CASE AND COMMENT

THIRD PARTIES AND THE REACH OF INJUNCTIONS

Two recent decisions have considered the extent to which injunctions might indirectly impose restrictions upon third parties. The issue was most famously (and controversially) explored by the House of Lords in the Spycatcher case (Attorney General v. Times Newspapers Ltd. [1992] 1 A.C. 191), where it was held that a third party would be guilty of contempt if he deliberately did an act that undermined the purpose for which the injunction had been imposed in the first place; and this, notwithstanding that the injunction was not directly binding, could have a significantly inhibiting impact upon freedom of expression.

In Attorney General v. Punch Ltd. [2003] 2 W.L.R. 49, the Attorney General obtained an injunction against David Shayler, the former M15 officer, and Associated Newspapers, restraining publication of information relating to the security services pending a breach of confidence action being brought against Shayler. A proviso permitted publication of material that had been consented to by the Attorney General. The editors and publishers of Punch, knowing of the existence and terms of the order and without the consent of the Attorney, nevertheless published the material, the editor taking the view that the material so published was not harmful to the public interest. Silber J. at first instance held that this amounted to an intentional contempt, but the Court of Appeal (Lords Phillips M.R. and Longmore L.J., Simon Brown L.J. dissenting) upheld the appeal. The House of Lords restored the original decision. There is no doubt that this result will be a disappointment to the press in the Human Rights Act era, since
they will have hoped that reference to Article 10 and its guarantees of freedom of the press might have tilted the balance away from the *Spycatcher* holdings in favour of freedom of speech.

The differences between the House and the Court of Appeal were relatively narrow. The members of that Court had identified the purpose of the judge in granting the injunction in the first place rather differently. According to Lord Phillips (with whom Simon Brown L.J. agreed on this aspect of the case), it was “to prevent the disclosure of any matter that arguably risked harming the national interest”. Longmore L.J. took the line that the judge’s purpose had been to prevent the publication of any information derived from Mr. Shayler not already in the public domain. As to the mens rea, however, both agreed that the Attorney General had not laid the foundation to show (in the view of Lord Phillips) that the editor knew that publication would interfere with the administration of justice. Longmore L.J. reasoned slightly differently. Since the editor might have thought that the purpose of the order was to restrain only material dangerous to national security, and since the editor might have believed that he had no intention to publish any such information, the requisite mental element was not established.

The House of Lords took a simpler view. Generally, the purpose of a court in issuing an interlocutory injunction is the preservation of the rights of the parties pending the final determination of the issues between them, and this was not to be confused with the purpose (be it the Attorney General’s as in this case, or more generally) of the party seeking the injunction. It is a contempt where a third person knowingly does something that undermines the court’s purpose to hold the ring pending final determination. Where, therefore, the substantial issue between the parties is whether or not it would be a breach of confidence to publish particular material, and the court grants an injunction prohibiting publication for the time being, it is a contempt for a third party to make the information public. It is not necessary to explore the often difficult question of why it was that the injunction was sought in the first place. Where, therefore, an editor publishes material which he knows the court was determined to treat as confidential pending the hearing, both the actus reus and the mens rea have been established.

The point in *Jockey Club v. Buffham* [2003] Q.B. 462 was allied to this. It concerned the question whether the *Spycatcher* decision was confined in its reach to temporary injunctions, or alternatively applied to final orders also. One might have supposed that the answer to this question was that it applied to the subversion of any
court order properly made, but Gray J. somewhat surprisingly held otherwise. As the House of Lords affirmed in *Punch* (still however to be decided in the House of Lords when Gray J. was obliged to give judgment), the purpose of a *Spycatcher* order was to preserve the status quo pending trial. Once the trial was over, therefore, there was nothing upon which the order could bite, and there could be no contempt if a third party did what a litigant had been forbidden to do. In principle, therefore, publication would not be restrained on the grounds that it is a contempt of court for a third person to make public what one of the litigants was obliged to treat as confidential.

This would appear at first sight to give subsequent publishers carte blanche, but it may be doubted whether it does so. Although Gray J. does not spell them out, there must be some important practical limitations on the entitlement to publish that such a decision impliedly entails. It could not apply, for example, to the *contra mundum* injunctions forbidding the identification of the killers of James Bulger of the kind made in *Venables v. News Group Newspapers* [2001] Fam. 430. Furthermore, if the parties were restrained by a permanent injunction (or undertaking, which is in the context the same thing), a third party would need to be very careful to avoid any conduct giving rise to the inference that it was behaving in a way that assisted one of the parties to act in breach of the injunction, since this would be aiding and abetting the party to commit a contempt. And if the purpose of the injunction was to preserve confidence, then a later publication by a third party might be a breach in exactly the same way as the original publication. A publisher who sought to reproduce the samizdat photographs that were the subject of the litigation in *Douglas v. Hello!* [2001] Q.B. 967, for example, could still be restrained in his own right from publishing (or mulcted in damages were he foolish enough to burst into print without prior warning to the happy couple).

*Buffham* is important for a further reason. The confidential information in question consisted of documents extracted by the former security director of the Jockey Club when he left his employment with them. These clearly were confidential, and the court had restrained their publication on that basis. These proceedings were in essence an application by a third party, the BBC, to vary the terms of the order/injunction in such a way as to enable them to use the material in a programme being made about the ability of the Jockey Club to police racing: allegations were to be made about race fixing and corruption. It is a well established principle that the public interest can defeat a claim to confidentiality, and the question was whether it did so here. Gray J.
came to the conclusion that it did. The public interest in the integrity of racing was such that the public were entitled to know about reservations and concerns over the ability of the Jockey Club to preserve the integrity of the racing industry.

A final word about the proviso permitting publication on the say-so of the Attorney General. In the Court of Appeal in *Punch*, Lord Phillips had been critical of the arrangement for giving permission to publish, taking the view that it subjected the press to the censorship of the Attorney General (as he had said on a previous occasion, in *Attorney General v. Times Newspapers Ltd.* [2001] 1 W.L.R. 885) and an interference with the European Convention right of freedom to publish. Lord Hope deals with the point most fully. Whatever arrangements are put in place for permitting the Attorney to vet the material prior to publication, he considered, must make it plain on their face that the last word does not rest with the Attorney but with the courts.

A.T.H. Smith

PROCEDURAL JUSTICE IN ADMINISTRATIVE PROCEEDINGS AND ARTICLE 6(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The applicability to administrative decision-making of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (which requires that the determination of a person’s “civil rights” should be by an “independent and impartial tribunal”) is somewhat vexed. First, it is often uncertain when an administrative decision determines “civil rights”. And, secondly, since non-compliance at first instance may be cured where the person aggrieved has access to a court of “full jurisdiction”, it is important but often uncertain to know what “full jurisdiction” is in the circumstances. The full tale is told in (2001) 60 C.L.J. 449 (Forsyth) and in Wade and Forsyth, *Administrative Law*, 8th edn. (2000) at pp. 441–444. Those unfamiliar with these technical issues should read a standard account before turning to *Runa Begum v. Tower Hamlets London Borough Council (First Secretary of State Intervening)* [2003] UKHL 5, [2003] 2 W.L.R. 388 (H.L.).

What had happened was that Runa Begum became homeless and the Tower Hamlets London Borough Council accepted that it had a duty under Part VII of the Housing Act 1996 to secure accommodation for her. But Runa Begum rejected the accommodation offered as unsuitable and requested a review of the
decision under section 202 of the 1996 Act. The review was conducted by the council’s rehousing manager, Mrs. Hayes, who found that Runa Begum’s rejection of the accommodation was unreasonable. So Runa Begum exercised her right of appeal under section 204 to the county court “on any point of law arising from the decision” of the housing officer. (In *Nipa Begum v. Tower Hamlets LBC* [2000] 1 W.L.R. 306 (C.A.) “point of law” was held to include the full range of issues that could be raised in judicial review.) In the House of Lords, the only issues of consequence remaining were, first, whether Article 6(1) applied to the decision of Mrs. Hayes. Even though there were significant procedural safeguards to ensure the fairness of her decision, Mrs. Hayes was plainly not an “independent and impartial tribunal” (she was a council employee with no security of tenure). Thus if Article 6(1) applied, it was breached. So the second question, which we turn to first, was whether the appeal in terms of section 204 was access to a court of “full jurisdiction” sufficient to ensure that the procedure overall did comply with Article 6(1).

*R. (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 W.L.R. 1389 had made it plain that, even though that court could not review the merits of the decision, a right of appeal on “a point of law” could cure the lack of impartiality and independence of the initial decision-maker. But what was the position where the issues were factual? Runa Begum was concerned about drug problems and racism in the area, she had allegedly been assaulted nearby, and her estranged husband frequently visited the building. These were factual issues. The court hearing a section 204 appeal has power to quash findings of fact that were perverse or irrational or when there was no evidence to support them, but the court could not substitute its own findings of fact for those of the first instance decision-maker (see Lord Millett, para. [99]). But the crucial point, stressed by their Lordships, was that access to a court of “full jurisdiction” meant “full jurisdiction to deal with the case as the nature of the decision requires” (per Lord Bingham (para. [5]) (emphasis added) in reliance upon Lord Hoffmann in *Alconbury* (para. [85])). In the particular statutory context, where the factual issues were preliminary to the broader discretionary powers (particularly whether Runa Begum’s refusal was reasonable), a full fact-finding jurisdiction in the appellate court was not required. Hence any non-compliance with Article 6(1) was cured by the appeal.

We may turn finally to the first mentioned issue: if Runa Begum’s “civil rights” were not determined by Mrs. Hayes’s
decision, then Article 6(1) was not engaged at all and the fairness of this decision-making process would be determined by the judge-developed principles of the common law. Since their Lordships decided, as explained above, that any non-compliance was cured by the availability of the right of appeal, it was not necessary for them to decide this issue. But it was discussed at length—particularly by Lord Hoffmann. Although Lord Millett concluded that it was “desirable” to extend the scope of Article 6(1) to cases such as Runa Begum, this is to go further than the European Court of Human Rights. Social welfare schemes analogous to private insurance (in which contributions were made in return for benefits, when required) were held to engage Article 6(1) in Feldbrugge v. Netherlands (1986) 8 E.H.R.R. 425 (contributory sickness benefit claim). A further step was taken in Salesi v. Italy (1993) 26 E.H.R.R. 187 when Article 6(1) was applied to a claim for a state-funded non-contributory disability pension. (See, similarly, Memnito v. Italy (2000) 34 E.H.R.R. 1122.) In these cases, although there was no analogy with private law, the right in question was an individual, economic right that flowed from specific statutory rules; this was enough to stamp it as a “civil right”. But Runa Begum concerned a benefit in kind, not cash, and the Council necessarily exercised a discretion in the allocation of the accommodation. However, Lord Hoffmann favoured the view of Hale L.J. in Adam v. Newham LBC [2001] EWCA Civ 1916, [2002] 1 W.L.R. 2120 (para. [55]) that once the statutory criteria were fulfilled the right to accommodation arose (even if discretion came into the allocation as well as deciding whether refusal was reasonable), and this meant the claim was “akin to a claim for social security benefits”; and so Article 6(1) was engaged.

So once more the curative principle saved the day, by providing the means whereby the applicability of Article 6(1) was reconciled with standard administrative practice. As Lord Hoffmann said (at para. [35]):

An English lawyer can view with equanimity the extension of the scope of article 6 because the English conception of the rule of law requires the legality of virtually all government decisions affecting the individual to be subject to the scrutiny of the ordinary courts .... [T]his breadth of scope is accompanied by an approach to the ground of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament.

That equanimity should not prevent one wondering whether anything has been gained by imposing upon the existing law of
procedural fairness these technical and uncertain arguments over the reach of Article 6(1). And, moreover, one may wonder whether the European Court of Human Rights will be as generous in according curative powers to judicial review.

Christopher Forsyth

INDETERMINATE SENTENCES … AGAIN

A Note on the legality of the mandatory life sentence in (2002) 61 C.L.J. 5 concluded that once the gap between the Government’s rhetoric and the reality was recognised, the mandatory life sentence could no longer be justified. After a bit of kicking from the European Court of Human Rights (see Stafford v. UK (2002) 35 E.H.R.R. 32, (2002) 61 C.L.J. 508), the House of Lords has at last recognised that the Home Secretary’s involvement in fixing the “tariff” can no longer be justified. Nearly six months after their Lordships issued a declaration that the existing legislative provisions were incompatible with the European Convention on Human Rights, it appears that the Home Office has still not decided what to do. We should expect late amendments to the already dense Criminal Justice Bill 2002, but at the time of writing (April 2003) the proposed amendments have not been published despite the fact that the Bill has reached its Report stage in the House of Commons.

On 25 November 2002 the House of Lords in R. (Anderson) v. Secretary of State for the Home Department [2002] UKHL 46, [2002] 3 W.L.R. 1800 declared section 29 of the Crime (Sentences) Act 1997 to be incompatible with Article 6 of the European Convention of Human Rights “in that the Secretary of State for the Home Department is acting so as to give effect to section 29 when he himself decides on the minimum period which must be served by a mandatory life sentence prisoner before he is considered for release on life licence”. This curious wording was agreed between the parties. Section 29 provides:

(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not [a discretionary life prisoner].

(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice.
Perhaps the section may appear at first sight somewhat innocuous. It says nothing about the procedures which in practice follow the imposition of a mandatory life sentence. Lord Bingham describes it as a “not very perspicacious section” (para. [30]). What is clear is that the power to release a convicted murderer is conferred on the Home Secretary. He may not exercise that power unless recommended to do so by the Parole Board. But the Parole Board may not make such a recommendation unless the Home Secretary has referred the case to it. And the section imposes no duty on the Home Secretary either to refer a case to the Board or to release a prisoner if the Board recommends release. Thus it is left to the Home Secretary to decide whether or when to refer a case to the Board, and he is free to ignore its recommendation if he so wishes. This was clearly the intention of Parliament, and as Lord Bingham puts it, “to read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the [Human Rights Act] 1998” (para. [30]). Therefore the House declared the will of successive Parliaments up to and including that of 1997 to be incompatible with the will of Parliament in the Human Rights Act 1998.

So far so good. Anderson was convicted of two separate murders in 1988. The trial judge suggested a “tariff” of 15 years, the Home Secretary had increased this figure to 20 years. Whilst the House of Lords was unanimous that the Home Secretary should play no part in fixing the tariff of a convicted murderer, what will be the new solution? What will be the outcome for Mr. Anderson? The existing law and tariffs were, of course, not declared to be unlawful, simply incompatible with the European Convention, and therefore they remain until new legislation is in place: see the Home Secretary’s written statement to the House of Commons of 25 November 2002. The power to fix the minimum length of time that the murderer should serve before his or her case is first considered by the Parole Board may be transferred to the trial judge, but this is only part of the story.

It should not be thought that the House was in radical mood in November: in R. v. Lichniak; R. v. Pyrah [2002] UKHL 46, [2002] 3 W.L.R. 1834, decided the same day as Anderson, the House confirmed the legality of the mandatory life sentence. It was asked to find that the sentence itself contravened both Articles 3 and 5 of the European Convention. Ironically, the appellants seem to have
lost their case in part because it was accepted that these two people were “low risk” murderers. The trial judges at both (quite separate) trials had specifically stated that neither was likely to pose a risk to the public on release. This allowed their Lordships to conclude that the appellants’ complaints were not of “sufficient gravity” to engage Articles 3 and 5. Lord Bingham explained (at para. [16]) that:

If their sentences were properly administered, reports would be prepared in sufficient time before the expiry date to permit the Parole Board to consider their cases and permit release on the tariff expiry date if the Board so recommended. . . . I doubt whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the Board to consider all the available material and form a judgment.

Once again, the reality is ignored: even for the “non risky”, the current release process is likely to be far from smooth. In 2001–2, the Parole Board recommended the release of only 89 of the 513 murderers whose cases they examined. (See, for detailed criticisms of the process, Padfield, Beyond the Tariff: Human Rights and the Release of Life Sentence Prisoners (Willan Publishing 2002)). It does seem as though the process may be speeding up—for example, the Annual Report of the Parole Board for 2001–2 reports that 99 per cent. of recommendations in mandatory lifer cases were issued within the Parole Board’s own target date, compared with 68 per cent. in 1999–2000. This Report, published in November, unsurprisingly “anticipates root and branch changes in the administrative processes”.

So what will these changes be? The mandatory life sentence for murder will remain in place, with improved procedures governing release. Murderers are not of course the only people subject to indeterminate sentences. As well as prisoners serving other forms of life sentence, there are non-criminal prisoners detained in English prisons indefinitely: see Part 4 of the Anti-Terrorism, Crime and Security Act 2001 and A, X and Y and others v. Secretary of State for the Home Department [2002] EWCA Civ 1502, [2003] 1 All E.R. 816. And many more people will fall to be detained under Chapter 5 of the Criminal Justice Bill 2002, which introduces the new indeterminate sentence of imprisonment for public protection. This will be available even for first time offenders; for a defendant with a previous conviction for a relevant serious offence, the sentencing court is to assume that there is a significant risk of future serious harm unless it considers that it would be “unreasonable” to reach such a conclusion. Once that assumption is made, an indeterminate sentence must be imposed. How will these new provisions withstand
challenges under the evolving jurisprudence of the Human Rights Act?

NICOLA PADFIELD

SPUSES AS WITNESSES: BACK TO BRIGHTON ROCK?

Graham Greene’s Brighton Rock is the tragic story of a murderer who marries an innocent girl, with the sole aim of preventing her giving evidence against him. Fact can be as strange as fiction—as the decision in R. (Crown Prosecution Service) v. Registrar General of Births, Deaths and Marriages [2002] EWCA Civ 1661, [2003] 2 W.L.R. 504 dramatically shows.

Mr. J was the prime suspect for a brutal double murder. Miss B, his long-term cohabitee, made statements to the police which gave them crucial information. While J was in prison awaiting the trial in which Miss B was billed as the star prosecution witness, B first tried to retract her statement—and when this failed to persuade the Crown Prosecution Service (CPS) to remove her from the witness-list, J and B announced that they were getting married. As under section 80 of the Police and Criminal Evidence Act (PACE) 1984 a wife cannot normally be compelled to give evidence against her husband in criminal proceedings, it looked suspiciously as if the intended union was motivated by this provision. To marry, a prisoner needs a certificate from the Registrar General: a document which the relevant legislation apparently requires this official to issue, provided the prison director raises no objection, which in this case he did not.

Faced with this, the CPS brought judicial review proceedings against the Registrar General, with a view to preventing him issuing the certificate, and the prison director, to encourage him to object. The courts briefly held that the prison director could only object on grounds relating to the suitability of the prison—and the main argument centred on the position of the Registrar.

The CPS argued that although the Registrar’s official duties are apparently absolute, this is subject to the implied condition that they should not be carried out so as to enable citizens to commit crimes. Thus although the Registrar has an apparently absolute statutory duty to tell adopted children who their natural parents are, it was held R. v. Registrar General, ex p. Smith [1991] 2 Q.B. 393 that he could lawfully refuse an application from a would-be parricide, currently a resident in Broadmoor (!). In the present case, the CPS argued that by marrying, J and B would commit the
offence of perverting the course of justice. Therefore the Registrar should refuse to issue the certificate.

On this argument the CPS won at first instance, but lost in the Court of Appeal. There it was unanimously decided that by exercising their right to marry, even in the present dubious circumstances, J and B would not commit the crime of perverting the course of justice—so the Registrar General had no ground to refuse the certificate.

The result, with respect, is surely correct. The right to marry is a fundamental one. As Waller L.J. pointed out, it “has always been a right recognised by the laws of this country long before the Human Rights Act 1998 came into force”. To refuse to allow J and B to exercise it would surely have been a wholly disproportionate reaction to the need for the CPS to solve a problem posed by the peculiarities of the rules of criminal evidence. And there is another point. The evidential rule the CPS wished to stop J and B making use of is commonly justified by the need to avoid putting strain on marriages: which presumably means that the law’s official stance on matrimony—unlike Mr. Punch’s in his celebrated advice to persons about to get married (“Don’t!”)—is that marriage is a good thing, and to be encouraged. Thus to prevent people marrying to stop them taking advantage of a rule designed to reinforce the institution of marriage seems strangely perverse.

That said, there is clearly something badly wrong with the law if a double murderer can escape justice by marrying the chief prosecution witness. If courts cannot (and should not) prevent them marrying, then the rules of criminal evidence should obviously be changed so that their marriage does not have this consequence—particularly when contracted in contemplation of the prosecution. This point the Court of Appeal accepted, when it said that section 80 of PACE possibly “needs reconsideration”.

The authoritarian solution would be to change the law so that the defendant’s spouse is a compellable witness for the prosecution, and hence obliged to testify at trial on the same terms as everyone else: as he or she already is in certain specific situations, set out in section 80 of PACE.

But to force the defendant’s spouse to give evidence, on pain of prosecution for contempt of court if he or she refuses and perjury if he or she tells lies or fails to tell the truth, is very harsh; almost as harsh, some would say, as it would be to force the same choice upon the defendant himself. Other legal systems, both in the common law world and in Continental Europe, shrink from this. A rule which put the defendant’s spouse in this position could—
conceivably—be seen as contrary to Article 8 of the European Convention (respect for family life).

The laws of other countries solve this problem in ways that are less brutal.

In France, the spouse is required to testify, and hence submit to questioning—but does not take the oath, and hence cannot be prosecuted for perjury. In Germany, the spouse is not obliged to testify. However, the spouse is not exempt where (as in the present case) the marriage took place in order to take advantage of the rule. And if an initially co-operative spouse was—as often happens—formally examined by a judge ahead of trial, the trial court can hear the evidence from the mouth of the examining judge if the spouse then declines to testify at trial.

In some parts of the common law world the solution is to provide that, where the spouse takes advantage of the privilege at trial, his or her previous statements become admissible in evidence as an exception to the hearsay rule. This is the position under Rule 804 of the Federal Rules of Evidence in the United States—a provision not limited to spouses, but applicable to the previous statements of any witness who declines to testify on grounds of privilege, and of any witness who without such privilege unlawfully refuses. This solution was proposed for England by the Criminal Law Revision Committee in its Eleventh Report in 1972. But alas, nothing so sensible is to be found in the Home Office’s latest proposals to reform the hearsay rule, which at the time of writing are before Parliament in the current Criminal Justice Bill.

This solution would be of limited use, because where (as is the case in England) the defendant has no opportunity to put his questions to the witness ahead of trial, a conviction based exclusively or mainly on such evidence would be contrary to Article 6(3)(d) of the European Convention on Human Rights, which guarantees the defendant the right to “examine or have examined the witnesses against him”. However, according to the Strasbourg case law this objection would not obtain in a case where there was substantial other evidence. Nor would it apply if (as in many other countries) we organised our pre-trial phase so that, where a witness is thought likely to retract, he or she can be formally examined at a preliminary hearing at which the defence have the right to participate and put their questions, and at that stage the spouse was prepared to talk.

J.R. Spencer
LOSS OF CHANCE: LOST CAUSE OR REMOTE POSSIBILITY?

Gregg v. Scott [2002] EWCA Civ 1471 involved a claimant with non-Hodgkin’s lymphoma, which was misdiagnosed by the defendant, who negligently failed to refer the claimant to a specialist. The claimant’s condition was correctly diagnosed a year later, by which time his chance of survival had been reduced to 25 per cent.; if he had been treated when he had first visited the defendant, his chance of survival would have been 42 per cent. The Court of Appeal, by a 2–1 majority, upheld the trial judge’s holding that because the chance of survival at the time of the defendant’s negligence was below 50 per cent., following Hotson v. East Berkshire Health Authority [1987] A.C. 750, the defendant could not be held causally responsible. On appeal, two lines of legal argument on loss of chance as actionable damage were advanced, one emphasising remoteness, and the other causation.

First, the loss of chance of survival was argued to be a matter of quantification, with the spread of the tumour being regarded as the relevant injury. By recasting the relevant damage, the causation inquiry was circumvented. The loss of chance of survival was then argued to be not too remote a consequence of the spread of the tumour—as, for example, the risk of epilepsy may be within the scope of risk of a head injury. This argument was rejected by the majority consisting of Simon Brown L.J. and Mance L.J., applying Hotson, but accepted by the dissenting judge, Latham L.J., who distinguished Hotson. Although the argument is appealing, it is suggested that the majority was correct in rejecting it, as it was an attempt to fudge the nature of the injury by conflating the physical damage with the actual loss, which was the chance of survival. An analogy may be drawn with the “complex structure” theory, previously advocated as a means to circumvent the restrictions on recovery for pure economic loss (D & F Estates Ltd. v. Church Commissioners for England [1989] A.C. 177, 207 per Lord Bridge), the fallacy of which was recognized in Murphy v. Brentwood District Council [1990] 1 A.C. 398, 470 per Lord Keith.

The second—and more significant—argument was that, in light of the recent developments in causation, Hotson should be reconsidered and that loss of chance should be recognized as actionable damage, at least in medical negligence cases of this type. The House of Lords, in the landmark decision of Fairchild v. Glenhaven Funeral Services Ltd. [2002] UKHL 22, [2002] 3 W.L.R. 89, had adopted a normative purposive approach to causation, reducing it to a pure policy question in certain circumstances. As a result, in some cases, as long as the injury is within the scope of
the risk, causation can be presumed, either by subsuming it within
the remoteness inquiry or by reversing the burden of proof of
causation. Two months after *Fairchild*, the Court of Appeal decided
a medical practitioner had negligently failed to inform the claimant
of an inherent risk in surgery. Even though it could not be shown
that disclosure would have led to an avoidance of the risk—as the
patient would have had no option but to undergo that very
procedure with that very risk some time in the future—it was held,
on policy grounds, that causation arguments should not be used to
frustrate the purpose of the duty in question and that causation
had been established.

The court in *Gregg*, while sympathetic to the loss of chance
arguments, refused to reconsider *Hotson*, leaving the position on
loss of chance in a wholly unsatisfactory state. The majority
apparently rejected it, while Latham L.J. allowed it only in so far
as it went to the issue of quantification (cf. *Mallet v. McMonagle*
[1970] A.C. 166 (H.L.)). It is suggested that in unique cases, just as
*Fairchild* has held that the rules of causation must be relaxed, so
too must the stringent view on loss of chance. *Gregg* is a classic
example of when loss of chance should be recognized, for both
policy and doctrinal reasons.

The underlying policy reason for rejecting the claim in *Gregg*
was one of “not extending the scope of liability within the field of
health treatment” (para. [102]). This assumes that recognizing loss
of chance will inevitably increase liability; the fact that loss of
chance can be a double-edged sword seems to have been ignored.
The prospect of significantly reduced damages—where otherwise
100 per cent. damages would have been available—may cut down
the overall cost of compensation and could be a deterrent to
litigation in some cases. The critical policy consideration, however,
ought to be the fact that in cases such as *Gregg*, claimants will
have suffered a real loss, in terms of a chance of a cure, but will
never be compensated for that loss. More alarmingly, where the
statistical chance of recovery is below 50 per cent., medical
practitioners will effectively be immune from actions in negligence;
there will be no incentive—there might perhaps even be a
disincentive—to take reasonable care (see H. Luntz, “Loss of
Chance” in I. Freckelton & D. Mendelson (eds.), *Causation in Law

Moving on from the policy considerations, a persuasive
doctrinal argument exists for loss of chance to be treated as the
“gist of damage” (see J. Stapleton, “The Gist of Negligence—Part
II” (1988) 104 L.Q.R. 389). Both *Fairchild* and *Chester* attributed
causal responsibility for damage that was not in fact proved to have been caused by the defendant; the courts were simply satisfied that the damage was of the very kind for which the defendant ought to be held liable. In Gregg, on the other hand, causal responsibility for the damage—loss of chance—could clearly be established on the orthodox test. Unfortunately, the damage was not recognized. While there is some resistance, there has not been a clear rejection of such claims by the higher courts in the major common law jurisdictions. The House of Lords and the High Court of Australia have avoided the issue, with individual judges sending out conflicting signals (Hotson; Chappel v. Hart (1998) 195 C.L.R. 232 and Naxakis v. Western General Hospital (1999) 197 C.L.R. 269), while the Canadian decision of Laferrière v. Lawson [1991] 1 S.C.R. 541, which did reject loss of chance in medical negligence, was actually based on the civil law of Quebec. The Chief Justice of Canada has since kept the issue alive by stating that the Laferrière ruling was not necessarily applicable to the common law; and there are several jurisdictions in the United States that have recognized loss of chance (see H. Luntz, above, pp. 180–181).

There have also been intermediate and lower court decisions in England and Australia allowing loss of chance claims in medical negligence (Judge v. Huntingdon Health Authority (1994) 27 B.M.L.R. 107; cf. Tahir v. Haringey Health Authority [1998] Lloyds Rep. Med. 104; Gavalas v. Singh (2001) 3 V.R. 404). Following the purposive approach to causation in Fairchild and Chester, it is suggested that a court should now be obliged to allow claims for loss of chance in appropriate circumstances. In cancer cases like Gregg, the sole purpose of the general practitioner’s duty of care is to give the patient a chance to be cured by timely referral to a specialist. The gist of damage is loss of chance and nothing else; failure to recognize this thwarts the purpose of the law and is, therefore, contrary to the clear authority of Fairchild and Chester. If Chester survives the current appeal to the House of Lords, there is more than a remote possibility that Gregg will also find itself in that House—hopefully not as a lost cause.

Kumaralingam Amirthalingam

VICARIOUS LIABILITY IN ENGLAND AND AUSTRALIA

In those cases, the Supreme Court ruled that an employee’s tort would be held to have been committed in the course of her employment if there was a “sufficiently close connection” between the employee’s tort and what she was employed to do to make it “fair and just” that the employer should be held vicariously liable for the employee’s tort. The Supreme Court went on to rule that such a connection would exist if and only if the work the employee was employed to do created or increased a risk that the employee would commit the kind of tort that she committed. The House of Lords adopted the “sufficiently close connection” test in *Lister v. Hesley Hall Ltd.* [2001] UKHL 22, [2002] 1 A.C. 215 (noted by Hopkins, (2001) 60 C.L.J. 458), but, unlike the Supreme Court, did not explain when it would be “fair and just” to hold an employer vicariously liable for an employee’s tort; it did, however, find that a “sufficiently close connection” was established in that case.

In *Dubai Aluminium Ltd. v. Salaam* [2002] UKHL 48, [2002] 3 W.L.R. 1913 the House of Lords affirmed its decision in *Lister* but did little to explain further when the “sufficiently close connection” test would be satisfied. Meanwhile, in *New South Wales v. Lepore, Samin v. Queensland, Rich v. Queensland* [2003] HCA 4, a majority in the High Court of Australia refused to depart from the old Salmond test (“an unauthorised mode of doing an authorised act”) for determining whether an employee committed a tort in the course of his employment.

**Dubai Aluminium**

This case concerned a company (“Dubai”) that was defrauded of $50m by its chief executive, acting in concert with a number of other individuals. A, a partner in a firm of solicitors, assisted the executive and his cronies to commit the fraud by drawing up some legal documents. On discovering the fraud, Dubai sued A’s firm for compensation, claiming that A had committed an equitable wrong in drawing up the documents and that A’s firm was vicariously liable for A’s wrong under section 10 of the Partnership Act 1890, which makes the partners in a firm vicariously liable for any wrongs committed by one of the partners “in the ordinary course of the business of the firm”.

A’s firm settled the claim against it, paying out $10m to Dubai. A’s firm then sought to make a claim in contribution against the participants in the fraud. To succeed in this claim, they had to show that had the “factual basis of the claim against [the firm been] established”, the firm would have been held liable to Dubai: *Civil Liability (Contribution) Act 1978*, section 1(4). The factual basis of the claim against the firm here was that A had acted
dishonestly in drawing up the documents and that A acted in his capacity as a partner in drawing up the documents. The House of Lords held that the firm was entitled to make its claim for contribution: had those facts been established, A would have committed an equitable wrong in drawing up the documents (the wrong of dishonestly assisting someone to breach a fiduciary duty) and there would have been a "sufficiently close connection" between A's wrong and the business of the firm to justify the firm’s being held vicariously liable for that wrong. The House of Lords went on to hold that the firm was entitled to recover from the participants in the fraud all the money that it had paid out to Dubai: as the participants in the fraud were still enriched by $50m as a result of their fraud, it was only fair that they should bear the full burden of compensating Dubai for the losses that that fraud had caused it to suffer.

The House of Lords gave very little guidance as to when the "sufficiently close connection" test would be satisfied, seeming to think that the issue of whether it would be "fair and just" to hold an employer vicariously liable for an employee’s tort would have to be resolved on a case by case basis. However, their Lordships did offer the following guidance:

1. The fact that an employee committed a tort by doing the kind of thing she was employed to do will not of itself make it "fair and just" to make the employer vicariously liable for the employee’s tort. However, if the employee was acting for the benefit of her employer at the time, it might well be "fair and just" to make the employer vicariously liable for her tort.

2. If B intentionally committed a tort for her own benefit while she was employed by A, it will be "fair and just" to hold A vicariously liable for B's tort if: (a) B, in committing her tort, failed to discharge some duty that A was subject to and which A had given B the job of discharging (the situation in Lister); or (b) A is estopped from denying that B was acting on his behalf at the time she committed the tort. If neither (a) nor (b) holds true, it will be difficult to establish that it is "fair and just" to hold A vicariously liable for B’s tort, but not impossible: "the circumstances in which an employer may be vicariously liable for his employee’s . . . misconduct are not closed" (per Lord Millett, at [129]).

3. Lord Nicholls took the view (at [21]) that the basis of the law on vicarious liability is that justice demands that businesses which create a risk that their employees will
commit torts should be held liable when those risks materialise. This suggests that he thinks that it would be “fair and just” to hold an employer vicariously liable for an employee’s tort if the nature of the employee’s employment created or increased a risk that the employee would commit the kind of tort that she committed. (This is, of course, the position taken by the Supreme Court of Canada.)

*New South Wales v. Lepore*

In each of the three conjoined appeals dealt with in this case, A, a teacher, sexually abused B, a pupil, while she was at school. B wanted to sue C, A’s employer, for damages. B argued, first, that C was liable to pay her damages in *negligence* because A’s acts of sexual abuse put C in breach of the non-delegable duty that C owed B to take reasonable steps to see that she would be safe from harm while at school. B argued, secondly, that C was liable to pay her damages because C was *vicariously liable* for A’s acts of sexual abuse.

The High Court ruled, by six to one (McHugh J. dissented), that the claim in negligence could not succeed. Kirby P. held that as A was C’s employee, the question of whether C should be held liable for the harm done by A should be resolved by reference to the law on vicarious liability, not the law on negligence. Callinan and Gaudron JJ. thought that some carelessness on C’s part would have to be shown before C could be held to have breached the duty of care it owed B—so the mere fact that A sexually assaulted B could not have put C in breach of that duty of care. Gleeson C.J., Gummow and Hayne JJ. admitted that C owed B a non-delegable duty of care and that C gave A the job of discharging that duty. However, they held that A could only have put C in breach of that duty if B had been physically harmed through a *lack of care* on A’s part; but here, A *intentionally* harmed B. This distinction is hard to justify. It threatens to revive *Cheshire v. Bailey* [1905] 1 K.B. 237, which ruled that a bailee of goods who gave the goods to an employee to look after would be liable for the loss of the goods if they were lost through the employee’s carelessness, but not if they were stolen by the employee—a proposition which was condemned as “clearly contrary to principle and common sense” by Lord Salmon in *Port Swettenham Authority v. T. W. Wu & Co.* [1979] A.C. 580, at 591.

The High Court was more divided on the issue of whether C was vicariously liable for A’s acts of sexual abuse. As McHugh J. had held that B could sue C in negligence, he declined to express a view on this issue. Kirby P. held that the court should use the
“sufficiently close connection” test to determine whether A’s acts of sexual abuse were committed in the course of his employment. However, he declined to express a view on whether such a connection was made out, preferring to leave that issue to be resolved by a new trial.

The other members of the Court were unwilling to depart from the old Salmond test in determining whether A’s acts of sexual abuse were committed in the course of his employment. Gummow, Hayne and Callinan JJ. thought that under this test, A could not possibly be held to have sexually abused B in the course of his employment. Gleeson C.J. and Gaudron J. preferred to allow the issue to be settled in a new trial. Gleeson C.J. in particular thought it was arguable that A’s acts of sexual abuse could have amounted to a form of excessive chastisement.

Why did the majority in the High Court not follow the example of the Supreme Court of Canada and the House of Lords? A number of reasons were given.

(1) None of the majority thought they were compelled by authority to adopt the “sufficiently close connection” test. The authorities—such as Lloyd v. Grace, Smith & Co. [1912] A.C. 716, Morris v. C. W. Martin & Sons Ltd. [1966] 1 Q.B. 716, and Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827—which are normally instanced as examples of the “sufficiently close connection” test at work were all distinguished as resting on estoppel or as not being vicarious liability cases at all but rather cases where an employer was put in breach of a non-delegable duty of care by the actions of his employee.

(2) Gaudron J. thought that the Supreme Court of Canada’s decisions in Bazley and Jacobi did not provide a “clear basis for determining whether a person should be held vicariously liable for the deliberate criminal acts of an employee” (at [126]); in particular, she found it hard to draw a distinction between cases where an employee was given an opportunity to commit a particular tort (which everyone agrees should not necessarily give rise to vicarious liability) and cases where an employer created or increased a risk that an employee would commit a particular tort (which the Supreme Court ruled should give rise to vicarious liability). Gummow and Hayne JJ. shared this worry, expressing themselves concerned that if Bazley and Jacobi were followed, an employer would be held vicariously liable for an employee’s tort whenever the tort “could not have
occurred but for the employment” (at [223]). What the employee was actually employed to do would become irrelevant.

(3) Gaudron, Gummow and Hayne JJ. also thought that the law of negligence was a more appropriate vehicle for determining the scope of an employer’s liability for creating or increasing a risk that his employees would do wrong than the law on vicarious liability.

(4) Callinan J. was strongly critical of the suggestion that the courts should determine whether an employee’s tort was committed in the course of his employment by simply asking whether it is “fair and just” to hold the employee’s employer vicariously liable for the employee’s tort. He thought that the law would be thrown into a state of intolerable uncertainty if such an approach were adopted in Australia, as different judges would take different views of what is “fair and just”. Of course, this is exactly the approach that has now been adopted in England and, as a result, the law on vicarious liability in England has indeed become intolerably uncertain. It is regrettable that the House of Lords in Dubai Aluminiun did very little to remedy this uncertainty.

Nicholas J. McBride

SALE OF GOODS—RELIANCE ON A THIRD PARTY’S SKILL AND JUDGMENT

In Britvic Soft Drinks Ltd. v. Messer UK Ltd. [2002] EWCA Civ 548, [2002] 2 Lloyd’s Rep. 368, affirming Tomlinson J. [2002] Lloyd’s Rep. 20, carbon dioxide produced by Terra Nitrogen (UK) Ltd. was sold to Messer and resold to Britvic, who used it in the manufacture of sparkling drinks. The carbon dioxide was contaminated by benzene, but in such small quantities as to pose no danger to health. Even so, because of adverse publicity the drinks as a practical matter were unsaleable. Damages were awarded to Britvic against Messer under the Sale of Goods Act 1979, s. 14(3) as being unfit for the buyer’s particular purpose. The case raises a couple of points of interest.

First, although we are taught that “goods” are “chattels personal”, which Halsbury (and, much earlier, Blackstone) defines as “things which are at once tangible, movable and visible”, there has never been any doubt that gases (and even air itself, e.g. as compressed air) are “goods” within the Sale of Goods Act, despite
lacking two of these three attributes. This was taken for granted by all concerned in the present case.

The issue of most interest was not pursued before the Court of Appeal. Section 14(3) not only requires that the buyer should make known to the seller, expressly or by implication, the particular purpose for which the goods are being bought, but also that the buyer should rely on the seller’s skill and judgment. (In fact the onus of proof is reversed, the burden being on the seller to show that the buyer did not so rely, but nothing turns on this for present purposes.) Here Messer, the seller, had exercised no skill or judgment at all: both parties had relied on Terra not to have permitted its product to be contaminated. In Tomlinson J.’s view, this was sufficient. Messer was in breach of section 14(3) because Britvic had relied on the skill and judgment of Terra, the person from whom the seller had acquired the goods. Plainly this ruling makes good commercial sense, however much it departs from the literal meaning of the section, at least in situations where the product passes down the chain of sales and subsales with none of the intermediate parties being able to make an independent assessment of its quality. But it will not be so easy in many other cases to attribute to the producer of the goods knowledge of the “particular purpose” of the eventual end user—herring meal is not necessarily fed to mink, or plastic pails sent to Kuwait. So this innovatory ruling is likely to be of limited application.

L.S. Sealy

SYNDICATED CREDIT AGREEMENT: MAJORITY VOTING

In Redwood Master Fund Ltd. v. TD Bank Europe Ltd. [2002] EWHC 2703(Ch), [2002] All E.R. (D) 141 (Chancery Division, Rimer J.) the court upheld a clause in a syndicated bank credit agreement empowering a majority to bind a dissentient minority even though the minority were placed in a worse position than the majority.

The effect in summary of the case law on creditor voting clauses—mainly in the context of bond issues—when combined with the case law on shareholder voting, voting on corporate schemes of arrangement and the like, is that the clauses are valid provided that (1) the decision was clearly within the terms of the power, (2) the majority were in good faith, i.e. not motivated solely by malice or vindictiveness, (3) there were no secret advantages to some creditors to procure their votes, e.g. bribes, and (4) most difficult of all, there was no unjust oppression of the minority so as to constitute a fraud
on the minority, *e.g.* by a discriminatory decision denying the minority an advantage granted to the majority. This has sometimes been stated as a test that the power conferred on majorities must be exercised bona fide for the purpose of benefiting the class as a whole—a kind of pale fiduciary altruism. It is this test of overall benefit which was particularly examined in *Redwood*.

The facts were that an international syndicate of banks agreed to make a syndicated credit of Euro 4 billion to a Dutch telecoms group. The credit agreement contained the usual provision entitling the majority lenders—in this case two-thirds by value—to amend the credit agreement, subject to entrenched provisions requiring unanimity, notably an extension of due dates for principal, a reduction in the margin of interest and an increase in a lender’s commitment. The borrower (there were two of them in fact) got into serious financial difficulties and an event of default occurred. The main creditors were the syndicate of banks and also bondholders (for several billions of euros) who endeavoured to work out a restructuring plan to keep the group afloat. So far as relevant, the syndicated credit agreement contemplated two types of facility: the A facility which was a revolving credit and a B facility which was a fixed term loan. When the crisis struck, the A facility was wholly undrawn but the B facility was almost fully drawn.

The upshot of the bank negotiations with the borrower was that the bank lenders agreed a waiver letter whereby the facilities were to be reduced. Most of the reduction was to be achieved by the borrower drawing on the undrawn A facility—the revolving credit—to pay back part of the B Facility—the term loan. This arrangement involved a lifting of the draw-stop caused by the default and a relaxation of financial covenants.

When the syndicated credit was signed, the lenders participated in both the facilities pro rata and so it would not have mattered that one was drawn to repay the other. But some of the original lenders had transferred their commitments to lend under the A facility (pursuant presumably to usual novation clauses in the credit agreement) to various hedge funds and had paid the funds to take over their commitments, *e.g.* Euro 35 for a Euro 100 commitment. These transfers had taken place after the default and when the terms of the waiver were being negotiated. Presumably the hedge funds gambled on the chance that the commitments they had taken over would be reduced by the waiver when finally agreed and that the sum they were paid for the transfers plus recoveries on any reduced loans they might have to make would exceed their losses on those loans. Secondary market trading of distressed loans is common.
The funds had just over 2 per cent. of the exposures and the amending waiver letter was passed by a majority of nearly 82 per cent. The funds objected that the majority decision was invalid, mainly on the ground that their commitments under the A facility were being used to pay back the loans of the holders of the B facility who were in fact those voting for the majority decision, i.e. the majority were enriching themselves at the expense of the minority and this was a fraud on the minority.

The court held that the majority lender decision was valid. There was no bad faith in the sense of injurious ill-will or malice towards the minority. Further, although the funds in the minority were disadvantaged because they had to pay out to the term lenders, this was a commercial decision which the majority were entitled to take, and not manifestly unfair and an oppression of the minority because (amongst other things) there were benefits for all lenders, e.g. the potential survival of the group, the payment of a waiver fee and an increased interest rate. The majority had not intended to discriminate against the minority: the allocation of the reductions between the facilities was required by the borrower to improve its cash flow.

The court stressed that, in cases where there were conflicts of interest between classes of creditors, one object of the voting clause was to resolve the conflicts by majority voting and it was unrealistic for lenders to have to educate themselves about the position of other lenders. If all classes had to be treated equally or the majority had to show that the decision benefited each member of the class, then the voting clause would often be paralysed and a small minority could veto the majority.

In political democracies the majority can vote out of vindictiveness and they can also vote for a government which will vengefully redistribute the wealth of the minority rich to the majority poor. In financial democracies the law requires higher standards of fair dealing. While each case will depend on the facts and the motives, the Redwood case pitches the standard at a more realistic level.

PHILIP R. WOOD

EXPLAINING RE ROSE: THE SEARCH GOES ON?

It is often stated that equity will not perfect an imperfect gift: failed donative intent will not be construed as a declaration of trust (Milroy v. Lord (1862) 4 De G.F. & J. 264). The justification, as
recognised by Maitland (Lectures on Equity, p. 74), arises from the fundamental difference between donors and trustees. The donor divests himself of all responsibility regarding the property he gives whilst the trustee often assumes onerous fiduciary duties over property. Thus to impose trusteeship upon a would-be donor is to impose an outcome that results in far greater responsibility than the donor anticipated. Re Rose [1952] Ch. 499 recognises an exception to this rule, namely that when a donor has done all that only he was able to do to effect a gift at law so that the donee is able to complete the legal transfer by himself, the donor will hold the property on trust for the donee and the gift, although imperfect at law, is effective in equity. Yet Re Rose provides no conclusive explanation for this exception. The Court of Appeal, in Pennington v. Waine [2002] EWCA Civ 227, [2002] 1 W.L.R. 2075, has sought to provide such an explanation.

In Pennington the donor purported to give shares in a company to her nephew. At the donor’s death the share register had still not been changed. Therefore clearly there had been no transfer of the legal title. Nevertheless the Court of Appeal held that the gift was effective in equity by means of a trust, but did not state clearly whether that trust was express or constructive.

The trust recognised in Re Rose was probably a constructive trust lasting only until perfection of the legal title. This trust creates an equitable interest in the shares. Contrary to this, in Pennington, Clarke L.J. interpreted Re Rose as an example of an intentional transfer of an equitable interest. An express trust is the outcome of his reasoning. Yet the donor in Re Rose was the absolute owner of the shares. There had been no prior separation of the legal and equitable titles. As Lord Browne-Wilkinson pointed out in Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] A.C. 669, 706, where there has been no separation, no equitable interest exists. There was no equitable interest to transfer unless the donor first created it by a declaration of trust. Re Rose examined steps taken by the donor to transfer the legal title to shares: for example, sending the signed share transfer forms to the company. The donor clearly intended to transfer the absolute title to property. He intended to make a gift, not to declare a trust. Thus Clarke L.J.’s “intentional transfer” interpretation of Re Rose in reality advocates construing clear donative intent as a declaration of trust, a contradiction of Milroy v. Lord. A constructive trust, on the other hand, arises by operation of law, independently of intention, and so avoids this problem.

Furthermore, where there is a transfer of an equitable interest then a donee has rights against a donor automatically. He has
received a perfect gift of the equitable title and has no need of equity’s intervention to aid him. Interpreting Re Rose as a transfer should render all discussion of the principle that equity will not perfect an imperfect gift irrelevant. The very fact that the judgments in Re Rose spent so much time discussing the rule and then justifying the aid of equity on the particular facts of the case indicates that it was certainly not considered at the time to be a case of a transfer.

Arden L.J., in Pennington, adopted a more hybrid approach, stating at para. [65] that “there could not be a constructive trust until the gift was perfected”. Arguably, there is no need for a constructive trust if the gift is perfect, and if the gift is imperfect it is the constructive trust that perfects it in equity, in the interim before perfection at law. Although Arden L.J. appeared, at times, to employ the “intentional transfer” reasoning, at para. [59] and implicitly at para. [64] she seemed to support the idea that a constructive trust created the equitable interest in Re Rose.

In Hurst v. Crampton Bros. (Coopers) Ltd. [2002] EWHC 1375, the next stage in this litigation, Jacob J. stated at para. [36], “[the donor in Pennington] has done more than merely give the beneficial interest. She has agreed to give the legal title and provided a form of transfer executed by her”, demonstrating again that the trust in Pennington was an interim constructive trust pending perfection of the legal title.

It is important to clarify what type of trust is involved since, by virtue of section 53(2) of the Law of Property Act 1925, constructive trusts but not express trusts are exempt from compliance with the formalities provisions of section 53. Furthermore, it affects the factors looked for to justify the finding of the existence of a trust. As discussed previously, an express trust would require evidence of the donor’s intention to create a trust whereas a constructive trust could exist without such intention. Yet a constructive trust which arises by operation of law does require an ascertained trigger to cause it to arise.

Both Clarke and Arden L.JJ. agreed that it would have been unconscionable if the donor in Pennington, or subsequently her executors, had been permitted to resile from her original gift. Arden L.J. introduced unconscionability as the trigger causing a constructive trust to arise. It had been assumed for the purposes of the decision that there had been no delivery to the company of the signed share transfer form, and, for this part of Arden L.J.’s decision, that the form remained with the donor. Therefore the donor in Pennington, unlike the donor in Re Rose, had not put the donee in a position to complete the legal transfer himself and hence,
a new test had to be formulated. Arden L.J. was also keen to put the test on a principled basis. However the support that she derives from *T. Choithram International SA v. Pagarni* [2001] 1 W.L.R. 1, in formulating a trigger test of unconscionability, is not entirely analogous. The unconscionability discussed in that case resulted from a duty that the donor had because he was a trustee. He had already been construed as declaring himself to be a trustee. In *Pennington* unconscionability is being used to justify imposition of trusteeship.

Interestingly, in *Re Rose*, as in *Pennington*, the donor was not in fact trying to resile from his gift. The challenge came from third parties seeking to upset what the donor still intended, or had intended until death, to be a valid gift. The test is formulated therefore on a hypothetical basis, namely: if the donor had attempted to resile, would equity have permitted this? It is far easier to justify equity’s aid when such aid is, in fact, simultaneously realising the intentions of the donor.

The donee in *Pennington* had agreed to become a director in the company, which required a share qualification, and the donor had expressly told the donee that he need not do anything further to secure the transfer of shares. These were the factors that justified a finding of unconscionability. Yet these do not constitute detriment to the donee. In *Banner Homes Group plc v. Luff Developments Ltd. (No. 2)* [2000] Ch. 372 two parties agreed that one would buy land and then both would own the land together, as part of a joint venture. The party making the acquisition gained from this agreement by not having the other party as a rival in the buying process. Thus it was unconscionable for this party to renge on the previous agreement, and a constructive trust arose to prevent this. Yet the donor in *Pennington* had not gained anything. So why was equity’s preemptive strike, precluding a retraction which had not actually been attempted, justified in the name of unconscionability when the donee had not incurred any detriment in reliance upon the gift and the donor had not gained any benefit? On other facts disclosing genuine unconscionability the imposition of a constructive trust may be justified, but on the facts of *Pennington* and *Re Rose* the search for an explanation continues.

Abigail Doggett

FINANCIAL ASSISTANCE: A RESTATEMENT

Section 151 of the Companies Act 1985 prohibits the giving by a company of financial assistance for the purpose of the acquisition
of its shares or for the purpose of reducing any liability incurred for the purpose of the acquisition. This penal section is notoriously broad and uncertain in its application. Judges may therefore be tempted to accept constructions which narrow its application at the expense of straining the statutory words. The Court of Appeal’s recent decision in Chaston v. SWP Group plc [2002] EWCA Civ 1999, [2003] B.C.C. 140 has reaffirmed the importance of adherence to the statutory wording.

SWP was negotiating to purchase DRCH’s share capital. SWP wished to obtain an accountant’s “due diligence” report, detailing the state of the target’s finances. Chaston was a director of DRC, a subsidiary of DRCH. He procured DRC to pay the accountant’s fees. The Court of Appeal, reversing Davis J., held unanimously that this constituted unlawful financial assistance by DRC for the acquisition of DRCH’s shares by SWP, and hence a breach of duty by Chaston. The leading judgment was given by Arden L.J., an expert in this area, and amounts to a restatement of the law. Buxton and Ward L.J.J.’s short judgments agreed with her analysis.

Arden L.J. began by reiterating the mischief against which section 151 is directed: that “the resources of the target company and its subsidiaries should not be used … to assist the purchaser financially to make its acquisition” (at [31]). On the one hand, the prohibition protects creditors from a sudden increase in default risk which may follow a leveraged acquisition. On the other, it protects shareholders who do not accept an offer made to sell their shares to such an acquiror, or those to whom the offer is not made.

To be prohibited, a transaction must not only constitute “financial assistance” within the general meaning of section 151, but must also fall within one of the four heads of subsection 152(1)(a). These restrict the breadth of “financial assistance” in two different ways. The first three heads (subsections 151(1)(a)(i)–(iii)) cover only specific types of transaction, and use definitional terms with recognised legal meanings (British & Commonwealth Holdings plc v. Barclays Bank plc [1996] 1 W.L.R. 1 at 13–14). The fourth (subsection 151(1)(a)(iv)) imports the general definition, covering “any other financial assistance”. It restricts this by reference to the effect on the company: the transaction must materially reduce the company’s net assets, or the company must have no net assets. On the facts, the payment of fees of circa £20,000 by a company with net assets of less than £100,000 was conceded to be a “material” reduction. Thus the arguments turned on the fourth head, allowing the Court to consider the general meaning of “financial assistance”. Arden L.J. reaffirmed (at [32]) that in contrast to the terms used in subsections 151(1)(a)(i)–(iii), this is a commercial concept, rather
than a term of legal art (Charterhouse Investment Trust Ltd. v. Tempest Diesels Ltd. [1986] B.C.L.C. 1 at 10, per Hoffmann J.). In determining whether a transaction constitutes prohibited financial assistance, what matters is its “commercial substance and reality”. The Court of Appeal elucidated how this test is to be applied.

The transaction must assist the acquisition, whether directly or indirectly. The payments alleged to be financial assistance were in respect of work done on account of the DRC Group. Nevertheless, Arden L.J. considered that “[a]s a matter of commercial reality, the fee payments smoothed the path to the acquisition of shares” (at [38]), or, as Ward L.J. saw it, the target paid for services for which the acquirer would otherwise have paid (at [54]).

Moreover, the assistance must be financial. In this respect, it did not matter that the DRC Group’s payments had no impact upon the price paid by SWP for the shares. This suggests that the “financial” aspect of the transaction is assessed from the point of view of the target company. As Arden L.J. explained during argument, creditors and minority shareholders might be prejudiced by any use of corporate assets to assist an acquirer (at [63]).

Perhaps the most troublesome point concerns timing. Counsel for Chaston argued that because DRCH’s assistance preceded the actual acquisition, it fell outside the prohibition, being “pre-transactional”. Arden L.J. rejected this, reasoning that “pre-transactional” assistance was capable of constituting assistance given “indirectely”, and moreover that section 151(1) expressly extends not only to actual, but also to proposed acquisitions of shares. Whilst the result in Chaston seems undoubtedly correct, the temporal scope of section 151 now merits further consideration. For example, at what point does an acquisition become “proposed”: when the vendor decides to solicit tenders, or when an offer is made?

The Court of Appeal also clarified what is not relevant to the application of section 151. First, they rejected a distinction, based on Australian authorities considered by Aldous L.J. in British & Commonwealth (above at 16–17) and relied upon by Laddie J. in MT Realisations Ltd. v. Digital Equipment Co. Ltd. [2002] EWHC 1628 (Ch) at [30], between “assistance” and a “mere inducement” to enter into a transaction.

Secondly, Arden L.J. affirmed that the application of section 151 is not conditioned upon showing objective detriment to the target company. For example, financial assistance given by way of loan could be objectively beneficial to the company—if the borrower is a good credit risk and the interest rate favourable—but would still be prohibited.
Thirdly, they rejected Davis J.’s finding that although DRCH’s purpose in paying the accountants was to facilitate the due diligence exercise, the acquisition of its shares was merely a reason for forming this purpose. This attempt to reverse the logic of Lord Oliver’s well-known distinction in Brady v. Brady [1989] A.C. 755 at 779–780 by applying it to the primary prohibition rather than the section 153 exception would, as Arden L.J. put it, “turn Brady, and the section, on its head” (at [49]). DRCH’s sole purpose was to facilitate the acquisition of its shares by SWP. Moreover, the fact that the directors had acted in good faith in the interests of the company did not negative this purpose, being relevant only to their motive in forming it.

The Court of Appeal’s approach, by focusing attention on the “commercial substance” of the transaction, brings increased certainty to the formulation of the law. Doubtless, however, much scope will remain for differences over the application of this test.

John Armour

CONDEMNED TO LIFELONG IGNORANCE

A Dickensian law dating back to the dire days where women were driven, by poverty and stigmatization of single motherhood, to give birth in secret and abandon their newborn children outside nursing homes, allows women in France to give birth anonymously, which means that the child will never know the identity of its natural mother, nor—in practice—that of its father or any siblings, who in turn will never learn of the existence of the child. This legislative regime, originally introduced to encourage women to give birth to unwanted children in the safety of a hospital, is still invoked by roughly 600 women every year. Its compatibility with the European Convention of Human Rights was challenged unsuccessfully in a recent case before the European Court of Human Rights: Odièvre v. France, judgment of 13 February 2003 (Grand Chamber).

The applicant had been born anonymously in the 1960s and grown up with adoptive parents. Upon her request for information regarding her origins, the French authorities had furnished her with a non-identifying description of her biological family (which, incidentally, revealed the existence of siblings), but refused to disclose the identity of her birth mother or any other blood relative to her. The applicant argued that the non-disclosure of this (fortuitously available) information contained in her file amounted to a violation of her right to private and/or family life protected by
Article 8 of the Convention, or alternatively of Article 8 read in conjunction with the prohibition of discrimination in Article 14. While a majority of ten judges rejected the applicant’s complaint on both grounds, an impressive minority of seven, encompassing inter alios the President of the Court and the President of the Chamber which originally relinquished jurisdiction in favour of the Grand Chamber under Article 30 of the Convention, was prepared to endorse the applicant’s case under Article 8.

All the judges in this case agree that, as an aspect of her right to private life under Article 8, the applicant has “a vital interest protected by the Convention in obtaining information necessary to discover the truth about important aspects of [her] personal identity, such as the identity of [her] birth parents” (Judgment, para. 29; Joint Dissenting Opinion, para. 3). Beyond that, there is little overlap between their views. The majority essentially accepts that “[t]he French legislation … seeks to strike a balance … between the competing interests”, and finds that “France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue” (para. 49). The minority, however, is adamant that proper balancing is impossible under a law which in practice gives birth mothers a power to keep their identity hidden from their child which is absolute, and insusceptible to being “overruled” in the interests of the child (Joint Dissenting Opinion, para. 7).

Do biological parents have a prima facie duty towards their offspring to reveal their identity to them? The majority’s judgment is defensible only on the assumption that they do not, because if they do, it can hardly be a proportionate restriction (“necessary in a democratic society”) to allow mothers to keep their identity from their biological children merely because they wish to do so. Rather, in order to protect the child’s right to know, the State would be obliged to put arrangements in place by which that right was protected in a way that did not make it unenforceable in practice. Under such a regime, sufficient information to identify the mother would have to be collected at birth, her wish that her identity be not revealed to the child and the reasons for it be recorded, and once the child sought to exercise its “right to know”, an independent decision-maker would balance the competing interests against each other, with the child’s disclosure interest prevailing unless it was outweighed by very grave private or public interests in preserving the mother’s anonymity. This was in fact the view taken by the minority, and it is unsurprising that the minority arrived at this opinion after denying that a mother can have a legitimate interest in making a unilateral, unchallengeable decision to “bring a
suffering child into the world and condemn it to lifelong ignorance” and “by the same means paralyse the rights of third parties, in particular those of the natural father or the brothers and sisters” (Joint Dissenting Opinion, para. 7).

The applicant argued her case as a claim about a right of “access to a file”. This clouded the real issue. The nub of the case is not whether the applicant has a right to see a file, but whether the applicant has a right to know who her biological mother is. If she does have such a right, the existence of the file puts the State in the fortunate position of being able to comply with its positive obligation to ensure that the applicant can trace her birth mother. If she does not have any such right, the identifying information in the file can and arguably must be withheld from her in order to protect her mother’s prevailing confidentiality interest.

A clear realisation of this point would have enabled the Court to come to grips with the temporal aspect of the case. The majority’s argument that when the request for information is made, the competing interests of two adults face each other, is misplaced. The crucial moment for the assessment of the respective rights and interests is the moment when the child is born and its and its mother’s interests diverge, the crucial question being whether the State, in order to protect the rights of the child, has a duty to record the mother’s identity against her will. It matters not whether the child demands that knowledge while still a minor or an adult. Nor, if there is no duty to record it, does it matter whether the information is in fact available at the time it is sought and could enable the child to identify its mother. What matters is whether it is lawful for the State to allow and in fact assist a parent to keep his or her identity a secret from their child.

*Odière v. France* is an important case, not least because of its implications for the possible outcome of an eventual “right-to-know” claim brought by an IVF child seeking retrospective lifting of sperm donor anonymity. Clearly, if the interests of a child who was conceived naturally and independently of any legal guarantee of a choice of anonymity for its mother cannot outweigh the mother’s anonymity interest once she has availed herself of a legal option to give birth anonymously, a child who might not have been conceived at all but for the prior assurance of anonymity for the gamete donor provided by the provisions of the Human Fertilisation and Embryology Act 1990 has an even weaker case under the Convention. Yet the sharp words of the minority act as a reminder that society will eventually have to revisit the question whether it is responsible public policy to enable people to bring human beings into the world who, as a result of conscious
legislative design, will be ignorant of their biological heritage. The current campaign by children conceived through gamete donation to have gamete donor anonymity, at least for future cases, removed from the statute book, will only be momentarily deflated.

Antje Pedain

TAXATION—COMPOSITE BUSINESS TRANSACTIONS—BUSINESS TRANSACTIONS OR NOT?

Tax lawyers have to apply the concepts contained in the tax legislation to facts created by taxpayers; this is not easy. In Barclays Mercantile Business Finance Ltd. v. Mawson (Inspector of Taxes) [2002] EWCA Civ 1853, [2003] S.T.C. 66, the Special Commissioners agreed with the Revenue; Park J. [2002] EWHC 1527 (Ch), [2002] S.T.C. 1068, agreed with the Special Commissioners but for rather deeper reasons. Now the Court of Appeal has accepted the taxpayer’s characterisation, making some very critical remarks about both lower level decisions. Normally, that would be the end of the matter, but the members of the Court of Appeal went out of their way to say, as closely as judges can do, that the recent decision of the House of Lords in MacNiven v. Westmoreland Investments Ltd. [2001] 2 W.L.R. 377, the case which rewrote the still emerging rules about when composite transactions are treated as one single transaction for tax purposes, had left the courts with a test which is unworkable (e.g. para. [69]).

Money had been spent by BMBF (a part of Barclays banking group) in buying an asset from X which it then leased back to X. If a company incurs expenditure on the provision of machinery and plant for the purposes of its trade, it is entitled to a capital allowance and can treat a percentage of that expenditure as a deductible expense in calculating its taxable profit. BMBF would expect to get the capital allowance; this would mean a lower rent and so a sharing of the fiscal benefit with X.

Such fiscal carrots attract manipulation; the question was whether the facts still fitted the terms of the capital allowance legislation—had BMBF “incurred expenditure” on the acquisition of an asset? The sums involved were significant. In simplified terms the asset was a pipeline which had just been built for X at a cost of £91m; X sold the pipeline to BMBF for £91m; BMBF leased it back to X which made a sublease to one of its subsidiaries which was going to transport and deliver the gas in accordance with X’s directions. So far the lease looks reasonably normal. Further
transactions of a financial nature, however, ensured that all the relevant payment would be made—there was a guarantee and a cash collateral arrangement under which the bank could be sure that the cash would be available to meet the terms of the guarantee. If, the Revenue argued, all this meant that BMBF was not at any risk, how could it be said that it had incurred any expenditure? BMBF had paid money out, but it was all coming back again and in a totally secured way.

The courts sometimes treat circular transactions as a single composite transaction but, as this case shows, they have sometimes struggled to provide a coherent explanation of what they are doing. The basis for these principles is to be found in statutory interpretation and not in some mystical external power to annihilate avoidance transactions: Craven v. White [1989] A.C. 398 and Westmoreland Investments v. MacNiven [2001] 2 W.L.R. 377. It is of course possible for a court to look at a composite transaction and hold that the scheme fails as a matter of statutory construction without having to rely on the composite transaction doctrine at all: IRC v. McGuckian [1997] 1 W.L.R. 991. Conversely, it is possible to hold, as a matter of statutory construction, that the composite transaction doctrine does not apply even though there is an avoidance scheme; this arises when the statutory concepts are to be interpreted “juristically” rather than “commercially”: MacNiven v. Westmoreland Developments Ltd. [2001] UKHL 6, [2001] S.T.C. 237. In BMBF the Court of Appeal judges expressed concern bordering on bemusement about how they were to apply the commercial/juristic distinction and, no less crucially, how they were to identify the particular concept which was to be classified.

The Court of Appeal also disagreed with the lower courts on the facts and on the law. Where the Commissioners had concluded that payments passing round the guarantee and collateral regime were financed by the United Kingdom taxpayers, the court said there was no evidence to support that (paras. [34] and [35]). Whereas Park J. had found (para. [51]) an underlying legislative purpose to provide lessees with finance at attractive rates to help them develop their business, the Court said, more simply, that the purpose was to encourage expenditure on machinery (para. [37]). Whereas Park J. found incurring expenditure to be a commercial concept (para. [57]), the Court of Appeal suggested that it was a legal one (paras. [44] and [74]). Whereas Park J. had wondered whether Barclays had not incurred any expenditure at all (para. [75]), the Court of Appeal felt otherwise (para. [47]). This level of disagreement is disturbing.
The thread that runs all through the Court of Appeal judgments is that BMBF was carrying out a normal financial transaction for good business reasons; on the evidence there was nothing artificial about the scheme. The composite transaction doctrine applies only where the steps inserted have no business purpose and so could not apply here and, even if it did apply, then its conditions were not satisfied.

There is much about the BMBF case that is unsatisfactory. Park J. was leading counsel in many of the House of Lords cases which have shaped the law and there is much about his approach which is convincing and attractive. However, the facts as interpreted by the Court of Appeal seem to preclude the deployment of that approach. The judges in the Court of Appeal were clearly unhappy with what MacNiven had left them to do. In that case Lord Hoffmann said that a concept was juristic if an ordinary person would say that one should ask a lawyer for an answer (para. [58]); one senses that the Court of Appeal thought the test should be to ask Lord Hoffmann. Leave to appeal has been granted—by the House of Lords. If the House takes the same view of the facts as the Court of Appeal, this may prove to be a superfluous exercise. The appeal will only be justified if the House brings some intellectual cohesion to an area of law which is in danger of falling into disrepute and is of critical importance to taxpayers and revenue departments alike. Whether that is achieved depends in part on the arguments being properly presented and analysed; sadly, it may also depend on who is on the panel which hears the case.

John Tiley

IDENTIFYING THE LOCUS OF THE TORT

In Emnstone Building Products Ltd. v. Stranger Ltd. [2002] EWCA (Civ) 916, [2002] 1 W.L.R. 3059 the claimant, who had supplied sandstone for a building in Edinburgh, retained the defendant to investigate and report when the stone developed unsightly staining. The contract was concluded at the defendant’s Scottish office and provided that research and testing were to be carried out in both England and Scotland, but predominantly in Scotland. Both parties were English companies.

The defendant reported, recommending that the sandstone be treated with oxalic acid, and this treatment was duly carried out. A few months later, however, the stone had again become disfigured.
When independent consultants advised that oxalic acid was likely to have exacerbated the staining problem, the claimant sued the defendant for negligence and/or breach of contract.

A trial of preliminary issues was ordered to determine both the governing law of the contract and the appropriate choice of law for the tort claim. The significance of these issues was that under Scottish law the claim was statute-barred. The judge at first instance held that Scottish law governed both claims: as the applicable law of the contract, under Article 4(2) of the Rome Convention, and, by way of an exception to double actionability, as the *lex loci delicti*. The claimant appealed successfully on both counts.

The Court of Appeal judgment raises a number of interesting issues about the scope of Article 4(2) of the Rome Convention. However, this note focuses on the court’s decision that the locus of the tort was England and examines the two material considerations upon which that decision was based. The first of these was the proposition, said to derive from *Diamond v. Bank of London & Montreal Ltd.* [1979] Q.B. 333, that, in the case of fraudulent or negligent misrepresentation, the tort is committed where the representation is received. The second was the court’s finding that the crucial breach of duty was the defendant’s recommendation, contained in a report sent to the claimant at its premises in County Durham, to use oxalic acid to clean the stone.

The events in *Emstone* all occurred before 1 May 1996 and thus the Private International Law (Miscellaneous Provisions) Act 1995 did not apply. That Act replaces the requirement of double actionability, in most cases involving foreign torts, with a general rule based on the applicability of the *lex loci delicti*, subject to a proper law exception. In future, cases involving fraudulent or negligent representations will fall under section 11(2)(c) of the Act and will be governed by “the law of the country in which the most significant element or elements of [the events constituting the tort] occurred”. However, *Emstone* is likely to retain significance under the 1995 Act given the view of both the Law Commission and Dicey and Morris that cases involving fraudulent and negligent representations should continue to be decided in a way which is consistent with the existing case law and with the ratio of *Diamond*, in particular. (See Law Com. Working Paper No. 87, *Private International Law Choice of Law in Tort and Delict* (1984), paras. 5.26–5.27; Dicey and Morris, *The Conflict of Laws*, 13th edn. (London 2000), paras. 35-085–35-086.)

In *Diamond*, the plaintiff brought an action for fraudulent misrepresentation against a bank in Nassau on the basis of an
inaccurate credit reference provided by the bank. A manager at the bank had provided the reference by telephone to the plaintiff in London. The Court of Appeal, although rejecting the plaintiff’s application on other grounds, was prepared to accept that the substance of the tort was committed within the jurisdiction.

This decision deserved closer attention by the court in Ennstone. In Diamond it was held that a misrepresentation occurs where the relevant statement is received and acted upon, not merely where it is received (pp. 346 and 349). That this is the ratio of the case was confirmed by the Court of Appeal in Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey (The Albaforth) [1984] 2 Lloyd’s Rep. 91, 92 and 96 and is now well established. In Ennstone the report was received in England but it was relied on in Edinburgh when the claimant attempted to clean the Standard Life building with oxalic acid, and in such circumstances the rule in Diamond unhelpfully points to two different loci.

An analogous case was considered by the High Court of Australia in Voth v. Manildra Flour Mills Pty. Ltd. (1990) 171 C.L.R. 538. The facts of that case were that an accountant was engaged in Missouri, in the United States, to provide accounting services to a Kansas company. The accounts were later relied upon in Australia by the parent company of the Kansas company. The parent company alleged that the accounts were negligently prepared and that it had suffered loss as a result. The issue before the court, on a forum non conveniens application, was where the tort had occurred.

The majority acknowledged that the rule in Diamond would pose a problem wherever a fraudulent or negligent statement was received in one place and acted upon in another (p. 568). Looking for a way out of this problem, they turned to the rule in Distillers (Biochemicals) Ltd. v. Thompson [1971] A.C. 458, saying that “in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in Distillers, where, in substance, the act took place” (p. 568). In the event, it was held that the locus of the tort committed by the accountants was Kansas, where the accounts were prepared, and not Australia, where they were received and relied upon by the parent company. Voth is a useful example of how a case involving a statement received in one place and acted upon in another might be dealt with by the English courts.

As for the court’s finding in Ennstone that the crucial breach of duty on the part of the defendant was its recommendation to use oxalic acid to clean the stone, this was far from being an obvious
or inevitable characterisation of the facts. Indeed, the defendant’s breach could be better described as the negligent provision of services. The defendant’s argument that it was required to do more than just provide advice was a strong one: it was engaged to provide consultancy and testing services, not merely to provide a recommendation. Moreover, any error in the final report must presumably have been the result of an earlier omission or miscalculation in the research and testing.

Voith is itself a strong decision in a case where the breach has been characterised as the negligent provision of services. It provides clear authority for the proposition that a claim regarding the negligent production of accountancy advice may arise where the accountancy is performed, rather than where the information is relied upon (p. 569). It is not a great leap from there to the proposition that a claim for the negligent provision of professional services in general may arise where those services are performed. Such a rule is surely more appropriate than the rule in Diamond wherever the bulk of services to be provided consists of research, development and preparation and where any report or advice is merely the end product of these services.

JOANNA PERKINS