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CASE AND COMMENT

SCARCE RESOURCES AGAIN

R. v. Manchester City Council, ex p. Stennett [2002] UKHL 34, [2002] 4 All E.R. 124 is the latest in a series of cases concerning the welfare of vulnerable members of our society and the scarce resources available to public authorities to meet those individuals' needs. Earlier examples include the education of a child with special needs (*R. v. Essex CC, ex p. Tandy* [1998] 2 All E.R. 769), essential non-nursing care for the elderly or infirm (*R. v. Gloucestershire CC, ex p. Barry* [1997] A.C. 584), accommodation (*R. v. Sefion BC, ex p. Help the Aged* [1997] 4 All E.R. 532) and even access to potentially life-prolonging medical treatment (*R. v. Cambridge AHA, ex p. B* [1995] 1 W.L.R. 898). *Ex p. Stennett* concerns the welfare of another vulnerable group, those who have been compulsorily detained under the Mental Health Act 1983.

In this case, the friction between scarce resources and the welfare of detainees under the 1983 Act derives from the duty imposed by section 117 of the 1983 Act on relevant public authorities to provide after-care services for those discharged from compulsory detention. There has been some confusion about whether an authority is entitled to charge individuals for those services. The three local authorities involved in this case did charge for the after-care services they provided, even though numerous indicia exist, including a 1994 Department of Health circular, which state that fees for section 117 services cannot be justified by reference to other sections of the 1983 Act which do allow a charge to be made for different services. The lawfulness of the local authority charges was challenged in these judicial review proceedings. The court of first instance and the

Court of Appeal found that there was no right to charge for section 117 services.

On appeal to the House of Lords, the public authorities offered a number of possible interpretations of section 117. One such interpretation was that whilst the section conferred a duty on an authority to provide after-care services, it was only a “gateway” provision. As such, section 117 led to other statutory sources, including the National Assistance Act 1948 s. 21, which does countenance a charge for provision of services. A further, more strained, interpretation was proposed: section 117 creates a duty but there is no corresponding power to deliver those services without reference to the National Assistance Act 1948 (para. [11]). Either interpretation would allow a charge to be made and thus conserve public authority resources. The decision of the House of Lords definitively rejected these interpretations and should prevent time and money being spent on future litigation. However, there will be a cost: public authorities will have to bear the expense of after-care services themselves. Lord Steyn, with whom the other members of the House agreed, noted that this cost would be considerable (between £30 million and £80 million), stretching what are already limited public resources.

Given that Lord Steyn acknowledged the significant financial impact of disallowing charges, and given that in the past the courts have been unwilling to intervene in questions of public authority resources, what was the basis for this decision? On one hand there is a very simple rationale for the decision. A public body can only do that which it is authorised to do (as noted by Buxton L.J. in the Court of Appeal [2001] Q.B. 370). Section 117 cannot be read as authorising public authorities to raise a charge owing to the “free standing” (para. [10]), as opposed to “gateway”, nature of the section. But Lord Steyn also considers counsel’s argument that such a reading of section 117 would be incompatible with other statutory provisions allowing a charge to be made for services. In effect, Lord Steyn seeks to identify Parliament’s legislative intention so as to distinguish the provision of after-care services for discharged compulsory detainees under the Mental Health Act 1983 from services provided under the National Assistance Act 1948.

His Lordship does make a distinction and it seems to lie in the involuntary aspect of receipt of some services. It would be wrong to charge persons for services which they do not seek but require by virtue of the risk they pose to themselves and to others (para. [15]). Furthermore, as in *R. (on the application of H) v. Ashworth Hospital Authority* [2002] EWCA Civ 923, if a detainee does not have after-care arranged his detention may be continued. Therefore,

unwillingness to pay plus assessment as to ability to pay could contribute to delay in arranging after-care, resulting in continued loss of liberty. In contrast, the majority of the precedents concerning scarce resources, for example in education, nursing care or accommodation, relate to potential recipients of services who positively seek those services and are not at risk of continued detention due to non-compliance. They are of course at risk of other losses but not of that very English freedom, liberty.

Lord Steyn's analysis identifies the section 117 duty, in contrast to other welfare services provided by public authorities, as incontrovertibly free-standing. Why then did public authorities defend charges for section 117 services when explicit advices to the contrary exist and the relevant statutory provisions are not ambiguous? The answer must lie in the familiar attempt by public authorities to conserve their scarce financial resources. When this issue has arisen before, the courts have either decided in favour of the authority and limited access to necessary services or, as in *ex p. Tandy*, by narrow interpretation of needs and assessment, carved out niches in which authorities must provide necessary services. However, in *Stennett*, the court was not constrained by its traditional refusal to question resource allocation policies because the question before it was one of raising revenue, not spending or allocating resources. Nonetheless, Lord Steyn goes beyond a simple exposition of statutory interpretation to give a strong defence of the needs of the vulnerable. Sadly however, given the specific statutory provisions relevant to this case, this defence is unlikely to be extended to other vulnerable groups. Thus cases representing the full spectrum of welfare needs are likely to parade before the courts until the problem of scarce resources is addressed, not by the courts, but by the proper forum: Parliament.

ANNE SCULLY

THE END OF ESTOPPEL IN PUBLIC LAW?

THE prospective buyers of a waste treatment plant ("Reprotech") wished to use the site to generate electricity from the waste produced. They asked the Chief Planning Officer of the local council whether this would be a material change of use, for which planning permission would be required, and were assured that it would not. After they bought the land, the council insisted that the Officer lacked authority to make such a determination and required a formal application for planning permission; this was met by local

opposition. Must the buyers make such an application and suffer a reduction in the value of the land if the application is unsuccessful, or should the public bear the consequences of the unauthorised act of the Officer? This was one of the questions facing the House of Lords in *R. v. East Sussex County Council, ex p. Reprotech (Pebsham) Ltd.* [2002] UKHL 8, [2002] 4 All E.R. 58. Their Lordships denied that there had been a “determination” for the purposes of the Town and Country Planning Act 1990, s. 64, upon which Reprotech sought to rely, but the obiter discussion of the proper role of estoppel in public law is the focus of this note.

On one view, based on the decision of Denning J. in *Robertson v. Minister of Pensions* [1949] 1 K.B. 227, the council ought to be estopped in the same way as a private party, since the loss suffered by the private party is the same regardless of the nature of the representor it seeks to estop. Furthermore, in *Lever Finance v. Westminster London Borough Council* [1971] 1 Q.B. 222, 231 Lord Denning M.R. pointed to the difficulties faced by individuals in discovering the lack of actual authority of the representor.

An alternative view is that to give effect to the decisions of officers made beyond their powers would allow an expansion of the powers conferred by the legislature, contrary to the ultra vires principle (see *Minister of Agriculture and Food v. Matthews* [1950] 1 K.B. 148, 154). This stricter view forms the basis of the leading Opinion of the United States Supreme Court in this area, *Federal Crop v. Merrill* 332 U.S. 380 (1947).

The impossibility of reconciling such divergent views is evident from the decision of the Court of Appeal in *Western Fish Products v. Penwith District Council* [1981] 2 All E.R. 204. Megaw L.J. held that the general principle was that estoppel had no place in public law, but that two exceptions to this existed: first, where the public authority had delegated the making of a particular decision to an officer; and secondly, where the public authority waived a procedural requirement in its decision-making process. It has been doubted whether the first exception is an example of estoppel at all, and the scope of the second exception is unclear. In particular, the separation of procedural and substantive requirements has been questioned in the United States (see *Schweiker v. Hansen* 450 U.S. 785 (1981)).

While it is clear that their Lordships did not approve of the *Lever* case and its kin, it is unclear whether they wished to exclude estoppel from public law entirely. On the one hand, Lord Hoffmann (with whom all their Lordships agreed) and Lord Mackay remarked that it was time for public law to “stand upon its own two feet”. The Court of Appeal in *South Bucks. District*

Council v. Flanagan [2002] EWCA Civ 690, [2002] 1 W.L.R. 2601 has since affirmed that there is “no longer a place for the private law doctrine of estoppel in public law”. However, instead of arguing from the ultra vires principle, their Lordships in *Reprotech* preferred the view that there is a public interest in ensuring that the detailed planning procedures involving public consultation should not be circumvented, regardless of the injustice suffered by the applicant.

The arguments for this position are strong in planning law: the advisory role of planning officers and the desirability of public consultation are important public interests, while the private party is likely to have legal advice, and so the burden of checking the scope of the officer’s authority is light. However, their Lordships’ argument leaves open the possibility that, in some cases, the balance of the public interest might favour giving effect to an estoppel. For example, where the private party claims a social security benefit, as in *Robertson*, the harm suffered by the public is more diffuse and the individual is less likely to have been legally advised. The experience in the United States, where there may remain a place for estoppel in “extreme circumstances”, perhaps in cases of “affirmative misconduct”, may be useful in considering the scope of this reservation. Since both *Reprotech* and *South Bucks* were planning law cases, it seems that the possibility of relying upon estoppel arguments in other areas remains, with the attendant difficulties of such a balancing of public interests.

Reprotech is also an interesting development in the relationship between the doctrines of legitimate expectations and estoppel. The orthodox conception of the relationship was that estoppel operated in cases involving unauthorised representations, whilst legitimate expectations arguments were reserved for authorised representations. Lord Hoffmann remarked that the doctrines were therefore only “analogous”. However, His Lordship then explained that, in the past, estoppel filled a gap in the protection of citizens that legitimate expectations could now fill alone. This remark is premised upon an overlap of the doctrines, and it is evident from recent cases that the doctrines, and the tests for each, are regarded as interchangeable (see *South Bucks*). This is interesting for three reasons.

First, it assumes that reliance, and hence knowledge, is required to found a legitimate expectation; this is questionable if legitimate expectations are conceived as objective constructs designed to uphold principles of good administration: see de Smith, Woolf and Jowell, *Principles of Judicial Review* (1999), para. 7–058. Secondly, the reliance upon legitimate expectations in

South Bucks., where the relevant officer had only ostensible authority, suggests that factual scenarios that were once argued using estoppel might now be argued using legitimate expectations. Hence, *Reprotech* may not effect as significant a curtailment of estoppel arguments as their Lordships contemplated. Thirdly, the case requires a re-evaluation of the theoretical justifications for giving effect to legitimate expectations. In particular, one of the main justifications—the moral force of a lawful promise made by a public authority—is less compelling in the case of unauthorised representations, and this ought now to be considered when deciding whether an expectation is “legitimate”. If legitimate expectations are no longer restricted to cases concerning *authorised* representations made by public authorities, a new rationale for the broader doctrine will be required. Such justification might be found, for example, by focusing upon the *public* interest in certainty when dealing with public authorities, rather than the *private* interest of the individual in the particular case. Whilst the clarification of the role of estoppel in public law is helpful, this encouragement to reassess the theoretical justification for the legitimate expectations doctrine will be the most useful legacy of *Reprotech*, and will be essential for the doctrine to mature in its new field of application.

SIMON ATRILL

ARBITRARY DETENTION IN GUANTANAMO BAY:
LEGAL LIMBO IN THE LAND OF THE FREE

THE dramatic terrorist attacks in the United States in September 2001 all too clearly illustrated the threat posed by international terrorism. Understandably, politicians are provoked into taking tough measures to protect their citizens from terrorist enemies. In times of danger the civil liberties implications of such measures can easily play second fiddle to security needs. Indeed, we need look no further in our jurisprudence than the discredited majority decision in *Liversidge v. Anderson* [1942] A.C. 206. Recently, Lord Woolf has warned that “the mistakes which have been made in the past, in relation to internment of aliens at the outbreak of war, should not be forgotten” (*A v. Secretary of State for the Home Department* [2002] EWCA Civ 1502 at para. [9]).

The Court of Appeal’s judgment in *R. (on the application of Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 addresses this tension between the

protection of fundamental human rights of the individual and States' responses to international terrorism. The facts are unusual. Abbasi, a British national, was captured by the United States forces in Afghanistan in January 2002 and transported to the US naval base located at Guantanamo Bay in Cuba. At the date of the hearing in September 2002, he had been held for eight months without access to a lawyer or to any court or other form of tribunal. His mother brought proceedings on his behalf contending that Abbasi's arbitrary detention was a violation of his fundamental rights. In this novel application for judicial review, the claimants sought to compel the Foreign Office to make representations on his behalf to the USA or to take other action appropriate in the circumstances.

Customary international human rights law prohibits arbitrary detention. Under customary humanitarian law, a nation at war may detain a lawful combatant as a prisoner of war (POW) until hostilities have ceased. If there is any doubt about whether a person is a lawful combatant, and hence a POW, upon capture, the Conventions provide that the detaining State should establish a tribunal to determine the issue.

According to the US Government, Abbasi is not entitled to POW status. He appears to be detained (his legal status is unclear) under the executive authority of the President of the USA in his capacity as Commander in Chief of the US Military. *Habeas corpus* applications in the US courts by non-US detainees at Guantanamo Bay have to date been unsuccessful, although further appeals are expected. The nub of the issue is that the US military has determined that Abbasi is an enemy combatant, who has not been, and may never be charged, and who is held for an indeterminate period of time and given no avenue to challenge the legitimacy of his detention before a competent tribunal. His misfortune is to inhabit a "legal black hole" (para. [22]).

The claimants argued that as Abbasi had no means to challenge the legality of his detention, the Foreign Secretary had a duty to assist him. In order to obtain appropriate relief against the Secretary of State (the United States Government was not before the Court), the claimants had to overcome issues of justiciability. The authorities have established that, in general, the English courts will not examine the legitimacy of action taken by a foreign sovereign State. The rule is not absolute. Public policy issues, including a grave infringement of human rights, may lead the courts to review the actions of a foreign State (*Kuwait Airways Corporation v. Iraqi Airways Company (Nos. 4 & 5)* [2002] 2 W.L.R. 1353, noted (2002) 61 C.L.J. 499, and *Oppenheimer v. Cattermole*

[1976] A.C. 249). After considering this jurisprudence, the Court concluded that it was necessary to consider Abbasi's legal position and that it was open to it to do so.

According to the Court, it is a fundamental principle in both English and American law that every imprisonment requires justification, and "the right to liberty and security of the person" (Article 9 ICCPR) is part of international human rights law. Given Abbasi's indeterminate arbitrary detention without any opportunity of challenge, the Court concluded that there was an apparent breach of fundamental principles in both jurisdictions and under international law, although no direct remedy for the breach was available, or sought.

The Court then considered on what legal basis the Foreign Secretary could owe Abbasi a public law duty of diplomatic assistance. According to Lords Phillips M.R., no assistance could be derived from customary international law, which had not yet recognised such a right. Nor could the claimants rely upon the European Convention of Human Rights and the Human Rights Act 1998; the jurisdiction of the Convention is territorial and the UK Government is not responsible for the predicament of Abbasi. Diplomatic assistance is not a human right secured by the European Convention. Nevertheless, the Court considered that in circumstances where a British subject is suffering a violation of a fundamental human right as the result of activities of a foreign State, a refusal to render diplomatic assistance could be subject to judicial review. In the opinion of the Court, the Foreign and Commonwealth Office, through its statements of policy, had created a legitimate expectation that a request for assistance would be considered in the light of all relevant factors.

The Court then turned to the second issue of justiciability: can the English courts adjudicate upon actions taken by the executive in the conduct of international relations? The grant of diplomatic protection by the UK Government is an exercise of prerogative power. The landmark decision in *Council of Civil Service Unions v. Minister for Civil Service* [1985] A.C. 374 established that a power derived from the prerogative is not necessarily excluded from the scope of judicial review. Review turns on the justiciability of the subject-matter in the particular case. In the view of the Court, any determination of the appropriateness of diplomatic representations will be intimately connected to foreign policy considerations, a subject-matter that is inappropriate for review by the courts. However, a public law duty to consider the position of a particular citizen "would seem unlikely to impinge on any forbidden area" (para. [106]).

The Court's willingness to extend the boundaries of judicial review where fundamental human rights are at stake is a progressive development. This decision has further opened the door to judicial consideration of issues traditionally considered immune from review. The Court has to tread a fine line in order to avoid interfering with legitimate executive discretion in the field of international relations. Indeed, the Court is proceeding cautiously. The expectations of a citizen are limited while the discretion of the Foreign Office is wide. On the facts of this particular case, it was clear that the Foreign Office had considered Abbasi's position and it would therefore be inappropriate to order the Secretary of State to make specific representations to the USA. Nevertheless, this decision is a clear indication that the courts will look closely at the exercise of power, even if it touches upon an apparently non-justiciable prerogative power.

The predicament of the detainees at Guantanamo Bay is to be considered by the appellate courts in the USA and the Inter-American Commission on Human Rights has taken up the case. One can only hope that they are rescued from legal limbo in the near future.

STEPHANIE PALMER

TREATIES AND TITLES TO TERRITORY

ON 10 October 2002, the International Court of Justice adopted the judgment on *Land and Maritime Boundaries between Cameroon and Nigeria (Cameroon v. Nigeria)*, in which it ruled on sovereignty over certain territories disputed between the litigating parties and also delimited the land and maritime boundaries between them. The differences dealt with in the case followed from the long-standing disagreements between Cameroon and Nigeria which—as is not uncommon—went back to the legal framework established by colonial powers.

The judgment deals with several issues of major significance, including delimitation of land and maritime boundaries. But the most significant aspect of the judgment was the issue of the dynamics of territorial title in the context of interaction of treaties, as normative instruments apparently or arguably conferring title on a given State, and factual realities related to such title, especially if these realities diverge from what is required by a treaty. This problem is dealt with in the judgment with regard to the title to certain Lake Chad areas, as well as to the Bakassi Peninsula.

The Court faced the argument that the 1931 Henderson-Fleuriau Exchange of Notes between France and Britain placed certain disputed areas at Lake Chad under the sovereignty of Cameroon. Nigeria opposed this argument on the basis of its alleged historical consolidation of territorial title; it claimed to have gained title through effective and long-standing occupation of the territory. The Court—without denying the facts presented by Nigeria in any significant respect—emphasised that the claims of historical consolidation of a title to territory based on peaceful occupation of that territory could not prevail over established treaty title (paras. 65–67). The effective exercise of State authority (*effectivités*) claimed by Nigeria did not correspond to the law, and accordingly preference was to be given to the holder of the title. Consequently, sovereignty over these territories remained with Cameroon.

With regard to the Bakassi peninsula, Cameroon invoked the 1913 Agreement between Germany and Great Britain, which transferred sovereignty to Germany (then in colonial possession of Cameroon). Nigeria submitted, first, that Britain could not have validly transferred sovereignty over Bakassi to Germany, since it lacked territorial sovereignty with regard to that territory; according to the 1884 Treaty between Britain and the Kings and Chiefs of Old Calabar, Britain acquired the powers of a protector only, and not of a sovereign; hence it was not entitled to enter into the 1913 Agreement and that agreement was void in relevant parts. However, the Court noted that agreements concluded by colonial powers with local rulers, even if the territory in question was not *terra nullius*, were to be regarded as derivative roots of title. The Court noted in particular that “Even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at the time in the Niger delta be given effect today, in the present dispute” (para. 205). In addition, from the outset Britain regarded itself as administering these territories, and not just protecting them (para. 207). Therefore, in 1913 Britain was in a position to determine in relation to Germany its boundaries in Nigeria and consequently to transfer to it the sovereignty over some of its lands.

The Court implied that the legal personality, if any, of the entity represented by the Kings and Chiefs of Old Calabar had lapsed after conclusion of the 1884 Treaty. Even Nigeria could not state with certainty whether the international status of those Kings and Chiefs survived after the Treaty, or whether they protested against that Treaty. Therefore, the Court was left with no option but to give effect to the 1913 Treaty.

The operation of the 1913 Treaty was also opposed by another argument of Nigeria, namely that its terms were never put into effect (para. 201); that Bakassi was administered as part of Nigeria from 1913 to 1960, and was never administered as part of Cameroon (para. 211). However, the Court referred to administration of Bakassi by the United Kingdom not as part of Nigeria, but “as if it formed part of” Nigeria in the period before Cameroon and Nigeria acceded to independence in 1960, and held this insufficient for supporting Nigerian title (para. 212).

Nigeria also referred to its widespread sovereign activities within Bakassi and submitted that this evidenced historical consolidation of Nigeria’s title. The Court therefore turned to the question whether an established treaty title could be outweighed by factors like effective administration (paras. 219 ff.). The Court noted that the case was not one of conflict between opposing claims of effective exercise of governmental functions by the two States, but one in which the territorial claims of one State were also supported by a treaty instrument, and emphasised that “The legal question of whether *effectivités* suggest that the title lies with one country rather than another is not the same legal question as whether such *effectivités* can serve to displace an established treaty title” (para. 223). This supports the view that the title conferred on Germany through the 1913 Treaty to which Cameroon succeeded on independence still prevailed over any practice which had taken place before or after 1960, including the practice allegedly exercised in pursuance of sovereign powers. Despite any such practice or activities of Nigeria, the Court held that the title was already established by the 1913 Treaty. The essence of the argument before the Court was whether a treaty title to territory could emerge and operate in spite of factual realities conflicting with the wording or spirit of that treaty. The Court held that it could.

This difference in the line of reasoning was characteristic of the arguments of the parties. With regard to the Lake Chad area, Cameroon referred to its conventional territorial title as the primary ground, and asserted *effectivités* “as a subsidiary ground of claim, an auxiliary means of support of its conventional titles” (para. 63). Nigeria, however, referred to the manifestations of sovereignty through effective administration accompanied, to a certain extent, by acquiescence of Cameroon (para. 66). Similarly, in Cameroon’s submissions, the arguments inspired by normative categories were predominant with regard to the acquisition of a title over Bakassi, while in Nigeria’s submissions the factual argumentation was central (paras. 211–212, 218).

The Court's support for normative against factual reasoning is clear. By a large majority the Court relied on general legal reasoning about the nature of international obligations to reject Nigeria's arguments. Only Judges Koroma and Rezek and Judge Ajibola, the *ad hoc* judge for Nigeria, dissented on the issues of *effectivités*, historical consolidation and validity of the 1913 Treaty. The Court affirmed the principle that treaties can operate independently and may be invoked by parties in spite of conflicting realities, unless it is proved that a party invoking a treaty has *consented* to the replacement of a legal regime embodied in a treaty by a different regime dictated by factual circumstances. Nigeria's argument on the invalidity of the 1913 Treaty did not succeed; hence the Court was unable to hold that when the tribal entities which were parties to the 1884 Treaty disappeared, Nigeria acquired territorial title. This approach, in conjunction with the Court's attitude with regard to the continued operation of the Henderson-Fleuriau Exchange of Notes, evidences the Court's consolidated view that the content of normative instruments prevails over factual realities conflicting with it, and these realities can give rise to rights and duties only in so far they do not conflict with the relevant normative instruments.

ALEXANDER ORAKHELASHVILI

CONSTRUCTING MANSLAUGHTER IN DRUG ABUSE CASES

WHERE a victim dies from the injection of a drug, is it possible to convict the person who supplied the drug of a homicide offence? The most obvious offence is constructive manslaughter, for which it is necessary to establish that the defendant committed an unlawful and dangerous act which caused death. This offence may have been committed where the supplier has injected the victim, as was recognised in *Cato* [1976] 1 W.L.R. 110. The unlawful act was there held to be the administration of a noxious thing, contrary to section 23 of the Offences Against the Person Act 1861, regardless of the victim's consent to the administration; and it was this administration which caused the death. But what of the case where the victim injected himself? This was the scenario which was considered by the Court of Appeal in *Dias* [2001] EWCA Crim 2986, [2002] 2 Cr.App.R. 5.

The defendant prepared a syringe of heroin with which the victim injected himself. The victim died from injecting the drug and the defendant was charged with constructive manslaughter. The

jury convicted the defendant following the trial judge's ruling, founded on the decision of the Court of Appeal in *Kennedy* [1999] Crim. L.R. 65, that the relevant unlawful act was the defendant's assistance in and encouragement of the unlawful self-injection by the victim. This ruling was rejected by the Court of Appeal on the ground that it is only an offence to supply or to possess heroin and it is not an offence to use it, so the defendant had not assisted the victim in the commission of a substantive offence. The defendant's conviction was consequently unsafe, unless it could be established both that he had committed an unlawful act and that this act had caused death. Since this could not be shown, the defendant's conviction was quashed. It apparently follows from *Cato* and *Dias* that the liability of the defendant will depend simply on whether or not he injected the victim. But is this really a morally significant distinction?

In determining the legitimacy of the decision in *Dias* it must first be established whether the defendant had indeed committed an unlawful act. With the acceptance that the use of heroin is not an offence, and because the defendant had not administered the drug himself, the obvious unlawful act that he had committed was the supply of a prohibited substance, as the Court of Appeal recognised. But did the unlawful act of supply cause death? The Court of Appeal concluded, surely correctly, that it did not, because the victim's self-injection was a voluntary act which broke the chain of causation (*Goodfellow* (1986) 83 Cr.App.R. 23, 27 interpreting the earlier case of *Dalby* [1982] 1 W.L.R. 425 where, on similar facts to *Dias*, the defendant's conviction was quashed). Where the defendant injects the victim, it is the defendant's own act which causes the death, and so the difference between *Cato* and *Dias* turns not on the recognition of a different unlawful act as such, but on whether the appropriate unlawful act had caused death. The Court of Appeal did recognise that in cases of self-injection a causative link from the supply to the death might be established, but did not explain when this would be the case. Causation might be proved if the victim was unaware of what he was injecting, or was mistaken as to the strength of the substance, since the victim would presumably not have injected the substance had he known what was being injected. Then the supply of the particular drug would have been a substantial cause of death. But if the victim knows what he is administering, as in *Dias*, then the voluntariness of the administration must break the chain of causation. It is only where the voluntariness of the administration can be qualified in some way (whether it be by mistake, duress or

incapacity of some kind, such as where the victim is an inexperienced child) that causation might be established.

In *Dias* an alternative unlawful act can be identified, but the hurdle of causation remains a difficult obstacle to surmount. Although the victim had not committed an offence in injecting himself with the drug, he had committed the offence of possessing a prohibited drug and, since the defendant had prepared the drug for use, he was surely an accessory to the commission of this offence. But this assistance in the commission of the possession offence did not cause the victim's death because, again, the victim had voluntarily injected himself.

The Court of Appeal did recognise an alternative route to securing the conviction of a defendant who has supplied the drug, namely the crime of gross negligent manslaughter, but the court did not show how this offence would operate. It would still be subject to the same difficulties of establishing causation. This is because the offence requires the prosecution to establish that the defendant owed a duty of care which was breached and which caused the death. If the victim has self-injected the drug then this still constitutes a break in the chain of causation, since the injection is a voluntary act. But by emphasising the breach of duty rather than the unlawful act, it might be possible to establish the necessary causative link. A duty of care will presumably be owed where the defendant has supplied the drug. Whether breach of this duty will have caused death will turn on the particular facts of the case, but causation might be established if, for example, the defendant remained present whilst the victim injected himself and did not do anything to assist once it became apparent that the victim was dying. In such a case the defendant might owe a duty to help the victim, by virtue of their jointly engaging in a hazardous activity (Smith and Hogan, *Criminal Law*, 10th edn. (2002), p. 64). However, even this argument would not have secured a conviction in *Dias* because the defendant had not left the victim until he had arranged for a passer-by to call for help. This would probably be sufficient to ensure that there was no liability for a failure to act.

So we are left with a fundamental distinction between those cases where the defendant has injected the victim and those where he has merely supplied the drug. This distinction is, ultimately, defensible, by virtue of the operation of the rules on causation. It was the failure to consider the significance of causation in some of the earlier drug abuse cases which created an inconsistent body of law. The law is now on a much more secure footing following *Dias*.

GRAHAM VIRGO

COMPANY DIRECTOR'S PERSONAL LIABILITY IN TORT

THE attribution of the tortious actions of a director to the company will operate to render the company liable. Does that attribution also operate to exclude the normal presumption that the director is liable for his own acts? Commonwealth courts have accorded primacy to the rules of company law and answered this question in the affirmative (*Trevor Ivory Ltd. v. Anderson* [1992] 2 N.Z.L.R. 517; *Sealand of the Pacific v. Robert C. McHaffie Ltd.* (1974) 51 D.L.R. (3d) 702). In England, the decision of the House of Lords in *Williams v. Natural Life Health Foods Ltd.* [1998] 1 W.L.R. 830 seemed to suggest that the answer would be no. In *Standard Chartered Bank v. Pakistan National Shipping Corpn. (Nos. 2 and 4)* [2002] UKHL 43, [2002] 3 W.L.R.1547 their Lordships have made this explicit: directors remain liable for their own wrongs.

Mr. Mehra was managing director of Oakprime Ltd. Oakprime was the beneficiary under a letter of credit issued by Incombank in respect of a contract for the sale of bitumen by Oakprime. A condition of the credit was that the goods be shipped before 25 October 1993. The shipment was delayed, but Mehra agreed with the carrier, Pakistan Shipping, to backdate the bill of lading. Mehra then presented the bill of lading and other documents to the confirming bank, Standard Chartered Bank (SCB). Although SCB was aware that another document that was required by the terms of the credit had been presented late, it waived late presentation and made payment. In seeking reimbursement from Incombank, SCB stated that all documents had been presented by the due date. Although Incombank was unaware of either Mehra's or SCB's falsifications, it rejected the documents on other grounds. SCB thereupon sought to recover from Pakistan Shipping, Oakprime and Mehra, alleging that they had all joined in issuing a false bill of lading.

The proceedings centred around two issues. The first was whether SCB's knowledge that the due date for presentation had passed gave rise to the defence of contributory negligence. The House of Lords agreed with the Court of Appeal ([2001] Q.B. 167: noted by Beresford (2002) 61 C.L.J. 17) that there was no such defence. The Law Reform (Contributory Negligence) Act 1945 applied only where the defendant would have had a defence of contributory negligence at common law. In their Lordships' view, there was no such defence at common law to a fraudulent misrepresentation. Lord Hoffmann stated (at para. [15]):

This case [*Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459] seems to me to show that if a fraudulent representation is relied

upon, in the sense that the claimant would not have parted with his money if he had known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid.

The second and more interesting issue was whether Mehra was personally liable for the misrepresentation in the bill of lading. The thrust of Mehra's argument, which was accepted by the majority of the Court of Appeal ([2000] 1 Lloyd's Rep. 218), was that "because Mr. Mehra was a director of Oakprime and acted as such when cheating Standard Chartered, his acts must be regarded solely as the acts of Oakprime and he should have no personal civil liability for them" (para. [39] *per* Lord Rodger). In the House of Lords this argument was rejected. In Lord Hoffmann's view, "No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable'" (para. [22]). Lord Rodger stated (at para. [39]):

Standard Chartered have proved all that is required to make Mr. Mehra—and through him Oakprime—liable in deceit. That being so, there is no conceivable basis upon which Mr. Mehra should not indeed be held liable for the loss that Standard Chartered suffered as a result of his deceit... His status as a director when he executed the fraud cannot invest him with immunity.

Intuitively, the merits of the proposition that as Mehra made the misrepresentation he was necessarily liable can hardly be contested. One's position as a company director clearly should not be a licence to commit fraud. The more complex question is whether this proposition can be justified as a matter of principle. Insofar as an individual is a mere agent of the company (as Lord Hoffmann thought Mehra was (para. [20])), this proposition is entirely orthodox. The law of agency does not purport to relieve the agent from liability for his actions as agent. However, where the individual is identified by the core rules of company law (corporate personality and the primary rules of attribution: *Meridian Global Funds Management Asia Ltd. v. Securities Commission* [1995] 2 A.C. 500) as the *alter ego* of the company, the proposition is more problematic.

The essential purpose of the core rules of company law is to ensure that general principles of law, such as those of tort, are applied to a different entity and that the scope of their application is limited. Thus, while the director may have committed the acts

constituting the tort, the company law regime modifies the normal consequences of the director's actions so as to direct liability to the company. In this sense the rules of company law have primacy over general principles of law. Any other view is to deny substance and effect to the company's existence. This is not, however, to commit oneself to the conclusion, apparently reached by the Court of Appeal, that if a director is regarded as the company's *alter ego* it must be for all purposes. Among the factors that determine the scope and effect of attribution are the purposes for which the State sanctions the corporate form. As the corporate form does not exist to facilitate non-recourse trading with respect to intentionally wrongful acts, company law does not purport to preclude the personal liability of the director.

The important point of principle, however, is that the law cannot, contrary to the implication in *Standard Chartered*, impose personal liability on the individual merely because, but for the existence of the company, the individual would otherwise incur liability. The permission that this country (and most other States) has granted to individuals to conduct their affairs through the corporate entity might be questionable on a moral and social level, but the fact remains that this permission has been granted and the protection of the individual from civil liability is a necessary and intended consequence of granting that permission (*Adams v. Cape Industries plc* [1990] Ch. 433, 539).

ROSS GRANTHAM

CONFIDENCE, DATA PROTECTION AND THE SUPERMODEL

THE supermodel Naomi Campbell told journalists that she shunned illegal drugs. Unfortunately, those statements were untrue. A newspaper discovered that she attended Narcotics Anonymous. It published a sympathetic story saying that she was fighting addiction. But when she threatened legal action, the newspaper responded with articles ridiculing her.

Ms Campbell's action against the newspaper invoked three theories: breach of confidence, breach of privacy and breach of the Data Protection Act 1998. At trial ([2002] EWHC 499), she dropped the privacy claim, conceding that privacy is not protected by a separate tort, but by an extended concept of confidentiality (see *B and C v. A* [2002] EWCA Civ 33) and by the 1998 Act. She succeeded on both the remaining claims. Morland J. found, however, that the only breach of confidence was revealing details of

her therapy. The revelation that she was addicted to drugs was itself not a breach, because she “had been misleading the public by her denials of drug addiction”. Damages were therefore limited to £2,500. But he added £1,000 aggravated damages, to reflect the extra distress from the newspaper’s belittling the claimant in the subsequent articles.

On the newspaper’s appeal (*Campbell v. Mirror Group Newspapers Ltd.* [2002] EWCA Civ 1373), Ms Campbell conceded that revealing her addiction did not itself constitute a breach of confidence, accepting that “where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight”. She sought only to support the judge’s view that revealing details of her treatment was unlawful.

The court treated the concession as well-made, but did not explain what “normally” means. We do not know, for example, whether the illegality or irresponsibility of drug abuse was important. What about an entertainer who, because of the unjustified stigma attached to mental illness, publicly denies that he has been treated for depression? But the court did say, qualifying *B and C*, that people whose status as “role models” has been thrust upon them are not necessarily fair game.

The court decided that revealing the details of treatment was not actionable: “[T]he details faded into insignificance compared to the central fact that Miss Campbell was receiving treatment for drug addiction”. In addition, if a public interest exists in publishing the fact that she had a drug problem, a public interest must also exist in publishing supporting details: “[T]he detail ... and indeed the photographs, were a legitimate, if not an essential, part of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public”.

In reaching these findings, the court, perhaps unwittingly, changed our understanding of breach of confidence. It also cast doubt on whether extending breach of confidence is the correct way to protect privacy at all. Finally, it made important decisions on the scope of the 1998 Act, because of which it also upheld the defendant’s appeal on that matter.

In *B and C*, Lord Woolf C.J. laid down 15 guidelines for interlocutory injunction claims in breach of confidence. He said that, to protect press freedom, even where an interest in confidentiality might attract legal protection, it might be insufficient to justify an injunction. *Campbell* concerns a claim for damages, not an injunction. One might expect the court to have distinguished between factors relevant to liability and those relevant to remedy.

This did not happen. Every factor mentioned appears to be relevant to liability. For example, in *Australian Broadcasting Corporation v. Lenah Game Meats Pty. Ltd.* [2001] HCA 63, Gleeson J. said that a useful test was whether “disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities”. Lord Woolf, albeit implicitly, used this test to help decide whether there should be an injunction. In *Campbell*, however, the test is used for liability.

For newspapers, it is important whether breach of the extended duty of confidence yields a right to an injunction or only to damages. If the former, there can be no breach unless all the conditions for issuing an injunction are satisfied, contrary to *B and C*. If the latter, there must be a difference between the conditions of liability and the conditions of granting an injunction, contrary to the impression given in *Campbell*.

Even more striking is the court’s doubt about whether extensions to breach of confidence are the right way to protect privacy. The defendants attempted an argument, which the court rejected, that developments in aspects of trusts law significant for the conventional duty of confidence (e.g. *Twinsectra v. Yardley* [2002] UKHL 12, [2002] 2 A.C. 164) meant that no liability could exist unless the defendant knew that the information was confidential and that the public interest could not justify its publication. The court commented that this argument was only possible because of “shoe-horning into the tort of breach of confidence [the] publication of information that would, more happily, be described as breach of privacy”. It continued, “We consider that the unjustifiable publication of such information would better be described as breach of privacy rather than breach of confidence”. This reversal is surprising, though understandable, since using confidentiality to protect privacy involves talking about “relationships” of confidence in ways which strain credulity.

Finally, *Campbell* is the first case to consider the liabilities created by section 13(1) the 1998 Act, which provides that “An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage”. The newspaper claimed the protection of section 32 of the Act, which exempts the “processing [of data] ... undertaken with a view to the publication ... of any journalistic, literary or artistic material”. The court holds that, although “processing” data must, given the terms of the Act, include publishing hard copy, the protection under section 32 also extends to publication itself and is not confined to processing before publication.

Although this interpretation is entirely plausible, it raises a difficulty which perhaps only the legislature can resolve. Newspapers maintain libraries of their own stories, previously cuttings, now increasingly in electronic form. Journalists rely on cuttings libraries when generating new stories. Consequently, errors in past stories tend to reproduce themselves. If section 32 applies to all newspaper operations, the fourth data protection principle, requiring data to be accurate, cannot help to correct cuttings libraries. One of the worst features of newspapers, their capacity to create myths, would continue to be legally incontestable.

DAVID HOWARTH

CAN AN EMPLOYER BE UNDER A DUTY TO DISMISS AN EMPLOYEE FOR HIS
OWN GOOD IN ORDER TO PROTECT HIS HEALTH?

SUPPOSE that an employee has some personal idiosyncrasy that puts him at risk while performing work that can be safely performed by virtually all his colleagues? If the employer simply has no alternative work reasonably available, what is he to do if the employee, with full understanding of the situation, nevertheless prefers to run those risks rather than have no job at all? *Coxall v. Goodyear Great Britain Ltd.* [2002] EWCA Civ 1010 suggests that the employer may be under a common law duty to dismiss the employee for his own good so as to protect his health.

The claimant, Mr. Coxall, worked in the defendant's factory. The manufacturing process was safe and satisfactory for the majority of the workers (employees were given rubber gloves, goggles, and respirators), but the claimant suffered from a mild constitutional predisposition to asthma. This condition was initially unknown both to him and to his employer. When it eventually came to light, the works doctor wrote a memorandum to the claimant's team manager stating that the claimant should be removed from his job because he must avoid any work involving exposure to known respiratory irritants, including the paint used in the manufacturing process. The claimant was aware of the doctor's advice. However, he chose to continue to work because he needed the money. The company did not act on the doctor's letter, and the claimant eventually collapsed, suffering from occupational asthma caused by exposure to irritant fumes at work. He then sued the company for negligence.

An employer is under a non-delegable personal duty under the common law to his employees to see that reasonable care is taken

of them (*Wilsons and Clyde Coal Co. v. English* [1938] A.C. 57). The duty is owed to individual employees. This means that particular characteristics of an employee may require extra care to be taken if the employer is or should be aware of them (*Paris v. Stepney Borough Council* [1951] A.C. 367). The issue in the Court of Appeal in *Coxall* was whether the employer had breached the duty of care owed to the claimant. The court (Brown and Brooke L.JJ.) concluded that there had been a breach.

According to Brown L.J., “cases will undoubtedly arise when, despite the employee’s desire to remain at work notwithstanding his recognition of the risk he runs, the employer will nevertheless be under a duty in law to dismiss him for his own good so as to protect him against physical danger”. In his opinion, *Coxall* was such a case; the company had come to recognise that the employee should no longer continue in the work, yet it had allowed him to continue. However, Brooke L.J. simply based his decision “on the limited basis that the defendants ought to have discussed with Mr. Coxall all the available options once their works doctor had formed the conclusion ... [that Mr. Coxall should be taken off the job]”.

Coxall raises at least five important questions.

First, is Brown L.J.’s judgment consistent with precedent? Prima facie, the answer is “no”. A series of Court of Appeal decisions, notably *Withers v. Perry Chain Co. Ltd.* [1961] 1 W.L.R. 1314, *Kossinski v. Chrysler United Kingdom Ltd.* (1973) 15 K.I.R. 225, *Henderson v. Wakefield Shirt Company Ltd.* [1997] P.I.Q.R. P413, and *Hatton v. Sutherland* [2002] EWCA Civ 76, [2002] 2 All E.R. 1, appear to be authority for the proposition that the common law does not require employers to refuse to employ a person who is willing to work for them simply because they think that it is not in the person’s best interest to do the work. For instance, in *Withers*, Devlin L.J. said “[t]he relationship between employer and employee is not that of schoolmaster and pupil ... the employee is free to decide for herself what risks she will run”. Brown L.J. considered each of these cases. He nonetheless also noted: “[j]ust as employers are regularly held liable notwithstanding that their employees knowingly take risks and even disobey orders, so too the primary responsibility for safeguarding them against harm should rest with the employers”. Having acknowledged the conflicting principles at play, he concluded: “the principal consideration in determining whether or not any particular case falls within the *Withers* principle must be the actual nature and extent of the known risk”. He thus distinguished *Coxall* from earlier cases like *Withers* on the grounds that in none of the older cases was the position reached where the

employers came to recognise that their employee should no longer continue in the work.

Second, if Brown L.J.'s judgment is correct, what are the principal factors in determining whether the employer should have dismissed the employee? According to Brown L.J., what is reasonable in cases like *Coxall* principally depends on "the actual nature and extent of the known risk". However, amongst other things, it would presumably also be relevant to consider the justifications for running the risk (see *Stokes v. Guest Keen and Nettlefold (Bolt and Nuts) Ltd.* [1968] 1 W.L.R. 1776). Thus, the health risk to the employee might have to be balanced against his interest in retaining his job.

Third, is Brown L.J.'s approach fair to the employer? Devlin L.J. rightly pointed out in *Withers* that the relationship between employer and employee is not that of a schoolmaster and pupil; the employee must take some responsibility for his decisions. On the other hand, as Hale L.J. said in *Hatton*, a serious danger with Devlin L.J.'s approach is that "taken to its logical conclusion ... [it] would justify employers in perpetuating the most unsafe practices ... on the basis that the employee can always leave". Counsel for the defendant in *Coxall*, Simon Beard, argued that courts should be extremely wary of impaling employers on Morton's fork: exposing them to personal injury claims if they allow employees to remain at work, and to claims for unfair dismissal if they do not. However, Mr. Beard has noted ("Case Commentary: *Coxall v. Goodyear Great Britain Ltd.*", <http://www.ropewalk.co.uk/news/txtnewsarticle07-02.htm>) that an employer forced into a dismissal in a case like *Coxall* ought to be able to justify it as fair on the ground that the employee was unsuited to the work, "[although] he will have to surmount the hurdles imposed by the combined effects of the Employment Rights Act 1996 and the Disability Discrimination Act 1995".

Fourth, why did Brooke L.J. conclude that the company had breached its duty by not discussing all the available options with Mr. Coxall? The answer is unclear. A discussion of the available options would not do much good if the employee already understands the situation, and "the employer can only be reasonably expected to take steps which are likely to do some good" (*Hatton v. Sutherland* [2002] 2 All E.R. 1, *per* Hale L.J.). There might have been some other work that the employer could reasonably have offered Mr. Coxall, in which case a meeting to discuss the available options could have helped him, since he could have taken alternative work and avoided continuing to run the health risk. However, Brooke L.J. did not say that the employer

should have offered Mr. Coxall alternative work. It seems strange that, on Brooke L.J.'s approach, the company apparently could have avoided liability simply by calling a meeting in order to discuss all the available options with Mr. Coxall, even if he had already been aware of them. (It is also unclear how Brooke L.J. concluded that the breach caused the damage in question, since the trial judge found that the claimant would have rejected a transfer to other work, if he had been offered it.)

Fifth, can an employer establish contributory negligence in a case like *Coxall*? The answer is almost certainly "yes". The defence was not raised in *Coxall*. However, Brown L.J. said, "had it been, it might well have relieved the appellants of part of their liability".

JESSE ELVIN

CAUSATION, LOSS AND DOUBLE RECOVERY

IN 1987, Mr. Primavera, a restaurant owner, was approached by the defendant, who offered him a loan for the development of a second restaurant, linked to an Executive Retirement Plan (ERP) for Mr. Primavera himself. The ERP promised a tax-free lump sum payment of £500,000 after seven years. However, the defendant neglected to tell Mr. Primavera that in order to qualify for the lump sum, he would have to draw a salary of not less than £334,000 per annum for at least three of the seven years. Unaware of this, Mr. Primavera paid himself a smaller salary. When he came to claim his lump sum in 1995, he found that the maximum that he could draw tax-free was £125,875. A claim form was issued against the defendant in respect of, amongst other things, £101,000 representing the tax payable on the rest of the lump sum. In the meantime, Mr. Primavera chose to continue with the ERP, paid himself a larger salary and, in 2000, qualified for the full £500,000 tax-free.

The question before the Court of Appeal in *Primavera v. Allied Dunbar Assurance plc* [2002] EWCA Civ 1327 was whether, in continuing with the ERP and qualifying for the full amount, Mr. Primavera had mitigated/avoided the whole of his loss. It might be thought that the law would have tackled this problem long ago, but Simon Brown L.J., delivering the leading judgment of the Court, readily admitted that he could "not pretend to have found [the issue] an easy one". After acknowledging that the arguments of both counsel had been persuasive, the Court determined that Mr. Primavera was entitled to the damages claimed.

The explanation for the Court of Appeal's difficulty, it is submitted, lies in the test that it was required to apply in order to determine whether the gains made by Mr. Primavera in deciding to continue with the ERP could be said to reduce the loss. That test, set out by Mustill L.J. (as he then was) in *Hussey v. Eels* [1990] 2 Q.B. 227, at 241, is to ask whether the fault that caused the loss also caused the gain, *i.e.* whether the gain was "part of a continuous transaction of which the [defendant's fault] was the inception". This test is said to exclude acts leading to a gain with which the defendant was not involved, or *res inter alios acta* (see Hirst L.J. in *Gardner v. Marsh and Parsons (a firm)* [1997] 1 W.L.R. 489 at 503).

This test is, it is suggested, utterly erroneous. Every day there are countless examples of benefits received by a claimant that mitigate or avoid his loss but could in no way be said to be part of a continuous transaction caused by the defendant's acts, since they are *res inter alios acta*. The surgeon who mends a broken arm, the physiotherapist who teaches an apparently permanently bed-ridden patient to walk again, the mechanic who repairs the car unusually cheaply, the work colleague whose knowledge of first aid saves the day: all of these, and very many others, mitigate and avoid the claimant's loss without any connection or reference to the defendant or his acts at all. It is obvious, for example, that a claimant whose arm is broken by the defendant's negligent act cannot recover for the loss of the use of the arm for the rest of his life if his arm has been repaired by a surgeon. Yet it is impossible to say that the effects of the surgeon's skill are caused by the defendant's act: they are the voluntary acts of a third party with whom the defendant has no connection.

It was on the basis of Mustill L.J.'s test that the Court of Appeal approached the fact that Mr. Primavera, in choosing to continue with the ERP, had apparently, in the end, got what he had bargained for. Simon Brown L.J. held (at para. [27]) that when the claim form was issued in 1996, the effects of the defendant's negligence were "spent" and that subsequent events could not be said to have been caused by it.

One of the cases cited by the Court was the recent decision of Sir Andrew Morritt V.-C. in *Needler Financial Services v. Taber* [2002] 3 All E.R. 501 in which a financial adviser negligently advised Mr. Taber to switch his pension from his existing scheme to a personal pension plan with a mutual assurance society. The result was that Mr. Taber's pension was worth considerably less than it would have been had he left it where it was. However, as a member of the society, Mr. Taber had received a windfall payment when the society

demutualised in 1997, which the adviser claimed should be taken into account in mitigation of the loss. *Morrith V.-C.* disagreed. The demutualisation of the society certainly could not be said to have been caused by the negligent financial advice and therefore the gain was irrelevant.

This approach, though forced upon *Morrith V.-C.* by precedent, needs only to be stated for the problem to be seen. It turns a respectable and difficult argument, as to whether a benefit received by Mr. Taber could be said to mitigate his loss, into a foolish and hopeless argument that the demutualisation of a major national life assurance society was caused by negligent financial advice given to one of its members!

It is understandable that the courts should seize upon a bright line test like the “continuous transaction” when difficult questions of measuring loss are put before them. However, something of the courts’ own misgivings about the test may be shown by the repeated reminders that the cases turn very much on their own facts: see, *e.g.*, *Gardner* at 503 per *Hirst L.J.*

A fresh approach is needed, and it is submitted that in the judges’ repeated references to the importance of the facts and in the penultimate sentence of the judgment of *Simon Brown L.J.* (at para. [29]), there is a hint as to what sort of approach that might be. He there states his conclusion that the action taken by Mr. *Primavera* after 1995 was “speculation ... on his own account”.

The test to be imposed by the court may simply be whether the subsequent gains are *referable to the loss*. The mending of a broken arm by a surgeon is an act referable to the broken arm. Winning the lottery is not so referable, and so would not be taken into account.

Applying this approach to the cases, one might ask whether in *Needler* the gain was referable to the loss. The result would appear to be unchanged, that the gain was a windfall that cannot in truth be said to be referable to the loss Mr. Taber suffered in changing his pension plan. However, it can be seen that on this approach, the court is forced to tackle the issue directly.

Seen in this light, the reason for the Court of Appeal’s concern in *Primavera* becomes clear: *Primavera* is a case very close to the line because the gain came about through the continuation of the plan through which the loss had arisen. In holding that Mr. *Primavera*’s decision to continue with the ERP was speculation on his own account, *Simon Brown L.J.* makes the key decision: that what occurred was more akin to an investment not referable to the loss (so it is to be treated as it would be had Mr. *Primavera*

invested in a different plan that just happened to result in a benefit) than to an attempt to mitigate the loss.

Asking whether the gain is referable to the loss is admittedly much less concrete than the bright-line test of continuous transaction. But it is for this very reason that it works so well—it enables the courts to consider the facts and the issues of policy involved, and to reach an honest and open decision based on the conclusions that they draw from those considerations.

S.B. MIDWINTER

CONTRACT: THERE'S STILL LIFE IN THE CLASSICAL LAW

THE case of *Carlton Communications plc and Granada Media plc v. The Football League* [2002] EWHC 1650 should serve as a cautionary tale for contract scholars seeking to promote a socio-legal approach to the development of contract law at the expense of the classical model. For such scholars, the development of an alternative to the classical law is thought necessary given “the devastating empirical finding of non-use” of contract law in sociological studies of contracting behaviour (D. Campbell, “Reflexivity and Welfarism in the Modern Law of Contract” (2000) 20 O.J.L.S. 477, 480). In parts of his recent work *Regulating Contracts* (Oxford, 1999) Hugh Collins argues that the legal rules frequently undermine the parties’ agreement because, at least in the commercial context, “considerations of the long term business relation, the customs of the trade, and the success of the deal” (*ibid.* p. 271) are more important than the contractual planning documents in regulating the relationship. Quite simply, contracting parties do not start from the rules and doctrines of contract law in constructing their agreement—they start from the deal. While cases like *Williams v. Roffey* [1991] 1 Q.B. 1 demonstrate some judicial appreciation of this fact, *Baird Textile Holdings v. Marks and Spencer plc* [2001] EWCA Civ 274, [2000] 1 All E.R. (Comm) 737 reminds us that agreements (in that case lasting some thirty years) may still falter for want of a (legal) contract. *Carlton Communications* is another reminder of what the socio-legal vision is up against.

Carlton Communications was concerned with the fallout surrounding the collapse of the television company ONdigital and with it the fortunes of many lower league division football clubs. ONdigital later changed its name to ITV Digital, but is referred to as ONdigital throughout this note. ONdigital and the Football

League (hereafter the League) entered into a written contract in June 2000 whereby the League agreed to license to ONdigital the rights to broadcast its football matches for three seasons. Having already paid £135 million, ONdigital agreed to pay two further annual sums of £89.25 million to the League, but then went into administration in March 2002 without making these payments. Almost all of the 72 clubs in the League were dependent on the revenue generated by the licensing agreement. The League contended that the financial liabilities incurred by ONdigital under the June contract were guaranteed by the claimants, Carlton and Granada, the sole shareholders in ONdigital's parent company. The League's case was that a guarantee had been offered, since in their initial bid for the television rights ONdigital had declared that "ONdigital and its shareholders will guarantee all funding to The Football League outlined in this document". However, the initial bid was marked "subject to contract". The June contract made no mention of a guarantee by Carlton or Granada, and only ONdigital and the League were parties to that contract. Carlton and Granada successfully sought a declaration that they were not liable to the League for sums due under the June contract. There were three main grounds for the decision. Langley J. held first, that the initial bid document did not contain a unilateral offer from Carlton and Granada to guarantee ONdigital's obligations which the League accepted by entering into the June contract. As it was expressed to be "subject to contract", the initial bid document could not have this effect. Secondly, if it was such an offer, ONdigital had no authority to make it on Carlton and Granada's behalf. Although Carlton and Granada were consulted on the size of bids, and their approval was required if ONdigital's expenditure exceeded £10 million, this was not tantamount to a grant of authority to bind them to a guarantee (para. [63]). Finally, the purported guarantee was ineffective because contrary to section 4 of the Statute of Frauds 1677, which provides that such an agreement must be in writing and signed by the party charged.

A reader schooled in the classical law of contract might react with incredulity at the League's attempt to fix Carlton and Granada with liability for ONdigital's debts. On the legal face of it, the League's difficulties stem from fairly rudimentary errors on the part of its solicitors which even the most dilatory student of contract and company law could be expected to avoid: get it in writing—and remember the corporate veil! The judge described the League's position as "unpromising", and one might wonder why it believed the action might succeed. As Hobhouse J. cautioned in *EE Caledonia Ltd. v. Orbit Valve Co. Europe* [1993] 4 All E.R. 165, the

parties have access to legal advice and they “are always able by the choice of appropriate language to draft their contract so as to produce a different legal effect. The choice is theirs” (at p. 173). That may be so, but while the legal position appears straightforward, *Carlton* is a good illustration of the gulf that sometimes exists between the legal and social aspects of contracting.

In the course of his judgment, Langley J. makes several factual observations about the deal. Although not demonstrating a definite intention on the part of the claimants to offer a financial guarantee, these observations illustrate the extent to which both parties to the contract understood that the success of the deal depended upon the support and co-operation of Carlton and Granada. They included the *de facto* control that Carlton and Granada exercised over the bidding process, the wording of the initial bid document, in relation to which it was conceded that the words could be read as offering a guarantee (para. [57]), Carlton and Granada’s stated commitment to fund ONdigital and see that it met its obligations, and the fact that the June contract anticipated a further “long form” agreement which would in part be based upon the initial bid document.

In the judgment these factors are marginalised and treated as significant only to the extent that they relate (or not) to the legal aspects of the relationship. They do not, as Collins would have it, constitute a normative framework for the deal in their own right. Thus the *de facto* control that Carlton and Granada exercised over ONdigital could not provide sufficient evidence of an *agency* relationship between those parties. The initial bid document was largely irrelevant because it was “subject to contract”. Carlton and Granada’s statement of support for ONdigital post-dated the June contract and could not have been relied upon by the League (para. [16]). Finally, the “long form” agreement never materialised and so could not supplant the June contract as the legally significant statement of the parties’ obligations (para. [43]). Of course, even if we consider the social context of the agreement, the same conclusion may be reached—there was no financial guarantee. However, the League’s (non-legal) representatives thought a guarantee was in place, but the judge remarked that they were not “focussed on the contractual or legal considerations involved” (para. [53]). Collins’s point is that contracting parties rarely are focussed on the legal. To the extent that unexpressed shared understandings are recognised in contract law they are sometimes called the “reasonable expectations of the parties”. Atiyah, in giving an answer to the question of “when one person is sufficiently entitled to entertain expectations, and to act upon them”, wrote “Look at the Law of Contract” (*Promises, Morals and Law*, Oxford

(1981), 68). Whatever the merits of the socio-legal approach, this is still a view to be reckoned with.

CATHERINE MITCHELL

INEQUITABLE MISTAKE

IN *Great Peace Shipping Ltd. v. Tsavlis Salvage (International) Ltd.* [2002] 3 W.L.R. 1617 the Court of Appeal considered the circumstances in which a contract, entered into as a result of a mistaken assumption shared by the parties, would be invalidated. In that case, the defendant, a salvage operator, agreed to provide its services to the owners of *The Cape Providence*, which had suffered severe structural damage. Unfortunately, the only tug that the defendant could find to perform these services was six days away from the vessel. This gave rise to concerns over crew safety if the vessel sank whilst awaiting the tug. The defendant's brokers, therefore, sought to hire a vessel which was sufficiently close to be able to evacuate the crew if necessary. The brokers were informed by a well-respected information agency that *The Great Peace*, a vessel owned by the claimant, was "in close proximity" to the stricken vessel, approximately 35 miles away. As a result, the defendant's brokers negotiated with the claimant for the hire of *The Great Peace* for a period of five days, both parties assuming that the information as to *The Great Peace*'s location was correct. On discovering that the vessels were in fact some 410 miles apart, the defendant hired an alternative vessel and sought to cancel the contract with the claimant. Proceedings were commenced to recover the full amount of the hire, or alternatively damages for breach of contract. The defendant resisted the claim on the ground that the contract was either void at common law or voidable in equity, as both parties had laboured under a fundamental mistake at the time of contracting. Both arguments were rejected by Toulson J., at first instance, and by Lord Phillips of Worth Matravers M.R. delivering the judgment of the Court of Appeal.

In considering the doctrine of mistake at common law, Lord Phillips followed the general approach of the House of Lords in *Bell v. Lever Bros* [1932] A.C. 161, accepting that the doctrine's ambit was extremely narrow and that its application in the case of a *res extincta* (*Associated Japanese Bank (International) Ltd. v. Crédit du Nord SA* [1989] 1 W.L.R. 255) or of a *res sua* (*Cooper v. Phibbs* (1867) L.R. 2 H.L. 149) was uncontroversial. His Lordship does, however, appear to have refined Lord Atkin's judgment in

Bell in several ways. First, in *Bell*, Lord Atkin stated that, in general, a contract would not be void if the parties were only mistaken as to some quality or characteristic possessed by the subject matter of the contract, unless “the thing without the quality [is] essentially different from the thing as it was believed to be”. Accordingly, a contract could be void even if “it may be possible to perform the letter of the contract”. Lord Phillips, however, stated that the authorities did not actually support Lord Atkin’s formulation of the test and that, in future, for a contract to be void for mistake “the non-existence of the state of affairs must render performance of the contract impossible”. Arguably, this reformulation (based upon the frustration case of *Hobson v. Pattenden & Co.* (1903) 19 T.L.R. 186) narrows the scope of the doctrine even further in those situations where the parties mistakenly assume that the subject matter of the contract possesses some quality or characteristic. Second, the House in *Bell* provided conflicting explanations of the doctrine’s theoretical basis. At one stage, Lord Atkin accepts that the doctrine is based upon the implication of a term that the fulfilment of the parties’ assumption would be a condition of the contract’s continued operation, whilst at the same time accepting, as does Lord Thankerton, that the doctrine is based upon a rule of law which renders the contract void when the parties’ mistake is sufficiently fundamental. Lord Phillips has now resolved this conflict by accepting that the doctrine is based upon a rule of law. This must be correct, given the rejection by Lord Radcliffe in *Davis Contractors Ltd. v. Fareham UDC* [1956] A.C. 696 of the “implied term theory” as the theoretical basis of the allied doctrine of frustration (see *contra* Smith (1994) 110 L.Q.R. 400). Third, Lord Phillips made clear that the mistake doctrine is subject to two important limitations. The first limitation is that the doctrine will not operate if, upon the proper construction of the contract, the parties have expressly or impliedly allocated the risk of their assumption proving false or have otherwise provided for the consequences of their assumption failing to materialize. The second limitation is that a party at fault cannot avail himself of the doctrine. This presumably would exclude a party who cannot show reasonable grounds for his mistakenly-held belief. Given that similar limitations would appear to restrict the operation of the doctrine of frustration (*The Super Servant Two* [1990] 1 Lloyd’s Rep. 1), one effect of the *Great Peace* decision is to bring the doctrines of mistake and frustration more into line with one another. This is to be welcomed, given that it may only be a matter of timing as to which doctrine is applicable

to the facts of a given case (see *Amalgamated Investment & Property Co. Ltd. v. John Walker & Sons Ltd.* [1977] 1 W.L.R. 164).

The real importance of the *Great Peace* decision must, however, lie in Lord Phillips' statement that "there is no jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law". His Lordship's refusal to recognise the existence of a doctrine of equitable mistake, which operates to supplement the common law doctrine, means that the controversial decision in *Solle v. Butcher* [1950] 1 K.B. 671 is no longer good authority. There are several reasons why *Solle* could no longer stand either in terms of precedent or in terms of the coherent development of this area of the law. First, the equitable doctrine was simply inconsistent with the House's decision in *Bell*. In *Solle*, Denning L.J. had stated that their Lordships in *Bell* had only considered the common law principles of mistake, but that "if [*Bell*] had been considered on equitable grounds the result might have been different". His Lordship purported to demonstrate this by citing *Cooper v. Phibbs* as authority recognising the existence of an equitable doctrine. It is, however, clear that their Lordships in *Bell* did consider *Cooper v. Phibbs* and decided that the court in that case ought to have concluded that the contract was void at common law. Lord Phillips quite correctly concluded, therefore, that there was no scope for the development of any further doctrine of equitable mistake after *Bell*. Second, Lord Phillips expressed concern as to how one could distinguish the equitable doctrine from its common law counterpart, given that both doctrines required the existence of a "fundamental" mistake. This uncertainty favoured the removal of the doctrine. Third, the remedial discretion to rescind a contract "on terms" that was recognised in *Solle* arguably gave the court too wide a power to re-write the contract for the parties and was, in fact, inconsistent with the way rescission operates when a contract is set aside on other grounds, such as misrepresentation (*TSB v. Camfield* [1995] 1 W.L.R. 430).

The removal of *Solle* is, therefore, largely to be welcomed, since it is surely better to deal with any defects in the common law doctrine by altering that doctrine, rather than by subverting its operation with a second and more flexible doctrine operating in tandem. Do any such defects, therefore, exist? The first potential defect is that a court no longer has any of the remedial flexibility afforded by the equitable doctrine, but is limited to declaring the contract void and ordering the restitution of any benefits conferred. It may be that the courts should be provided with some degree of

flexibility by means of legislation increasing their remedial options (see for example New Zealand's Contractual Mistakes Act 1977, s. 7). The second potential defect is that the departure from *Solle* reduces the protection afforded to innocent third parties. This is because, whilst equitable mistake only rendered a contract voidable, its common law counterpart renders the contract void: a third party may acquire good title to goods which have passed under a voidable contract, but not under a void contract. The Court of Appeal has recently called for legislation which would increase the protection afforded to third parties in mistake cases by allowing the courts to apportion losses between the various innocent parties (see *Shogun Finance Ltd. v. Hudson* [2002] 2 W.L.R. 867). Let us hope that this happens sooner rather than later.

CHRISTOPHER HARE

EXEMPLARY DAMAGES—TWO COMMONWEALTH CASES

THE topic of exemplary damages has often been shrouded in controversy. Indeed, in some jurisdictions (such as England), the very award of such damages is confined to an extremely narrow compass (though *cf.* the recent House of Lords decision in *Kuddus v. Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 A.C. 122). Although the jurisdiction to award such damages is broader in other Commonwealth jurisdictions, difficult issues remain, two of which were recently explored by the highest appellate courts in New Zealand and Canada, respectively.

The (New Zealand) Privy Council decision of *A v. Bottrill* [2002] UKPC 44, [2002] 3 W.L.R. 1406 raised the interesting (and significant) issue of whether exemplary damages in cases of *negligence* should be restricted to cases of intentional wrongdoing or conscious recklessness (even though the basic criterion of outrageous conduct by the defendant had been established), or whether such damages could be awarded so long as the defendant had been guilty of outrageous conduct. The Board held, by a bare majority of three to two, that exemplary damages could be awarded on the latter broader basis.

In *Bottrill*, the claimant brought an action against the defendant, a pathologist, for negligence in misreading or misreporting four cervical smears taken from her. This led to far more severe treatment than was necessary, resulting in the destruction of the claimant's ovaries (and the opportunity to conceive) as well as leaving her with a weakness in her left leg. She

also suffered depression and was unable to work for some time. Young J. held that, despite the defendant's negligence, an award of exemplary damages was ("by a narrow margin") not warranted. The claimant subsequently discovered fresh evidence of negligence in other situations and applied for a re-trial, which was granted. The Court of Appeal, however, allowed the defendant's appeal (Thomas J. dissenting) on the basis that exemplary damages could only be awarded in cases of negligence where either intentional wrongdoing or conscious recklessness was demonstrated and that, on this more restrictive approach, the new evidence was insufficient to warrant a re-trial (see [2001] 3 N.Z.L.R. 622). A majority of the Privy Council (Lord Nicholls of Birkenhead delivering the judgment) reversed this decision, adopting the wider approach and held that, as a matter of *principle*, exemplary damages centred on outrageous conduct that was "altogether unacceptable to society" (para. [20]); hence a further requirement of intentional wrongdoing or conscious recklessness on the part of the defendant was unnecessary. This would also avoid a lack of coherence in distinguishing between different types of outrageous conduct (paras. [22] and [40]). The majority also pointed to supporting precedents (paras. [41]–[50]). Finally, as a matter of *policy*, the argument about "floodgates" was not persuasive (paras. [58]–[62]).

The minority (comprising Lords Hutton and Millett) was of the view that the punishment that would be inflicted by an award of exemplary damages would not be appropriate unless the defendant had "a guilty mind". It is significant that the minority emphasised "that the rationale of exemplary damages is not to mark the court's disapproval of outrageous conduct by the defendant, rather the award is made to punish the defendant for his outrageous behaviour" (para. [77]). Here, we find the crux of the disagreement between the members of the Board. Before proceeding to consider this, it is interesting to note that the minority dissented only with regard to the law; it held that, *applying* the more restrictive approach, it would (like the majority) also hold that a new trial ought to be ordered.

The majority was obviously viewing the award of exemplary damages as being based wholly on the needs of the community; hence, the defendant's state of mind was immaterial so long as the outrageous conduct (*ex hypothesi* injurious to society) was present. The minority, on the other hand, adopted a wholly different approach, focusing on the individual (here, the defendant) instead. In other words, despite the fact that the conduct was outrageous, the individual defendant ought not to be punished if he had not been guilty of any advertent conduct. Here, we have the classic

(and intractable) clash between utilitarianism on the one hand and (conflicting) individual rights on the other. Far from being merely theoretical, the adoption of one approach or the other has profound implications on the practical plane. It is suggested that because the award of exemplary damages is highly exceptional precisely because of its punitive effect on the defendant, it ought not to be made save where the defendant either knew of or was consciously reckless towards the risk to which his conduct would expose the claimant, such state of mind to be ascertained by an *objective* analysis of the facts and surrounding circumstances (such an objective analysis also at least indirectly incorporating wider communitarian factors as well). Although the majority argues that criminal liability need not always flow from advertent conduct (para. [30]), strict liability is the exception rather than the rule. The minority's approach is also more persuasive because it would, practically speaking, hardly ever be the case that actionable negligence would be established where the defendant had not somehow been guilty of some advertent conduct in the first instance. The majority admits this (para. [23]) but insists that there might be exceptional situations (para. [26]). However, these are likely to be so rare as to be non-existent. Finally, although the majority cites a whole series of precedents and reports, it is submitted that many of them are neutral in effect or actually supportive of the minority's position (see, e.g., the English Law Commission's Report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com. No. 247) at paras. 5.46–5.53). Whilst one can agree with the citation by the majority of many cases establishing that outrageous conduct is necessary, it does not necessarily follow that advertent conduct on the defendant's part ought to be dispensed with.

The second decision, that of the Canadian Supreme Court in *Whiten v. Pilot Insurance Company* (2002) 209 D.L.R. (4th) 257, raised, *inter alia*, the interesting issue of whether or not exemplary damages could be awarded for cynical breaches in a *contractual* (as opposed to the more usual tortious) context. More generally, *Whiten* contains an excellent comparative overview as well as a succinct summary of the law relating to exemplary damages.

This case concerned not only a breach of contract in an insurance context but also conduct by the defendant insurer which the court found (LeBel J. dissenting) merited the restoration of a substantial award of exemplary damages by the trial judge that had been overturned on appeal. The court endorsed the existing Canadian position that exemplary damages may be awarded in a contractual context but such an award would be extremely rare *and*

that the defendant's conduct must *also* constitute a separate and independent actionable wrong (see *Vorvis v. Insurance Corp. of British Columbia* (1989) 58 D.L.R. (4th) 193 at 206 and *McKinley v. BC Tel* (2001) 200 DLR (4th) 385 at 416–418; cf. *Royal Bank of Canada v. W. Got & Associates Electric Ltd.* (1999) 178 D.L.R. (4th) 385 where, however, there was *concurrent* liability in contract and tort). However, the court adopted a broad construction of the latter requirement in holding that it did not necessarily require the commission of a tort but may be satisfied by the breach of an independent *contractual* duty to deal with the claimant policyholders in good faith.

In our view, the special effort taken in clarifying this requirement in *Vorvis* should be welcomed, as a more restricted approach insisting on concurrent liability in tort would create an artificial (and unjustifiable) distinction between contract and tort cases (see *per* Linden J. in *Brown v. Waterloo Regional Commissioners of Police* (1981) 136 D.L.R. (3d) 49; varied on appeal, (1983) 150 D.L.R. (3d) 729). And where the independent actionable wrong is itself *contractual* in nature, what is the justification for not providing for the possibility of awarding exemplary damages for breach of the *original (also contractual)* obligation provided that the defendant's conduct was sufficiently outrageous, hence avoiding what is, in effect, an arguably even more pronounced artificiality? Admittedly, this is a more liberal approach which has to respond to the concept of efficient breach which allows defendants to breach contracts (even cynically and outrageously) in order to garner a larger profit elsewhere, on the twin bases that the claimant suffers no real loss as it is compensated in damages and society generally benefits by a re-deployment of scarce resources. However, efficient breach is by no means universally accepted and might not in fact result in an increase in social efficiency (particularly in non-commercial situations). Here, again, we encounter a clash between societal and individual concerns. It is suggested, however, that the latter would have, on balance, a stronger call where the award of exemplary damages would actually reinforce the underlying moral conception of promise-keeping which constitutes the very essence of the law of contract itself. One other less ambitious possibility is to confine the liberal approach to specific situations where the award of exemplary damages is clearly justifiable: for instance, in the employment context, where considerations centring on “non-material” factors such as respect, dignity and the like are involved (see, *e.g.*, Venour, (1988) 1 Canadian Journal of Law and Jurisprudence 87 at 98–100). It should also be emphasised that the award of exemplary

damages is the exception rather than the rule. In the circumstances, it would be preferable not to limit severely the possibility of such awards in the first instance.

ANDREW PHANG
PEY-WOAN LEE

A HARSH TWILIGHT

THE *New Shorter Oxford Dictionary* defines heresy as an opinion or doctrine contrary to the accepted doctrine of any subject. In *Pye v. Graham* [2002] 3 W.L.R. 221 the House of Lords robustly confirmed the orthodoxy relating to adverse possession and discounted discordant voices as heretical. There is probably general relief that no fireworks have disturbed the established law in its twilight years, but for this writer there is some regret over a wasted opportunity. Yet again in an adverse possession case, a result has been reached that caused some of the judges misgivings about the fairness of the outcome, but there was no serious attempt to try to address this by subjecting the whole area to a fresh scrutiny and considering whether there was any merit in heretical views.

The case concerned 25 hectares of agricultural land with development potential. Pye, a development company, was the registered proprietor of the land, but had no immediate use for it. So, perhaps understandably, and certainly foolishly, the company failed to react when the Grahams continued to farm the land after the expiration of their grazing agreement. The last permission granted to the Grahams expired in August 1984, but it was not until April 1998 that Pye woke up to the dangers of the situation and started proceedings for possession. By that time, of course, it was possible for the Grahams to claim that they had acquired title by adverse possession.

At first instance, Neuberger J. [2000] Ch. 676 held, “with no enthusiasm”, that the Grahams had indeed established title by possession. This decision was reversed by the Court of Appeal [2001] Ch. 804, in an understandable but dubious attempt to find for Pye. Pye’s relief has proved short-lived, however, because the House of Lords has now unanimously restored the judge’s decision. Lord Browne-Wilkinson, who delivered the leading speech, gave a ringing endorsement to Slade J’s “remarkable judgment” in *Powell v. McFarlane* (1977) 38 P. & C.R. 452, subsequently approved by the Court of Appeal in *Buckinghamshire County Council v. Moran* [1990] Ch. 623.

In particular, Lord Browne-Wilkinson cited Denman C.J. (twice) to confirm that the concept of non-adverse possession had been abolished by the Real Property Limitation Act of 1833. Since then, he asserted, possession had to be given its ordinary meaning and the only question was whether the squatter had been in possession of the land in the ordinary sense of the word. He swept aside any arguments questioning the necessity to show an intention to possess and reaffirmed what every undergraduate knows, that there are two elements necessary for legal possession, factual possession and intention to possess. His Lordship gave equally short shrift to the suggestion, apparent in some cases, that the squatter should have an intention to own the land in order to be in possession. This “heresy” was disposed of with dispatch, as was the “heresy” that the acts of the squatter must be inconsistent with the intentions of the paper owner. Lastly, he confirmed that a squatter’s willingness to pay the paper owner for the use of the land, if asked, was not inconsistent with the squatter being in possession in the meantime. In view of this robust affirmation of conventional doctrine, the only plausible decision was that the Grahams had acquired title through adverse possession.

Some subtle shifts can be discovered in the speeches, but nothing dramatic. The thrust of Lord Hutton’s speech was that where a squatter was in factual possession, then normally that in itself would also provide sufficient evidence of the required intention, and Lord Hope made a similar point. It is only when the actions of a squatter are equivocal that the intention may need further evidence and may become more difficult to prove. This is hardly novel, but the primacy of establishing by conduct a factual possession has possibly received fresh emphasis.

It may well be that further and more careful analysis of the principles would have yielded the same conclusions as to their validity, but it is a pity that such analysis was not forthcoming, in view of the difficulties caused by this jurisprudence in terms of judicial discomfiture. Generally, after all, there is some explanation for the attraction of a heretical belief and some of the heresies dismissed can be explained as quite reasonable judicial attempts to limit the success of claims that seemed unmeritorious. As it is, the law stays the same and anomalies will still persist. For example, the Grahams wrote asking for a renewed grazing licence in 1985; presumably that would have amounted to a written acknowledgment of title and so should have started time running anew (though this does not seem to have been argued and indeed in the time scale would not have been fatal to their claim). But why a written acknowledgment should have such an effect when an oral

acknowledgment would not even offend *in principle* against time running, and so of course would have no effect, is curious. It may be possible to explain how such juxtaposition of principles has arisen, but that does not prevent the present paradox and possible capricious distinctions from being regrettable. It is lucky for the Grahams that they were not enthusiasts for the epistolary art.

Lords Bingham and Hope were concerned about the apparent injustice of a result that rewarded the Grahams with valuable land which they always knew belonged to Pye and which Pye seems to have lost through mere inadvertence. They both found consolation, however, in the fact that the Land Registration Act 2002 will introduce a new regime. This is indeed true, and the new regime is to be warmly welcomed. Whether it will sufficiently address the issue of a proprietor's inadvertence is still to be seen. It looks as if a registered proprietor will have a three-month window of opportunity to object if a squatter makes claim to the land. Of course in an ideal world this should be more than sufficient time, but one can easily imagine scenarios where the notice does not reach the right person in time, and yet another local authority or ill-managed corporation loses the plot. The writer would prefer at least a six-month period, when so much is at stake—and when the proprietor is by definition incompetent, for otherwise the squatter would not have been there at all. And the new Act's pragmatic approach to boundary disputes also leaves room for loss through inadvertence. Here under the new regime a squatter who has reasonably believed the land to be his may succeed in a claim despite the protests of the registered proprietor.

The question that remains is the impact of the Human Rights Act 1998 on adverse possession. Of course the Land Registration Act 2002 has been drafted with human rights in mind, but the new regime does not apply to unregistered land, nor indeed present claims, and so the issue is still compelling. In the Court of Appeal, Pye had advanced arguments on the basis of human rights, and the Court of Appeal robustly defended the principle that limitation was not incompatible with human rights. This is persuasive in theory, but there was also a specious quality to Mummery L.J.'s assertion that the extinctive provisions of the Limitation Act merely barred a right to bring an action and did not amount to a deprivation of possessions. The arguments were not pursued before the House of Lords because Pye conceded that the 1998 Act was not retrospective in effect and so did not apply to the present case. A faint clue to judicial attitude is provided by Lord Hope, who adverted to the question and remarked that it was not an easy one; does this suggest a measured approach? Leave to appeal to the

House of Lords has however now been granted in *Family Housing Association v. Donnellan* (Ch.D., 12 July 2001), and so the whole question may well be aired in the future.

And so to conclude: the Grahams are blessed, and Pye has learnt a hard lesson. The owner of land, even when registered as proprietor at the Land Registry, has responsibilities towards that land that he ignores at his peril. The House of Lords was in no mind to develop or reinterpret the jurisprudence and instead chose to reaffirm the orthodox version. The result may seem unfair, but the House of Lords was unrepentant; it reached the only possible conclusion that it could properly have done on its chosen terms. Thank goodness that the Land Registration Act 2002 will soon come into effect and then the present unsatisfactory jurisprudence will largely fade away into a twilight zone of harsh decisions and lucky breaks.

LOUISE TEE

THE UNCERTAIN FLIGHT OF *BRITISH EAGLE*

IN a winding-up, the property of the insolvent company must be liquidated and the proceeds distributed *pari passu* amongst its unsecured creditors. This being mandatory, a company cannot by contract arrange to do things differently, and a provision purporting to do so will be void (*British Eagle International Airlines v. Compagnie Nationale Air France* [1975] 1 W.L.R. 758). The scope of this common law rule of public policy is, however, notoriously uncertain. Neuberger J.'s judgment in *Money Markets International Stockbrokers Ltd. v. London Stock Exchange Ltd.* [2002] 1 W.L.R. 1150, based on a thorough and erudite review of the authorities, suggests some helpful clarifications.

Prior to April 2000, the London Stock Exchange ("LSE") was owned and controlled exclusively by its members. The LSE's rules provided, *inter alia*, that membership would terminate were a member declared a "defaulter"—being unable to pay its debts to other members. The LSE had been incorporated as a limited company, structured to give effect to the organisation's mutual character. Only "B" shares carried voting rights. Clause 8.03 of the articles of association required new members to acquire "B" shares; conversely, a shareholder ceasing to be a member would be required to dispose of its shares. "B" shares could only be transferred to firms that were members of the LSE, and not for any consideration.

Money Markets International Ltd. (“MMI”) was a member firm of the LSE. In February 1999 it was the subject of a winding-up petition. The next day, MMI was declared a defaulter, stripped of its membership, and in accordance with article 8.03, required to dispose of its “B” share for no consideration. Whilst MMI’s liquidation was still ongoing, the LSE agreed to “demutualise”, whereupon each “B” share became a liquid asset worth approximately £2.8 million. The liquidator of MMI argued that article 8.03 was void as a fraud on the insolvency laws, because it compulsorily deprived the insolvent company of the “B” share, which ought to have been available for its creditors.

Following the House of Lords’ decision in *British Eagle*, the rule of public policy in question has often been referred to as the “*pari passu* principle”. Yet the “deprivation provision” in *Money Markets International* did not offend *pari passu*, for no creditor was put in a preferential position. Neuberger J. accepted a broader basis for the rule, namely that it avoided provisions which deprived the insolvent of assets and thereby harmed unsecured creditors. Offending *pari passu* is just one way in which such harm could occur. Another, as in the instant case, is the removal of an asset for inadequate consideration. This analysis lends support to those who contend (e.g. Mokal, (2001) 60 C.L.J. 581) that the principle at play in *British Eagle* was not simply one of distribution, but was rather a more general rule about the protection of insolvency law’s mandatory character.

LSE’s principal argument was that article 8.03 constituted an inherent limitation on MMI’s interest in the share. In insolvency proceedings, what constitutes the company’s “property” is largely defined by reference to its pre-insolvency entitlements. Thus, the argument runs, a provision derived not from a collateral contract, but inherent in the property interest itself, does not deprive the company of anything it would otherwise have had. The interest is itself defined by the provision. It has long been established that a beneficial interest may be expressed to subsist only for so long as the beneficiary remains solvent, and that its determination does not offend insolvency law (*Brandon v. Robinson* (1811) 18 Ves. Jun. 429, 433). Less certain was whether this reasoning could be extended to a case where the “property” itself constitutes a bundle of contractual rights—as is the case with a share.

As Neuberger J. recognised, the notion of a deprivation provision as an inherent limitation on a package of contractual rights is fundamentally at odds with the House of Lords’ decision in *British Eagle*, at least where it purports to take effect once insolvency proceedings have commenced. In that case, all five of

their Lordships (albeit the minority only in the alternative) characterised the airlines' arrangement as giving rise to bilateral choses in action, subject to a restriction that they could only be enforced via the clearing house following multilateral netting. For the minority, the restriction formed an inherent limitation on the "property" to which British Eagle could lay claim. Yet for the majority, the "property" was conceived as bilateral obligations subject to collateral restrictions. The netting provisions would therefore have the effect of depriving creditors of assets to which they would otherwise be entitled—namely, the debts—and preferring clearing house creditors to general unsecured creditors. As a result, these provisions were void.

Although there is a certain bootstraps quality to the majority's reasoning in *British Eagle*, Neuberger J. rightly felt it compelled him to reject LSE's first argument. More radically, his Lordship suggested that the principle might also strike down so-called "*ipso facto*" clauses in contracts, which purport to terminate one party's obligations on the other's insolvency, noting an observation of Professor Goode that such clauses are rendered ineffective in the US by section 541(c)(i) of the Bankruptcy Code. Logically, determinable equitable interests should also be rendered ineffective, but Neuberger J. recognised that their validity—and that of forfeiture provisions in leases—was firmly, albeit anomalously, recognised by authority.

LSE's alternative argument, which his Lordship ultimately accepted, was that article 8.03 was not intended to subvert insolvency law, but rather to preserve the personal character of membership of the LSE. Clearly, following *British Eagle*, that the provision was neither drafted in bad faith nor expressed to take effect upon insolvency would not suffice to ensure its validity, if it had the effect of depriving the insolvent company of an asset to the detriment of creditors. "Detriment" for these purposes might depend on whether a preference was conferred on any creditor, whether the asset was valuable, and what consideration was given to the company in return. Thus, deprivation provisions relating to valueless assets, or requiring fair value to be paid (*Borland's Trustee v. Steel Bros. & Co. Ltd.* [1901] 1 Ch. 279), will not normally be struck down. By extension, the Judge accepted that contracts expressed not to be assignable, or property the ownership of which depended on the personal characteristics of the owner, could also be treated as valueless to creditors. In each case, a liquidator could not alienate them for value. This held the key to the case's resolution. Membership of the LSE was dependent on the personal characteristics of the members, was not capable of realisation by a

liquidator, and hence might validly be the subject of a deprivation provision. The “B” share was by the scheme of the LSE’s articles designed to confer rights *ancillary* to membership, and was not transferable to a non-member. This imbued “B” share ownership with the essentially personal characteristics of membership, and sufficed to validate article 8.03’s operation.

The reasoning in *Money Markets International* is not free from difficulties. It is not immediately obvious that a no-assignment clause should validate a deprivation provision. Simply because a contract is unassignable does not mean that it is valueless to the creditors. The liquidator might, after all, be able to procure the company to complete the contract. Moreover, if (as they are) parties are free to include no-assignment clauses by contract, then this provides a straightforward way for those who wish to insert an *ipso facto* clause to “work around” the common law rule which Neuberger J. outlined. That said, similarly difficult distinctions are drawn elsewhere: for example, section 365 of the U.S. Bankruptcy Code renders *ipso facto* clauses invalid, but preserves no-assignment clauses. All in all, Neuberger J.’s thorough synthesis of the law answers more questions than it raises.

JOHN ARMOUR

THE DIRECTOR’S FIDUCIARY OBLIGATIONS—A FRESH LOOK?

It is a pillar of equity that “a person in a fiduciary position must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict” (*per* Lord Upjohn in *Phipps v. Boardman* [1967] 2 A.C. 46, 123). The House of Lords in *Regal (Hastings) v. Gulliver* [1942] 1 All E.R. 378 demonstrated the unrelenting nature, and some have argued inequitable severity (see, *e.g.*, Jones, (1968) 84 L.Q.R. 472), of the director-fiduciary’s obligations to his company. Such “absolutism” (Lowry & Edmunds, [2000] J.B.L. 122) is necessary because human infirmity makes it difficult to resist temptation, and it is only thus that the level of conduct for fiduciaries can be “kept at a level higher than that trodden by the crowd” (*per* Cardozo C.J. in *Meinhard v. Salmon* (1928) 249 N.Y. 456, 464). The principle that a director is free to act as a director of or otherwise engage in a competing business, established at the turn of the 19th century by Chitty J. in *London & Mashonaland Exploration Co. Ltd. v. New Mashonaland Co. Ltd.* [1891] W.N. 165 and assumed correct by Lord

Blanesburgh in *Bell v. Lever Bros. Ltd.* [1932] A.C. 161, 195, is therefore clearly an aberration and somewhat difficult to defend. A reconsideration of the rule would be timely. In this light, the decision of the Court of Appeal in *Plus Group Ltd. and others v. Pyke* [2002] EWCA Civ 370 is something of a missed opportunity as both Brooke L.J. and Jonathan Parker L.J. thought it unnecessary to attempt a resolution. Sedley L.J., although perspicuous about his discomfort with it, nevertheless admitted that *Mashonaland* “is the law that binds us”. His Lordship did however observe that “if one bears in mind the high standard of probity which equity demands of fiduciaries, and the reliance which shareholders and creditors are entitled to place upon it, the *Mashonaland* principle is a very limited one”.

The facts of *Plus Group Ltd.* are unusual. Mr. Pyke and Mr. Plank were shareholders (on a 50–50 basis) and sole directors of Plus Group Ltd., and also sole directors of its three wholly-owned subsidiaries (together, “the claimants”). Constructive Interiors, with whom Mr. Pyke had an excellent working relationship, was an important customer of the business. Mr. Pyke unfortunately suffered a stroke in mid-1996 which kept him away from the companies’ business for most of that year. Thereafter, for various reasons, he and Mr. Plank fell out, leading to a “complete rupture” of their relationship by January 1997. From then until his formal departure from the boards in March 1998, Mr. Pyke was effectively excluded from the management of the companies, denied access to information and remuneration, and prevented from drawing against his corporate loan account. During this time, relations between the claimants and Constructive had also been deteriorating. In June 1997, Mr. Pyke incorporated John Pyke Interiors Ltd., and this company carried out £200,000 worth of work for Constructive. The Court of Appeal had to decide whether Mr. Pyke had breached his fiduciary duties.

If equity’s no-conflict and no-profit rules were rigidly applied, Mr. Pyke would be in breach. He did not set up a competing business in the style of *Mashonaland* without more; he had courted the claimants’ only important customer, who to his knowledge was unhappy with the claimants. It was this knowledge, acquired in his capacity as director, that arguably allowed him to profit without the consent of the claimants. Further, as a fiduciary, he was required to look first to the interests of the claimants and not his own, particularly during those times when the claimants’ interests obviously required protection (see Beck, (1971) 49 *Canadian Bar Review* 81, 107). And as Sedley L.J. observed, it was “impossible to divorce the acquisition of Constructive’s work by Mr. Pyke and his

new company from the cessation of Constructive's relationship with the claimants". But what was Mr. Pyke to have done? To avoid a breach, he needed to obtain the informed approval of the shareholders, namely Mr. Plank, and obviously this was unlikely given their acrimonious relationship.

The members of the Court of Appeal were unanimous in exonerating Mr. Pyke from liability, but not unanimous in their reasons. At trial, Judge Levy Q.C. had dismissed the claim against Mr. Pyke because he thought that there "was no such [fiduciary] duty upon Mr. Pyke in the circumstances". Judge Levy however, proceeded then to say: "if ... I was wrong on this ..., in my judgment Mr. Pyke cannot be blamed for what he did". In the Court of Appeal, Brooke L.J. based his decision on whether the fiduciary has *breached* his duty (which must by necessary implication then be assumed to exist). Although he referred to Lord Upjohn's caution in *Phipps v. Boardman* [1967] 2 A.C. 46 that "the facts and circumstances of each case must be carefully examined to see whether a fiduciary relationship exists in relation to the matter of which complaint is made", he concluded, after reiterating the salient facts, that "the judge was right when he held that Mr. Pyke committed no breach of fiduciary duty in trading with Constructive". Sedley L.J., on the other hand, appeared more concerned with whether the fiduciary duty to the claimants *remained* in those exceptional circumstances. Although he agreed that Judge Levy was right to hold that "it is not a breach of fiduciary duty for a director to work for a competing company in circumstances where he has been excluded effectively from the company of which he is director", he thought that Mr. Pyke's duty to the claimants had been "reduced to vanishing point" by the inexplicable actions of Mr. Plank.

Judges have always said that the categories of fiduciaries should not be considered closed (see, *e.g.*, *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 325, 341, *per* Sir Eric Sachs L.J., and *Tufton v. Sperni* [1952] 2 T.L.R. 516, 522, *per* Sir Raymond Evershed M.R.). Perhaps this constant exhortation should be read in this light: just as other relationships beyond the established may be fiduciary in nature, the converse may also be true, and it should not be assumed that the relationship that an actor in an established category bears to his beneficiary is necessarily fiduciary in nature. As Dickson J. of the Supreme Court of Canada opined in *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 (S.C.C.), 341, "[it] is the *nature* of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty" (emphasis added). This would mean, especially in resignation cases, that the focus

should be the survival of the fiduciary relationship post-resignation and whether the duty then was breached, rather than whether a “maturing corporate opportunity” was stolen, or whether confidential information had been misused.

It remains to query how a director like Mr. Pyke will be dealt with under the proposed statement of directors’ duties (see CLRSG, *Modern Company Law for a Competitive Economy: Final Report* (2001, URN 01/942 (vol. 1) and 01/943 (vol. 2) Annex 1 and *Modernising Company Law-Draft Clauses* Cm. 5553-II, schedule 2). Certainly the option of saying that a director, while still a director, is not subject to certain (fiduciary) duties will not exist. All directors, regardless of the nature of their relationship with the company, are subject to the stated obligations. Would Mr. Pyke be in breach then? As the statement is currently crafted, this is not unlikely. The role of section 727 of the Companies Act 1985 as an exculpatory provision could then take on added significance. Whether this is the best approach to take, however, remains to be seen.

PEARLIE KOH

INQUORATE BOARDS, ORGANS AND SECTION 35A OF THE COMPANIES
ACT 1985

THE recent decision of the Court of Appeal in *Smith v. Henniker-Major & Co.* [2002] EWCA Civ 762, [2002] 3 W.L.R. 1848 demonstrates the mess that the United Kingdom has made of its implementation of the First Directive of the European Union on harmonisation of company law and the interpretation of the legislation.

Section 35A(1) of the Companies Act 1985, which represents the second attempt to implement the Directive, provides that

In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed free of any limitation under the company’s constitution.

The central issue in the case, which involved an appeal against dismissal of an action as having no real prospect of success, was whether the chairman of a company who purported to act as an inquorate board meeting to assign the company’s rights of action to himself could rely on the protection of the section. Although the transaction was self-interested, the claimant (whose good faith was assumed) was seeking to combat the misconduct of two of his

fellow directors in making off with a corporate opportunity. In terms of the section he was trying to have his cake and eat it. He was claiming to be the board of directors, and also claiming to be a person dealing with the company in terms of the section or a third party in terms of the Directive.

The majority of the Court of Appeal (Robert Walker L.J. dissenting) held that although a person dealing with a company could include a director, here the director was also chairman and involved in the decision. It was his duty to ensure that the constitution was properly applied and he could not rely on his own error to constitute a decision of the board. This is quite apart from the fact that the transaction might be voidable by the company under section 322A. All three members of the court held that delay and some prejudice to the respondent made it unfair for the claimant to rely on an attempt to ratify the assignment by deed subsequently.

Robert Walker L.J., dissenting, thought that there was no justification in taking a narrow view of the section and that there was a distinction to be drawn between a defective meeting and no meeting at all.

It is submitted that a purposive view of the section is appropriate: see H. Kutscher, "Methods of Interpretation as seen by a Judge at the Court of Justice" in *Reports of the Judicial and Academic Conference of the Court of Justice of the European Communities* (1976), Pt. I, sections 5–6). On the second point, however, there is something of a paradox in the Directive and section. The Directive aims to protect third parties, but to be protected there must be an act done by an organ of the company in the words of Article 9(1) of the Directive. Section 9(1) of the European Communities Act 1972 referred to "the directors". Section 35A(1) refers to the board of directors. In one pre-1973 case, *D'Arcy v. The Tamar, Kit Hall and Collington Railway Co.* (1866) L.R. 2 Exch. 158, it was held that the absence of a quorate decision of the board made the transaction a nullity. Other cases, however, held that a *bona fide* third party without notice was protected by the rule in *Royal British Bank v. Turquand* (see *Bargate v. Shortridge* (1855) 5 H.L.C. 297; *Davies v. R. Boulton & Co.* [1894] 3 Ch. 678; *Duck v. Tower Galvanizing Co.* [1901] 2 K.B. 314, cited by *Pennington's Company Law*, 8th edn., pp. 137–138). These latter decisions turned to some extent on matters such as representation, acquiescence or the presence of a validating article. In *TCB Ltd. v. Gray* [1986] Ch. 621 the Vice-Chancellor had held on the 1972 wording that a strict interpretation would drive a coach and horses through the section and adopted a purposive construction where there was agreement but no meeting of the directors ([1986] Ch. at 636C–D and 637C).

The view taken in the present case of wording which arguably justified the application of a strict view was similarly liberal and can be reconciled with the earlier case law. The problem to some extent was that the crucial issue of the good faith of the claimant was assumed for the purpose of the present proceedings and yet seemed to have some bearing on the majority decision.

Carnwath L.J.'s view was that if a document is put forward as a decision of the board by someone appearing to act on behalf of the company, in circumstances where there is no reason to doubt its authenticity, a person dealing with the company should be able to take it at face value. This is to be contrasted with Robert Walker L.J.'s dissenting opinion that the irreducible minimum was a genuine decision taken by a person or persons who can on substantial grounds claim to be the board of directors acting as such even if the proceedings are marred by procedural irregularities. It is submitted that Carnwath L.J.'s view, with which Schiemann L.J. appeared to agree, is more practical and is consistent with the opinion of Advocate-General Myras in *Friederich Haaga GmbH*. [1974] E.C.R. 1201 at 1210.

The majority view is consistent with Lord Simonds' *obiter dicta* in *Morris v. Kanssen* [1946] A.C. 459 at 476 and Lord Pearson's dicta in *Hely-Hutchinson v. Brayhead Ltd.* [1968] 1 Q.B. 549 at 594A-B on the question of a director's duty to know and observe the constitution: *a fortiori* in the case of a chairman, on which hitherto there has been surprising lack of authority. Schiemann L.J. thought that a director fell outside the concept of third party as used in the Directive, although this seems debatable where the director did not participate in the decision.

This case shows the continuing ambiguity in the concept and function of an organ and indeed of the board of directors in English law. Matters such as these are difficult to resolve in interlocutory proceedings. Clarification of both is a prerequisite of effective corporate governance, yet seems to have been neglected in the latest reform proposals.

J.H. FARRAR

FREEDOM OF ESTABLISHMENT FOR COMPANIES: A GREAT LEAP FORWARD

FREEDOM of establishment has been a promise not only to individuals, but also to companies, ever since the foundation of the EEC, and the relevant articles in the EEC Treaty have long been declared to have direct effect (*Reyners v. Belgium* [1974] E.C.R.

631). Yet until recently companies faced extra hurdles. A majority of the Member States applied the so-called “theory of the real seat” (for references see H. Xanthaki, “*Centros*: is this really the end for the theory of the *siège réel*?” (2001) 22 *Company Lawyer* 2). In essence, the theory is a rule of private international law that a company will be treated according to the law of its central place of management (the “real seat”), notwithstanding that it may have been incorporated in a different jurisdiction. In such a case, the company will not fulfil the formal requirements of registration in the jurisdiction of its real seat and will normally lack the quality of a legal person there. The aim of the theory is to preserve national company law as a policy instrument in areas such as corporate governance, by disallowing pseudo-foreign companies, *i.e.* companies set up to do business mainly or exclusively in one jurisdiction, but evading local regulation there by incorporating abroad. But the theory can strike beyond this goal, as the facts of Case C-208/00 *Überseering BV v. Nordic Construction Company Baumanagement GmbH* demonstrate.

Überseering BV had been incorporated in the Netherlands. It had lawfully bought property in Germany while its central place of management had been in the Netherlands. Some time later all its shares were acquired by two Germans, and the court found, as a fact, that the new owners had moved the central place of management to Germany. As a result, from the German perspective, the company ceased to exist as a Dutch company without acquiring legal personality under German law, and consequently the German courts refused to allow it to enforce contractual remedies resulting from a building contract.

Certainly such an approach is difficult to square with the spirit of freedom of establishment, but many continental lawyers drew comfort from *R. v. HM Treasury, ex p. Daily Mail and General Trust plc* [1988] E.C.R. 5483, [1989] Q.B. 446, where the ECJ had held that the EEC Treaty regarded the differences in national legislation concerning the required “connecting factor”, and the question whether (and if so how) the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another, as problems which are not resolved by the rules concerning the right of establishment.

In March 1999, however, the ECJ dropped a bombshell in *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] E.C.R. I-1459, [2000] Ch. 446. A Danish couple had incorporated a private limited company with its registered office in England and a notional share capital of £100. They made no secret of their intention to carry on the business in Denmark and of their motive of avoiding Danish

rules on a minimum share capital. The ECJ held this to be a legitimate exercise of freedom of establishment and added that it was inherent in a single market that anyone could choose to form a company in the Member State whose rules of company law seemed to him the least restrictive.

The case rang alarm bells across the continent, but some commentators were not convinced that it would demolish the theory of the real seat, because *Centros* concerned two Member States, Denmark and the UK, neither of which applied the theory. The debate was fuelled by the ECJ's failure even to mention *Daily Mail*, which left considerable room for speculation as to the relationship between the two cases.

The point has now been settled by *Überseering*. The ECJ insists that its remarks in *Daily Mail* should be read only in conjunction with an earlier passage where the court had called companies “creatures of the law and, in the present state of Community law, creatures of national law”, existing only by virtue of the varying national legislation which determines their incorporation and functioning. So when *Daily Mail* spoke of a “connecting factor”, that did not relate to the general use of the term in private international law parlance, which would include “connecting factors” required by the Member State where the company has its central place of management. The reference to the “connecting factor” in “national legislation” is an exclusive reference to the law under which the company has been formed. That law is a characteristic part of its corporate identity and accompanies it wherever the company moves. *Daily Mail* only referred to restrictions in that law, but not to a “connecting factor” required by another jurisdiction.

Überseering is not a revolutionary decision, but it puts the revolutionary content of *Centros* beyond doubt: this *is* the end of the theory of the real seat. It is a significant step. For the first time, all Member States of the EU will be exposed to a degree of competition in the area of corporate regulation. Is the EU now set to develop a phenomenon similar to the notorious “Delaware-effect” in the US, where a single jurisdiction has proved overwhelmingly attractive for incorporations? In some regards the situation in Europe differs fundamentally. Diversity is much greater among the European legal systems, not least because of the many different languages. And the EU lacks a proper federal law, whereas in the US important areas of business law such as securities regulation and insolvency law are governed by federal law, complete with federal enforcement agencies and courts. In the field of insolvency the EU has just managed to harmonise the rules

on the conflict of laws in the new Council Regulation (EC) No. 1346/2000 on insolvency proceedings, but not substantive law. Incidentally, under the Regulation the insolvency proceedings will be governed by the law of the forum, and the insolvency forum will be determined according to the “centre of a debtor’s main interests”, a kind of re-incarnation of the theory of the real seat. That may produce clashes between company law and insolvency law, where the company is incorporated in another Member State. The challenge will be to resolve such situations. *Überseering* is a milestone, but the road towards a coherent system of corporate regulation within the EU is long and winding.

THOMAS BACHNER

ACQUITTED: PRESUMED INNOCENT, OR DEEMED LUCKY TO HAVE GOT AWAY
WITH IT?

IN November, M. Canivet, the First President of the French *Cour de cassation*, gave a public lecture in Cambridge on *la responsabilité du juge*, where he described the recourse that modern French law provides for citizens who find themselves ill-served by the legal system. He told us that in France, defendants remanded in custody pending trial now receive automatic compensation if at trial they are acquitted, and that citizens can bring civil claims against the State where they are hurt by the malfunctioning of justice.

Two recent cases show how very different things are in England.

The first is *Quinland v. Governor of Swaleside Prison* [2002] EWCA Civ 174, [2002] 3 W.L.R. 807. For a package of assorted misdeeds, a judge gave Quinland a package of periods of imprisonment, some concurrent and some consecutive. Unfortunately he added them up wrongly, and described the package as bigger than it was. Nobody noticed, and the excessive period was stated in the warrant for commitment on the basis of which Quinland was then locked up. The error was eventually spotted, and pointed out: but thanks to a further blunder, this time in the Court Service, nothing was done in time to prevent Quinland serving out the period of imprisonment appropriate to the longer sentence—six weeks more “porridge” than he should have eaten. It was only after his release that the Court of Appeal officially varied the sentence. Then, some five years later, Quinland attempted to bring a claim for damages.

He did not even try to sue the judge, because the common law, being judge-made, predictably says that judges are immune from claims in negligence (*Sirros v. Moore* [1975] Q.B. 118). So he sued

the prison governor for false imprisonment, and the Crown, in the shape of the Lord Chancellor's Department, as liable for the negligence of the nameless official in the Court Service who had blundered. Both claims were struck out by the district judge, whose decision was upheld by the Court of Appeal. The claim against the prison governor failed because he had detained the claimant for the proper period required by the warrant of commitment—which, though based on the judge's poor addition, was valid. The claim against the second defendant failed because section 2(5) of the Crown Proceedings Act 1947 provides that no action shall lie against the Crown in respect of "anything done or omitted to be done by a person whilst discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of the judicial process"—a phrase the Court of Appeal thought apt to cover the Court Service blunder. (The court left open the question whether the result would have been the same if the events had occurred after the Human Rights Act.)

Would Quinland have fared any better if, instead of trying to sue for damages, he had sought compensation from the State under section 133 of the Criminal Justice Act 1988, which the marginal note describes as providing "compensation for miscarriages of justice"? That he would not is plain from the second case, *R. (Christofides) v. Secretary of State for the Home Department* [2002] EWHC 1083 (Admin), [2002] 1 W.L.R. 2769, which turns on the construction of this provision.

Christofides was convicted of murder in 1992. Nine years later, the Court of Appeal quashed his conviction. For the murder conviction it substituted a conviction for attempted GBH, and for the mandatory life sentence, a sentence of two years' imprisonment. For the seven years in prison which in retrospect he should not have spent there, Christofides applied to the Home Secretary for compensation under section 133, which was refused. Christofides challenged the refusal by way of judicial review, and in the Divisional Court he failed.

Section 133 was enacted to secure compliance with the UK's international obligations towards victims of miscarriages of justice under Article 14 (6) of the UN International Covenant on Civil and Political Rights—but, it seems, as narrowly as possible.

Copying the Convention, section 133 (as amended) first announces a right of compensation where a person "has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond

reasonable doubt that there has been a miscarriage of justice". Then, glossing the Convention, it defines "reversed" narrowly. "Reversed" is taken "as referring to a conviction having been quashed (a) on an appeal out of time; or (b) on a reference (i) under the Criminal Appeal Act 1995 or (ii) under section 263 of the Criminal Procedure (Scotland) Act 1975; or (c) on an appeal under section 7 of the Terrorism Act 2000". Thus there is no right to compensation in a "normal" case, where someone was wrongly convicted at first instance, and the Court of Appeal, acting properly, then quashed the conviction under its usual procedures. Then, as final step to ensure that as far as possible nobody gets anything, it provides that "the question whether there is a right to compensation under this section shall be determined by"—yes, you've guessed!—"the Secretary of State".

Confronted with this singularly mean provision, the Divisional Court construed it in accordance with the spirit in which it was conceived. They held that it only applies where the claimant is eventually cleared of everything, and does not cover the situation where the original conviction was quashed, a conviction being substituted for a lesser offence. Thus the Home Secretary was right to rule that Christofides had no valid claim.

Alongside section 133 the Home Secretary operates what is called "the extra-statutory ex gratia scheme". The Home Office, in other words, will sometimes compensate people even if they fall outside section 133—particularly, one suspects, where the word "Strasbourg" crops up repeatedly in the correspondence. The second string to Christofides' legal bow was an attempt to judicially review the Home Secretary's refusal to make a discretionary payment, on the ground that Christofides had a "legitimate expectation".

This also failed, because the Divisional Court found nothing to found a legitimate expectation in the Home Secretary's pronouncements in relation to the scheme.

In various public statements, the Home Secretary has stressed that he will not pay compensation "simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought". He might pay up, he says, "in certain exceptional cases where the appellant has spent time in custody, for example where there is serious default by a public authority, such as the police, or if an accused person is completely exonerated (whether at trial or on appeal)". None of this applied to Christofides. Christofides had asked the Home Secretary to accept that his case was, in its own way, equally "exceptional", in that his

murder conviction had been quashed only after two unsuccessful trips to the Court of Appeal and one successful visit to the Criminal Cases Review Commission, and meanwhile he had spent in prison seven years more than the Court of Appeal eventually thought appropriate for the offence he could be proved to have committed. This invitation the Home Secretary declined—and the Divisional Court refused to interfere. As Sedley L.J. put it, with regret: “The courts are there to ensure that the Home Secretary sticks to what he and his predecessors have promised, but not to enlarge or improve the scheme. That remains a question for government.”

For those who were locked up wrongly or unnecessarily, the result of all this is as follows.

First, there is no automatic right to compensation, even if it happened because the criminal justice system grossly and obviously malfunctioned. Second, there is no right if you were imprisoned where it initially malfunctioned, and its own internal processes corrected it. And third, there is—a *fortiori*—no right to compensation if the system functioned properly, but in retrospect too zealously: as where you were remanded in custody where reasonable grounds existed at the time for refusing bail, but in the end you were acquitted.

That this is unsatisfactory surely needs no stressing: particularly when in the rest of Europe, compensation is nowadays more or less automatically given to anyone who was locked up when it turns out they should not have been.

Behind this lies an uncomfortable paradox.

In this country, it is widely believed that a distinguishing feature of our legal system is that it protects the presumption of innocence, whereas in Continental Europe it is set at naught. If anything, the reverse in fact is true. Our version of respecting the presumption of innocence is preserving a range of archaic and irrational rules of procedure and evidence, which ensure that a lot of guilty people are improperly acquitted. And then, uneasily aware of this, we treat everyone who is acquitted as if they really did it.

J.R. SPENCER

