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## CASE AND COMMENT

### HOUSE OF LORDS DECISIONS

NOTES on the Court of Appeal decisions in the cases listed below appear in earlier numbers of the *Journal*. Appeals to the House of Lords in these cases have now been disposed of as shown:

*Attorney-General v. Blake*, noted [1998] C.L.J. 258. Appeal dismissed: [2000] 3 W.L.R. 625.

*Hamilton v. Al Fayed*, noted [1999] C.L.J. 471. Appeal dismissed: [2000] 2 W.L.R. 609.

*Jolley v. Sutton London Borough Council*, noted [1999] C.L.J. 12. Appeal allowed: [2000] 1 W.L.R. 1082.

*McAlpine Construction Ltd. v. Panatown Ltd.*, noted [1998] C.L.J. 250. Appeal allowed: [2000] 3 W.L.R. 946.

*Phelps v. Hillingdon London Borough Council*, noted [1999] C.L.J. 270. Appeal allowed: [2000] 3 W.L.R. 776.

*R. v. Smith*, noted [1999] C.L.J. 7. Appeal dismissed: [2000] 3 W.L.R. 654.

### LEGITIMATE EXPECTATION: THE SUBSTANTIVE DIMENSION

THE need to redress the inequality of power between the citizen and the State, which lies at the heart of public law, is illustrated nowhere more clearly than in the facts of *R. v. North and East Devon Health Authority, ex p. Coughlan* [2000] 2 W.L.R. 622. As a result of her severe disability Pamela Coughlan was, for many years, looked after as a hospital in-patient. In 1993, however, she agreed to move to a purpose-built care facility on the strength of the respondent's promise that it would be her "home for life"; yet, only five years later, the health authority decided to close the new home, citing financial reasons. That the applicant possessed a

legitimate expectation which would be breached by closure of the home was not in doubt. The difficult question was how the expectation could be protected. Courts have long been willing to enforce procedural promises and to safeguard expectations of substantive benefits by requiring the adoption of a fair procedure (typically consultation) before the benefit is denied. *Coughlan*, however, makes it clear that courts may go further than this by substantively protecting substantive expectations.

This is a sensitive issue, given its implications for the autonomy of executive bodies. Reviewing courts have traditionally attempted to preserve agency freedom by focusing primarily on how decisions are made rather than on their content. This vision of how judges and decision-makers ought to relate to one another, which English administrative law has long embodied, gave rise to the *Wednesbury* principle which heavily circumscribes the courts' role: only if the content of the decision is manifestly unreasonable does *Wednesbury* sanction judicial intervention.

Prior to *Coughlan* it appeared that the doctrine of legitimate expectation fitted comfortably into this framework. Provided that they acted rationally, public authorities were free to determine where the balance lay between the policy factors pointing towards frustration of the expectation and the unfairness which would thereby be occasioned to the representee (see, e.g., *Richmond-upon-Thames L.B.C.* [1994] 1 W.L.R. 74, 94, *per* Laws J.; *Hargreaves* [1997] 1 W.L.R. 906, 921, *per* Hirst L.J.). *Wednesbury* therefore supplied a wide zone of discretion within which agency action was immune from substantive review.

*Coughlan*, however, does not confine the courts' role thus. Lord Woolf M.R., giving the judgment of a Court of Appeal consisting also of Mummery and Sedley L.JJ., adopted a tripartite categorisation of legitimate expectation cases. First, the applicant may be entitled to expect merely that the executive will "bear in mind its previous policy before deciding whether to change course"; here, the court may intervene only if departure from the policy is irrational. Secondly, the expectation may relate simply to procedure, in which case the court will require the relevant procedure to be followed. Thirdly, however, as in *Coughlan* itself, the applicant may be entitled to expect that she will receive a substantive benefit or outcome. In such cases, "once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy". On the facts the court concluded that the public interest arguments advanced by the respondent were insufficient to justify breach of the "home for life" promise.

This is clearly inconsistent with the view that *Wednesbury* delimits the courts' role. Indeed, the standard of review applied in *Coughlan* resembles the interrelated concepts of proportionality and objective justification, which are commonplace in the jurisprudence of the European Court of Human Rights, much more closely than the unreasonableness doctrine. Although the Court of Appeal asserted that this approach was supported by authority, this is doubtful. While previous cases clearly envisaged that expectations could be afforded a measure of substantive protection (see, e.g., *Liverpool Taxi* [1972] Q.B. 299, 308, *per* Lord Denning M.R.; *Preston* [1985] A.C. 835, 866–867, *per* Lord Templeman; *M.F.K. Underwriting* [1990] 1 W.L.R. 1545, 1568, *per* Bingham L.J.), they did not squarely confront the *standard* of protection to be conferred: specifically, they did not clearly determine whether *Wednesbury*, or a more intrusive form of review, ought to apply.

However, outside the particular context of legitimate expectation, there is clear guidance concerning the standard of substantive review which has traditionally been considered appropriate. Decisions such as *Brind* [1991] 1 A.C. 696 and *Smith* [1996] Q.B. 517 supply detailed explanations both of the orthodox view that reviewing courts are constrained by *Wednesbury* and of the constitutional vision of the relationship between judges and decision-makers on which that model of substantive review is founded. In departing from that ethos without offering any principled constitutional justification for doing so, *Coughlan* is surprising but not unique. Cases such as *Witham* [1998] Q.B. 575 (noted (1997) 56 C.L.J. 474) and *Simms* [1999] 3 W.L.R. 328 (noted (2000) 59 C.L.J. 3) also exemplify a standard of substantive scrutiny which is more rigorous than that which *Wednesbury* commends, while making little attempt to explain why the strictures of cases such as *Brind* and *Smith* need not be adhered to.

In one sense this is very unsatisfactory. Since attachment to *Wednesbury* rests upon a particular constitutional ethos concerning the courts' role and their relationship with the executive, any alteration in the standard of curial intervention must logically reflect a judicial conviction that the underlying constitutional dynamics warrant such change. It is self-evidently desirable that such matters should be articulated openly by the courts. In another sense, however, the legitimacy of review which transcends *Wednesbury* scrutiny is not such a live issue as once it was. Irrespective of whether it has, to date, been appropriate for the courts to engage in such review, the Human Rights Act 1998 places the matter beyond doubt. In taking account of the Strasbourg Court's jurisprudence, as section 2 entitles them to do, English

courts will inevitably shift from *Wednesbury* to proportionality review in cases concerning the Convention rights. Since the 1998 Act thus clearly establishes the legitimacy of high intensity review, the manner in which the courts are likely to engage in such review becomes the central issue.

In this regard, the Court of Appeal's decision in *R. v. Secretary of State for Education and Employment, ex p. Begbie* [2000] 1 W.L.R. 1115 is of interest. The applicant asserted a legitimate expectation that the Secretary of State would, in his discretion, provide her with continued assistance with her independent school fees following the abolition of the assisted places scheme; this was therefore a *Coughlan* category three claim of entitlement to a substantive benefit. *Begbie* is interesting for two reasons.

First, the court emphasised that the gateway through which those seeking to establish a legitimate expectation must pass is relatively narrow: the applicant failed because she relied, in part, on pre-election statements issued by the Labour Party which, said the court, could not give rise to a legitimate expectation. Moreover, to have required the Minister to act consistently with the asserted expectation would have frustrated the clear policy of the enabling legislation. As Peter Gibson L.J. pointed out, "any expectation must yield to the terms of the statute". Threshold considerations such as these assume a heightened relevance now that *Coughlan* has established that, once the threshold is crossed, a high level of review may apply which, in turn, can impact substantially on executive freedom. The courts will need to approach the Convention rights with similar vigilance, given that they, too, form the gateway to a potentially intrusive mode of judicial review.

Secondly, Laws L.J. emphasised (*obiter*) that, even when an applicant establishes a legitimate expectation, intensive *Coughlan*-style review may well be inappropriate. In particular, he offered a more sophisticated and nuanced analysis than the tripartite categorisation favoured in *Coughlan*, opining that the first and third *Coughlan* categories—which provide respectively for low-intensity *Wednesbury* and high-intensity proportionality review—are "not hermetically sealed". Rather, substantive review operates on a sliding scale which embraces many different levels of judicial intervention, with the standard of review being determined by the specific features of the case. Thus, if the matter in question lies in the "macro-political field", raises "wide-ranging issues of general policy" or is likely to have "multi-layered effects" which substantially reduce the government's freedom to formulate policy, a less intrusive form of review is called for.

Although, according to *Coughlan*, such matters are relevant to

the categorisation of a case, Laws L.J.'s analysis is more appealing. Just as *Wednesbury* is a catholic, not a monolithic, principle, so proportionality conceals a variety of levels of intervention. Moreover, although *Wednesbury* and proportionality constitute distinct modes and levels of substantive review, in the final analysis they are merely different points on a single continuum of judicial intervention rather than wholly distinct species of review. *Begbie* therefore places *Coughlan* in context. Whereas the latter establishes the possibility of high intensity review in expectation cases, the former emphasises that such curial scrutiny merely represents one end of a spectrum which embraces many different shades of substantive review.

In itself, this conclusion is important to our understanding of the doctrine of legitimate expectation. However, it also has a wider resonance. The approach to substantive review advocated by Laws L.J. in *Begbie* highlights the fact that, just because the Human Rights Act places the proportionality test at the disposal of English courts, such an intrusive form of review will not be appropriate in all fundamental rights cases. Consequently, debate about whether the Act will mark the demise of *Wednesbury* is ultimately arid. The rationality and proportionality doctrines are not competitors that must be chosen between; they are, rather, complementary modes of substantive review which the courts will deploy as circumstances require. In this sense, *Coughlan* and *Begbie*, read together, are significant not only in the field of legitimate expectation, but also as a wider blueprint for sensitive judicial deployment of the new tools of substantive review which are now at the disposal of English courts.

MARK ELLIOTT

#### CONSTRAINING ARREST FOR BREACH OF THE PEACE

GIVEN that it was no more than a decision of the Divisional Court, and a pre-War decision at that, the case of *Duncan v. Jones* [1936] 1 K.B. 218 has exercised a remarkably enduring influence. The case appeared to give the police enormous operational discretion in dealing with actual and prospective breaches of the peace. When a constable reasonably apprehended a breach of the peace, he could take steps (arguably, only reasonable steps) to prevent it or its recurrence. This disarmingly simple formula made it very difficult to challenge, let alone control, the way in which the police

exercised their powers. The case is also notable—if not notorious—for the dismissive remarks of Lord Hewart C.J., who said:

There have been moments during the argument in this case when it appeared to be suggested that the court had to do with a grave case involving what is called the right of public meeting for political or other purposes. The right of assembly, as Professor Dicey puts it ... is nothing more than a view taken by the court of the individual liberty of the subject.

As generations of students would be prepared to attest, it was never really possible to reconcile this decision with the principle acknowledged in *Beatty v. Gilbanks* (1882) 9 Q.B.D. 308, that a person behaving lawfully commits no wrong merely because he or she knows that others will react unlawfully to what he or she is doing. Two recent decisions demonstrate just how much Lord Hewart's approach and its accompanying rhetoric have dated.

The facts of *Redmond-Bate v. D.P.P.* (1999) 163 J.P. 789 were not dissimilar to those in *Duncan v. Jones*. A woman was preaching on the steps of Wakefield Cathedral, in the company of two fellow "Christian fundamentalists". They were not causing any obstruction to passers-by, having been warned by a police officer that they were not to stop people. Some twenty minutes after he had issued the warning, the policeman returned to find that a crowd of more than a hundred had gathered. Fearing a breach of the peace, the constable asked the women to stop preaching and when they refused to desist, he arrested all three for breach of the peace. One of them, the appellant, was convicted of obstructing a constable in the execution of his duty. Her appeal to the Crown Court was dismissed, and she appealed to the Divisional Court.

In a judgment of some importance, Sedley L.J. analyses and refines the issues that are at stake. A member of the public who fails to comply with a reasonable request properly made by a constable who is seeking to prevent a breach of the peace is guilty of obstruction. The question whether the constable's action is reasonable is an objective one for the court to decide, and the test is not whether the view taken by the constable fell within a broad band of rational decisions (the *Wednesbury* test, though this is not stated as such by the court), but whether in the light of what he knew and perceived at the time, the court is satisfied that it was reasonable to fear an imminent breach of the peace. But there was said to be a further question for the constable, and in turn for the court, namely the question where the threat to the peace is coming from, "because it is there that the preventive action must be directed". His Lordship cites *Beatty v. Gilbanks* as authority for this latter proposition, and then develops its significance in the free

speech context as affected by the impending implementation of the Human Rights Act 1998:

To speak of rights at all ... is to recognise the constitutional shift which is now in progress. The old order is crystallised in Lord Hewart C.J.'s ... remarks in *Duncan v. Jones* ... A liberty ... is only as real as the laws and bylaws which negate or limit it. A right, by contrast, can be asserted in the face of such restrictions and must be respected, subject to lawful and proper reservations, by the court.

The European Court of Human Rights has already accepted in *Steel v. The United Kingdom* (1997) 5 B.H.R.C. 339 that the core concept of breach of the peace is sufficiently certain to pass muster under the jurisprudence of that court, because it is confined to persons who cause or appear to be likely to cause harm to others or who have acted in a manner "the natural consequence of which was to provoke others to violence". Sedley L.J. concluded that "a police officer has no right to call upon a citizen to desist from lawful conduct. It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, would not be entirely unreasonable that a constable is empowered to take steps to prevent it." Since the speakers here were behaving entirely lawfully, there was nothing in the scenario confronting the constable to justify his conclusion that there was likely to be a breach of the peace, much less a breach for which the three women were responsible, and the appeal was allowed. Expressing a sentiment that deserves to become at least as well known as that of Lord Hewart's cited earlier, Lord Justice Sedley said:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

That the essential principles are not confined to the protection of freedom of speech is both illustrated and reinforced by the welcome adoption of *Redmond-Bate* by the Court of Appeal in *Bibby v. Chief Constable of Essex* (2000) 164 J.P. 297. A bailiff seeking to enforce a judgment debt was confronted by a debtor who declined to part with his assets. A police officer called to the scene concluded, apparently, that the bailiff, a large man, was intimidating by being there and by being very forthright, and that the bailiff was short-tempered and at the end of his tether. Fearing that a breach of the peace was about to occur, he told the bailiff to leave. When he declined to do so, the bailiff was arrested and



handcuffed, but subsequently released without charge. The bailiff sued for assault and wrongful imprisonment. An assistant recorder held that the police officer was entitled to act as he had, since there were reasonable grounds to fear that a breach of the peace would otherwise occur. An appeal was allowed, and a number of principles articulated. The power of arrest for breach of the peace is now an exceptional one, only to be exercised in the clearest of circumstances against a person not at the time acting unlawfully. The threat must come from the person about to be arrested. His conduct must clearly interfere with the rights of others; its natural consequence must be violence from a third party which was not wholly unreasonable; and the conduct of the person to be arrested must be unreasonable. Applying these principles, it was plain that the bailiff was perfectly within his rights to act as he did. He was not interfering with the rights of the debtor in any way unlawfully. If anything, the recalcitrant debtor would have been the cause of the unlawful violence were any used.

The principles thus articulated are greatly to be welcomed. They might, perhaps, make the task of the policemen on the spot slightly more difficult. But they might also alert the police to the fact that the protection of free speech is not merely a matter of discretion but of obligation on their part, and the unfortunate *Duncan v. Jones* will have been trimmed to size.

A.T.H. SMITH

#### ITLOS FLAGS ITS INTENT

*THE M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (1999) 38 I.L.M. 1323 was, on the facts if not on the docket, the continuation and conclusion of *The M/V "Saiga"* 110 I.L.R. 736, the first case to be heard by the International Tribunal for the Law of the Sea (ITLOS) established under the 1982 Convention on the Law of the Sea. The cases arose out of an incident in which the *Saiga*—a Cypriot-owned, Scottish-managed and Swiss-chartered tanker flying the flag of Saint Vincent and the Grenadines—was detected refuelling fishing vessels at sea ("bunkering") in the Exclusive Economic Zone, and in violation of the customs laws, of Guinea. Guinean patrol craft forcibly arrested the *Saiga*, injuring a Ukrainian crewman and a Senegalese painter, and escorted the ship to port, where its Ukrainian master was convicted of customs offences. As well as a suspended sentence of



six months' imprisonment, the court imposed a substantial fine, seizing the vessel and confiscating its cargo by way of guarantee.

In the earlier "*Saiga*" case, on the question of prompt release, the Tribunal found for Saint Vincent and the Grenadines. But it was not until just before an order on provisional measures, in the first phase of *The M/V "Saiga" (No. 2)*, that the Guinean authorities actually released the vessel.

At the merits stage, Saint Vincent and the Grenadines asked the Tribunal to adjudge and declare, *inter alia*, that (subject to limited exceptions found in the Convention) the customs and contraband laws of Guinea were in no circumstances to be applied or enforced in its Exclusive Economic Zone; that the actions of Guinea in attacking the *Saiga* and its crew, in arresting and detaining the ship, and in removing its cargo of gasoil violated the right of Saint Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in the Convention; and that Guinea was liable for damages as a result of the alleged violations.

Guinea challenged the claim's admissibility on the grounds of the nationality of the ship at the time of arrest. It was undisputed that a provisional certificate of Vincentian registration had expired and so, at least on its face, had the *Saiga's* entry in the ships register of Saint Vincent and the Grenadines. According to Guinea, this denied the former State standing to bring the case.

The ship's nationality assumed added importance in the light of two rulings later in the judgment. First, as to the flag State's right to seek reparation for loss or damage caused to its ships by the acts of other States, the Tribunal held that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant." Second, the Tribunal held that the rule codified in Article 95 of the Convention—that local remedies must be exhausted before a State may bring a claim against another by way of diplomatic protection—did not apply. This was not a case of diplomatic protection: the alleged breaches by Guinea were all direct violations of the rights of Saint Vincent and the Grenadines as a flag State under the Convention. Nor were local remedies required to be exhausted where, as here (as held later), the acts complained of took place outside the respondent State's jurisdiction.

In determining the *Saiga's* nationality, the Tribunal applied Article 91 of the Convention, codifying general international law, which leaves to each State exclusive jurisdiction over the grant of its nationality to ships. On the facts, the (perhaps credulous)

Tribunal was persuaded that, under the law of Saint Vincent and the Grenadines, a vessel once registered remained so until deleted from the register. The expiry of a provisional certificate of registration and of an entry in the register did not deny a ship the Vincentian flag, a conclusion criticised in the separate and the dissenting opinions. As for other evidence deemed persuasive, the conduct of St Vincent and the Grenadines in acting as the *Saiga*'s flag State in every phase of the proceedings, and the fact that at no time before its counter-memorial did Guinea seek to challenge this, reinforced the Tribunal's conclusion that the vessel had Vincentian nationality.

Guinea, however, argued in the alternative that there was no "genuine link" between the *Saiga* and Saint Vincent and the Grenadines, even if the vessel *was* registered there. The requirement of a genuine link is found in Article 91 (1) of the Convention:

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Guinea denied any obligation to recognise the *Saiga*'s nationality; *vis à vis* Guinea, Saint Vincent and the Grenadines' claim would therefore not be admissible. This argument rested on the fact of the ship's foreign ownership, management and charter, and on the legal assertion that, in the absence of prescriptive and enforcement jurisdiction over the owner and operator of a ship, a flag State cannot fulfil its obligations under the Convention, and so has no genuine link with the vessel. Addressing this proposition, the Tribunal noted that Article 91 (1) did not provide the answer. Recalling, however, the *travaux préparatoires* of Article 5 (1) of the 1958 Convention on the High Seas, the precursor to Article 91 (1) of the Convention, the Tribunal pointed to the non-adoption in the final text of a draft requirement that "*for purposes of recognition of the national character of the ship by other States*, there must exist a genuine link between the state and the ship". The Tribunal concluded that:

the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

In sum, it was not open to Guinea to refuse to recognise the *Saiga's* Vincentian nationality.

This conclusion of law is not without its problems. The Tribunal was right to consider the unadopted phrasing; it went too far in drawing so firm a conclusion. Redundancy is one plausible ground for the redraft: the *Nottebohm* case [1955] I.C.J. 4 had already done the omitted wording's job. More to the point, whatever *Nottebohm's* status today, the overarching doctrine of good faith continues to condition a State's competence to grant its nationality. It is a condition enforceable by an international tribunal—indeed, a condition which might have been enforced in this case.

Yet the Tribunal had reason to be cautious. On the facts, it was not satisfied anyway that the evidence supported the denial of a genuine link; and Guinea never framed its argument as one of good faith. Invocation of that doctrine by the Tribunal would have been obiter, *proprio motu* and highly controversial. (It is not without relevance that the majority in the first “*Saiga*” case had been excoriated by an influential minority for just this sort of *sua sponte* bombshell.) The Tribunal was well aware of the political background to the case in the long-standing controversy over “flag of convenience” or “open registry” States. The ICJ had side-stepped the issue in the *Constitution of the Maritime Safety Committee of IMCO* advisory opinion [1960] I.C.J. 150; and, as noted by the Tribunal, three post-Convention treaties had left it unresolved.

In the event, having found the claim admissible, and applying the plain meaning of the Convention along with orthodox international jurisprudence, the Tribunal had little trouble in holding that Guinea had violated the rights of Saint Vincent and the Grenadines under the Convention. But although requested to do so by the parties, the Tribunal pointedly declined to declare on the widespread and lucrative practice of offshore bunkering.

On the whole, the Tribunal's judgment, if not altogether rigorous, stuck to the dispute at hand, avoiding gratuitous excursions into lawmaking. In its handling of general international law, *The M/V “Saiga”* (No. 2) should calm those concerned at the proliferation of international tribunals. ITLOS will follow the lead where this is clear and tread warily where it is not.

ROGER O'KEEFE

“AND THAT’S MAGIC!”—MAKING PUBLIC BODIES LIABLE FOR FAILURE TO  
CONFER BENEFITS

THE facts of *Kent v. Giffiths* [2000] W.L.R. 1158 were that the claimant had suffered an asthma attack and was attended by a doctor at her home. At 4.25 p.m. the doctor called an ambulance, gave the patient’s name, address, age and condition, and requested that she be transferred immediately to casualty where she was expected. Ambulance control replied “Okay doctor”. At 4.35 p.m. the claimant’s husband was assured, on making a second call, that the ambulance was on its way. He was told to hang on for another seven or eight minutes. A similar response was given to a third call made sixteen minutes later. The ambulance finally arrived forty minutes after the initial call was made. The claimant suffered respiratory arrest resulting in brain damage and a miscarriage. At trial Turner J. held that the London Ambulance Service (LAS) was liable for breach of a duty of care. He found not only that there was no reasonable explanation for the delay, but also that the ambulance crew had falsified their records ([1999] Lloyd’s Rep. Med. 424). Had the ambulance arrived when it should, there was a high probability that the respiratory arrest would have been averted.

The question for the Court of Appeal was whether the LAS owed the claimant a duty of care. In *Capital & Counties plc v. Hampshire CC* [1997] Q.B. 1004 the Court of Appeal had ruled that the fire service was under no duty to victims of fire, unless it made the damage any worse. Similar decisions had been given in favour of the police (*Alexandrou v. Oxford* [1993] 4 All E.R. 328) and the coastguard (*OLL Ltd. v. Secretary of State for Transport* [1997] 3 All E.R. 897). The case raised the perennial problem of whether a public body can be liable for failure to confer a benefit. This is an issue which has troubled the English courts, evoking different responses by the House of Lords in *East Suffolk River Catchment Board v. Kent* [1941] A.C. 74 and *Anns v. Merton LBC* [1978] A.C. 728 and again dividing the House in *Stovin v. Wise* [1996] A.C. 923. The uncertainty was compounded by the failure of the House of Lords to deal with the issue in *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633, although it was clearly pertinent to several of the claims in that case.

Two fundamental issues dominate the question. The first is the general aversion of tort law to liability for omissions. Several reasons can be given to justify this (see *Stovin v. Wise* at pp. 943 G–944 C), but the overriding objection is that it is contract, and not tort, which protects future benefits. The courts require an extremely high degree of proximity, a special relationship, before they will

recognise a duty to act. The second issue is specific to public bodies. Where Parliament has conferred, not a duty to act, but a discretion whether or not to do so, it is said that it would be inconsistent with the statutory framework to impose a private law duty. Another aspect of this is that it is difficult to see how a mere discretion (or what is often referred to as a power) can underpin a finding of sufficient proximity on which to hang a positive duty in private law.

Lord Woolf M.R. in *Kent* also adverted to the favourable treatment usually afforded by the law of negligence to volunteers and rescuers (the fairness, justice and reasonableness points are beyond the scope of this note). He easily dismissed this point by observing that it was the public function of the LAS to assist the injured and unwell. It is publicly funded and its employees cannot be said to be deserving of any special treatment as rescuers or volunteers.

Lord Woolf neatly sidestepped the more problematic first two issues by recharacterising the public law discretion to act as, on the facts, a duty. He said that “it would have been irrational not to have accepted the request to provide an ambulance” (at p. 1170 H). In *Stovin v. Wise* (at p. 953 D) Lord Hoffmann said that it was a precondition for liability for failing to confer a benefit that “it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act”. By finding such a public law duty to act Lord Woolf M.R. set the stage for finding a duty in private law.

In the light of this initial step in Lord Woolf’s reasoning, establishing proximity becomes much more straightforward. Lord Woolf found that there *was* sufficient proximity, and did so by drawing a distinction between ambulance services and the other rescue services. The fire service and police owed duties to the public at large, which might conflict with the interests of specific individuals. A closer analogy, he thought, was with the other health services who often owed positive duties in private law to confer benefits on specific people in their care. At first instance Turner J. had emphasized the fact that, by contrast with claims against the fire service, the loss suffered was personal injury. Lord Woolf’s way of distinguishing the cases seems generally sound, although (like Turner J.’s) it is much more difficult to justify with reference to the coastguard than the fire and police services. The facts of *Hardaker v. Newcastle Health Authority* (8 March 1996, unreported) illustrate this. The coastguard was there held to owe no duty of care for failing to ensure that the plaintiff was expeditiously transported to the appropriate decompression facility. Perhaps the coastguard

ought to be regarded as a special case protected by the tortious rules on volunteers and rescuers, as while it is publicly funded it is staffed partly by volunteers and has no statutory powers or obligations of any sort. Turner J. had also put considerable emphasis on the common statutory origins of ambulance and medical services.

Lord Woolf did not advert to Turner J.'s test for determining proximity. This was that there must be an initiating call to the ambulance service giving sufficient information for it to "understand the nature of the call on its services" and that time was of the essence. Secondly there had to be an acceptance by allocating an ambulance. Lord Woolf preferred to leave the proximity question to the facts of each case, perhaps having one eye on the ruling of the European Court of Human Rights in *Osman v. UK* 29 E.H.R.R. 245. This approach is fundamentally different from that adopted in the *Capital & Counties* line of cases, which favoured the articulation of broad areas where sufficient proximity could not exist. Lord Woolf noted that if the complaint had been that the ambulance had failed to respond properly to a multiple victim accident, liability might have been denied, not on the grounds of no-proximity, but rather no-fault. He also, wisely, avoided resting the decision on specific reliance. Had he done so, this might have led to a situation where liability would only arise in those cases where the claimant had access to a car or other means of transport to hospital. Lord Woolf also said that there was no question of the issue's being non-justiciable in negligence: the ambulance had been assigned, and there was therefore no issue of resource allocation or conflict of priorities.

Arguably these proximity and justiciability points were all that were needed to decide the case. Lord Woolf himself at one point said: "... even when a statute creates only a power for a body to act ... the body can be liable for negligence if there is also a common law duty created on the particular facts of the case" (p. 1170 D–E). Indeed the public law concept of irrationality is better seen as neither necessary nor sufficient for liability.

It is not *sufficient* because even when irrationality is proved the negligence tests must still be satisfied. The irrationality may spring from factors wholly unconnected to the negligence claim. It should not be *necessary* because failure to comply with other public law duties (for example, failure to take into account relevant considerations) may also disclose negligence, as well as rendering the decision *ultra vires*. The irrationality test renders these situations immune from liability. Moreover recourse to *any* public law concepts may be thought unnecessary (for one such view, see

Bailey and Bowman [2000] C.L.J. 85), and the ultra vires nature of a decision certainly cannot in English law be sufficient for liability.

The concept is also *unhelpful*. The contention that an irrational decision not to act in effect gives rise to a public law duty to act is, in public law terms, a *non sequitur*. Even where mandamus is granted it is usually to compel the remaking of a decision which is irrational and not to compel the conferment of a benefit on the claimant. Only in the controversial area of substantive legitimate expectations is such an approach envisaged (see for example Forsyth [1997] P.L. 373, but see *Ex p. Coughlan* [2000] 2 W.L.R. 622, noted above, p. 421). Lord Woolf attempted to avoid this issue by arguing that providing an ambulance would have been the only rational response which the LAS could have made. This assertion was not supported by reasoned analysis of any sort. Nor did Lord Woolf, or their Lordships in *Stovin v. Wise*, advert to the unconventional use to which the public law test is being put.

The concept of irrationality, so used, is better avoided altogether (although this is not to say that public duties cannot be implied: see *Lonrho v. Tebbit* [1991] 4 All E.R. 973, 981 c–e, 983 h). Moreover proximity and justiciability ought to be able to provide the answer (always remembering that a common law duty “must be profoundly influenced by the statutory framework ...”: *Bedfordshire* at p. 739 C, *per* Lord Browne-Wilkinson), and arguably did so in *Kent* in any case. In fact, Lord Woolf comes close to saying that it would be irrational not to act *because* of the private law duty. This would clearly be circular reasoning. While the outcome itself, and the majority of Lord Woolf’s judgment, is therefore to be welcomed, the use of irrationality (like the conjuror’s decoy) seems no more than a cover for a judicial sleight of hand.

TOM HICKMAN

EMPLOYERS’ LIABILITY—ASSESSMENT OF DAMAGES—REDUCTION TO  
REFLECT FAULT OF OTHER PARTIES

THE claimant was employed for 39 years as a marine fitter, working for various employers. For 24 of those years he was exposed to asbestos, and eventually he developed asbestosis, presumably as a result of that exposure. He sued the defendants, one of the firms that had employed him; about 12 years of his exposure, half the total, were suffered through the defendants’ negligence and breach of statutory duty. General damages were assessed at £32,000. The issue was whether or to what extent those damages should be



reduced, to reflect the fact that other firms (now either insolvent or untraceable) shared the responsibility for the claimant's exposure to risk.

The trial judge reduced the damages by 25%, and the Court of Appeal has now been prepared to support this result: *Holtby v. Brigham & Cowan (Hull) Ltd.* [2000] 3 All E.R. 421. As for the precise figure, this certainly seems odd. The obvious figure was 50%: half the exposure time was the defendants' responsibility. The medical evidence was that the risk of asbestosis was linear, and there was no reason to suppose that the exposure for which the defendants were responsible was any more or less dangerous than the remainder. While admitting that liability would have been apportioned at 50% had the other employers been before the court, and that the trial judge had perhaps "erred on the side of generosity", nonetheless the Court of Appeal considered the higher figure to be within the bounds open to him. More generally, the court held (by a majority) that the burden of proof in such a case was with the claimant, not the defendant, though it nonetheless thought it desirable, if not mandatory, that the defendant should plead the responsibility of others. However, it did not envisage that many such cases would turn on the burden of proof.

What are we to make of this? Let us go back to basics. Suppose a claimant has suffered injuries for which a variety of people are responsible. The first question is whether the various injuries are divisible. If the claimant can be seen as the victim of a number of distinct injuries, then each defendant is only responsible for those injuries for which they were responsible. For those injuries which are not divisible, we ask which defendants can be held responsible for each. In principle, each defendant is liable *in full* for each injury for which they are responsible. What if more than one defendant is responsible in respect of one injury? That depends on who the issue is between. In an issue between the claimant and any one defendant, it is irrelevant whether any other person is responsible—the defendant is liable in full if responsible. However, if two or more defendants can be shown to be responsible, then *as between them* a court may order apportionment. But this does not affect the claimant's position.

In the light of those basic principles, plainly the result in *Holtby* is either wrong, or must be justified on the basis of some exception. There was only one, indivisible injury, namely the asbestosis; for some purposes we might want to distinguish the different risks to which the claimant was subjected by different potential defendants, but the result of running those risks was that there was a single injury. And so the 25% reduction seems to place the risk that other

solvent defendants cannot be found on the claimant, not on the defendants, who might ordinarily be expected to bear it. So if the case falls into some exception, what is it?

The answer, if there is one, seems to lie in causation. The basic approach to causation is that the defendant is only responsible if the injury would probably not have occurred “but for” the defendant’s conduct. However, a more generous approach has been taken in a slender line of authorities, of which *Bonnington Castings v. Wardlaw* [1956] A.C. 613 is perhaps the most famous. If it is not entirely clear how the injury was caused, but it can be shown that the defendant “materially contributed” to the risk of injury, then the claimant can recover even though the claim fails a “but-for” test of causation. This approach the Court of Appeal now seems to be modifying: a defendant who is liable only by virtue of the *Bonnington* principle is entitled to a reduction for the fault of other (insolvent or untraceable) defendants. The Court of Appeal seems to be saying that the pro-claimant approach of *Bonnington* needs to be balanced by a pro-defendant principle, reducing the damages in the event of multiple tortfeasors.

The difficulty with this is that it treats *Bonnington* as a distinct rule, needing to be subjected to special limitations. But this is not how the case has been treated up until now; rather, it has been a particular application of ordinary concepts in a situation—of which asbestosis liability is a leading example—where it is impossible to say what would have happened without the defendants’ behaviour, the medical evidence in the case consisting only of risk assessments. It is the application of the ordinary rule to an unusual situation, not a distinct rule. If *Bonnington* is now to be seen as a distinct rule, which either “applies” or “does not apply”, a number of consequences follow. In particular, a quite different view of the facts of *Holby* would have to be taken. Suppose, on closer investigation, it turned out that the claimant had served precisely 12 years with the defendants, but only 11 years and 51 weeks in other asbestos-laden areas. The claimant then does not need to rely on the special *Bonnington* “rule”, as he satisfies an ordinary “but-for” criterion, and so the limitations now introduced by the Court of Appeal do not apply. In truth, the Court of Appeal seems to be introducing a quite fundamental departure here. The “material contribution” principle has hitherto been discussed on the assumption that its effect is to make the defendant fully liable. It really will not do for the Court of Appeal to treat *that* aspect of the doctrine as an open question, saying that the courts have yet to ask whether a reduction should be made.

It is certainly not obvious that this innovation is a desirable

one. Of course, there are arguments for saying that the contributory fault of others should reduce the extent of the defendant's liability; but, those arguments having been so firmly thrust out of the front door, we should not be so willing to accept them round the back. The new rule certainly seems to involve the courts in rather arbitrary estimates of the amount to be deducted—in effect it requires a hearing on apportionment, but without the benefit of evidence and argument from the other party whose contributing fault is said to justify the apportionment. And the simple fact is that neither the trial judge nor the Court of Appeal felt able to apply their new doctrine to the facts, somehow feeling in their bones that a 50% reduction in damages would be too much. If the very court which articulates a new doctrine seems to feel that it is too harsh, then very probably it is, and we are better off without it.

STEVE HEDLEY

#### SLIPPING INTO UNCERTAINTY

HOLBECK Hall Hotel stood on the cliffs at Scarborough with views over a lawn and rose garden to the North Sea. The undercliff below the hotel was owned by Scarborough Borough Council. Over the years, natural erosion of the coastline led to relatively minor landslips in the area. The Council engaged engineers to investigate them and remedial works were carried out in 1989, but in 1993 there was a massive landslide. The lawn and rose garden fell into the sea, and the ground under the seaward wing of the hotel collapsed so badly that the whole building had to be demolished. Its owner claimed damages from the Council, and Judge John Hicks Q.C., applying *Leakey v. National Trust* [1980] Q.B. 485, held the Council liable for breach of a “measured duty of care”. The Court of Appeal agreed that an occupier could be under such a duty to prevent danger to a neighbour's land from lack of support due to natural causes, but held the Council not liable because it owed no duty in relation to latent defects which could only have been discovered by extensive geological investigation: *Holbeck Hall Hotel Ltd. v. Scarborough Borough Council* [2000] 2 W.L.R. 1396.

Like *Leakey*, where Burrow Mump shifted from natural causes and shed detritus on the plaintiffs' house, *Holbeck Hall* involved failure to carry out remedial works, but the defendant argued that the *Leakey* duty arose only where there was an encroachment from the defendant's land to the plaintiff's; in *Holbeck Hall* the

movement was in the opposite direction. However, Stuart-Smith L.J., who gave the only reasoned judgment, stated that encroachment was simply one form of nuisance; another occurred where activities on the defendant's land caused physical damage through loss of support to his neighbour's land and buildings. Disapproving Sir Wilfrid Greene M.R.'s dictum in *Bond v. Nottingham Corporation* [1940] Ch. 429, 438–439, that the right of support does not require the owner of the servient tenement to repair a building which provides support for his neighbour, but allows him to “let it fall into decay”, he said that the same principles should apply, whether the defendant had himself created the nuisance or had merely adopted or continued it. In *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 the House of Lords had held the defendant liable for failure to abate a nuisance caused by the act of a trespasser, and this principle could be extended to failure to deal with the hazards of nature, whether they caused encroachment or loss of support, but “in each case, liability only arises if there is negligence”.

Stuart-Smith L.J. held that for a measured duty of care to arise, “the defendant must know or be presumed to know of the defect or condition giving rise to the hazard and must, as a reasonable man, foresee that the defect or condition will, if not remedied, cause damage to the plaintiff's land”; further, the defect must be patent, not latent. The plaintiff argued that the risk of landslips in the area was patent; the defendant was therefore liable for damage of this type and, on the principle of *Hughes v. Lord Advocate* [1963] A.C. 837, should be liable for the full extent of the damage, whether that extent was foreseeable or not. But Stuart-Smith L.J. distinguished *Hughes* on the ground that it involved damage as the result of the defendant's operations, whereas “the present is a case of non-feasance” (a distinction between acts and omissions which sits oddly with his refusal to distinguish them earlier). Megaw L.J. in *Leakey*, discussing the factors to be considered in deciding whether there was a breach of duty, had listed ease and expense of abatement and the ability of the defendant to achieve it, but had also asked: “What is to be foreseen as to the possible extent of the damage if the risk becomes a reality?” In Stuart-Smith L.J.'s view, the major landslide was so different in extent from any landslide which the defendant could have foreseen that (by analogy with the pervasive *Caparo* test for duty of care in negligence) it would not be just and reasonable to hold the defendant liable for it.

The outcome of the case is to be welcomed: it would surely have been unreasonable to expect the taxpayers of Scarborough to pay for their Council's failure to shore up a commercial enterprise,

the owner of which had had as much opportunity as the Council to detect the possibility of aqueous incursions. Yet the decision shows the difficulties (dismissed by Megaw L.J. in *Leakey* as “more theoretical than practical”) of predicting the outcome of litigation where it is argued that there is a “measured duty of care”, tailored to the defendant’s particular circumstances. Although it is a relief to find that major and minor landslips are not to be regarded as different types of damage (and the House of Lords in *Jolley v. Sutton London Borough Council* [2000] 1 W.L.R. 1082 has recently advocated a broad approach to identification of a “type”, albeit in the context of personal injury), it is difficult to see why the *Hughes* principle of liability for the full extent of a foreseeable type of damage should apply to negligence and to nuisances of human origin (*The Wagon Mound No. 2* [1967] 1 A.C. 617) but not to natural hazards. What about the related but distinct “take your plaintiff as you find him” rule? *Leakey* allows for consideration of the relative skills and resources of the parties, but it gives no guidance on cases where the plaintiff suffers property damage of a foreseeable type which, owing to the peculiarly valuable or sensitive nature of his property, is greater than the defendant could have foreseen. In *Leakey* Shaw L.J. said that he “must confess to substantial misgivings” about the development of the law relating to natural nuisances, and concurred “with diffident reluctance” with the other members of the Court of Appeal in holding that failure to abate them could give rise to liability. The uncertainties revealed by *Holbeck Hall* show that his reluctance was justified.

C.A. HOPKINS

TRUST PROPERTY AND UNJUST ENRICHMENT: TRACING INTO THE PROCEEDS  
OF LIFE INSURANCE POLICIES

*FOSKETT v. McKeown* [2000] 2 W.L.R. 1299 concerned the aftermath of a property development scheme in the Algarve marketed by one Mr. Murphy. 220 customers (“the purchasers”) entered into contracts which provided that after two years they would each be conveyed a specified plot of land or their money would be repaid with interest. Unless and until the purchasers’ money was used for the stated purposes it was to be held on trust. However, at the expiration of the specified period, it was discovered that the trust money had been misappropriated. While much of the trust money was untraceable, Murphy had applied around £20,000 of it to pay the fourth and fifth premiums of a life insurance policy that was

settled in favour of his wife and children (“the beneficiaries”). In 1991, after his malfeasance was exposed, Murphy committed suicide. The insurance policy yielded a death benefit of £1,000,000. The question to be resolved was whether the use of the purchasers’ money to pay some of the premiums gave them any interest in the death benefit.

*Foskett v. McKeown* was an especially difficult case because of the particular terms of the insurance policy involved. The policy combined savings and insurance elements. Notional investment units were allocated upon the payment of premiums. The investment element of the policy served two purposes. First, it would determine the death benefit if the value of the investment units came to exceed the sum for which the policyholder was assured. Secondly, the life cover was expressed to consist of the investment element along with a “balancing sum” to take the death benefit up to the sum assured. The cost of life cover was paid for through annual “internal premiums” whereby sufficient investment units were cancelled to fund that cover. Significantly, if the holder failed to pay premiums, the policy would convert to a “paid-up” policy. If this happened, life cover would be maintained for as long as there were sufficient units allocated to the investment element of the policy to be cancelled to provide for the annual “internal premiums”. On the facts of *Foskett v. McKeown*, before the payment of the fourth and fifth premiums, sufficient units were already allocated to the investment component of the policy to fund the payment of internal premiums beyond what proved to be the date of Murphy’s death. This meant that, as events transpired, the use of the trust money to pay those premiums had no effect on the death benefit payable.

The Court of Appeal, by a 2–1 majority, reversed the decision of the High Court and limited the purchasers to a lien over the proceeds of the policy to secure the repayment of the amount of the trust moneys used to pay the insurance premiums. The House of Lords disagreed, by a 3–2 majority, and held that the purchasers were indeed entitled to an enhanced share of the proceeds of the policy representing that proportion of the sum total of all the premiums paid by Murphy that had been funded by trust money. The purchasers were thus entitled to around £400,000.

In their dissenting judgments Lords Hope and Steyn concluded that it was crucial that the beneficiaries had not been unjustly enriched at the expense of the purchasers. Lord Steyn argued that the absence of a causative link meant that “The purchasers’ money did not ‘buy’ any part of the death benefit”. Rather, he reasoned, the death benefit was “an asset ... which had already been acquired at the date of the use of the stolen moneys” (p. 1310). He and

Lord Hope argued that the case was analogous to one in which money was applied to maintain or improve an already existing asset, such as a house. On this view, the purchasers were entitled to nothing more than a lien to secure the repayment of the trust money wrongly spent on that asset.

The claim that the rights of the beneficiaries had “crystallised” by the time the premiums in question were paid is unconvincing. First, the extent of the death benefit payable depended upon whether the investment element of the policy exceeded the sum for which Murphy was insured. Secondly, whether the death benefit was payable at all depended upon whether there were sufficient investment units to cancel to provide the annual “internal premiums”. Thus, if events had transpired differently, the purchasers’ money could indeed have been crucial in ensuring that a death benefit was payable. In that sense, it would be truer to say that the rights of the beneficiaries crystallised only on Murphy’s death.

In the view of the majority, the fact that the beneficiaries were not enriched at the expense of the purchasers was wholly irrelevant. In the words of Lord Millett, “The transmission of a claimant’s property rights from one asset to traceable proceeds is part of the law of property, not part of the law of unjust enrichment” (p. 1322). However, it is not clear that this dichotomy is either necessary or desirable. There is no reason why considerations of unjust enrichment should not play a role in shaping property rights.

The view that tracing has nothing to do with unjust enrichment has important implications. While commentators have generally assumed that the change of position defence would be available for tracing claims, Lord Millett suggested that, because they are based not on unjust enrichment but on property, tracing claims would be subject only to the defence of bona fide purchase. This is an unfortunate conclusion. It would strike a fairer balance between the interests of tracing claimants and innocent recipients if tracing claims were subject to the defences normally available for restitution claims.

In concluding that the purchasers were entitled to a pro-rata share of the proceeds of the policy, Lord Millett preferred the view of Ungood-Thomas J. in *Re Tilley* [1967] Ch. 1179 to that of Sir George Jessel M.R. in *Re Hallett* (1880) 13 Ch.D. 696. Jessel M.R. had suggested that, where a fiduciary obtained an asset, in part with the claimant’s money and in part with his own money, the claimant would be limited to an equitable lien to secure the repayment of the amount of his money used in purchasing the



asset. This view, which had often been criticised in the intervening years, would now seem to have been authoritatively rejected.

Ultimately, much turned on how the policy was conceptualised. In contrast to the analogy of an already acquired asset favoured by the minority, the majority compared the policy with a bank account. The comparison is not entirely apt. The insurance policy in question was a rather more complicated arrangement. As mentioned, the policy had separate insurance and savings components, and which element of the policy would determine the amount payable to the policyholder depended on how events unfolded. It is not obvious how the purchasers' money could be traced beyond the investment units and into the life insurance component of the policy.

Lord Hoffman dismissed the issue, characterising the investment component of the policy as "notional units in a notional fund of notional investments". In his view, the investment units "were merely part of the formula for calculating what would be payable. They cannot be regarded as separate property or even some kind of internal currency" (p. 1311). While the characterisation of the units as "notional" is a useful rhetorical flourish, it is rather unhelpful. After all, "money" in a bank account is equally notional; what the customer has is a chose in action. Even if they were in some sense notional, the separate elements of the policy generated real entitlements. Thus, if the investment element of the policy exceeded the sum assured, it would be this element that would determine the policyholder's entitlement; otherwise, that entitlement would be determined by the sum for which the policyholder was assured. Moreover, according to the policy, premiums played no role in entitlement to the life cover except to the extent that they generated investments units that were cancelled to fund the cost of that cover. Consequently, it is difficult to see how the separate elements of the policy could be ignored.

Lord Millett took the issue more seriously. According to his analysis,

Prior to their cancellation the cancelled units formed part of a mixed fund of units which were the product of all the premiums paid by Mr Murphy, including those paid with the plaintiffs' money. On ordinary principles, the plaintiffs can trace the last two premiums into and out of the mixed fund and into the internal premiums used to provide the death benefit. (p. 1333)

Yet, it is not clear that "ordinary principles" do indeed dictate that the purchasers could trace their money into the internal premiums. If the investment units generated by the premiums in question became

“part of a mixed fund of units” that had already included enough allocated units to fund life cover for the years at issue, which units from this fund were actually cancelled to pay for life cover?

*Foskett v. McKeown* contains an important discussion of the nature of tracing. However, despite the majority’s description of it as “a case of hard-nosed property rights” (p. 1305 *per* Lord Browne-Wilkinson), it remains unclear how the premiums in question could be traced into the insurance component of the policy.

CRAIG ROTHERHAM

EQUITIES TO RESCIND AND INTERESTS UNDER RESULTING TRUSTS

*TWINSECTRA Ltd. v. Yardley* [1999] Lloyd’s Rep. Bank. 438, a unanimous decision of the Court of Appeal, illustrates the various liabilities of a fiduciary who obtains money by a fraudulent misrepresentation. Apart from liability at law for deceit, he may be liable in equity as a resulting trustee or the claimant may rescind the transaction for fraud. This note asks how real the differences are between these two equitable means of reversing the unjust enrichment of the fiduciary.

Twinsectra lent £1 million to Yardley to enable him to purchase properties. Twinsectra insisted on an undertaking from a solicitor to secure repayment of the loan. Yardley called upon Sims. Sims was a solicitor but he had also done some nefarious business deals with Yardley which left him heavily in Yardley’s debt. The two men agreed that in return for Twinsectra’s advance to Yardley, Sims would undertake to Twinsectra (i) personally to repay the loan with interest; and (ii) to retain the proceeds in his client account and apply them solely towards the property purchases.

In breach of his undertaking, Sims paid most of the loan monies to Leach, Yardley’s solicitor. Leach applied only about half towards the property purchases. He transferred much of the balance to subsidiary companies of Yardley’s and applied some in payment of his own fees. Sims never repaid the loan and went bankrupt. Yardley’s companies went into administration and it must be assumed that Yardley’s own solvency was in doubt.

Disagreeing with Carnwath J., the Court of Appeal held that Yardley was liable in tort for deceit in respect of the fraudulent misrepresentations made by Sims in obtaining the loan. Sims had impliedly represented to Twinsectra that he was Yardley’s solicitor and that he intended to apply the money according to his

undertaking. But Twinsectra's real motivation for establishing Sims' fraud was that it could thereby rescind the loan and sue the third parties implicated in the transaction, such as Yardley's companies and his solicitor, Leach. Twinsectra would therefore improve its chances of recovery.

The Court of Appeal gave a standard explanation of the equity to rescind a transaction for fraud. "[T]he transferor may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no ... trust ... [B]efore rescission, the owner has no proprietary interest in the original property; all he has is a mere equity of his right to set aside the voidable contract" (p. 461). Only when he positively avoids the transaction would his right crystallise as a vested equitable interest.

That said, Twinsectra got the same result against the third parties through its parallel argument that it had an equitable interest in the proceeds under a resulting trust. Sims' undertaking to hold the money separately and solely for the agreed purposes imposed a primary purpose trust on him, by analogy with *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1970] A.C. 567. By misapplying the money, he caused a secondary, resulting trust to arise of which Twinsectra was the beneficiary.

These alternative claims to the loan proceeds provided the foundation for Twinsectra's successful actions against the third parties:

- (i) Leach, Yardley's solicitor, was liable for dishonest assistance in Sims' breach of his duties as a fiduciary (*Royal Brunei Airlines Sdn. Bhd. v. Tan* [1995] 2 A.C. 378). When Sims gave his undertaking he assumed fiduciary duties to Twinsectra. In obtaining the money by a fraudulent misrepresentation, he breached those duties. Equally, the misapplication of the money, which was the very fact that created the secondary resulting trust, amounted to a breach of his duties as trustee of the primary purpose trust;
- (ii) Having an equitable interest in the loan proceeds, Twinsectra could sue Leach for knowing receipt of the proceeds which he accepted in payment of Yardley's debt to him. Twinsectra's equity to rescind for fraud would also have given it a sufficient title to sue even though the solicitor received the proceeds before Twinsectra actually elected to rescind the transaction (see *El Ajou v. Dollar Land Holdings plc* [1993] 3 All E.R. 717 (Millet J.));
- (iii) Either Twinsectra's interest under the resulting trust or its equity to rescind would have given it a sufficient title to

trace the loan proceeds into the assets of Yardley's companies and assert a proprietary claim to them: see *Lonrho plc v. Fayed (No. 2)* [1992] 1 W.L.R. 1, 11–12 *per* Millett J., and *El Ajou v. Dollar Land Holdings plc* (above).

The similarities go further. Like the interest under the resulting trust, the equity to rescind has obvious proprietary characteristics. The election to revest title which it confers can be enforced only against the original asset or its specifically traceable proceeds. It binds third parties who derive their title to those assets from the representor, such as donees or those taking with notice of the fraud. The claimant can assign the equity *inter vivos* or devise it by will, even before he has rescinded: *Stump v. Gaby* (1852) 2 De G.M. & G. 623. It does not bind a bona fide purchaser of a legal interest in the proceeds.

There is the difference, however, that an equity to rescind for fraud does not bind a bona fide purchaser of a later equitable interest, whereas a vested equitable interest can: *Phillips v. Phillips* (1861) 4 De G.F. & J. 208, 218 *per* Lord Westbury L.C. However, this need not undermine the essentially proprietary character of an equity to rescind. It simply demonstrates that different property rights vary in the extent to which they can be enforced in conflict with competing interests: *cf. Blacklocks v. J.B. Developments (Godalming) Ltd.* [1982] Ch. 183, 196 *per* Judge Mervyn Davies. Granted, a distinctive feature of rescission is that the claimant must make counter-restitution of the benefits that he received from the representor. But in many instances this condition may not make much practical difference. In cases like *Twinsectra* where the claimant receives a purely executory consideration, he may have nothing to restore. Besides, the wrongful conduct of the representor in procuring the transaction may disentitle him from insisting on strict counter-restitution from the claimant: *Berridge v. Public Trustee* (1914) 33 N.Z.L.R. 865 (Edwards J.). It is true that a claimant who affirms a voidable contract may bar his right to rescind it. But as *Twinsectra* itself holds, a claimant who runs alternative claims for rescission and breach of contract does not necessarily affirm the contract.

All in all, where a fiduciary is guilty of fraudulent misrepresentation, it is only in rare instances that a claimant has any real advantage in relying on the defendant's status as a resulting trustee, rather than as a person with a voidable title.

DAVID FOX

## HOW KNOWING IS KNOWING RECEIPT?

DIRECTORS of BCCI (Overseas) Ltd. deliberately applied its funds in breach of their duties, and Chief Akindele received those funds. Later, the company, acting by its liquidator, sued Chief Akindele both for knowing receipt of the misapplied funds and for dishonestly assisting their misapplication. The High Court dismissed the claim for dishonest assistance: the company could not prove that Chief Akindele had been dishonest. There was no appeal against this ruling. So at the very beginning of his judgment in *BCCI (Overseas) Ltd. v. Akindele* [2000] 4 All E.R. 221, which was the only reasoned judgment given in the Court of Appeal, Nourse L.J. stated the key remaining question about the claim for knowing receipt: “What must be the recipient’s state of knowledge? Must he be dishonest?”

Earlier, in *Houghton v. Fayers* [2000] 1 B.C.L.C. 511 (C.A.), Nourse L.J. had indicated that the defendant would be liable if he knew, or ought to have known, that he had received either funds which were misapplied in the relevant breach of duty, or their proceeds. In the *BCCI* case, he restated the test for liability: “The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt”. Nourse L.J. thought that this test, while it could not avoid difficulties of application, ought to avoid the difficulties of definition which have bedevilled other categorisations of the requisite degree of knowledge, such as the five point scale proposed by Peter Gibson J. in *Baden, Delvaux & Lecuit v. Société Generale* (1983) [1993] 1 W.L.R. 509 at pp. 575–576.

This focus on knowledge as the requisite fault element, rather than dishonesty, is welcome. Knowledge describes a person’s state at a certain material time, such as on a receipt. Dishonesty is an inappropriate fault element for a cause of action founded on a receipt, notwithstanding some recent judicial pronouncements (see, e.g., the *BCCI* case in the High Court, [1999] B.C.C. 669 at p. 677; *Dubai Aluminium Co. Ltd. v. Salaam* [1999] 1 Lloyd’s Rep. 415 at p. 453; *Bank of America v. Arnell* [1999] Lloyd’s Rep. Bank. 399 at pp. 406–407, noted [2000] C.L.J. 28 and possibly *Twinsectra Ltd. v. Yardley* [1999] Lloyd’s Rep. Bank. 438 (C.A.) at p. 466, noted [2000] C.L.J. 444). Dishonesty describes and qualifies action, not a passive receipt. Indeed, it is for precisely that reason that dishonesty is an appropriate fault element in a cause of action founded on culpable acts: procuring or assisting a breach of trust or fiduciary duty (see *Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378 (P.C.)). Dishonesty also suggests a greater degree of moral

opprobrium than knowledge. Yet while the distinction between knowledge and dishonesty is appropriate, it should not be overemphasised: both knowledge and dishonesty will commonly be inferred from the same sort of facts.

It is now clear that, for practical purposes, the question of knowledge is a question of fact. Nevertheless, answering that question is likely to be very difficult. The *BCCI* case provides no guidance on what degree of knowledge of what facts must be pleaded and proved to sustain an allegation of knowing receipt. Though it might not differ much in its effects from Nourse L.J.'s test, a clearer formulation of the fault element in knowing receipt would be to make liability turn on notice (actual, constructive or imputed) of the breach of duty through which the funds were misapplied, while recognising that what amounts to notice will depend on what enquiries should have been made by the particular recipient about the origin of the funds he received (*Macmillan Inc. v. Bishopsgate Trust (No. 3)* [1995] 1 W.L.R. 978 at pp. 1000–1001 *per* Millett J., and Fox, “Constructive Notice and Knowing Receipt: An Economic Analysis” [1998] C.L.J. 391). The question of notice could largely be answered by comparing the recipient's behaviour to established practice in similar situations.

Nourse L.J. also addressed briefly the argument that the personal liability of those who receive funds applied in breach of trust, or their traceable proceeds, should be *prima facie* strict, though subject to defences. He correctly indicated that, in the light of current authority, such an argument could only succeed in the House of Lords; but he was inclined against it on principle as well. In his view, any such reformulation of liability would be likely to undermine the need for security of receipts. Yet security of receipts can be achieved by the application of strong defences, interpreted and applied with suitable liberality. The defences of bona fide purchase and change of position are vital in this regard. Unfortunately, change of position has generally appeared to be a rather narrowly drawn defence since its recognition in *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548, and perhaps therefore unequal to its task of securing receipts. Yet the defence has recently been applied robustly in *Phillip Collins Ltd. v. Davis* [2000] All E.R. (D) 595, where Jonathan Parker J. allowed a change of position defence based on the increased general living expenditure consequent on receipt of a mistaken payment.

More specifically, Nourse L.J. thought that such a regime of strict liability subject to defences would be inconsistent with the policy behind *Royal British Bank v. Turquand* (1856) 6 El. & Bl. 327, that “persons contracting with a company and dealing in good

faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular” (*Morris v. Kanssen* [1946] A.C. 459 at p. 474, *per* Lord Simonds). With respect, Nourse L.J.’s concerns are difficult to understand. The application of *Turquand’s* case in the present context itself provides an example of reliance on defences to secure receipts: the recipient of funds applied in breach of duty, or their proceeds, will plead *Turquand’s* case to establish a defence which entitles him to retain the benefit of his receipt.

So, at present, if a company makes a claim for knowing receipt, it must demonstrate that the recipient knew about the breach of duty which founds the claim. If the breach occurred within the company’s apparently proper internal management, the recipient may use the rule in *Turquand’s* case to raise a presumption that he had no reason to suspect the breach (see *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1986] Ch. 246). As long as the presumption remains unrebutted by evidence that the recipient actually knew about the breach, the company’s claim will fail: the company will be unable to show that the recipient had such knowledge of the breach as to make it unconscionable for him to retain the benefit of his receipt. If liability were strict, subject to defences, the recipient would use the rule to avoid the *prima facie* liability attaching to him by virtue of his receipt. Again, the rule would establish a presumption that the recipient was not on notice of the internal irregularity which founds the company’s claim for restitution. This presumption, if unrebutted, would go towards establishing a defence of bona fide purchase for value without notice of the irregularity, or a defence of innocent change of position. Once successfully made out, any such defence would preserve the receipt, either in full if bona fide purchase is proven, or else to the extent that change of position makes restitution inequitable.

There are other, practical arguments against the adoption of strict liability, though none is compelling. It might be that removing the need for a claimant to prove a recipient’s fault will make it easier to commence actions in equity to recover the benefit of a receipt, including speculative actions, thus enabling the claimant to fish for evidence in documents disclosed by the recipient as the action progresses. Yet the courts’ control of litigation through the Civil Procedure Rules, and the threat of what a court might do to an abusive claimant, may well be enough to contain the possibility of abuse, without shutting out meritorious claims which currently fail (or are never even brought) because of the difficulties of proving the recipient’s knowledge. A more important concern is that banks and other financial intermediaries who



innocently receive misapplied funds might feel their position was insufficiently protected if they had to make out a defence. In order to ascertain the respective practical merits of fault-based and strict liability, what is required is some more economic analysis (*cf.* Fox, above) both theoretical and empirical.

At root, the argument over whether knowing receipt should be a fault-based cause of action or strict, subject to defences, reflects a controversy about the very nature of the action. Is it about the imposition of the onerous duties of a trustee on the recipient of a fund (see *Re Diplock* [1948] Ch. 465 at p. 478; *Re Montagu's S.T.* [1987] Ch. 264 at p. 278B–C, cited in the *BCCI* case)? If so, it makes perfect sense to require that the recipient be at fault before he is subjected to those duties. Or is it about restitution of funds received (*El Ajou v. Dollar Land Holdings plc* [1993] 3 All E.R. 717 at p. 738 a–b; *Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378 at p. 386 F)? Subject to any pragmatic concerns identified by economic analysis, strict liability would then be appropriate, in conformity with other restitutionary actions, but subject to defences, including those, such as bona fide purchase, which recognise that an equitable, not a legal, right is in issue. Or does the action combine, and confuse, both approaches, which should now be separated out, as suggested by Lord Nicholls in his essay “Knowing Receipt: The Need for a New Landmark” (ch. 15 in Cornish *et al.*, *Restitution: Past, Present and Future*)? As Lord Nicholls suggests, there might be a strict restitutionary action to recover funds received, coupled with a fault-based action to remedy improper dealings with property which, in equity, belongs to another.

There is to be no further appeal to the House of Lords in the *BCCI* case. It will not become the much needed landmark anticipated by Lord Nicholls.

RICHARD NOLAN

ENFORCING RESTRICTIVE COVENANTS IN LEASES: THE CASE OF  
COUNTY HALL

THE important recent decision of Neuberger J. in *Oceanic Village Ltd. v. United Attractions Ltd.* [2000] Ch. 234 considers the enforceability of a restrictive covenant, contained in a lease, which relates to other adjacent land of the landlord. All relevant title was registered, and the case raised the problem addressed in relation to unregistered land by *Dartstone Ltd. v. Cleveland Petroleum Co. Ltd.* [1969] 1 W.L.R. 1807 where Pennycuik J. held that, as such

covenants were not registrable under the land charges legislation, all depended on an application of the doctrine of notice. Shirayama, the Japanese freeholders and registered proprietors of the old County Hall, granted a lease in February 1997 of premises in the building to the claimants, Oceanic, for a term of 20 years. Oceanic covenanted not to use the premises otherwise than as a high quality gift shop without the landlord's written consent. By clause 4.6 of the Oceanic lease, the landlord covenanted "not to permit any other gift shop to be operated in the Building provided that the restriction shall not apply to any hotel in the Building". In July 1998, Shirayama granted a lease of another unit in the building to the defendants, United, for a term of 15 years. Under the United lease, the use of their unit was to be restricted to a Football Hall of Fame and ancillary commercial uses. There was no specific restriction of gift shop use. When Oceanic sought assurances from United that they would not operate a gift shop selling football shirts, and such assurances were not forthcoming, they sued, seeking an injunction and damages. While it may seem strange that Oceanic sought to enforce a "landlord covenant" against United, which was a tenant, United was not a tenant of the premises demised to Oceanic, but of other premises in the complex. United had acquired an interest in those premises from Oceanic's landlord. There was no reason in logic why United's status as tenant (as opposed to freeholder) of its unit should make any difference to the outcome.

Neuberger J. first held, adopting a common sense interpretation of clause 4(6), that it imposed an obligation on Shirayama as landlord not to use any part of the building as a gift shop. As both Oceanic and United leases, being granted after 31 December 1995, were subject to the statutory principles for the enforceability of covenants by and against successors in title set out in the Landlord and Tenant (Covenants) Act 1995, Oceanic argued that, applying section 3(5), the restrictive covenant was capable of enforcement not only against an assignee (*sc.* of the landlord or tenant as the case may be) but also against United being an occupier of demised premises (*i.e.* the building) to which the covenant related. The covenant clearly related to all units within the building, as it was intended to protect the proposed use of Oceanic's unit as a gift shop. Construing section 3(5), the question for the court was whether United occupied "demised premises to which the covenant relates". Neuberger J., realising that the literal meaning of section 3(5) was hopelessly wide, limited it by deciding that enforceability of the restrictive covenant was possible only against an owner or occupier of "any of the premises demised by the lease in question".

This purposive interpretation of a difficult provision accords well with the general intention of section 3. While it has the effect that few landlord covenants will be enforceable by virtue of this provision, which on its face is supposed to apply to both landlord and tenant covenants, the likelihood is (and we must speculate—there is no clear indication in its legislative history) that it was primarily intended to provide a means of enforcing “tenant covenants” against sub-tenants—the most obvious “occupiers” of the demised premises to which the covenant relates. It is likely, as Neuberger J. surmises, that it may also have been applied to “landlord covenants” to facilitate enforcement of such covenants against a landlord who has obtained possession of part of the land subject to the tenancy following forfeiture or a surrender by a tenant.

The covenant was not registrable by means of a notice, as the Land Registration Act 1925, s. 50(1), specifically excludes a “covenant or agreement made between a lessor and lessee”, and these words include covenants relating to other land of the lessor (see the interpretation of Land Charges Act 1972, s. 10, in *Dartstone Ltd. v. Cleveland Petroleum Co. Ltd.*, above). Nor did the provisions of the Land Registration Act 1925, in particular section 20(1), support the invocation of the doctrine of notice in circumstances such as these. It was immaterial that a different result would ensue according to whether the title to land was registered or not. Neuberger J.’s unconcern about the uniformity of substantive principle in the parallel systems of registered and unregistered title echoes the sentiments of, amongst others, Lord Wilberforce in *Williams & Glyn’s Bank v. Boland* [1981] A.C. 487, 504.

*Oceanic Village* discloses a failure in the current registration machinery, as a restrictive covenant contained in a lease does not appear to be capable of adequate protection against those not privy to the estate. Not only is registration by notice ruled out by section 50(1), there are profound difficulties with other means of registration. Taking the lead from Ruoff & Roper’s *Registered Conveyancing*, para. 21–29, Neuberger J. proposed the entry of a restriction on the title of the landlord’s land, recording the fact that there should be no entry in the property or charges register of the burdened land without the tenant’s consent. This is all very well, but the limitations of this course of action are not spelt out. A restriction is only available to restrict the disposition of a registered interest, and it cannot be used to restrict the disposition of a minor or overriding interest. If, subsequent to registration of a restriction protecting the tenant’s rights, the landlord were to grant a lease

which did not itself require registration, the restriction would not bind. Indeed, in *Oceanic Village* itself, the entry of a restriction would have been futile, as the lease to United, the tenants against whom the restriction would be hoped to bite, was not a disposition requiring registration: it was granted for a term of less than 21 years. Nor would a caution against dealings, accurately described by Neuberger J. as giving rise to “complex, time-consuming, expensive and uncertain consequences”, be likely to provide a panacea, not only because premature registration may lead to liability in damages (see J.E.A. [2000] Conv. 193, 194), but also because a caution is only effective to give notice of a claim, not to confer priority in its own right: see *Clark v. Chief Land Registrar* [1994] Ch. 370. If truth be known, the only satisfactory solution to the gap in protection identified in *Oceanic Village* lies in amendment of the title registration legislation

STUART BRIDGE

#### ESTOPPEL, UNCONSCIONABILITY AND FORMALITIES IN LAND LAW

KEN Holt was a wealthy farmer in Lincolnshire. In 1952 he befriended Geoffrey Gillett and then persuaded the young man to work on the farm instead of continuing at school. For nearly 40 years, Gillett was Holt’s right arm, a relationship that did not falter when Gillett married. Over these years, when Gillett managed the farm and eventually entered into partnership with Holt, Holt repeatedly promised that Gillett would be the principal beneficiary of his will. These were no idle boasts, but were repeated often, in public, and were given effect in several versions of Holt’s will. In 1992, Holt formed a friendship with Mr Wood (a trainee solicitor), the result of which was the eventual breakdown of his relations with the Gillett family and their exclusion from his will. In *Gillett v. Holt* [2000] 3 W.L.R. 815 Geoffrey Gillett asserted that Holt was estopped from changing his will so as to deny Gillett his expected legacy. As we might think, a simple case of proprietary estoppel based on assurance, reliance and detriment. However, Carnwath J. at first instance thought otherwise and rejected estoppel because first, Gillett could not establish that Holt had made an irrevocable promise not to change his will (and everyone knows that wills may be changed), and secondly, Gillett had suffered no detriment.

The Court of Appeal allowed Gillett’s appeal, noting that estoppel was an equitable doctrine, designed to remedy unconscionability, and that each case was to be looked at “in the

round". We are not to break down estoppel into the rigid compartments of assurance, reliance and detriment for they act upon each other; the quality of the relevant assurance can influence the issue of reliance and this can be interwoven with detriment. (The Court of Appeal, taking an holistic view of the entire relationship between the parties, concluded that Gillett had suffered detriment, an entirely supportable decision.) This is all unobjectionable, but clearly tells us very little, save that the court thought that Gillett *deserved* to win. Perhaps he did—40 years is devotion indeed—but what does it mean for the future of proprietary estoppel?

At first instance, Carnwath J. was worried that it could not be unconscionable for Holt to change his mind because a will was essentially a revocable document. Holt could make a new one and who had not heard tales of the errant beneficiary "being cut out of the will". Hence, in the Court of Appeal much time was spent arguing over whether an "estoppel assurance" must be irrevocable in order for the claimant to succeed. Robert Walker L.J. (with whom Waller and Beldam L.J.J. agreed) had no trouble rejecting this, and rightly so. They accepted instead the counter argument that it is the very fact of detrimental reliance by the claimant that makes withdrawal of the promise unconscionable. So, if an assurance is made, once it is relied on to detriment, it becomes unconscionable for it to be revoked and an estoppel is triggered. With all due respect, this is a circular argument and the whole question of the revocability (or not) of "estoppel assurances" is a red herring. It is true that the burning question is *why* is it unconscionable for the assurance to be revoked, but the answer lies in the reason why proprietary estoppel exists, not in one of the conditions for its application in a given case.

Binding agreements concerning land must, with but few exceptions, be made with due formality: a written contract, a deed or registered disposition, a will. Where these formalities are omitted, the promise made by the landowner cannot generate a right for the claimant. Estoppel is an antidote to this absence of formality *if* it would be unconscionable for the landowner to rely on the absence of formality (i.e. no will) to defeat the claimant. This means that if a landowner (Holt) has made an assurance, relied on to detriment by a claimant (Gillett), but it is clear that the parties understood that proper formality (a will) would be required, there is no unconscionability if all the claimant can prove is the absence of the expected formality. What is needed is a subsidiary promise, express or implied, that the claimant can have the proprietary right *whether or not* the required formalities are

executed. In other words, it is not unconscionable to withdraw a promise merely because it has been relied on to detriment (as the Court accepts). Rather, it becomes unconscionable because the claimant has relied to detriment on an assurance both that he can have a right *and* that required formalities for its grant will not be required. This analysis avoids the circularity of expressing unconscionability in terms only of detrimental reliance and explains why estoppel is an exception to the normal rules concerning formality.

Where, then, does this leave the judgment in *Gillett*? The Court of Appeal's focus on detrimental reliance as the core of unconscionability is understandable given that Holt promised that Gillett could have the land "in his will" *not* "without the need for a will". This seems to remove any prospect of unconscionability under the approach outlined above and would deny a deserving Gillett. However, in the majority of successful estoppel cases, there is no overt assurance that required formality can be dispensed with: this is inferred from the facts and is bound up with the assurance as to the nature of the claimant's right. Admittedly, it might be difficult to make this inference here because of Holt's known intention to use formality (a will), but with a fresh wind we might just manage the conclusion that Holt's intention to use a will did not exclude the inference that he had promised the land even if he did not. Obviously, this is a more difficult path for the court to take and would not have resulted in a resounding affirmation of Gillett's claim. Yet it is crucial that the precise meaning of unconscionability within estoppel is understood because hard cases do make bad law. If unconscionability resides only in the fact of a denial of an assurance that has been relied on to detriment, the law requiring formality for dispositions of proprietary rights can be overthrown with ease. On the other hand, if unconscionability is limited to those cases where the landowner expressly or impliedly promises the claimant a right *and* that they may have it without formality, estoppel can be the counterpart to the formality rules in land law, not their nemesis. If this second approach is correct, fears concerning the integrity of testamentary dispositions which have arisen since *Gillett* can be assuaged, as can the daunting prospect that every oral representation concerning land may generate an interest so long as it is supported by detrimental reliance.

MARTIN DIXON

## FIXED CHARGES ON BOOK DEBTS—THE STORY CONTINUES

FOR the purposes of creating consensual security interests, are a debt and its proceeds a single indivisible asset or can they be separated? Is a security on book debts and proceeds a single indivisible charge or two charges? If it is a single indivisible charge, can it be a convertible charge, that is a charge which is fixed so long as it attaches to unrealised debts but floating in respect of proceeds of the debts? Recent decisions of the English courts have shrouded these questions in confusion. The appeal from the New Zealand Court of Appeal's decision in *Re Brumark Investments Ltd.* [2000] 1 B.C.L.C. 353 gives the Privy Council an opportunity to provide much-needed clarification.

Some general points should be stated at the outset. First, the value of a debt lies in more than just a right to sue the debtor. A security on debts can be realised otherwise than by suing the debtors for payment, such as by factoring the uncollected debts. A fixed security on debts ranks ahead of later security interests in the same property assuming all registration requirements are fulfilled. There are sound commercial reasons for taking fixed charges on uncollected debts regardless of how the proceeds are treated for security purposes.

Secondly, whether a fixed charge on debts can exist if the chargee does not control the proceeds depends on the current conceptual boundaries of security interests. Commercial law should support and facilitate business (*Re BCCI (No. 8)* [1998] A.C. 214). However, if something is legally impossible, the fact that practitioners have managed to convince themselves otherwise cannot preclude the court from striking it down: practice is not a safe harbour.

Thirdly, if a fixed charge on debts without chargee control of the proceeds is conceptually possible, as the law now stands it will not be defeated in the court on the public policy ground that it undermines the position of other claimants against the chargor whose debts have preferential status under insolvency legislation. Policy implications of extending the categories of fixed charge through contractual creativeness are a matter for Parliament rather than the courts.

The essential characteristics of a fixed charge on book debts is the issue specifically raised in *Brumark*. Since the new turn in the law achieved by the English Court of Appeal in *Re New Bullas Trading Ltd.* [1994] B.C.C. 36, the established approach—that the chargee must control both the debts and their proceeds for the charge on the debts to be fixed—has been open to question.



According to *New Bullas*, control of a debt and of its proceeds is only required where the charging document treats them as indivisible elements of a single asset; if they are separated by contractual stipulation, security can be created which, through appropriate provision for chargee control of dealings in the uncollected debt, is fixed in respect of the debt but floating in respect of the proceeds, which therefore remain available for use in the ordinary course of the chargor's business.

The *Brumark* charge had been drafted with a view to taking advantage of the *New Bullas* debt/proceeds dichotomy but, reversing the first instance decision, the NZ Court of Appeal held that the so-called fixed charge on the book debts was really a floating charge. No valid distinction could be drawn between dealings in the form of the collection of the proceeds of the debts and dealings by way of disposals to third parties of the debts themselves. The exclusion of the proceeds of the debts from the fixed charge simply emphasised the company's freedom to deal with the debts on its own account.

The key argument against *New Bullas* is that if the chargor is free to collect the proceeds of debts for its own account, the chargor is able to extinguish the subject-matter of a charge on debts by its own act. Third parties, i.e. the debtors, are also involved so the timing of the extinction of the debts by payment does not lie totally within the chargor's control. But as between chargor and chargee, control of the debt collection process lies with the chargor. For the chargor to be in control of the process of extinguishing the subject-matter of the security is inconsistent with the nature of fixed security (*Re Yorkshire Woolcombers Assn. Ltd.* [1903] 2 Ch. 284, 294 *per* Vaughan Williams L.J.). This points to the conclusion that a fixed charge on book debts that leaves the chargor free to collect the proceeds is simply conceptually impossible.

Looked at this way, it becomes clear, as Worthington has argued, that the question whether a debt and its proceeds can be divided is too broad a question to ask in this context. Proceeds can be charged by way of fixed charge whilst the debts themselves are subject to a floating charge or are unsecured. But where the issue is whether a charge on debts is a fixed charge, the security must, for the reasons just mentioned, allow the chargee to control the proceeds of debts as well as the debts themselves.

If, contrary to the analysis supported here, absence of chargee control over the debt collection process is not fatal to the existence of a fixed charge, the "one charge or two" question becomes relevant. Should the Privy Council rule in favour of a *New Bullas*-

type security, there seems little doubt that it should be regarded as a single convertible charge (a view supported by Gough and Goode (otherwise a powerful critic of *New Bullas*) and perhaps misunderstood at first instance in *Brumark* where indivisibility was assumed to preclude convertibility). This would be a pro-secured creditor result since a convertible charge which is created as a fixed charge, though it later converts to a floating charge in respect of proceeds, will rank ahead of preferential debts. If there were two security interests—a fixed charge on the debts and a floating charge on the proceeds—the preferential debts would rank ahead in respect of the proceeds.

EILÍS FERRAN

#### ATTRIBUTING HARM: CHILD ABUSE AND THE UNKNOWN PERPETRATOR

How far should we as a society concerned to protect children be prepared to run the risk of trampling on the rights of potentially innocent parents? Once the technicality is stripped away, this was essentially the issue which the House of Lords confronted in *Lancashire County Council v. B* [2000] 2 W.L.R. 590. The courts may only make a care or supervision order where the local authority can satisfy the “threshold conditions” in the Children Act 1989, s.31(2). The child must be suffering, or likely to suffer, significant harm but this harm, or the risk of it, must also be:

attributable to—

- (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
- (ii) the child’s being beyond parental control.

What then is the position if it can be shown that the child is suffering significant harm, which is attributable to a deficiency of proper care, but which cannot be directly attributed to either of the child’s parents or to any identifiable individual? The *Lancashire* case concerned two babies and four adults. Child A was looked after partly by her mother and father and partly by a childminder who was the mother of child B. The father of B was living with B’s mother. During the period of this arrangement, A suffered serious non-accidental head injuries which were caused by at least two episodes of violent shaking. The father of B was exonerated from any blame, but the parents of A, together with the childminder, all remained under suspicion. The evidence could not, however,

establish that any one of them was the perpetrator. In these circumstances the local authority, concerned for the safety of both children, sought care orders in relation to each of them. The judge refused both applications but the Court of Appeal allowed the authority's appeal in relation to A. There was no further appeal in relation to B, on the basis that this child had not yet suffered harm and could not be said to be at risk either—since it had not been established that his mother had caused the injuries to A. The House of Lords therefore only had to consider whether the threshold conditions were established in relation to A.

The argument for the appellants was that the phrase “care given to the child”, bearing in mind the statutory context and the legislative policy, referred only to care given by parents or other primary carers and was not wide enough to cover care given by substitute carers such as a childminder. Hence, if the harm could not be attributed to the standard of care provided here by the parents, there would be no jurisdiction to make an order. This interpretation, it was urged, was consistent with the “non-interventionist” philosophy of the legislation—that children's interests were best served by leaving them to be cared for by their parents unless the State could demonstrate some serious deficiency in the standard of care provided by *those parents*. The House of Lords unanimously rejected this contention, adopting an interpretation which was wide enough to include the many situations in which there is now *shared* care of children, but excluding wholly temporary delegations of parental authority. Thus, in situations where care is shared, the statutory language applies to all those involved in the care of the child, including in this case both the parents and the childminder. As Lord Clyde pointed out, the statute does not expressly require the identification of the author of the harm, and the phrase “not being what it would be reasonable to expect a parent to give to him” simply defines the *standard* or *level* of care and “does not restrict the scope of the persons who may be responsible for the care given to the child in the particular case”.

So much for the technical arguments, but is this a defensible decision on policy grounds? The Lords themselves advanced two policy arguments justifying this relatively liberal, purposive interpretation. The first was that Parliament could not possibly have intended a child in this situation to remain unprotected. As Lord Nicholls of Birkenhead put it, to adopt the more restrictive interpretation “would mean that the child's future health, or even her life, would have to be hazarded on the chance that, after all, the non-parental carer rather than one of the parents inflicted the

injuries. Self-evidently, to proceed in such a way when a child is proved to have suffered serious injury on more than one occasion could be dangerously irresponsible.” The continued exposure of the child to such risks justified intervention even when set against the consideration that “parents who may be wholly innocent, and whose care may not have fallen below that of a reasonable parent, will face the possibility of losing their child, with all the pain and distress this involves”. The second policy argument was thought to mitigate this risk of unfairness to parents. Repeating an argument which had weighed with the House in its earlier decision in *Re M (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 A.C. 424, the House was influenced by the consideration that the issue before it was merely a *jurisdictional* question. Even if the threshold were crossed, the Court would not be bound to make a care order, supervision order or indeed any order if, applying the welfare principle at the discretionary stage, it decided that no order was required in the circumstances. Thus, according to Lord Clyde, “it is reasonable to allow a degree of latitude in the scope of the jurisdictional provision, leaving the critical question of whether the circumstances require the making of an order to a detailed assessment of the welfare of the child”.

On a close examination of the principal speeches and of the original decision of Judge Gee, it is evident that a particular concern in this case was that it might not be possible even to make a *supervision* order. This is because the threshold for supervision is the same threshold which applies in relation to *care* orders. The reasoning behind this was every bit as ideological as it was practical, and we have to go back to 1985 to find it. It was grounded in that same “non-interventionist” philosophy which the appellants invoked in this appeal. In the *Review of Child Care Law*, para. 18.18, the case for establishing different and less onerous grounds for supervision was rejected largely on the basis that nothing less than the minimum grounds for a care order “could justify compulsory state intervention even at the level of supervision”. The kind of problems which arose in *Lancashire* and in the earlier decision of the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C.563 (in which there was a strong suspicion, but insufficient evidence, of sexual abuse) suggest that this view should be revaluated and that ideology ought perhaps to give way to more practical concerns. If, as *Lancashire* reveals, there are going to be cases in which it is felt that there is a necessity for compulsory intervention even where it is not possible to prove the case against a parent, there will be those who may feel that such compulsory action should be confined to the more limited

form of intervention which supervision represents, and that the more draconian care order (which authorises removal of the child from the family) should be available only on proof of the allegations against the parent. This would require primary legislation to amend the Children Act, but it is not inconceivable that the Government might be forced down this road in order to comply with the European Convention on Human Rights. The argument was indeed presented by the appellants that the actions of the local authority, in continuing the care proceedings and leaving A in foster care after it realised that the case against the parents could not be proved, was a violation of their rights to family life under Article 8(1). This was cursorily dismissed by Lord Nicholls on the basis that the steps taken were “no more than those reasonably necessary to pursue the legitimate aim of protecting A from further injury” and were thus within the exceptions set out in Article 8(2). It seems entirely likely that parents and other primary carers will continue to invoke the Convention whenever there is a suggestion of compulsory action but the evidence against them is inconclusive. In this, as in other areas of family law, the courts are increasingly going to be called upon to resolve the clash between the fundamental rights of individual family members protected by the Convention—in this case the child’s fundamental right to protection and the parents’ fundamental right to family integrity. Where the harm has already occurred to the child, as it had in the case of A, the message of *Lancashire* seems to be that it is legitimate to give priority to the former, whereas where it has not, as in the case of B and in the case of the younger girls in *Re H*, priority must be given to the latter. But is this not also open to the objection that we ought not to have to wait for serious harm to befall a child before taking protective measures?

ANDREW BAINHAM

#### FORUM-SHOPPING: FROM RUSSIA WITH LOVE

RECENT years have witnessed considerable controversy over the principles that determine when a court has jurisdiction to hear claims against foreign publishers who circulate defamatory material in several jurisdictions, including England. This is the situation that arose in the recent decision of the House of Lords in *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004. In 1996 Forbes Magazine, a company incorporated in the United States, published an article

about certain activities in Russia of two prominent businessmen, Mr. Berezovsky and Mr. Glouchkov, who were resident in Russia. The magazine containing the article was primarily circulated in the United States, but did have an English circulation accounting for approximately 0.2% of its global circulation. In 1997 Mr. Berezovsky and Mr. Glouchkov issued proceedings in England alleging that the article contained defamatory material. The claimants, however, limited their claims to the damage done to their reputations in England as a result of the magazine's English publication. The issue before the House of Lords was whether the claimants should be given permission to serve their claim form on the publisher out of the jurisdiction, pursuant to R.S.C. Order 11, rule 1(1)(f), now C.P.R. Part 6.20(8). At first instance Popplewell J. had refused such permission, but had subsequently been overturned by the Court of Appeal ([1999] E.M.L.R. 278: judgment of the court delivered by Hirst L.J.). The House of Lords by a majority (Lords Hoffmann and Hope dissenting) dismissed the appeal and held that permission should be given for the trial of the action to proceed in England.

The House did not consider whether the case before it fell within the jurisdictional head in C.P.R. Part 6.20(8), but only whether England was the *forum conveniens* for the trial of the action. Their Lordships were unanimous in reiterating the basic principle that, in determining the appropriate forum, citation of authority involving similar facts is to be discouraged, as each case will turn upon its own facts (*Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460 at 465 *per* Lord Templeman). It is, therefore, unsurprising that the minority disagreed with the majority about the weight to be attached to the various factors connecting the claimants, and the dispute generally, with England. The speeches do, however, contain a point of considerable importance: the House had its first opportunity to approve the principle that, in relation to actions based on a tort, the place where the tort was committed is presumed to be the *forum conveniens* for the trial of the action. Lord Steyn, for the majority, considered two aspects of this presumption. First, His Lordship considered the weight to be attached to the presumption and approved Goff L.J.'s statement in *The Albaforth* [1984] 2 Lloyd's Rep. 91, 96, that "if the substance of the tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum". According to this approach, the place where the tort was committed will not simply give an indication of where the case ought to be heard, but will be determinative of that issue.

The second issue considered by Lord Steyn was how to determine, for the purposes of applying the presumption, where a “multi-jurisdictional” libel had been committed. Before the Court of Appeal, the defendant had submitted that, in the case of “multi-jurisdictional” torts, the court should treat the wrongful acts taking place in the various jurisdictions as giving rise to a single “global tort”. In order to determine the place where that “global tort” had been committed, for the purposes of the presumption, the court should ask where “in substance” that tort arose (see *Metall und Rohstoff AG v. Donaldson, Lufkin and Jenrette Inc.* [1990] 2 Q.B. 391). This argument was, however, rejected by both Hirst L.J. in the Court of Appeal and Lord Steyn in the House of Lords on the ground that each publication of an article gave rise to a separately actionable tort and that, as a result, each act of publication should be examined separately to determine where it had been committed.

Lord Steyn’s approach to the presumption has two consequences. First, the victim of defamation who limits his claim to the damage suffered in a particular jurisdiction will have complete freedom to sue in the jurisdiction most favourable to his case and will be able to use that judgment as a weapon in subsequent litigation in other jurisdictions. Second, a claimant who limits his claim to the damage suffered in England will always be able to show that the tort was committed in England and, as a consequence, be able to take advantage of the presumption that England is the *forum conveniens*. It would appear to be difficult to rebut this presumption. As Lord Hoffmann recognised, this approach will encourage “forum shoppers in the most literal sense”. The effect of the decision in *Berezovsky* is to equate the approach to be adopted under C.P.R. Part 6.20(8) with that adopted by the European Court of Justice in *Shevill v. Presse Alliance SA* [1995] 2 A.C. 18 in the context of Article 5(3) of the Brussels Convention 1968. The decision in *Shevill* has equally been criticised for encouraging forum-shopping (see Reed and Kennedy, “International Torts and *Shevill*: the ghost of forum shopping yet to come” (1996) L.M.C.L.Q. 108). Whilst the charge that the Brussels Convention encourages forum-shopping must sometimes be accepted as the corollary of the application of its unashamedly rigid jurisdictional rules, it ought not to be possible to level such a criticism at a jurisdictional system based upon the exercise of a discretion designed to discover the most appropriate forum. Lord Hoffmann may, however, have identified the potential solution: to treat the fact that the tort had been committed within the jurisdiction as no more than one factor that should be taken into account when



balancing the various factors connecting the dispute with England (see *Schapira v. Ahronson* [1999] E.M.L.R. 735 at 745 *per* Peter Gibson L.J.). This may be the only available way of preventing England from becoming an international libel tribunal for the rest of the world.

CHRISTOPHER HARE

#### A NEW SYSTEM OF CIVIL APPEALS AND A NEW SET OF PROBLEMS

THE decision itself in *Tanfern Ltd. v. Cameron-MacDonald* [2000] 1 W.L.R. 1311 (C.A.) hardly merits attention (held: the court lacked jurisdiction to hear the instant appeal). But Brooke L.J.'s judgment, endorsed by his colleagues, contains an analysis of the new system of civil appeals which took effect on 2 May 2000. He rightly describes these as "the most significant changes in the arrangements for appeals in civil proceedings in this country for over 125 years".

The new rules appear mostly in Part 52 of the Civil Procedure Rules (1998) ("C.P.R."). The Access to Justice Act 1999, ss. 54–57, paved the way for these changes and that statute implemented recommendations made in the "Bowman Report", *Review of the Court of Appeal (Civil Division)* (Lord Chancellor's Department, 1997).

Three principles govern the new appellate scheme: finality, proportionality and the efficient allocation of scarce judicial resources (especially hard-pressed Lords Justices of Appeal). The second and third principles are articulated in the remarkable "Overriding Objective" in C.P.R. Part 1. These principles underpin the following changes.

The Court of Appeal's law-making role will be enhanced because important appeals can now proceed directly to that court rather than being heard on appeal within the county court or High Court (C.P.R. 52.14 and Access to Justice Act 1999, s. 57). Civil appeals, including those to the Court of Appeal, now require permission in nearly all cases (C.P.R. 52.3(1)). A civil appeal, at whatever level it is heard, will be restricted normally to a review of the relevant decision rather than a re-hearing (C.P.R. 52.11). Exacting criteria now govern the grant of permission for second appeals, that is, appeals within the county court or High Court followed by recourse to the Court of Appeal (C.P.R. 52.13). Furthermore, as under the old law, the appeal court will not normally receive oral evidence, nor evidence which was not before the lower court (*ibid.*).

These changes will reduce the delay, expense, and uncertainty of civil proceedings and they will also increase the incentive for litigants to “get it right first time round”. However, the same changes will reduce the chances of rectifying defective decisions. This is the price paid for achieving the impressive benefits of the new system of appeals.

It is interesting to consider the House of Lords’ decision in *Arthur J.S. Hall & Co. v. Simons* [2000] 3 W.L.R. 543 in the light of these restrictions upon civil appeals. That decision abolished the advocate’s immunity against professional liability for negligence in the conduct of criminal or civil hearings or trials (an immunity affirmed by *Rondel v. Worsley* [1969] 1 A.C. 191). A civil litigant who is aggrieved by the outcome of a hearing can now sue his advocate (whether a solicitor or a barrister) for compensation, alleging that it was the latter’s negligent conduct of a hearing or trial which caused the defeat or disappointment.

What of the connection between abolition of the advocate’s immunity and criminal or civil appeals? As for criminal matters, the *Hall* decision states that an aggrieved defendant must have the guilty verdict set aside on appeal before he can sue his allegedly negligent advocate for civil compensation. But the House did not say that an aggrieved civil litigant must also exhaust his avenues of appeal before seeking compensation against his advocate.

Perhaps the exacting controls upon civil appeals, summarised above, will indirectly stimulate claims for compensation against advocates, especially now that their immunity against liability for court-room negligence has been abrogated by the *Hall* decision. The House did not draw this connection between roughly coincident legal developments, possibly because argument in the *Hall* case took place in March 2000, two months before the changes were made to C.P.R. Part 52. But the driving factor is the fact that, even if not all lawyers have deep pockets, they carry compulsory insurance against professional liability. Factually hopeless claims against advocates can be repelled by summary judgment obtained by the defendant under C.P.R. Part 24, or by striking out under C.P.R. Part 3.4 (as emphasised in the *Hall* case at pp. 551 H, 554 B, 563 H). But might claims concerning earlier civil proceedings be struck out on the bald basis of an “abuse of process”?

No doubt it is not an abuse of process if a civil litigant, disappointed by the result at first instance, seeks compensation against an advocate who also plainly instructed him not to appeal, or if his lawyer failed to apply in time for permission to enable his client to appeal. Nor is there any abuse if the advocate’s alleged

negligence concerns the manner in which the appeal itself was argued. But there are doubtful situations where the client's claim against his advocate for compensation, which concerns the result at first instance, is in potential collision with the outcome of the appellate process, which affirmed that result. For example, what if the litigant was refused permission to appeal? What if he lost the appeal without negligence on the part of his lawyer in the conduct of that appeal, but he alleges that negligence explains his defeat at first instance? Finally, what of the aggrieved litigant who decided, without or despite legal advice, not to appeal against the civil judgment and now seeks compensation from his lawyer? Is this last case an abuse of process because an aggrieved civil litigant declined to appeal and instead wishes to sue his lawyer? Lord Hobhouse in the *Hall* case seems to say "no" to this question (pp. 613–614, 615 G, 622 A–B). But the other six speeches are tentative, unclear or silent on the abuse of process doctrine's impact in the civil context (pp. 552 A, 557 A, 574 C–F, 578 A–E).

Other courts will instead have to wrestle with these points. One vexing question, noted by Lord Hope (pp. 582, 594), will be whether the abuse of process doctrine can be deployed here without violating the qualified guarantee of formal access to justice based upon Article 6(1) of the European Convention and its parallel in the Human Rights Act 1998.

N. H. ANDREWS

#### NAMING AND SHAMING YOUNG OFFENDERS

IN the criminal justice system's scheme of unpleasant things, what official part is played by "naming and shaming" the offender?

For adults, the unspoken premise seems to be that being named in the newspaper is a part of the sanction, and the risk of public shame is part of the law's system of deterrents. For children and young persons, however, the considerations are different—as the Divisional Court recently reminded us in *McKerry v. Teesdale and Wear Valley Justices* (2000) 164 J.P. 355.

The basic rules on naming juvenile defendants are contained in sections 39 and 49 of the Children and Young Persons Act 1933. Between them, these two sections provide that where (exceptionally) juvenile defendants are tried in the Crown Court the media are free to identify them unless the court rules otherwise, but where (as usual) they are tried in the youth court the presumption is the other way round: the media must not reveal their names unless the court expressly says they may.

Section 39—the Crown Court provision—gives no guidance as to when the courts should order the name of a juvenile to be withheld, leaving them to make up the rules themselves. By contrast section 49—the youth court provision—does try to guide the courts as to when they should allow the name of the young offender to be published. It originally said this could be done wherever it was “in the interests of justice”. In 1969, Parliament substituted a more protective test: henceforth the name could be published only “for the purpose of avoiding injustice to the child or young person”. But in 1997 a “law and order” Parliament scrapped this in favour of a new test, similar but not identical to the first one. As section 49 now stands, the youth court can allow the name of the young offender to be published “if it is satisfied that it is in the public interest to do so”.

But what in this context is meant by “in the public interest”? A range of possibilities presents itself. At its loosest and widest, “public interest” could mean that the offence has attracted widespread attention, so that the public, avid for details, are particularly keen to know exactly who it was that committed it. Scarcely less widely, it could mean that the court thinks the young offender was exceptionally wicked, so that—unlike most juvenile offenders—he deserves the extra punishment incurred by being “named and shamed”. Or, similarly, it could mean that the court thinks the crime was exceptionally harmful, so that other potential offenders—even young ones—need the extra dose of deterrence that stems from the knowledge that if you get caught you will probably be named and shamed as well as punished. Or, more narrowly, the “public interest” could require the naming of the offender because he is likely to reoffend—so that the public needs to be able to recognise him in order to avoid him.

In *McKerry v. Teesdale and Wear Valley Justices* a sixteen-year-old boy, with a long record of offending, pled guilty at the local youth court to taking a vehicle without the owner’s consent. At the request of the local newspaper, and over the objection of the boy’s solicitor, the magistrates made an order permitting his identity to be revealed. As they explained to the Divisional Court when the boy appealed against the order by way of case stated: “We announced our view that the appellant constituted a serious danger to the public and had shown a complete disregard for the law. These were our reasons for relaxing the reporting restrictions.”

Upholding the magistrates’ order, the Divisional Court said that these reasons were acceptable ones, because “no doubt the justices had in mind that members of the public, if they knew the appellants name, would enjoy a measure of protection if they had

cause to encounter him". The Divisional Court added that the power to dispense with anonymity "must be exercised with very great circumspection", and that it will "very rarely be the case" that the public interest criterion is met. They said that it would be "wholly wrong for any court to dispense with a juvenile's *prima facie* right to anonymity as an additional punishment", and that it is "very difficult to see any place for 'naming and shaming'".

This is a more restrictive approach than the courts have taken when interpreting the power of the Crown Court to withhold names under section 39. In the leading case of *Lee* [1993] 1 W.L.R. 103 the Court of Appeal upheld the refusal of a judge to ban the media from identifying a fourteen-year-old boy convicted of robbery and rape because it would involve "no real harm to the applicant, and [be] a powerful deterrent effect on his contemporaries, if the applicant's name and photograph were published".

An important factor that underlay the Divisional Court's more restrictive approach to section 49 was the UK's international obligations—a matter discussed at length in the *McKerry* case, but in *Lee* mentioned not at all. These obligations include the 1989 UN Convention on the Rights of the Child, Article 40 of which guarantees the right of a child defendant "to have his or her privacy fully respected at all stages of the proceedings".

The truth is that many countries take a different view from ours about the proper role of "naming and shaming" as a sanction in the legal system, just as at one time many failed to share our earlier taste for "stripping and whipping". In Holland and in Germany, for example, it is normally thought decent and proper for the media to suppress the names of those whom the courts have convicted, even where they are adults. Against this international background, the rule proclaimed in Article 40 of the UN Convention should cause us no surprise.

J.R. SPENCER

#### ADMITTING ACQUITTALS AS SIMILAR FACT EVIDENCE OF GUILT

AN accused is charged with rape. He will claim that the complainant consented. The Crown can prove that on four previous occasions that selfsame accused has been tried on other counts of rape, but on all but one of them has been acquitted. The trial judge rules that, had the accused been convicted of all four earlier rapes, such evidence would have been admissible at the fifth

trial under the similar fact evidence principles enunciated by the House of Lords in *D.P.P. v. P* [1991] 2 A.C. 447. The single earlier conviction, however, standing alone, does not qualify as admissible similar fact evidence. These, in essence, were the facts confronting the House of Lords in *R. v. Z* [2000] 3 W.L.R. 117, the general question for the House being: despite three of Z's previous trials having resulted in acquittals, was the Crown entitled to lead evidence of all four earlier incidents, including testimony from the three complainants whose allegations had failed to persuade juries in the past?

Presumptively, the answer used to be, No. Indeed, in *R. v. Z* the Court of Appeal had regretfully upheld the trial judge's decision to exclude this evidence. Although the authorities were far from consistent, it was broadly accepted that Lord MacDermott's statement in *Sambasivam v. Public Prosecutor* [1950] A.C. 458, 479 that "A verdict of acquittal ... is binding and conclusive in all subsequent proceedings between the parties to the adjudication" applied in this situation. Thus, no matter how suspicious the evidence, the Crown might not prove offences that had resulted in acquittals if such evidence was irreconcilable with the accused's innocence. Plainly, in *R. v. Z*, if the prosecution adduced the acquittal evidence, this invited the conclusion that three earlier verdicts may have been mistaken and that Z was in truth guilty of those offences as well.

Since an acquittal may indicate no more than that the jury entertained a reasonable doubt as to the defendant's guilt and no tribunal of fact is infallible, it might be counted quixotic for English law to have contemplated treating acquittals as though they were conclusive findings of innocence. The *Sambasivam* principle could be defended to the extent that it places a fitting premium upon the integrity of verdicts and avoids any appearance of an accused being placed in double jeopardy. But double jeopardy can mean different things. It could signify that an accused ought not to have to defend himself repeatedly against the same allegations and therefore entail that "in a subsequent criminal proceeding ... an acquittal is the equivalent to a finding of innocence" (*Grdic* [1985] 1 S.C.R. 810, 825 *per* Lamer J.; see also *Arp* [2000] 2 L.R.C. 119, 146 *per* Cory J.: Canadian Supreme Court). In *R. v. Z*, however, the House of Lords gave a more restricted meaning to double jeopardy. Lord Hutton, delivering the principal speech, analysed the authorities and, deriving comfort from the fact that his conclusions coincided with proposals advanced by the Law Commission in its Consultation Paper No. 156, held that "double jeopardy" was to be confined within the limits drawn by Lord Devlin in *Connelly v.*

*D.P.P.* [1964] A.C. 1254, namely, to staying prosecutions in which the defendant is being *re-tried* on the same or substantially the same facts as gave rise to an earlier prosecution that resulted in an acquittal. This was not at all *Z*'s predicament: *Z* was at no risk of conviction on the three rape counts of which he had already been acquitted. As an inevitable corollary to this first proposition, Lord Hutton concluded that "evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted" (p. 135).

The House's decision in *R. v. Z* to admit acquittals as similar fact evidence provided that they possess sufficient probative value accords with instinctive common sense. Probative evidence ought on the whole to be admissible. Indeed, Lord Hobhouse felt that to treat acquittal evidence as inadmissible was actually "a denial of the principle upon which similar fact evidence is admitted" (p. 139). As with similar fact evidence generally, each individual case will turn on the probative force of the accumulating evidence, some or all of which, when originally placed before a court, may not have been sufficient to persuade that tribunal of the defendant's guilt. As well as conventional acquittals, *R. v. Z* will apply where the proffered "acquittal" evidence consists of, say, a quashed conviction (*Pommell (No. 2)* [1999] Crim.L.R. 576) or a case thrown out by committing magistrates for want of evidence (*Caceres-Moreira* [1995] Crim.L.R. 489), both of which have been equated with acquittals. Whilst it may be unclear what probative weight one attributes to a solitary conviction on a firearms charge quashed because the judge wrongly excluded a defence of duress (*Pommell (No. 1)* [1995] 2 Cr.App.R. 607), viewed cumulatively along with the other evidence in the case, each item of proof lending mutual strength to the others, the unsafeness of a conviction (or, *a fortiori*, evidential deficiencies in a prosecution case) may thereby be cured.

Clearly anxious that, when admitted, acquittal evidence ought not to prejudice defendants unduly, the Law Lords explicitly invoke the discretion to exclude technically admissible evidence under section 78 of PACE, should the judge consider that it reflects adversely on the fairness of the proceedings. (Lord Hutton additionally invokes the common law discretion to exclude prejudicial evidence). That the defendant has to deal anew with facts which were in issue in an earlier proceeding where he was acquitted is one more factor to be taken into account when the judge determines whether the admission of similar fact evidence might compromise the fairness of the trial. Although the courts



sometimes assert that the similar fact rules involve “a matter of judgment” (*Gurney* [1994] Crim.L.R. 116), given their overtly discretionary nature, it could be wondered whether in reality such an independent exercise of discretion makes much sense. However, owing to the momentous and, dare one say, deadly effect of similar fact evidence—in practical terms, the court’s decision to admit it all but seals the defendant’s fate—it probably does no great harm to enjoin the judge to think twice before ruling in favour of the Crown.

Even if, in many respects, the House of Lords’ decision in *R. v. Z* is welcome, the admission of acquittal evidence arguably presents an additional problem, not referred to in the case. Take this cautionary tale. In 1956 Lt.-Commander Swabey was convicted by court-martial of indecently assaulting a sub-lieutenant. A mere seventeen years later, following a gruelling series of appeals and petitions, the Ministry of Defence acknowledged that Christopher Swabey had been the victim of a dreadful miscarriage of justice. The members of the court-martial that had tried him, quite improperly, had been aware that, by coincidence, in 1950 Swabey had been acquitted by another court-martial of a charge of committing indecency with a rating. Self-evidently, that information would have weighed heavily in the deliberations of the court in 1956. (For a full account of the case, see A. Draper, *Smoke without Fire* (London 1974)). Following *Z*, there is little doubting that such evidence could now be treated as admissible. Although such cases may be rare, a risk attendant upon admitting acquittal evidence is that, over and above the familiar aura of prejudice that evidence of convictions and other misconduct can readily evoke, acquittal evidence conveys the insidious implication that there is no smoke without fire. No matter how anxiously the judge frets over the proffered evidence, no matter how conscientiously the jury attempts to make allowance for its distorting effect, this element introduces another incalculable into the nebula that is the similar fact evidence rule.

RODERICK MUNDAY

