since both children were clearly and equally the subject of the application for the declaration. The Court’s conclusion—that it must balance the welfare of one child against the other with the scales starting equal—is, it is submitted, a more respectable and intellectually convincing approach. It is the one which was favoured by the Law Commission (see Report No. 172, paras. 3.13 and 3.14 and clause 1(2) of the Draft Bill appended to that report) but not adopted in the Children Act 1989.

The Court’s treatment of the second question is less satisfactory. On the one hand its reiteration of the principle that the parental view is not sovereign and that the court is not confined to reviewing the reasonableness of a parental decision is welcome. It repairs some of the damage which the Court of Appeal may have done in its earlier decision in Re T (Wardship: Medical Treatment) [1997] 1 W.L.R. 242. Many commentators felt that this had leant too closely towards upholding parental wishes and not closely enough towards giving effect to the best medical interests of the child. On the other hand Ward L.J. surely goes too far when he says that “it would ... have been a perfectly acceptable response for the hospital to bow to the weight of the parental wish however fundamentally the medical team disagreed with it. Had St. Mary’s [Hospital] done so, there could not have been the slightest criticism of them for letting nature take its course in accordance with the parents’ wishes.” This is difficult to square with other portions of his judgment in which he emphasises the duty on both the parents and the hospital to act to save Jodie and, in the case of the parents, even speculates on whether they might have been criminally liable under the Children and Young Persons Act 1933 or in manslaughter for neglecting to authorise the operation. It is
also difficult to reconcile with modern ideas of children’s rights, the more so at a time when human rights (which clearly extend to children) are under the spotlight. Doubtless the Court was correct in its view that the conclusion reached in this case would be unlikely to be affected by implementation of the Human Rights Act 1998 or by anything the Court in Strasbourg might or might not do. But there is also a moral dimension to human rights which surely requires us to continue to ask difficult and uncomfortable questions on behalf of vulnerable, in this case helpless, children. Would it really have been consistent with the human rights of Jodie for nature to be allowed to take its course solely because, hypothetically, the hospital happened to be in agreement with the parents? This is not a new problem for the law. It came to prominence a quarter of a century ago in Re D (A Minor) (Wardship: Sterilisation) [1976] Fam. 185 when only the chance intervention of an educational psychologist prevented, in wardship proceedings, an 11-year-old girl from undergoing the sterilisation operation favoured by her mother. Nor, sadly, is it an uncommon, let alone rare, dilemma. What, if anything can the law do about it and is it indeed at all the concern of the law that children be treated equally in like situations? If this is a requirement of a true commitment to the (human) rights of children, further thought perhaps needs to be given to the introduction of mandatory judicial procedures which might operate in a limited category of grave cases and which would require the medical authorities concerned to bring the matter before the courts.

ANDREW BAINHAM

DEHYDRATION AND HUMAN RIGHTS

In NHS Trust v. Bland [1993] A.C. 789 the House of Lords held it lawful for a doctor to withdraw tube-delivered food and fluids from his patient in persistent vegetative state (pvs) even though this would cause death by dehydration. The most controversial aspect of the case was the further ruling by three of their Lordships that it was lawful even though the doctor’s purpose was not merely to withdraw what he regarded as a futile “medical treatment” but was precisely to kill the patient. As one of their Lordships, Lord Mustill, rightly recognised (even though he thought withdrawal ethically justifiable), this ruling left the law “morally and intellectually misshapen”, prohibiting intentional killing by an act but permitting intentional killing by omission.
In *NHS Trust A v. M; NHS Trust B v. H* [2000] All E.R. (D) 1522 the question before Butler-Sloss P. was whether the withdrawal of tube-delivered food and fluids from two patients in pvs would breach the European Convention on Human Rights. Mrs. M., aged 49, was in pvs as a result of a cardio-respiratory arrest during surgery in September 1997. Mrs. H had been in pvs probably since January 2000 and her tube had become blocked. The diagnoses were not disputed by counsel for the Official Solicitor who represented both patients, Mr. Emmerson Q.C. Nor did he oppose the application by the two hospital trusts for declarations that it would be lawful to discontinue artificial nutrition and hydration.

The judge observed that since the implementation of the European Convention, the principles laid down by *Bland*, by which she was no longer bound, fell to be reconsidered, principally in the light of Article 2, but also of Articles 3 and 8. She adopted three key questions set out by Mr. Emmerson in his submission.

First, was a patient in pvs alive? She concluded that the answer was clearly affirmative.

Secondly, did the withdrawal of artificial nutrition and hydration constitute an “intentional deprivation of life” within Article 2(1)? Her Ladyship noted that in *Re A (Children)* [2000] 4 All E.R. 961 Robert Walker L.J. adjudged that the word “intentionally” in Article 2 was to be given its ordinary and natural meaning. She was persuaded by the majority in *Bland* that the doctor’s intention or purpose in withdrawing tube-feeding from a patient in pvs was indeed to bring about the patient’s death. However, she ruled, such withdrawal did not amount to an intentional “deprivation” of life since this required a deliberate act as opposed to an omission. The death of the patient would be a result of the illness or injury and that could not be described as a deprivation. The analysis of the issues by the House of Lords in *Bland* was, she concluded, entirely in accordance with Article 2 and withdrawal would not infringe the negative obligation to refrain from taking life intentionally. An omission to provide medical treatment would only be incompatible with that Article where there was a positive obligation to take steps to prolong life.

Thirdly, if withdrawal did not constitute an intentional deprivation of life, were the circumstances such that the Article imposed a positive obligation to provide life-sustaining treatment?

Article 2 did contain a positive obligation to take adequate and appropriate steps to safeguard life, and the standard laid down by the European Court of Human Rights in *Osman v. United Kingdom* (1997) 29 E.H.R.R. 245 was similar to the *Bolam* test for negligence
in English law. Consequently, in a case where a responsible clinical decision was made to withhold treatment on the ground that it was not in the patient’s best interests, and that decision was made in accordance with a “respectable body of medical opinion”, the State’s positive obligation was discharged. Indeed, since the High Court reviewed and could reject the medical opinion as to best interests in pws cases, domestic law imposed a higher test than that set by the European Court.

On the assumption that Article 3 required to be considered, the judge stated that withdrawal of tube-feeding would be for a benign purpose in accordance with the best interests of both patients. Moreover, she ruled that the Article required the victim to be aware of the inhuman or degrading treatment he or she was experiencing or at least to be in a state of physical or mental suffering, and that the Article did not therefore apply to the instant cases.

Similarly, there would be no breach of Article 8 which, she said, protected “the right to personal autonomy, otherwise described as the right to physical and bodily integrity”. In seeking to determine the scope of the positive obligation under Article 2, she ruled, assistance could be derived from Article 8. She felt it unnecessary to decide whether the wishes and feelings of families formed part of the patient’s right to respect for family life, adding that if they were relevant they could not outweigh any positive obligation to preserve the patient’s life, and doubted whether families had rights under Article 8 separate from those of the patient.

The judge’s view that “intentionally” in Article 2 should be given its ordinary meaning is welcome and avoids the domestic law’s artificial and confusing conflation of intention and foresight. However, her ruling that intentional “deprivation” of life requires an act rather than an omission is an incoherent interpretation of the unambiguous words of Article 2 which seriously undermines its scope. Her ruling is all the more remarkable in the light of the European Court’s view that Article 2 is one of the most fundamental provisions and must be strictly construed.

Her ruling that Article 3 requires the victim to be aware or suffering is equally unpersuasive. Why is it not inhuman or degrading for a doctor to subject an insensate patient to a lingering death from dehydration if the doctor does so to end a life he considers no longer worthwhile? The judge said that in the instant cases the purpose was “benign”, but was not the purpose, in her judgement, precisely to kill?

Further, she confused autonomy (which patients in pws do not have) with the right to bodily integrity (which they do), and her
view that the cause of death would be the pre-existing illness or injury, rather than dehydration, begs the question. Not only may patients in pvs live for many years if provided with food and fluids but, as Lord Mustill recognised in *Bland*, the doctor’s withdrawal of treatment is in law a cause of death, at any rate if it is unlawful.

It is regrettable that counsel for the Official Solicitor did not articulate and defend the principle of the inviolability of life, on which English law and Article 2 are historically based, a principle which has no truck with the incoherent distinction between intentional killing by an act and intentional killing by omission. Nor does he appear to have advanced the argument that tube-feeding is basic care rather than “medical treatment”.

In short, an ideal opportunity to restore the law’s moral and intellectual shape has been sadly missed.

John Keown

SLOW PROGRESS IN STRIKING OUT DILATORY LITIGANTS:  
“NO SECOND BITE AT THE CHERRY”

For many years the problem of delay has plagued English civil proceedings. The main instrument used to counter it has been the power to strike out claims on the basis of “want of prosecution” (*Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, C.A.; *Birkett v. James* [1978] A.C. 297, H.L.). But, notoriously, this doctrine long ago lost its snap. Now the Court of Appeal in *Securum Finance Ltd. v. Ashton* [2000] 3 W.L.R. 1400 has sharpened the doctrine’s bite, or at least lengthened its leash, by deciding that this power of dismissal extends to claims which are not yet statute barred.

The present case has twice proceeded to the Court of Appeal, on the first occasion as *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.* [1998] 1 W.L.R. 1426. These are the main facts underlying both decisions. Arbuthnot lent money to Trafalgar. The Ashtons guaranteed the loan and, to support the guarantee, they provided a mortgage in favour of Arbuthnot over their Essex home. In the first action Arbuthnot sought repayment of the debt and made claims against the debtor and the guarantors. That action was struck out because of the claimant’s excessive delay. Chadwick L.J. in the *Securum* case (at para. 51) confirmed that the basis of the striking out in the *Arbuthnot* case had been “limb 2” of the *Birkett v. James* rules, viz.:
that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers [which produces] ... a substantial risk that it is not possible to have a fair trial of the issues in the action or is likely to cause ... serious prejudice to the defendants ... ([1978] A.C. 297, 318, per Lord Diplock).

Next, Arbuthnot assigned the “bad debt” to Securum, which tried to rehabilitate it as a good debt by bringing the second action. The relief sought in these later proceedings differed in two respects from that claimed in the first: the assignee was now suing upon the guarantors’ covenant to indemnify the creditor and, secondly, was enforcing its rights as mortgagee. Rather generously, both types of claim are subject to a 12-year period of limitation (for details, Securum case, paras. 10, 45).

The Ashtons applied to have the second claim struck out as an abuse of process. That challenge posed the issue, “whether it is an abuse of process to seek to litigate, in subsequent proceedings, issues which have been raised (but not adjudicated upon) in earlier proceedings which have themselves been struck out [for ‘want of prosecution’]” (para. 18). The striking out application failed at first instance because the judge followed Birkett v. James [1978] A.C. 297, 320, 322, H.L., which decided that an action cannot be struck out for want of prosecution if at the time of the striking out application the cause of action has not become statute barred. The House of Lords reasoned that a court could not prevent the claimant bringing fresh proceedings and that these would be secure from procedural challenge because the Limitation Act (now the 1980 Act) “permits” it to proceed. The court could strike out the second action only where the first action is dismissed for “abuse of process”. But in 1978, in fact until Chadwick L.J. gave judgment in the Securum case, the assumption was that mere delay, even if lengthy and inexcusable, does not disclose “abuse”.

In the Securum case Chadwick L.J. declared such leniency to be anachronistic in the light of the “Overriding Objective” in C.P.R., Part 1. He said (para. 34):

... The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant’s wish to have “a second bite at the cherry” outweighs the need to allot its own limited resources to other cases.

The new position is this: when an action is struck out for want of prosecution, it is prima facie an abuse of process for the same claimant to bring a second action on the same facts, unless he can show “some special reason” to justify it. This is Chadwick L.J.’s
innovation. The new institutional value-judgement is that a claimant who makes inefficient use of the public amenity of civil litigation is guilty of “abuse of process” (para. 52). In short, Birkett v. James has been overtaken in this respect by the strictures of the new procedural code.

However, abuse is here only presumed. On the facts of the Securum case the Court of Appeal declined to strike out the second claim. The court said that it would be unreasonable to require a creditor who has a triplet of rights—to repayment by the principal debtor, the benefit of a guarantee, and a mortgage supporting the guarantee—to fire the entire fusillade of remedies in the first action (para. 17).

What of the bigger picture? There are at least four sources of sanction against dilatory litigation:

(i) striking out for want of prosecution, the subject of this note;
(ii) striking out for “abuse of process” where the litigant has shown a “complete” (“total” or “wholesale”) disregard for the procedural rules, especially those concerning the action’s progress (the Arbuthnot case [1998] 1 W.L.R. 1426, C.A., noted P. Key (1999) 115 L.Q.R. 208);
(iii) striking out for “abuse of process” where the claimant’s overriding desire is not to seek justice but instead to embarrass, vex or oppress his opponent (Grovit v. Doctor [1997] 1 W.L.R. 640, H.L.);
(iv) finally, the court can impose costs or other pecuniary sanctions instead of striking out (as explained by Lord Woolf M.R. in Biguzzi v. Rank Leisure plc [1999] 1 W.L.R. 1926, C.A.).

In category (i), which joins (ii) and (iii) in this respect, the second action can be barred as an “abuse of process” even when the claim is not yet statute barred. After 32 years this is clear progress, if a trifle slow.

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