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CASE AND COMMENT

LEGITIMATE EXPECTATIONS AND UNLAWFUL REPRESENTATIONS

ENGLISH administrative law has long struggled with the problem of unlawful statements issued by or on behalf of public authorities, upon which individuals go on to rely. The potential injustice to those who discover, after the expenditure of time and money, that apparently authoritative assurances are actually worthless has occasionally been addressed by invoking the concept of estoppel, so as to prevent public authorities from resiling from their officials' ostensibly reliable statements (see, e.g., *Lever Finance Ltd. v. Westminster LBC* [1971] 1 Q.B. 222, per Lord Denning M.R.).

However, concern for the individual's welfare must be tempered by reference to a wider public interest in lawful decision-making by the designated agency pursuant to the statutorily-prescribed procedure. The almost insurmountable obstacle to the establishment of estoppels in public law cases erected by judicial emphasis on such public interest concerns (see *Western Fish Products Ltd. v. Penwith DC* [1981] 2 All E.R. 204) has now become an absolute barrier, in view of the courts' willingness to follow obiter dicta in *R. (Reprotech (Pebsham) Ltd.) v. East Sussex CC* [2002] UKHL 8, [2003] 1 W.L.R. 348 (noted at (2003) 62 C.L.J. 3) to the effect that estoppel should be confined to the private sphere in which it was developed, leaving legitimate expectation as the central principle in this area of public law. Does this mean that it is now possible to found a *legitimate* expectation upon an *unlawful* representation? Although some post-*Reprotech* decisions (e.g. *South Buckinghamshire DC v. Flanagan* [2002] EWCA Civ 690, [2002] 1 W.L.R. 2601) have hinted that this may be possible when such

undertakings are promulgated with ostensible authority, these issues were the subject of more thoroughgoing attention in *Stretch v. UK* (2004) 38 E.H.R.R. 12 and *Rowland v. Environment Agency* [2003] EWCA Civ 1885, *The Times*, 20 January 2004.

In the former, the applicant purchased from a local authority a 22-year lease which obliged him to erect industrial buildings and conferred an option to renew for a further 21 years. When renewal negotiations had reached an advanced stage, the local authority informed the applicant that the option could not be exercised because, *inter alia*, its statutory predecessor never had legal capacity to grant such an option. This argument met with grudging acceptance in the Court of Appeal (*Stretch v. West Dorset DC* (1999) 77 P. & C.R. 342), Peter Gibson L.J. noting that it seems “unjust” that public bodies which misconstrue their powers should be able to “take advantage of their own errors to escape from the unlawful bargains that they have made”.

The European Court of Human Rights, however, was unwilling to accept the insuperability of the legal incapacity argument. Without reference to it, the Court held that the applicant had acquired a legitimate expectation of exercising the option; that, for the purposes of Article 1, Protocol 1 of the European Convention on Human Rights, this could be characterised as attaching to the property rights arising under the lease, and that the local authority’s conduct frustrated the expectation. The issue of legal incapacity was considered only at the final stage of the analysis. Here, in assessing whether the option’s non-enforcement could be objectively justified, the Court accepted that the “doctrine of *ultra vires* ... provides an important safeguard against abuse of power”, but concluded that damages should nevertheless be awarded because, on the facts, it could not be argued that the local authority had “acted against the public interest in the way in which it disposed of the property under its control or that any third party interests or the pursuit of any other statutory function would have been prejudiced by giving effect to the renewal option”. The significance of this analysis lies in its treatment of legal incapacity merely as a factor to be placed in the balance when deciding whether the legitimate expectation may lawfully be frustrated. This is in stark contrast to the English authorities’ mechanical presupposition that the public interest in legality is necessarily of overriding force.

There are considerable difficulties in attempting to map the *Stretch* approach onto domestic law, as *Rowland* illustrates. The case concerned undertakings (by way of regular and consistent practice) by the defendant and its predecessors to the effect that public rights of navigation did not exist over a stretch of the River

Thames known as Hedsor Water. However, in 2001, the defendant decided that such rights did exist, and ordered the claimant to remove signs giving the contrary impression. The Court of Appeal agreed that public rights of navigation existed over Hedsor Water, holding that it was beyond the defendant's powers to extinguish them. Although the Court accepted that the conduct of the defendant and its predecessors was sufficient to give rise to a legitimate expectation, and that the claimant and her late husband's reliance upon the implied representations was reasonable, the claim was "bound to fail under English domestic law" because "there can only be a legitimate expectation founded on a lawful representation or practice" (*per* Peter Gibson L.J.).

While May L.J. (like Mance L.J.) reached the same conclusion, he did so with "undisguised reluctance", lamenting the fact that authority prevented the Court of Appeal from reviewing a "defective" area of law and obliging it to "uphold an unjust outcome". His Lordship would have preferred to adopt the view of Craig (see *Administrative Law* (London 2003), pp. 675–680) that legal incapacity should not automatically be considered an insuperable obstacle, and that any potentially damaging effects of enforcing unauthorised representations should instead be balanced against the harm likely to be occasioned to the individual by frustrating the expectation.

Although the legal incapacity argument prevailed at common law, the Court recognised that further reflection was required as a result of *Stretch*. The Court found that the legitimate expectation constituted a "possession" which would be entitled to protection under Article 1 of Protocol 1 unless interference could be shown to be necessary and proportionate. Mance L.J. therefore observed that, in cases concerning ECHR rights, "it can no longer be an automatic answer ... to a case of legitimate expectation, that the Agency had no power to [fulfill the expectation]". This, however, was without prejudice to the fact that the Court "cannot grant relief which would have the effect of obliging the Agency to continue to treat Hedsor Water as private".

While the latter proposition is uncontroversial, it does not follow that *any* protection of unlawfully-generated expectations is impossible. Where, for example, *ultra vires* decisions have already been taken in line with such expectations, the courts' remedial discretion might be exercised so as to leave such decisions intact. The situation which arose in *Rowland*, in which enforcement of an unlawful promise was sought, is more problematic, but a partial solution was embraced. Mance L.J. explained that while "the Agency could not, even bearing in mind any contrary legitimate

expectation, be expected to perform acts exceeding its actual powers”, it could be required to “alleviate any injustice by benevolent exercise of its powers”. It was, however, sufficient for the defendant to act (as it had already undertaken to) in a manner sensitive to the claimant’s expectation by not actively promoting public use of Hedsor Water. There is no reason in principle why this approach should not also be applied in cases not involving Convention rights, although its capacity to satisfy disappointed individuals will remain limited unless a more extensive duty to act benevolently is developed in subsequent cases.

Compensation in lieu of fulfilment of the expectation was not sought in *Roland*, but is advanced by some commentators (e.g. Wade and Forsyth, *Administrative Law* (Oxford 2000), p. 343) as the best means by which to reconcile competing public and private interests in this sphere. Others, however, including May L.J. in *Rowland*, feel that enforcement of unlawfully-generated expectations, if acceptable on a balancing test, is “a fairer and more proportionate outcome than for the public purse to compensate” the disappointed individual. It is, moreover, unclear on what basis compensation could be made available (except where misleading advice is given negligently): where breach of an expectation implies violation of a Convention right, the use of section 8 of the Human Rights Act 1998—the obvious vehicle for a damages claim in such circumstances—would seem to be barred by section 6(2), which provides that it is not unlawful for a public authority to act in a given way when primary legislation constrains it to do so.

An alternative approach—countenanced at first instance in *Rowland* by Lightman J: [2002] EWHC 2785 (Ch), [2002] Ch. 581—might be to imbue with greater substance the requirement to act benevolently when frustrating unlawfully-generated expectations. Drawing upon *S v. France* (1990) 65 D.R. 250 and dicta in *Marcic v. Thames Water Utilities Ltd.* [2002] EWCA Civ 64, [2002] Q.B. 929 (reversed by the House of Lords: [2003] UKHL 66, [2003] 3 W.L.R. 1603), it may be argued, subject to the terms of relevant legislation and any margin of appreciation, that the exercise of a given power so as to elevate community interests over those of an expectation-holder may—and hence must: section 6(1), Human Rights Act 1998—be rendered compatible with the expectation/right by compensating its holder, thus striking the fair balance between individual and wider public interests demanded by the Convention. Whether English courts are willing to give teeth of this sort to the benevolent exercise of power doctrine, however, remains to be seen.

MARK ELLIOTT

THE RIGHT TO TRIAL WITHIN A REASONABLE TIME

ARTICLE 6(1) of the European Convention on Human Rights and Fundamental Freedoms provides that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent tribunal established by law” (emphasis added). The reasonable time guarantee is an important protection that gives a defendant who is not guilty the opportunity to clear his name without excessive delay. It also prevents a guilty defendant from undergoing the additional punishment of protracted delay (see *Wemhoff v. Federal Republic of Germany* (1968) 1 E.H.R.R. 55, para. 18; *Stögmüller v. Austria* (1969) 1 E.H.R.R. 155, para. 5; *H v. France* (1989) 12 E.H.R.R. 74, para. 58). The House of Lords’ decision in *Attorney General’s Reference (No. 2 of 2001)* [2003] UKHL 68, [2004] 2 W.L.R. 1 is the latest domestic decision attempting to settle the vexed question of the precise scope of this guarantee.

In April 1998 there was a disturbance at an English prison. Proceedings were brought against several inmates, and when the matter finally reached court in January 2001, the judge stayed proceedings on the ground that there had been a violation of the reasonable time requirement in Article 6(1). The Attorney General referred the matter to the Court of Appeal, which held that a stay would have to be imposed if a fair trial were not possible; such cases apart, however, a stay would not normally be appropriate (*Attorney General’s Reference (No. 2 of 2001)* [2001] EWCA Crim 1568, [2001] 1 W.L.R. 1869).

On the present application, the first question for the House of Lords was whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in circumstances where the accused cannot demonstrate any prejudice arising from the delay. In other words, does the breach lie in the holding of a trial after the lapse of a reasonable time, or solely in the State’s failure to hold the trial within a reasonable time? Under the former construction, holding a trial is incompatible with the Article 6(1); under the latter, it is not.

As Lord Bingham observed (at para. [20]), many highly respected courts around the world have taken the former view. Significantly, the majority of the Privy Council held as a Scottish devolution issue in *H.M. Advocate v. R* [2002] UKPC D3, [2003] 2 W.L.R. 317 that in continuing to prosecute criminal charges after the lapse of a reasonable time, the Lord Advocate would act incompatibly with Article 6(1). The majority of the House of Lords

(Lords Bingham, Nicholls, Hoffmann, Steyn, Hobhouse, Millett and Scott), however, declined to follow the Privy Council and held that breach consists in the delay that has accrued, not in the prospective hearing. This decision was based largely on the fact that once spent, time cannot be recovered and so if a breach of the reasonable time requirement is shown to have occurred, it cannot be cured. It would, Lord Bingham said, “be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant’s other Article 6(1) rights” (para. [20]).

The effect of this decision is that criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the accused. If neither of these conditions is met, the appropriate remedy will depend on the nature of the breach and all the circumstances, including the stage of proceedings at which the breach is established. Lord Bingham suggested that if the breach is established before the hearing, appropriate remedies would include public acknowledgement of the breach, action to expedite the hearing and perhaps, if the defendant is in custody, his release on bail. If the breach is established after the hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant (para. [24]).

With respect, this undermines the principle that the reasonable time requirement is a separate and independent guarantee and not simply part of the overriding right to a fair trial (see *Porter v. Magill* [2001] UKHL 67, [2002] 2 A.C. 357, 497). The opposite conclusion reached by the Privy Council in *H.M. Advocate v. R* and the (Scottish) minority (Lords Hope and Rodger) in the present case, is more attractive:

[T]he fact that this particular breach of article 6(1) cannot be cured by holding a fresh hearing is not just some quirk of the Convention On the contrary, it stems from the very nature of the wrong which the guarantee is designed to counteract When the authorities delay unreasonably, months or years of the defendant’s life are blighted. He cannot have them over again; they are gone forever. By signing up to article 6(1) states undertake to avoid inflicting this kind of harm. (para. [151], *per* Lord Rodger.)

Pre-trial delay where the accused is held in custody is the subject of extensive regulation (see, *e.g.*, Prosecution of Offences (Custody Time Limits) Regulations 1987 (S.I. 1987 No. 299) as amended; *R.*

v. Manchester Crown Court, ex p. McDonald [1999] 1 W.L.R. 841). But where the accused is not in custody, protection against dilatory prosecution is minimal. The interpretation of Article 6(1) favoured by the minority would have remedied this and had a salutary effect on the criminal justice system. The failure of the House of Lords to follow the Privy Council's lead makes it imperative that Parliament should intervene and enact the relevant standards to ensure expedition as well as fairness in prosecutions (for further discussion in the context of youth justice see J. Jackson, J. Johnstone and J. Shapland, "Delay, Human Rights and the Need for Statutory Time Limits in Youth Cases" [2003] Crim.L.R 510).

The second question for their Lordships was an important practical point: in determining whether a criminal charge has been heard within a reasonable time, when does the relevant time period commence? Their Lordships were unanimous; the relevant time period commences at the earliest time at which a defendant is officially alerted to the likelihood of criminal proceedings against him, which in England and Wales will ordinarily be when he is charged or served with a summons.

Finally, the minority's interpretation of Article 6(1) raised an interesting additional question. Section 57(2) of the Scotland Act 1998 provides that a member of the Scottish Executive, including the Lord Advocate as public prosecutor, has "no power" to act in a way that is incompatible with a Convention right. Thus in *H.M. Advocate v. R*, having held that continuing with the prosecution would be incompatible with the defendant's Convention right, the Privy Council had no choice but to impose a stay. Must the same result follow under section 6(1) of the Human Rights Act 1998 which provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right"?

The majority held that it must, since section 6(1) prohibits public authorities from acting incompatibly with Convention rights (see also M.C. Elliott, "Human Rights as Interpretative Constructs: The Constitutional Logic of the Human Rights Act 1998" in C.F. Forsyth (ed.), *Judicial Review and the Constitution* (Oxford 2000)). The minority rejected the notion that section 6(1) imposes a *vires* control on public bodies, holding instead that "Section 6(1) makes acts which are incompatible with the Convention unlawful simply so that the courts can grant a remedy in terms of section 8(1). In other words, taken together, these provisions make up the mechanism by which our courts are to grant remedies for breaches of people's Convention rights" (para. [174] *per* Lord Rodger).

This is a novel interpretation of section 6(1), but can it have been the intention of Parliament, in enacting section 6(1) HRA

1998 and section 57 SA 1998, to introduce qualitatively different schemes of protection for Convention rights in England and Scotland? More fundamentally, notwithstanding the remedial provisions of section 8(1) HRA 1998, one ought to question whether it is right in normative terms that public authorities acting incompatibly with Convention rights should be regarded as acting *intra vires*.

RICHARD MOULES

RECOGNITION OF DIVORCE WITHOUT RECOGNITION OF STATEHOOD

IN 2001 Sumner J., sitting in the Family Division, acknowledged the validity of a divorce effected under the law of the Turkish Republic of Northern Cyprus (TRNC), in *Emin v. Yeldag* [2002] 1 F.L.R. 956. This decision created a precedent in English law concerning recognition of acts of entities not recognised as States, yet it went almost unnoticed, perhaps indicating its timeliness.

The TRNC is a Turkish-Cypriot entity in the northern part of Cyprus, which in 1983 purported to secede from the Republic of Cyprus. Following UN Security Council Resolution 541 (1983) which declared the purported secession illegal and invalid, the TRNC has remained unrecognised by all States except Turkey.

The marriage of the applicant wife (Emin) was dissolved by a court in the TRNC in accordance with the law and practice of the TRNC. The applicant requested that the overseas divorce be recognised in England, so that she could be granted leave to apply for financial relief. The arguments therefore revolved on the validity of the divorce decree in English law, given that the UK Government does not recognise the TRNC as a State.

A. Non-recognition in English law

It was for long established in English law, that where the executive withheld recognition from a purported State or government, courts should follow suit. This meant not only that they should not make their own determination on statehood, but also that they could not attribute any validity to the acts of the entity in question insofar as those were dependent on the unrecognised status. The rationale for this policy was that the judiciary and the executive should speak with one voice, so that the judiciary did not frustrate the executive's exercise of non-recognition (*A.M. Luther v. James Sagor & Co. (No. 1)* [1921] KB 456).

Other States adopted different approaches. Most notable was the United States, where as early as 1868 the Supreme Court ruled that although the Confederate States established during the Civil War remained illegal and unrecognised, “acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and domestic relations, governing the course of descents, regulating the conveyance and transfer of property real and personal, and providing remedies for injuries to person and estate ...” should be given effect (*Texas v. White*, 19 L. Ed. 227 p. 240).

English courts, however, remained steadfast in their refusal to make any exceptions, although individual judges suggested that the *Texas v. White* exception should be applied: see Lord Wilberforce, obiter, in *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. and Others* (No. 2) [1967] 1 AC 853, and Lord Denning M.R., concurring with the other members of the Court of Appeal but not with their reasons, in *Hesperides Hotels and Another v. Aegean Turkish Holidays and Another* [1978] QB 205). In 2000 the validity of a TRNC divorce first arose in the Family Division (*B v. B* [2000] F.L.R. 707), but although H.H. Judge Compston conceded that, in principle, the exception to non-recognition might apply, he held that it did not cover divorce.

In the case of the TRNC, not only English rules on conflict of laws apply. Since the non-recognition of the TRNC is based on its illegality under international law, that law is also of relevance. The international law implications of illegality with regard to recognition of acts was addressed in the Advisory Opinion of the International Court of Justice in the *Namibia* case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] I.C.J. Reports 16 at [125]) where an exception similar to that in *Texas v. White* was envisaged: “... the illegality or invalidity of acts ... cannot be extended to such acts as the registration of births, deaths and marriages”.

B. The Court's ruling

In *Emin v. Yeldag*, the court was faced with the bizarre position that, despite numerous dicta on the applicability of the exception to matters of divorce, the only case turning on the issue—*B v. B*—was one in which the exception had not been applied.

Relying on a long list of persuasive authorities, both on the exception in the case of marriage and divorce, and on the possibility of granting some validity to TRNC acts, Sumner J. held that the

exception, based on the *Texas v. White* formulation, did apply, and that the divorce could be recognised despite the non-recognition of the TRNC. The list of authorities, and indeed the argument supporting recognition, came through the intervention by the Attorney-General and Secretary of State for Foreign and Commonwealth Affairs, undertaken specifically to avoid a repetition of *B v. B*. The intervention saved the judge from a head-on collision with the “one voice” policy. Two voices were indeed heard, but they were not those of the executive and of the judiciary, but of the executive itself, which opted not to recognise the TRNC but to recognise some of its acts. Thus Sumner J. could adopt a just result without clearly compromising the “one voice” policy or defying the executive; he actually saved the executive from itself.

Nevertheless, this decision opens the way for other situations where despite non-recognition of an entity’s statehood by the executive, its acts will be recognised by the judiciary. Marriage and divorce seem the least controversial areas in which to launch this new judicial policy.

The matter could have ended there. The judge could simply have stated that for the purposes of Family Law Act 1986, section 46(1)(a) (concerning recognition of foreign divorce decrees), the TRNC was, despite its non-recognition, the country in which and under whose law the divorce was validly obtained. Instead, the Court embarked on a complicated analysis of facts, only to end up with two contradictory conclusions. One seems to be that the TRNC is in fact an independent entity, and the other that consequently, “recognition is possible because the Republic of Cyprus is one country but with two territories, each with their own system of law within section 49(1) of the 1986 [Family Law] Act” (at [77]).

The result is that Sumner J. justified the recognition of the TRNC’s divorce under the exception to non-recognition, and then made an about-face and proceeded to recognise the divorce under the rules of conflict of laws applicable to complex States. It is submitted that he erred in his reasoning, confusing two alternative—and mutually exclusive—constructions. Either he should have given validity to the TRNC’s acts as if the TRNC were recognised as a State (as the reliance on extensive discussion of authorities suggests), or he should have regarded the TRNC as a territorial unit within a complex State. Sumner J., however, failed to distinguish and choose clearly between the two options.

Moreover, the latter construction—that of regarding the TRNC as a unit within a complex State—cannot apply to the TRNC. The application of the law of a unit within a complex State is based on

that unit's right to administer the law under the constitutional system of the complex State. For example, a divorce granted in Ontario is recognised in the UK because under Canadian law, the Ontario governing bodies are entitled to legislate for divorce and to administer it. However, the law of the Republic of Cyprus does not provide for a different system to apply in the northern part of the country. Accordingly, the TRNC cannot be considered a territorial unit within a supposedly complex State of the Republic of Cyprus for the purposes of the Family Law Act 1986.

The unfortunate final twist in *Emin v. Yeldag* should not detract from the importance of the case in opening the way to recognition of acts, at least marriage and divorce, carried out by entities whose claims to statehood are not recognised by the UK. Nevertheless, it would have been preferable for the discussion of the statutory basis to be replaced by a simple affirmation that section 46(1)(a) of the 1986 Family Law Act should be interpreted as also applicable to a divorce obtained in the TRNC in accordance with its laws.

YAËL RONEN

KIDNAPPING, SEX OFFENCES, ASSAULTS AND THE ROLE OF THE
VICTIM'S MISTAKE

ON various occasions Cort would stop his car at bus stops and offer lone women lifts to their destinations on the pretence that the bus for which they were waiting had broken down, and on two occasions the women accepted his offer. The first changed her mind and asked to be let out. Cort complied. The second was taken to her destination. Although handcuffs, condoms, string, a knife and tape were recovered from his car, he pleaded that these were there for innocent purposes and the Court of Appeal observed, perhaps a little charitably, that there was no reason to suggest that this was "anything other than truthful and accurate".

Kidnapping is a common law offence, defined by Lord Brandon in *R. v. D* [1984] A.C. 778:

... the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another; (2) by force or by fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse.

The issue for the Court of Appeal in *R. v. Cort* [2003] EWCA Crim 2149, [2003] 3 W.L.R. 1300 was the relationship between (2) and (3). It was true that V had been carried away "by fraud", but could it also be said that it had been without her consent? For other offences

against the person, cases such as *Flattery* (1877) 2 Q.B.D. 410; *Clarence* (1888) 22 Q.B. 23; *Linekar* (1995) 2 Cr.App.R. 49 and *Elbekkay* [1995] Crim. L.R. 163 have long established that only mistakes as to the identity of D or the nature or purpose of the act vitiate V's consent. On this basis it was argued that in *Cort V* was under no mistake in relation to the act of riding in the car to an intended destination. She was thus not mistaken as to the nature of the act and her consent was valid. Point (3) of the *D* test was thus not fulfilled and Cort was therefore wrongly convicted. As Buxton L.J. noted, this would lead to a surprising outcome because many potential defendants would not be guilty unless their fraud under point (2) was as to a "very unusual and limited matter not in fact likely to arise in most kidnapping cases". Whenever fraud rather than force was used to carry the individual away, point (3) would remain unfulfilled unless the fraud was as to the very fact of carrying away, and it is hard to imagine such a situation. It is also hard to imagine any other definition of "fundamental mistake" for the purpose of kidnapping that would parallel the lines drawn in other offences against the person.

To avoid this, Buxton L.J. held that the law applicable to assault and rape need not be applied to the offence of kidnapping. Basing himself on *Linekar*, he held that "it was the absence of consent to sexual intercourse rather than fraud which constituted the offence of rape. But in kidnapping the fraud is part of the very definition of the offence". On this basis, he concluded, it was very difficult to see that the matter of V's consent could re-enter the matter once fraud had been established.

It is true that, as explained above, if consent at point (3) were allowed to repair the fraud found at point (2) it would be very difficult to secure convictions for kidnapping by fraud. However, the effect of Buxton L.J.'s judgment is to go to the opposite extreme; point (3) is effectively abandoned so that there will never be any cases where consent prevents a kidnapping by fraud. He justified this on the basis that "had Lord Brandon had a case such as the present in mind when he set out the elements of the offence in the case of *R. v. D.* he would have addressed this matter by making it plain that issues of consent were unlikely, or impossible, to arise when the offence was taking away by fraud".

Is the requirement of fraud in kidnapping really sufficient to distinguish this offence from all other offences against the person in this way? Some mistakes by the victim will vitiate consent even in those other offences and fraud is simply victim mistake plus two other elements: causation of the mistake by the defendant and some *mens rea* as to doing so.

It is questionable whether the fact that the defendant caused V's mistake can properly be the justification for widening the scope of operative mistakes in kidnap beyond those found in *Elbekkay*, *Flattery* etc. Buxton L.J. justified this by distinguishing passive mistake by V from positive deception by D. But is this really satisfactory? Did Clarence positively represent himself as being healthy or merely fail to tell his wife that he was diseased? If he did not actually cause her mistake, he certainly created the situation in which her mistake was made. So it is arguable that there is nothing here in *Cort* that can be used to distinguish it from *Clarence*.

As for the second element, if fraud in kidnapping requires intent to induce V's mistake, then this may indicate greater culpability than the lack of reasonable belief in V's consent that the 2003 Sexual Offences Act now requires for sexual offences, or the lack of an honest belief in V's consent required by the current rules on non-sexual offences against the person. But even this distinction is not wholly convincing. If the presence of fraud is what matters, then why in other offences against the person is the range of operative mistakes still limited to those found in *Elbekkay* and *Flattery* in cases where fraud is present?

If this is so, then kidnapping cannot sensibly be distinguished from other offences against the person. From this it follows that the category of operative mistakes ought to be limited for all offences against the person or for none. The "none" approach in *Cort* has the disadvantage of widening the offence of kidnapping a great deal and much will now depend on whether V has also been "carried away". However, the categorisation of operative and inoperative mistakes has never been satisfactory and there is much to be said for the "clean slate" approach of Buxton L.J. If limits are really necessary, other and more convincing limits must be found instead.

REBECCA WILLIAMS

RYLANDS LIVES

THE defendant in *Rylands v. Fletcher* (1866) L.R. 1 Exch. 265 had constructed a large reservoir on his land from which water escaped and flooded the plaintiff's mines. The defendant was held strictly liable and the case has since been treated as laying down a distinct principle of liability separate from nuisance and negligence. Under *Rylands*, a defendant is liable for harm caused by the escape of

anything brought or kept on the defendant's land for a non-natural use and which is likely to cause harm if it escapes.

Rylands has not had a happy history. Although the rule has its roots in nuisance, its scope has not been clear, with courts sometimes extending it to personal injury cases (e.g. *Hale v. Jennings Bros.* [1938] 1 All E.R. 579) while imposing numerous exceptions to limit its reach (see *Transco plc v. Stockport Metropolitan Borough Council* [2003] 3 W.L.R. 1467, [2003] UKHL 61, at [30]–[38] per Lord Hoffmann). The key concepts of “dangerousness” and “non-natural use” remain obscure. The rapid expansion of negligence, the development of statutory regimes for dangerous activities and the overlap with nuisance have raised questions as to the viability of *Rylands*. The House of Lords in *Cambridge Water Co. v. Eastern Counties Leather plc* [1994] 2 A.C. 264 left very little room for *Rylands* to operate outside nuisance, and the High Court of Australia has abolished the rule by absorbing it into the tort of negligence (*Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 179 C.L.R. 520).

In its recent decision of *Transco* (above), the House of Lords was asked to follow the Australian High Court and abolish *Rylands*. The House refused to do so, holding that *Rylands*' demise would leave a lacuna in the law. The facts in *Transco* were that a water pipe designed to supply water to the respondent council's block of flats leaked, resulting in water collecting on the respondent's land and flowing into an embankment, also owned by the respondent, which supported the appellant's high-pressure gas main. The embankment collapsed and the unsupported gas main posed a serious risk, which the appellants avoided by repairing the embankment. They claimed the cost of the remedial measures under *Rylands*. The House unanimously dismissed the appeal on the grounds that the water pipe was not a non-natural use, nor was it dangerous.

The justification for retaining *Rylands* was largely based on social policy and *Transco* is interesting for the Lords' markedly different approaches. It was noted in *Transco* that *Rylands* itself was decided in a climate of social concern about the dangers of reservoirs and that arguably that was what persuaded the *Rylands* court that strict liability was justified (see B. Simpson, “Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v. Fletcher*” (1984) 13 J. Leg. Stud. 209). Lord Bingham of Cornhill accepted that the common law should reflect public concern in such cases and impose strict liability with respect to certain activities (para. [6]). Indeed, similar social concerns in the wake of the Bhopal gas disaster in India prompted the Supreme Court of

India to create an absolute liability rule that was not subject to the exceptions to *Rylands* (*M.C. Mehta v. Union of India* (1987) 1 S.C.C. 395). This is a classic illustration of the common law stepping into the breach to provide social justice.

This is in fact what the Court of Appeal had done in *Khorasandjian v. Bush* [1993] Q.B. 272 where the principles of nuisance were extended to protect against harassment (*Khorasandjian* was subsequently overruled by the House of Lords in *Hunter v. Canary Wharf Ltd.* [1997] A.C. 655 following the enactment of the Protection from Harassment Act 1997). It is this kind of “reactive social policy” engagement that is, and should remain, the hallmark of the common law; this is judicial law-making that is perfectly acceptable. The danger is when courts engage in what may be termed “prescriptive social policy” by making value judgments on the impact of insurance and allocation of risk based on perceived notions of welfare. This is an area best left to the legislature. In *Transco* itself, two Lords took diametrically opposing views on this: Lord Hoffmann argued that the claimant should insure against water damage (para. [49]) while Lord Hobhouse of Woodborough strongly rejected this view as “unsound” (para. [60]), arguing that the focus should instead be on who should bear the cost of certain inherently risky activity. Lord Walker of Gestingthorpe, referring to chemical explosions in England in the twentieth century (para. [104]), accepted that special societal concerns should guide the courts, but cautioned against engaging in “prescriptive social policy” (para. [105]).

Having justified the continuation of *Rylands*, the Lords affirmed that the rule was a sub-species of nuisance and therefore it excluded claims for personal injury or death and was limited to claimants who had a proprietary right or interest in the land (cf. *Hunter*). The twin requirements of dangerousness and non-natural use were seen as interlinked and to be tested by “ordinary contemporary standards”. This fusing of the two limbs of *Rylands* is achieved with highly normative language. There has to be an “exceptionally high risk of danger” (para. [10] *per* Lord Bingham) and the activity must be highly unusual or “special” (para. [108] *per* Lord Walker) to warrant strict liability. This calls for a degree of intuition and not surprisingly the House resorted to the time-honoured test of reasonable foreseeability to determine whether an activity was dangerous and unusual. This arguably dilutes the strict liability aspect of the rule. Nevertheless, *Transco* has rightly given *Rylands* a very narrow application and thus saved it from disrepute.

Given the rule's basis in nuisance, the House also insisted on the requirement of escape of the dangerous thing from the defendant's land (cf. *Read v. J. Lyons & Co. Ltd.* [1947] A.C. 156). There was no requirement of foreseeability with respect to the escape and here *Transco* remains true to strict liability. The problem with these "escape" and "proprietary interest" requirements is that they can result in uncertainty and arbitrariness. In *Transco* itself, the appellant had an easement over the embankment which belonged to the defendants. Four Lords accepted that this was a sufficient proprietary interest for the tort (Lord Hobhouse disagreeing, para. [68]); and again, four Lords accepted that there had been an "escape" (Lord Scott disagreeing, para. [78]). If the underlying policy of *Rylands* is that there are certain risks for which the creator must bear the cost, surely liability should not hang on the precise nature of the proprietary interest or, worse, geographical chance.

Transco is a welcome decision for its recognition that there is a need for a pocket of strict liability. As Lord Walker noted, even if negligence covered the field in most cases, the *Rylands* strict liability rule was still significant for it effectively shifted the burden of proof to the creator of the risk (para. [110]); justice required this in certain situations. It would have been better if the House had simply dissociated *Rylands* from nuisance and reinvented it as a special rule that was applicable in cases where fairness dictated the imposition of strict liability. This would have emancipated the rule from the unnecessary encumbrances of nuisance and provided a valuable, modern tort that afforded protection in an age where hazardous materials and activities relating to industry, war and terrorism abound.

KUMARALINGAM AMIRTHALINGAM

CLOUDING THE ISSUES ON CHANGE OF POSITION

THE defence of change of position has a pivotal role to play in controlling the scope of claims for restitution of unjust enrichments. The cause of action of unjust enrichment imposes a strict liability on the recipient. This might seem harsh and over-extensive were it not balanced by the recipient's right to say, "I am not liable because the enrichment has been lost". Since it was first authoritatively accepted by the House of Lords in *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548 the courts, through a series of cases, have slowly but surely—in the finest traditions of the

common law—been clarifying the ingredients of the defence. There is a danger that two recent decisions of the Court of Appeal will be interpreted in such a way as to undermine much of that good work.

In *Niru Battery Manufacturing Company v. Milestone Trading Ltd.* [2003] EWCA Civ 1446, [2004] 1 All E.R. (Comm) 193, the claimant bank (Bank Sepah) had paid \$5.8m under a letter of credit to the defendant bank (Credit Agricole Indosuez) on presentation of a bill of lading that was false. The claimant did not know that the bill of lading was false. It therefore paid the money under a mistake of fact. The defendant, through one of its managers, Mr. Francis, knew that the goods for which the money was being paid had already been sold to other purchasers and that the claimant must therefore have been paying by mistake. Nevertheless, having received the money, the defendant, through Mr. Francis, paid it away in accordance with its customer's instructions. The sole question on appeal, as regards the law of restitution, was whether the defendant had a change of position defence to the claim for the mistaken payment. Upholding the decision of Moore-Bick J., the Court of Appeal held that it did not.

Moore-Bick J. had rationalised the disapplication of change of position by saying that the defendant, through Mr. Francis, had been acting in bad faith. Although it was not (subjectively) dishonest, bad faith extended beyond (subjective) dishonesty to include “a failure to act in a commercially acceptable way and sharp practice” ([2002] EWHC 1425 (Comm), [2002] 2 All E.R. (Comm) 795, para. [135]). On the facts, the defendant was acting in bad faith when it paid the money away realising that the claimant must have made a mistake and yet without making further enquiries of the claimant. Moore-Bick J. relied on Lord Goff's distinction in *Lipkin Gorman* between good faith and bad faith change of position; and on the Privy Council's judgment in *Dextra Bank & Trust Co. Ltd. v. Bank of Jamaica* [2002] UKPC 50, [2002] 1 All E.R. (Comm) 193 to the effect that, provided acting in good faith, fault of the recipient should not bar change of position.

Unfortunately the Court of Appeal did not simply adopt Moore-Bick J.'s reasoning. Instead both Clarke L.J. and Sedley L.J. (with both of whom Dame Elizabeth Butler-Sloss P. agreed) chose to express much of their reasoning in terms of whether it was, on all the facts of the case, inequitable or unconscionable or unjust to allow the recipient to deny restitution to the mistaken payer. In so doing, they relied on broad words of Lord Goff in *Lipkin Gorman* and also drew an analogy with the unconscionability test for “knowing receipt” proffered by Nourse L.J. in *Bank of Credit and*

Commerce International (Overseas) Ltd. v. Akindele [2001] Ch. 437. But such broad tests tell us almost nothing. We need to know, for example, whether bad faith is wider than subjective dishonesty (as Moore-Bick J. thought) and whether fault short of bad faith can ever bar change of position; and, if the answer to the latter question is “yes”, we need to build up examples—so that in time one can clarify the underlying principle—of when this will be so. Clear answers to such questions are obscured if the courts resort to saying, without more, that everything turns on whether it is inequitable to allow change of position on the particular facts.

In *Commerzbank AG v. Gareth Price-Jones* [2003] EWCA Civ 1663 Mr. Price-Jones, an investment banker, was mistakenly paid £265,000 instead of £15,000 as a bonus by his employer (“the bank”). The payment was made in December 2000. Earlier, in June 2000, the bank had told Mr. Price-Jones by letter that he would be paid a bonus and he had mistakenly interpreted the letter as indicating that his bonus would be £265,000 rather than £15,000. But for his expectation of that bonus, Mr. Price-Jones would have sought employment with another investment bank in June 2000. When he later sued the bank for other monies owing, the bank sought to set-off the £250,000 overpayment as money paid by mistake. To that restitutionary “counterclaim”, Mr. Price-Jones argued that he had a change of position defence constituted by his having forgone the opportunity to take up equivalent employment elsewhere.

Mummery L.J., with whom Sedley L.J. agreed, held that while, applying the *Dextra Bank* case, an anticipatory change of position counts, there were two reasons why the change of position defence should here fail. First, it was not clear that Mr. Price-Jones had suffered any detriment or loss. In Mummery L.J.’s words at para. [40], “The fact that, but for his expectation of a very large additional bonus, he would have decided to seek similar employment elsewhere is not sufficiently significant, precise or substantial in extent to be treated as a change of his position ...”. Certainly there was no evidence that Mr. Price-Jones would have been paid an initial bonus of £250,000 by another investment bank.

Second, even if he had changed his position by staying with the bank, he had been induced to do so by his own mistaken interpretation of the bank’s letter of June 2000. The bank was therefore not causally responsible for that change of position. Oddly, in a judgment that is otherwise to be applauded in striving to articulate clear principle, Mummery L.J. did not mention how this could be reconciled with the Privy Council’s view in *Dextra Bank* that fault, short of bad faith, does not bar the change of position defence.

The tenor of the third judge's—Munby J.'s—reasoning is most worrying. He expressly attacks an approach to change of position which seeks clarity through the development of articulated principle. According to Munby J., the defence should be frozen in its new-born state as described by Lord Goff's broad words in *Lipkin Gorman*. All should turn on whether the defendant's position has so changed that it would be inequitable on the facts of the particular case to require him to make restitution. There should be no gloss or refinement. "Lord Goff saw his statement of principle as sufficiently meeting the standard of adequately defined legal principle" (at para. [50]). But, with respect, this is not the best interpretation of what Lord Goff had in mind. In first authoritatively accepting the defence, Lord Goff stressed that "nothing should be said *at this stage* to inhibit the development of the defence on a case by case basis in the usual way" (my italics); and he later said, "*At present*, I do not wish to state the principle any less broadly than this" (my italics). It is submitted that Lord Goff was anticipating the refinement and clarification of the ingredients of the defence through subsequent decisions. He was anxious not to pre-empt that principled development by an initial over-narrow articulation. He was not contemplating that his broad words should stand as the final word on change of position.

Munby J.'s approach leads him to draw some odd distinctions between "judicial discretion" and "judicial evaluation" and between stating specific factors that do not count as change of position (he regards this as acceptable) and stating specific factors that do count as change of position (this is, apparently, unacceptable). But the real danger of his approach is shown by the issue of the recipient's fault. For having recognised the apparent inconsistency between *Dextra Bank's* rejection of "relative fault" and saying that Mr. Price-Jones should not be able to rely on change of position because he had "only himself to blame for his predicament" (para. [82]), Munby J. simply evades the need for a reconciliation by saying that the relevant question is whether it is inequitable to deny the defence and "I can see nothing inequitable in denying the defendant such a defence" (para. [83]). Not surprisingly, Munby J. found support for his approach in the judgments in *Niru Battery*.

This is a pity because elsewhere in his judgment Munby J. assists the development of principle by agreeing emphatically that anticipatory change of position is a defence; by clarifying that an opportunity foregone can amount to a change of position just as much as a "reduction of assets"; and, most interestingly, albeit controversially, by suggesting that a non-pecuniary change of position may count.

The success of the modern law of restitution has been built on the articulation of clear principles gleaned from a mass of often obscure common law and equitable cases and concepts. To accept, without further articulation, that the change of position defence is simply a matter of whether the change means that it is inequitable or unconscionable or unjust to deny restitution would be to take us back to the dark ages of the subject.

ANDREW BURROWS

ENRICHMENT: THE CASE OF THE CHERISHED MARK

THE notion of enrichment within the law of unjust enrichment is notoriously complex but largely unimportant since the vast majority of restitutionary claims relate to money which, being the measure of value, always constitutes an enrichment. Exceptionally, however, the precise definition of enrichment is crucial to the determination of a case. *McDonald v. Coys of Kensington* [2004] EWCA Civ 47 is such a case.

In *McDonald* a firm of auctioneers, Coys, had sold a car on behalf of the executors of Mr. T.A. Cressman. This car carried the personalised registration mark TAC1, known as a “cherished mark”. McDonald was the successful bidder. It was an express term of the contract of sale that the purchaser would not get the personalised mark, but the auctioneers mistakenly failed to retain the right to the mark. Consequently, when the car was delivered to McDonald, he was entitled to have the car registered in his name with that mark, which he did. McDonald refused to transfer the mark to the executors when requested to do so. Coys sought restitution of the mark or its value by means of a claim for contribution, since Coys had already settled the executors’ claim for breach of contract against it.

Mance L.J., delivering the leading judgment, concluded that the just result was that McDonald should make restitution, but the problem lay in fitting the facts of the case within the unjust enrichment principle, especially the notion of enrichment. The putative enrichment in this case was the mark itself. Although the matter was not considered explicitly by the Court of Appeal, the preferable analysis of an enrichment is first to determine whether the defendant has received something of objective value. A cherished mark certainly has such a value. However, it is possible for the defendant to argue that he did not value the enrichment. The defendant in this case could assert such a subjective

devaluation since the mark was of no intrinsic value to him, as his initials were different and he had no intention of selling the mark. However, there are two ways of defeating subjective devaluation, namely free acceptance and incontrovertible benefit. Both methods are thoroughly discussed in the books on the subject, but are rarely examined in the cases. Both were, however, considered in this case to establish the receipt of a valuable enrichment.

The free acceptance principle involves consideration of the circumstances of receipt. It applies either where the defendant's unconscientious conduct precludes him from asserting subjective devaluation, as propounded by Birks, or, according to the more narrow version advocated by Burrows, where the defendant has reprehensibly sought out the benefit but does not wish to pay for it. McDonald could not be considered to have freely accepted the benefit at the time the car was delivered, but Mance L.J. did suggest that either of the tests (without expressing any preference between them) may have been satisfied when he registered the mark in his own name, since at that point he was aware of Coys' mistake and so acted unconscientiously or reprehensibly. But this argument can only succeed if the benefit is considered to be the registration of the mark in McDonald's name, rather than the right to register the mark which was received on delivery. This is a novel conclusion since it suggests that events subsequent to receipt may convert a benefit which has been legitimately subjectively devalued into an enrichment.

In the end Mance L.J. did not need to rely on free acceptance to establish the enrichment. Instead he relied on the incontrovertible benefit principle, which "depends on the nature and value of the benefit as and when acquired". One example of this is where the defendant has realised a benefit through the sale of property. There is disagreement in the literature as to whether this example extends to a benefit which is merely realisable, as Goff and Jones have suggested, or is confined to a realised benefit, as Birks advocates. Burrows adopts an intermediary position, whereby a realisable benefit can be incontrovertibly beneficial if it is reasonably certain that the defendant will realise it. Although Mance L.J. considered Burrows' approach to be too speculative, he did not need to resolve which of the other interpretations should be adopted, because he recognised a new type of incontrovertible benefit, namely one which is readily returnable without substantial difficulty or detriment. Since McDonald could easily have returned the mark but did not do so, it followed that he must have considered the retention of the mark to be valuable. This is a legitimate extension of the notion of an incontrovertible benefit. Where property has been received and the defendant could easily

return it when asked but decides not to do so, it is appropriate to conclude that the defendant's decision indicates that he did value the benefit.

The application of this principle of a readily returnable benefit is likely to be of limited use within unjust enrichment claims, since it is only applicable as regards the receipt of property. It will not apply to money, which is always beneficial, and it will not apply to services which, by their nature, cannot be returned. Where the services result in an end-product there is a benefit which might be readily returnable, but the preferable view is that it is only the service which should be treated as the relevant benefit rather than the end-product which was obtained. A consequence of this decision is that a hierarchy of enrichments is emerging: money is always an enrichment; property is often an enrichment, save where it is no longer held by the defendant; and services are usually not an enrichment, save in exceptional circumstances.

There is one other aspect of the decision, which was not fully examined by the court but which is significant to the analysis of the unjust enrichment principle, namely that the fault of the defendant appears to have been an important consideration. This is clearly relevant to the identification of free acceptance, and the defendant's knowledge that the claimant wanted the mark to be returned was also significant to the new notion of returnable benefit. In addition, the defence of change of position was not available to the defendant in this case, as regards his claim that he had given the car to his partner, because he knew of the mistaken failure to retain the mark at the time of the gift and so was acting in bad faith. But the defendant's fault also appears to have been relevant to the conclusion that the claimant's mistake was sufficient to ground a restitutionary claim: see paras. [25] and [37]. This is a novel approach which is highly significant. On one level it appears to arise from a need to find an additional justification to explain why a claimant should obtain restitution on the ground of his own spontaneous mistake. This is easier to explain if the defendant was at fault in some way. But this introduction of fault has dangerous consequences, even if it is confined to mistake claims, because it undermines the strict nature of liability for unjust enrichment and takes us perilously close to incorporating notions of unconscionability into the law of unjust enrichment. This must be resisted. Fault can be relevant to the defence, and exceptionally to the enrichment, but should be ignored when considering the ground of restitution.

JUDICIAL REVIEW OF TRUSTEES' DISCRETIONARY DECISIONS

A TRUST was established, following tax advice, settling the settlor's share in a management buy-out company. The settlor held a life interest in the trust fund, but the trustee had an overriding power of appointment in favour of a defined class of discretionary objects. The settlor asked his tax adviser to inform the trustee that he wanted the trustee to exercise its power of appointment to create discretionary trusts of 40% of the trust fund in favour of the settlor's two sons, to the exclusion of the settlor. The trustee exercised its power of appointment, but, owing to a mix-up on the part of the tax adviser, the trustee appointed 60% of the trust fund to the sons' discretionary trusts. The validity of the mistaken exercise of the power of appointment was considered in *Abacus Trust Co. (Isle of Man) v. Barr* [2003] EWHC 114 (Ch), [2003] Ch. 409.

This prompts contemplation of the grounds on which trustees' discretionary decisions may be judicially reviewed and the practical consequences of such review. If a trustee does not even realise that it is exercising a discretionary power then it has effectively made no decision at all and the decision is void (*Turner v. Turner* [1984] 1 Ch. 100, 111). If the trustee consciously purports to exercise the power but acts outside the power granted, such as for example if it exercises it in favour of a person not within the class of discretionary objects, the decision is *ultra vires* and void (*In re Hay's Settlement Trusts* [1982] 1 W.L.R. 202, 213 (Ch.D.)). If the trustee acts within the power but exercises the power otherwise than bona fide for the purpose for which it was granted, it commits a fraud on the power and the appointment is void (*Vatcher v. Paull* [1915] A.C. 372, 378 (P.C.)). Even if the trustee has acted *intra vires* the power and has exercised the power in good faith for proper purposes, the decision is still susceptible to review if the trustee took into account considerations which it should not have taken into account, or failed to take into account considerations which it ought to have taken into account (*In re Hastings-Bass, dec'd* [1975] 1 Ch. 25, 41 (C.A.)).

In *Abacus Trust v. Barr*, the trustee would not have acted as it did had it been aware of the settlor's true wishes (only 40% of the fund would have been appointed to the sons' trusts). The trustee argued that this error fell within *Hastings-Bass*. Lightman J. rejected the sons' argument that *Hastings-Bass* review requires a fundamental mistake and that a mere mistake as to quantum is insufficient. However, he also rejected the settlor's argument that any mistake on the part of the trustee suffices. "What has to be

established is that the trustee in making his decision has ... failed to consider what he was under a duty to consider" (at [23]). In other words, a trustee's exercise of discretion may be interfered with if the trustee acted in breach of duty by not considering relevant considerations; but the decision is not susceptible to review merely because the trustee made a mistake or because the decision has unpalatable consequences, provided the trustee complied with its duty to take into account all of the relevant considerations.

This still leaves for analysis in each case the question, what considerations was the trustee duty-bound to consider? In *Abacus Trust v. Barr*, Lightman J. concluded that the trustee had properly identified that it was required to take into account the settlor's wishes, and that the mere fact of a mistake as to the extent of those wishes did not itself bring *Hastings-Bass* into play. However, he nonetheless found that the trustee had breached the *Hastings-Bass* rule on the basis that, in the circumstances, the tax adviser was to be considered as the trustee's agent. The responsibility for the mix-up therefore lay at the feet of the trustee, which had consequently failed in its duty to ascertain the true wishes of the settlor.

The effect of the decision, therefore, is to impose on trustees a duty to ensure that they have "used all proper care and diligence in obtaining the relevant information" (at [23]). Mere inaccuracy in information considered does not itself trigger *Hastings-Bass* review, provided the relevant consideration actually was considered, but *Hastings-Bass* does apply if the inaccuracy is the result of the trustee's own breach of duty.

In *Hastings-Bass*, the court said that it would only interfere where it is shown that the trustee's decision *would* have been different had the relevant information not been ignored (or had the irrelevant information been ignored): [1975] 1 Ch. 25, 41. Other cases have raised the possibility of the court interfering if the trustee *might* have acted differently (e.g., *Hearn v. Younger* [2002] EWHC 963 (Ch), [2002] W.T.L.R. 1317, at [86]). *Abacus Trust v. Barr* leaves this controversy unresolved: it was clear that the trustee *would* have acted differently had it known the settlor's true wishes and so it was unnecessary to decide the point.

The "would" vs. "might" issue is related to the question whether a decision which is reviewable under *Hastings-Bass* is void, or merely voidable. Cases since *Hastings-Bass* have left this unclear, many suggesting that the decision is void (e.g., *AMP (UK) plc v. Barker* [2001] W.T.L.R. 1237, at [90] (Ch.D.)) while others suggest voidability (e.g., *Stannard v. Fisons Pension Trust Ltd.* [1992] I.R.L.R. 27, 34 (C.A.)). Lightman J. had to address this issue in

Abacus Trust v. Barr and, with little citation of previous authority, held that the decision is merely voidable. This allows the court flexibility in dealing with decisions which may have been reached many years earlier and on the basis of which intervening decisions may have been made (see the concern expressed in *Breadner v. Granville-Grossman* [2001] 1 Ch. 523, 553 at such decisions being void; although that concern is presumably somewhat ameliorated by the doctrine of laches). However, the countervailing consideration in all cases of flexibility is a consequential increase in practical uncertainty as to the validity of such decisions. The relationship between the issues of “void” vs. “voidable” and “would” vs. “might” carries importance here. It seems “the court will interfere with [a trustee’s] action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account”: *Mettoy Pension Trustees Ltd. v. Evans* [1990] 1 W.L.R. 1587, 1621 (Ch.D.). It also seems that the court will not interfere with a trustee’s decision if “it is clear that on a proper consideration of all relevant matters the decision would still have been the same”: *Abacus Trust Co. (Isle of Man) Ltd. v. NSPCC* [2001] W.T.L.R. 953, 965 (Ch.D.). If decisions to which *Hastings-Bass* applies are void, then it seems sensible to limit that invalidity to cases where it is clear that the decision *would* have been different. But if they are merely voidable, then the court can take into account the surrounding circumstances, and particularly the way in which people have ordered their affairs in reliance on the decision, in determining whether it is appropriate to require a decision to be taken again where the trustees *might* have reached a different decision.

Abacus Trust v. Barr also contains important observations on the relationship between private law judicial review of trustees’ discretionary decisions and judicial review in administrative law. Similarities between these two forms of review have been noted, both academically and judicially, in recent years (e.g., Oliver, *Common Values and the Public-Private Divide* (1999), pp. 189–194; *Edge v. Pensions Ombudsman* [2000] Ch. 602, 628 (C.A.)) and in the past (e.g., Finn, *Fiduciary Obligations* (1977), at [6]). *Abacus Trust v. Barr* highlights the need for caution here as it emphasises that the two jurisdictions are not identical (see also *R. v. Charity Commissioners, ex p. Baldwin* [2001] W.T.L.R. 137, 148–149 and 150 (Q.B.D.)). Contrasting with the position in trust proceedings, Lightman J. noted that public law courts have remedial discretion, which affects the public law understanding of the concept of a “void” decision, and that strict time limits are insisted upon for commencing public law judicial review proceedings. Careful analysis

is needed before one draws conclusions about one jurisdiction from the other.

MATTHEW CONAGLEN

RESCISSION: INDUCEMENT AND GOOD FAITH

IN *Drake Insurance plc v. Provident Insurance plc* [2004] 2 W.L.R. 530 a third party, B, was injured by K when K was driving the car of her husband, S. K was insured under her own policy with Drake and was also insured as a named driver in the policy of S with Provident. Drake compensated B and sought contribution from Provident which, however, purported to avoid its policy with S on the ground of non-disclosure of a motoring conviction (fact A) by S on his last renewal. S, however, had also failed to disclose another matter (fact B), which was in his favour. That would have offset fact A with the net result that, if Provident had known both facts, the insurance would have been renewed on the same terms. The majority of the Court of Appeal, Rix L.J. and Clarke L.J., held that Provident's purported avoidance was invalid.

Inducement: the whole picture

The main ground lay in the law of misrepresentation: "an insurer who seeks to avoid for non-disclosure must show that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms": Rix L.J. at [62]. The Court found that, if fact A had been disclosed, it was "very likely" that fact B would have come to light too. Thus if there had been disclosure of A, Provident would have had the whole picture and would have entered the contract on "the relevant terms", with the corollary that Provident had not been induced by non-disclosure of fact A to contract on different terms. That was enough to decide the case, but the Court also addressed the associated and more general question, "whether the insurer's right to avoid must be judged according to the information provided to the insurer at the time of contract ... or according to the true facts as at that time".

This was a question "on which no cases have been cited to us" and on which "I would therefore wish to be cautious": Rix L.J. at [69]. In principle, he said, "a party which seeks to terminate a contract, whether under an express clause, or whether by way of rescission for misrepresentation or avoidance in insurance for non-disclosure, or whether for breach of condition, or by way of acceptance of a repudiation, must make good his ground for

bringing the contract to an end". In this he is not "limited to the ground which he advances at the time of termination", for if he gives no ground or a bad ground then but finds later that he has a good ground, he can fall back on the latter. For this the Court might have cited *The Mihalis Angelos* [1971] 1 Q.B. 164, 193, per Lord Denning M.R. As regards avoidance Clarke L.J. agreed. The insurer's right to avoid must be judged according to the true facts at the time of contracting.

Rescission and good faith

Alternatively, if Provident did have a ground to avoid for non-disclosure, the majority of the Court opined that the exercise of the right was limited by the doctrine of good faith. Rix L.J. at [85] quoted recent statements in the House of Lords to this effect, but conceded at [88] that actual decisions "are not to hand" because:

once an insured has been found wanting in good faith in the matter of pre-contractual non-disclosure, it is likely to be hard to conclude that the same doctrine of good faith itself prevents the insurer from exercising his right to avoid. On the whole English commercial law has not favoured the process of balancing rights and wrongs under a species of what I suppose would now be called a doctrine of proportionality. Instead it has sought for stricter and simpler tests and for certainty.

In any event, the exercise of the right to avoid for non-disclosure is the independent act of the insurer and not the act of the court. Any limit on the right comes into play only if the point comes before a court. In *The Grecia Express* [2002] 2 Lloyd's Rep. 88, 133, Colman J. thought that avoidance in such a case would be "starkly unjust" and "unconscionable". But in *Brotherton v. Aseguradora* [2003] 2 All E.R. (Comm) 298 this view was flatly rejected by Mance L.J. at [27]. Precedent, he said, established that "rescission in the general law of contract ... is not generally subject to any requirement of good faith or conscionability". However, he cited precedent that does not directly address the point; and other statements in the House of Lords support Colman J.: see [2003] C.L.J. 557. It would surely be odd that the court should have a discretion to refuse specific performance but not, apart from the Misrepresentation Act 1967, to refuse rescission.

Good faith for all?

Be that as it may, in *Drake* Rix L.J. acknowledged at [89] that "not all insurance contracts nowadays are made by those who engage in commerce" and that it "may be necessary to give wider effect to the doctrine of good faith and recognise that its impact may

demand that ultimately regard must be had to a concept of proportionality implicit in fair dealing". This statement is reminiscent of a recent banking case, in which Lord Bingham explained the central requirement of good faith in the Unfair Terms in Consumer Contracts Regulations as being "one of open and fair dealing": *Director General of Fair Trading v. First National Bank* [2002] 1 A.C. 481 at [17]. It remains only for the courts to bridge the gap between unfair terms and unfair behaviour. That should not take long.

As for the gap between "those who engage in commerce" and those who do not, in practice there is not even a line, still less a gap. A line is hard to draw without resort to arbitrary tests such as turnover and the dichotomy has already been ignored. A notable example is *Cook*, in which Lord Lloyd, with whom Lord Steyn and Lord Hope agreed, said of a self-employed builder that his certificate of disability insurance "must be construed in the sense in which it would have been reasonably understood by him as the consumer": *Cook v. Financial Insurance Co.* [1998] 1 W.L.R. 1765, 1768.

Drake does not close the gap, but it does promote the alignment of insurance contract law with general contract law. One reason for that is that insurance non-disclosure and misrepresentation can be hard to separate. If I describe the shandy that I have just bought you as lemonade, is that non-disclosure of part, the beer, or misrepresentation of the whole? Another is that, if there are still to be special rules for insurance contracts, they must be explained and justified to busy lawyers and their clients; and this is becoming harder to do.

MALCOLM CLARKE

NOT SO BLACK AND WHITE: THE LIMITS OF THE AUTONOMY PRINCIPLE

PURSUANT to a letter of credit, a bank undertakes to pay the beneficiary of the credit upon presentation of documents which comply strictly with its terms. It is a fundamental principle, however, that a bank may not justify its refusal to pay on the ground that there has been a breach of the underlying transaction, which the letter of credit is being used to finance. This is the principle of autonomy: see Articles 3(a) and 4 of the Uniform Customs and Practice for Documentary Credits (UCP 500). Its limits were considered recently in *Sirius International Insurance Corp. (Publ.) v. FAI General Insurance Co. Ltd.* [2003] EWCA Civ 470, [2003] 1 W.L.R. 2214.

A Lloyds syndicate wished to enter into a contract of reinsurance with the defendant, FAI General Insurance Ltd. Given that there were concerns over the defendant's solvency, the claimant, Sirius International Insurance Corporation, agreed to "front" the reinsurance policy with the syndicate and to retrocede that policy to the defendant. As security for the defendant's liabilities under the retrocession agreement, the claimant required a letter of credit to be opened in its favour with Westpac Bank. By a separate "letter of acceptance", the claimant and defendant agreed, *inter alia*, that the former would not draw upon the letter of credit without first obtaining the latter's written consent. This was not, however, included as a condition of the letter of credit itself. Following a claim by the syndicate under the reinsurance policy, the claimant commenced arbitration proceedings against the defendant to recover the equivalent sum as owing under the retrocession agreement. These proceedings were eventually compromised by the parties when the defendant admitted its liability under the retrocession agreement. The proceeds of the letter of credit were drawn down by agreement and paid into an escrow account.

It fell to be determined as a preliminary issue whether the claimant was entitled to the balance in that account. The defendant argued that, as the claimant had not satisfied the conditions in the "letter of acceptance", it had no entitlement to the escrow monies. The claimant raised two counter-arguments: first, that the conditions of the "letter of acceptance" had been satisfied by the defendant's admission of liability under the retrocession agreement and second, that, as the obligations in the letter of credit were autonomous of any underlying arrangement between the claimant and defendant, the claimant was entitled to the proceeds of that credit, irrespective of whether the conditions in the "letter of acceptance" had been satisfied. At first instance, Jacob J. ([2003] 1 W.L.R. 87) accepted the claimant's first counter-argument but rejected the second. On appeal against both parts of the judge's decision, a unanimous Court of Appeal (May and Carnwath L.JJ. and Wall J.) found for the defendant upon both grounds. For present purposes the first ground of appeal, which turned upon the proper construction of the "letter of acceptance", need not be discussed. It is the second ground of appeal, concerning the scope of the autonomy principle, which is of particular interest.

May L.J. supported his conclusion that the autonomy principle did not permit the claimant to ignore the terms of the "letter of acceptance" on two grounds. First, his Lordship held that one of the primary justifications for the autonomy principle was the need

to provide the beneficiary of a credit with the guarantee of receiving payment from the bank, regardless of any arguments raised by the applicant as to the state of performance of the underlying agreement: a letter of credit was equivalent to cash. In his Lordship's view, however, this justification did not apply when a beneficiary had expressly agreed not to draw upon a letter of credit unless certain conditions were satisfied: the beneficiary had freely chosen to waive the security of payment normally provided by a credit and had agreed to the credit being less than equivalent to cash. Secondly, May L.J. agreed that, hypothetically, the claimant could have been restrained by injunction from drawing upon the letter of credit, since the presentation of the documents by the beneficiary would have involved the breach of an *express term* regulating the conditions under which presentation could take place. Earlier decisions which had denied the availability of injunctive relief against a beneficiary, *e.g. Deutsche Rückversicherung AG v. Walbrook Insurance Co. Ltd.* [1995] 1 W.L.R. 1017, were distinguished on the basis that they did not involve the breach of such a term.

There are several reasons why May L.J. ought to have decided that the autonomy principle did in fact apply. First, it seems counter-intuitive to suggest that the courts must ignore breaches of an agreement which the credit is being used to finance (*i.e.* the retrocession agreement), but that the breach of an agreement (*i.e.* the "letter of acceptance"), which is less intimately linked with the credit, may nevertheless affect its operation. Secondly, whilst the protection of the beneficiary may no longer justify the application of the autonomy principle, when that beneficiary has contractually restricted his ability to present the documents under the credit, there are other justifications which continue to operate. In particular, as May L.J. admitted, the autonomy principle also seeks to protect the paying bank, by relieving it of the need to make onerous enquiries beyond the administrative task of verifying the strict compliance of the documents with the credit. The autonomy principle, therefore, ensures that the paying bank is never in any doubt as to whether it is obliged to pay. If, however, the court was to grant an injunction on the facts of *Sirius*, this could potentially leave the paying bank in an impossible position, if the beneficiary decided to present conforming documents in defiance of that injunction. On the one hand, the bank would be risking its commercial reputation if it did not pay against such documents, but on the other hand, payment would entail the risk of liability for breaching the terms of an injunction. In order to avoid placing banks in such a dilemma, the courts have (with the exception of

Themehelp v. West [1996] Q.B. 84) refused to enjoin the beneficiary of a credit unless it is also possible to enjoin the paying bank directly: *Group Josi Re v. Walbrook Insurance Co. Ltd.* [1996] 1 W.L.R. 1152; *Czarnikow-Rionda Sugar Trading Inc. v. Standard Chartered Bank London Ltd.* [1999] 1 All E.R. (Comm) 890. As neither of the established exceptions to the autonomy principle, which apply in cases of fraud or illegality, provided any basis for enjoining the paying bank in *Sirius*, it was wrong to suggest that the claimant could have been enjoined.

Thirdly, it is instructive to examine what the position would have been if the bank had paid the claimant in breach of the “letter of acceptance”. As there were no equivalent restrictions upon presentation in the credit itself, the bank would have been authorised to pay against presentation of conforming documents, entitling it to reimbursement from the defendant. The effect of such an authorised payment would have been to discharge the defendant’s liability to the claimant under the retrocession agreement. The claimant would, therefore, have had a good defence to any claim by the defendant to recover the proceeds of the letter of credit from it: *Barclays Bank Ltd. v. W.J. Simms* [1980] 1 Q.B. 677. It is submitted that, if the defendant could not have enjoined the beneficiary from drawing on the credit, as suggested above, and could not have recovered the proceeds of the credit, once paid, from the claimant, there was little basis upon which it could deny the claimant’s entitlement to the escrow monies. Given that the defendant retained a damages claim for breach of the “letter of acceptance” and given that it was open to the defendant to restrict the circumstances in which the beneficiary could draw upon the credit by amending the credit itself, such a conclusion does not appear to involve significant unfairness to the defendant.

When the House of Lords eventually hears the appeal in this case, it is to be hoped that their Lordships will take the opportunity to reassert the fundamental importance of the autonomy principle.

CHRISTOPHER HARE

COPYRIGHT TERM: WHO’S TAKING THE MICKEY?

COPYRIGHT does not last indefinitely. However, the appropriate term for copyright protection has always been a matter of heated debate. Macaulay’s appraisal of the English scene is, perhaps, the most famous. In 1841 he described copyright as “a tax on readers for the

purpose of giving a bounty to writers” and objected to a proposed extension of its term on the grounds that “my hon. and learned friend doubles, triples, quadruples, the tax, and makes scarcely any perceptible addition to the bounty” (*Hansard, Parliamentary Debates* (3rd series), 56 (1841) 350). Very similar arguments have recently been heard by the United States Supreme Court in *Eric Eldred, et al. v. John D. Ashcroft, Attorney General*, 123 S.Ct. 769 (2003).

The 1998 Copyright Term Extension Act (CTEA) extended the term of US copyright protection for both future and existing works by 20 years. The usual term is now the author’s life plus 70 years: this applies to works not published by the CTEA’s effective date. Works published before this date with subsisting copyright were granted a term of 95 years from publication. The petitioners, all of whom had some interest in works falling into the public domain, argued that Congress had exceeded its powers. The first objection was based on the Constitution’s Copyright Clause: Article 1, § 8, cl. 8. This grants Congress power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”. The petitioners admitted Congress’ right to set the term for newly-created works, but resisted the application of the new term to existing works. They argued that this practice of granting extensions would allow Congress to dodge constitutional authority by stringing together an unlimited number of “limited Times”. Secondly, the petitioners challenged the CTEA on First Amendment grounds, arguing that copyright operated as a form of speech regulation, by preventing material from falling into the public domain. Both arguments were rejected by the majority, led by Justice Ginsburg, although two powerful dissenting judgments signal the significant disquiet engendered by copyright’s now very considerable duration.

The first English copyright statute, the Act of Anne 1710, guaranteed protection to newly-published works for a mere 14 years. The term was increased in 1814, in 1842, and again in 1911. Since 1995, EU Member States have been required to adopt a term of the author’s life plus 70 years. Early American law reflected its English model. The 1790 Copyright Act provided for an initial federal copyright term of 14 years from publication. Further increases followed in 1831, 1909, and 1976. How could the CTEA’s additional increases be justified, particularly given the comparatively limited term of patent protection?

Economic incentives lie at the heart of modern intellectual property, and copyright is no exception; the copyright industries

now represent perhaps 5% of the GDP of developed nations. But moral claims and idealism have always been prominent in the list of justifications for copyright. Even the anti-monopolistic Macaulay was willing to admit “the necessity of giving a bounty to genius and learning”. It has generally been agreed that this should take the form of a property right inheritable by the creator’s heirs. Overt patronage, whether state or private, is no longer an acceptable method of stimulating creativity. An extended protection period ensures that success is not dependent on instant popularity. Since copyright law is less fierce than patent law in terms of what it prevents, a considerable difference in their terms is defensible.

However, one potent criticism of the copyright regime is that the length of protection offered does not increase proportionately the incentive to produce. Entrepreneurs calculate short-term returns and will not pay creators significantly more for a longer term. Nevertheless, the entrepreneur may enjoy a significant windfall if a work enjoys enduring success, without any obligation to revisit the bargain with the creator. The CTEA became widely known as the “Mickey Mouse Extension Act”, following Disney’s extensive lobbying efforts in its support. Billions of dollars in revenues were at stake. The Mickey Mouse character, copyrighted in 1928 as Steamboat Willie, would otherwise have entered the public domain in 2003. A “Free the Mouse” campaign was mobilised to oppose the Act: Mickey’s iconic silhouette was depicted behind bars, a poignant symbol of the valuable property locked away from the public as a direct result of the CTEA. The colossal benefits flowing to high-profile copyright holders were one focus of criticism. Another key concern was the likely chilling effect on educational and non-commercial uses of copyright works. Tracing the holders of low-value copyrights is burdensome work, often impossible. Such works will remain inaccessible until their copyright expires—outside the public domain but not commercially exploited. Digital technologies would facilitate access to such works, for educational or archival purposes perhaps. But without relevant permissions they remain in a state characterised in Justice Breyer’s dissent as “a kind of intellectual purgatory”. Extension of copyright in such circumstances seemed to him to be a failing of a constitutional kind.

However, the majority in *Eldred* protested that “Justice Breyer’s stringent version of rationality is unknown to our literary property jurisprudence”. Nor did the majority accept that permitting Congress to extend existing copyrights would allow evasion of the “limited Times” constraint—and thus perpetual copyright—by way of repeated extensions. Earlier Acts had proceeded in the same way, and the Court was not persuaded that the CTEA crossed a

constitutionally significant threshold. Nevertheless, although rejecting the petition, the Court found a way to acknowledge the force of the petitioners' arguments, at least in the context of legislative policy:

we find that the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.

Concerns therefore remain. Copyright law must address the legitimate needs of the public domain. The question of balance ought not to be left to the market, nor to legislation crafted by lobbyists. If major copyright proprietors appear to be fat cats taking the mickey out of the public, they must one day expect to hear the mouse roar.

CATHERINE SEVILLE

THE ORIGINALITY DEBATE IN COPYRIGHT LAW—THE CANADIAN
PERSPECTIVE

ONE of the most hotly contested issues in the law of copyright concerns the standard of originality for factual compilations. In the very recent decision of *CCH Canadian Ltd. v. The Law Society of Upper Canada* (2004 S.C.C. 13), the Supreme Court of Canada was called upon to decide, *inter alia*, the issue as to whether copyright subsisted in the plaintiff publishers' compilation of reported judicial decisions as well as in other closely associated subject-matter such as headnotes, case summaries and topical indices. Agreeing with the result reached by the Federal Court of Appeal as regards this specific issue (see [2002] 4 F.C. 213), the highest court in Canada decided this question in the affirmative. In the process, the court took advantage of the opportunity once again to express its views on the much-debated subject of originality and, more importantly, to clarify for the future what the appropriate threshold for originality ought to be in Canada.

McLachlin C.J., in giving the judgment for the Supreme Court, acknowledged the long-standing judicial divide between the position taken in England (and in other Commonwealth jurisdictions) on the one hand, and that in America on the other (para. [15]). The English approach to originality was, in her Honour's view, consistent with the "sweat of the brow" standard, which standard was apparently "too low" (para. [24]). In contrast, the American test of "creativity" reflected a much higher and more exacting

standard (*Feist Publications Inc. v. Rural Telephone Service Co.* 499 US 340 (1991)).

These conflicting approaches to originality were described by McLachlin C.J. as representing the two “extremes” and her Honour came to the conclusion that the “correct position”, insofar as Canada was concerned, “[fell] between these extremes” (para. [16]). She then proceeded to set out a “workable, yet fair standard” of originality (para. [24]), namely that to attract copyright protection, the work in question must be the product of the exercise of “skill and judgment” that is more than “trivial” (interestingly, with no mention of the word “labour” or any of its variants), noting also that this exercise of skill and judgment “will necessarily involve intellectual effort” (para. [16]). In reaching this formulation, the learned Chief Justice had taken the following matters into consideration:

The Plain Meaning of “Original”

Having recourse to the plain and dictionary meaning of the word “original”, her Honour acknowledged (at para. [18]) that the whole idea of originality must necessarily connote an element of creativity, or at least a shade of it (in the form of “some intellectual effort”). Indeed, the present author ventures to add that the definition of the word “original” in almost any English dictionary will, more likely than not, also include the word “creative”.

The History of Copyright Law

The learned Chief Justice agreed with Professor Sam Ricketson’s observation that the “sweat of the brow” standard of originality was somewhat inconsistent with “the spirit, if not the letter” of the Berne Convention (citing, at para. [19], S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (1987), at pp. 900–901). It is also Professor Ricketson’s view (and that of other commentators—see, e.g., Christie, [2001] E.I.P.R. 26 at 34–37) that implicit in the notion of a “literary and artistic work” under the Berne Convention lies the idea of an “intellectual creation”. More importantly, perhaps, her Honour was also influenced by the *droit d’auteur* mentality of continental civilian jurisdictions (such as France) which require, quite apart from mere industriousness, some “intellectual contribution” from the author in order to ground copyright (para. [20]).

Recent Jurisprudence

Whilst acknowledging that courts in Canada have generally adopted the lower threshold for originality in copyright law,

McLachlin C.J. was quick to point out that recent decisions (both in Canada and in the US) have begun to question the continued viability of courts adhering (almost religiously) to the “sweat of the brow” standard. On this basis, it was apparent that her Honour no longer endorsed the “sweat of the brow” as the appropriate measure of originality in Canadian copyright law. However, it was equally clear that Canada was not yet ready to go as far as her North American neighbour in requiring an original work also to possess a minimal degree of “creativity” (paras. [21]–[22]).

The Purpose of the Copyright Act

McLachlin C.J. also took the opportunity to re-emphasise the overarching purpose of Canadian copyright law, which is to maintain (so far as is possible) a fair and appropriate *balance of rights* between the creators of intellectual property on the one hand and society at large on the other (para. [23]). In her Honour’s view, applying the “sweat of the brow” standard of originality would tip the scales too far in favour of the author or creator. On the other hand, applying the test of “creativity” would simply produce the converse effect.

Therefore, in trying to achieve some form of equilibrium and a sort of “half-way” mark between these two “extreme” approaches to originality, the Canadian Supreme Court decided to tread on the safer path of requiring the author of an original work to have exercised “skill and judgment” or to have at least displayed some “intellectual effort”. Nevertheless, it cannot be denied that the threshold for originality in Canadian copyright law has now been raised, given the court’s outright rejection of the “sweat of the brow” standard as well as its definition of the words “skill” and “judgment” (at para. [16]).

The *CCH* decision is to be welcomed for clarifying the law on a much-debated topic in copyright and for paving the way towards a “workable, yet fair standard” of originality in Canada. The decision is also a fine example of the growing impetus (in the international context) towards recognising a threshold for originality that is somewhat more meaningful, though not necessarily more onerous, than the “sweat of the brow” standard. Indeed, courts of the 21st century ought to be sensitive to the fact that the standard of originality in copyright law is an *evolving* standard and one which is constantly attuned to the times in which we live. In light of *CCH*, the question remains as to whether other jurisdictions (such as England and Australia) will similarly take the initiative to re-examine the standard of originality in their domestic

law of copyright. It is respectfully suggested that the sooner this is done, the better.

CHENG-LIM SAW

TOBACCO PRODUCTS IN THE INTERNAL MARKET

IN Case 491/01, *R. v. Secretary of State for Health, ex p. British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd.*, judgment of 10 December 2002 (*BAT*), the European Court of Justice refined its case law relating to the European Community's market-building powers under Article 95 EC.

In a reference by the High Court of Justice, the European Court was asked to consider the validity of Directive 2001/37/EC which establishes common rules on the manufacture, presentation and sale of tobacco products. This instrument replaces two directives that previously fixed maximum tar yields of cigarettes, and labelling requirements of tobacco products, respectively. It defines new maximum tar, as well as nicotine and carbon monoxide, yields and sets out stricter rules regarding health warnings. It also bans the use of texts, names, trademarks, such as "light", "ultralight" or "mild", and any other signs suggesting that a tobacco product is less harmful than others. Moreover, it provides that any product meeting these standards can be freely produced, marketed and released for free circulation in the Member States. The Directive was adopted on the basis of Article 95 EC and Article 133 EC, in view of its alleged external trade dimension.

The claimants, two tobacco companies established in the UK, argued before the High Court that the Directive was invalid for several reasons. In particular, they contested the adequacy of its legal bases, considering that it was not an internal market measure but a public health measure, for which the Community has no harmonising powers. They also considered that it infringed *inter alia* the principles of proportionality and subsidiarity.

The High Court asked the European Court of Justice to tackle these points, and also to determine, in case the Directive was found valid, whether the packaging requirements should also apply to tobacco products destined to be exported. In response, the Court of Justice held that Article 95 EC was indeed the right legal basis, for the Directive genuinely had "as its object the improvement of the conditions for the functioning of the internal market". The Court also emphasised that "it [was] no bar that the protection of public health was a decisive factor in the choices involved in the

harmonising measures which [the Directive] defines". Article 133 EC, however, was held to be unnecessary as a legal basis. Moreover, the Court found that none of the general principles invoked by the claimants had been infringed, and thus upheld the validity of the Directive. It also construed the packaging requirements as applying only to tobacco products marketed within the Community.

This decision clearly confirms the Court's famous judgment in Case C-376/98 *Tobacco Advertising* [2000] E.C.R. I-1795 where it laid down the general conditions necessary to establish the existence of a Community competence to adopt common rules under Article 95 EC. In brief, competence is recognised when such rules actually contribute to eliminating obstacles to the free movement of goods, or to freedom to provide services, or to removing distortions of competition. In *BAT*, the Court used the same approach and found, contrary to what happened in *Tobacco Advertising*, that the Directive fulfilled the conditions, and that the Community was competent. Not only did the measure contain a free movement clause, unlike the directive at issue in *Tobacco Advertising*, but also and more generally, the Court found that the Directive actually contributed to the elimination of obstacles to the free movement of tobacco products.

Indeed, *BAT* warrants particular attention as it sheds further light on what these contentious obstacles are: "national rules laying down product requirements are in themselves liable, in the absence of harmonisation at Community level, to constitute obstacles to the free movement of goods". The Court thus connects Articles 95 and 28 EC. Given that they are "in themselves" obstacles to free movement, such national rules constitute *in themselves* a justification for adopting common rules. A possible consequence of such connection is this: the more Member States adopt rules laying down product requirements to protect public interests, the more the Community's intervention under Article 95 EC is justified. At the same time, in mentioning "product requirements" by reference to its *Keck and Mithouard* decision (C-267/-268/91, [1993] E.C.R. I-6097), the Court suggests that national rules that fall under the category of "certain selling arrangements" do not as such justify harmonisation, unless such arrangements actually hinder intra-Community trade, as in the *Gourmet* case (C-405/98 [2001] E.C.R. I-1795).

The *BAT* judgment also concerns the exercise of the Community internal market competence, particularly when common rules have already been adopted in a particular field on the basis of Article 95. The Court recalls that in such cases, Member States have been

dispossessed of their competence to enact unilateral measures in the field covered by those rules. The Court emphasises that the competence acquired by the Community is dynamic. Given that the Community's task is to safeguard the "general interests recognised by the Treaty, such as public health", not only can it adjust its common rules in view of new scientific facts, as argued by the parties by reference to Article 95(3), but it may also adapt them in view of other considerations, *i.e.* "change in perceptions or circumstances", *in casu* the increased importance given to the social and political aspects of the anti-smoking campaign. The Community is therefore granted freedom to update its rules, to prevent their "fossilisation" (Opinion of Advocate General Geelhoed, para. 127), but also to pre-empt Member States' adoption of new requirements in response to social and political developments and thus to forestall possible future impediments to trade.

Finally, the *BAT* decision further reveals the type of control exercised by the Court over the recourse to Article 95 EC. In that regard, a distinction can be made between the judicial control over the existence of Community competence under Article 95 and the control over the exercise of that competence. In brief, the Court seems rigorous when controlling the existence of a Community competence in accordance with *Tobacco Advertising*. Once the Community competence is acknowledged, however, the Court's control over the exercise of this competence seems much more restrained, as *BAT* illustrates. As suggested before, the Court recognises a broad Community discretion in exercising its internal market powers. The Court's control of proportionality is thus limited to ascertaining that the Community legislature has not manifestly acted beyond the limits of its discretion. As to the control of subsidiarity, while the *BAT* judgment may suggest a growing interest on the part of the Court in ensuring its observance, such control seems somewhat illusory in the context of Article 95, given that as soon as the *Tobacco Advertising* requirements are fulfilled, the two conditions of the principle of subsidiarity, namely "best level" and "intensity", are likely to be automatically observed (see S. Weatherill, "Competence Creep and Competence Control" (2004) *Yearbook of European Law*, forthcoming).

THE DISCRIMINATING DOCTOR

IN its seminal judgment in Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] E.C.R. I-6097 the Court of Justice drew a distinction between rules concerning product requirements and rules concerning certain selling arrangements. While the former are caught by the *Dassonville* formula (Case 8/74 *Procureur du Roi v. Dassonville* [1974] E.C.R. 837, para. 5) and so breach Article 28, the latter do not, provided that they apply to all affected traders operating in the territory and have the same burden in law and in fact on the domestic goods and imported goods (*i.e.* they are non-discriminatory). By implication, selling arrangements which are discriminatory will breach Article 28 unless they can be justified by the defendant State by reference to one of the mandatory requirements or one of the Article 30 derogations, a view supported by paragraph 17 of *Keck* where the Court suggested that Article 28 would be triggered only where national rules impeded access to the market for foreign goods more than they impeded access for domestic products.

Although the Court took a while to reach this logical conclusion to its own judgment in *Keck* (see, for example, its much criticised decisions in Case C-412/93 *Leclerc-Siplec v. TFI Publicité SA* [1995] E.C.R. I-179 and Case C-391/92 *Commission v. Greece* [1995] E.C.R. I-1621 (infant milk)), it finally recognised the point in Joined Cases C-34–36/95 *De Agostini* [1997] E.C.R. I-3843, a case concerning (*inter alia*) a Swedish ban on television advertising directed at children under 12. In that case the Court said that an outright ban on a type of promotion for a product which is lawfully sold might have “a greater impact on products from other Member States” (para. 42). It continued that while the efficacy of various types of promotion was a question of fact to be determined by the national court, “in its observations *De Agostini* stated that television advertising was *the only effective form* of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents” (para. 43, emphasis added). These paragraphs contain a strong hint that the Court thought that the Swedish measure had the same burden in law but a different burden in fact and so breached Article 28 unless justified.

Case C-254/98 *Heimdienst* [2000] E.C.R. I-151 extended the ruling in *De Agostini* to a discriminatory selling arrangement which, while not actually preventing market access, did *hinder or impede* that access. It concerned an Austrian rule permitting bakers, butchers and grocers to sell their produce door-to-door using a

delivery van but only if they also traded from a shop in that or an adjacent area. The Court found that the legislation did not “affect in the same manner the marketing of domestic products and that of products from other Member States” (para. 25) because the legislation obliged traders with a shop in another Member State to buy a shop in the locality (with the additional costs this entails) before they could sell their goods door-to-door. Since traders established in other Member States suffered a disadvantage in comparison with local economic operators who already met the requirement of having a shop in the area, the Austrian rule breached Article 28 and needed to be justified. On the facts, the Court found the requirement of having a shop in the locality to be disproportionate.

Heimdienst influenced the Court’s judgment in Case C-322/01 *Deutscher Apothekerverband eV v. 0800 DocMorris NV, Jacques Waterval*, judgment of 11 December 2003. DocMorris had a pharmacy in the Netherlands and also offered medicines for sale over the internet; both activities were licensed in the Netherlands. In Germany medicinal products could be sold, but only in pharmacists’ shops; sales by mail order were prohibited. The German pharmacists’ association therefore tried to prevent DocMorris selling medicines to German consumers over the internet. The Court of Justice found that the prohibition of internet sales was “more of an obstacle to the pharmacies outside Germany than to those within it”. While German pharmacies also could not sell their products over the internet, for them this was an “extra or alternative method” of gaining access to the German market: they could still sell their products in their dispensaries. However, for pharmacies not established in Germany, the Court noted, that “the internet provides a more significant way to gain direct access to the German market”. It concluded that “[a] prohibition which has a greater impact on pharmacies established outside German territory could impede access to the market for products from other Member States more than it impedes access for domestic products” (para. 74). Because the prohibition did not affect the sale of domestic medicines in the same way as it affected the sale of those coming from other Member States, the German rule breached Article 28 (paras. 75–76). On the question of justification, the Court said that while the breach could not be justified on public health grounds in respect of non-prescription medicines, it could be justified in respect of prescription medicines.

The interest in *DocMorris* lies first in its clear confirmation of the post-*De Agostini* case law and the assertion that discriminatory certain selling arrangements can constitute measures having

equivalent effect to quantitative restrictions (para. 76, although see the confusing wording in para. 68).

Second, *DocMorris* is of interest because the Court appears to suggest that potential—rather than actual—disparate impact of the national rule is enough to trigger Article 28. As we have seen, at paragraph 74 the Court talks of the prohibition which “could” impede access to the market. While this sits comfortably with the Court’s traditional analysis of indirectly discriminatory measures (see, e.g., Case C-237/94 *O’Flynn* [1996] E.C.R. I-2617) and comes closer to the basic *Dassonville* formula (“all trading rules which are capable of ... hindering, directly or indirectly, actually or potentially, intra-Community trade”) it seems to run counter to the principle apparently established in *De Agostini* of the need to show actual disparate impact. Further, in *DocMorris* the Court also appears to have overlooked the presumption of legality which it also seemed to have laid down in *De Agostini*: while product requirements are presumed to impede market access and so breach Article 28 (the *per se* illegal approach), certain selling arrangements are presumed not to hinder access to the market and so do not breach Article 28—the *per se* legal approach. In the certain selling arrangement situation the trader will need to work hard to rebut the presumption of legality, possibly by producing statistical or other evidence (as in *De Agostini*) to prove actual, rather than merely potential, disadvantage.

However, in *DocMorris* the Court did not expressly engage with these issues and any shift in approach must be read subject to its own (re-?)analysis in paragraph 71 of the pre-*De Agostini* cases such as *Leclerc-Siplec* where, it observed, on the facts of *Leclerc-Siplec* the prohibition on broadcasting the advertisements was not extensive (since it covered only one particular form of promotion (television advertising) of one particular method of marketing products (distribution) and so the ban did not have a different burden in fact on the imported goods). This tends to suggest that any “potential” disparate impact must be pretty concrete—coming very close to actual.

Finally, all this talk of discriminatory certain selling arrangements should not divert attention away from the fact that genuinely non-discriminatory certain selling arrangements continue to fall outside Article 28. This was most recently confirmed in Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, judgment of 25 March 2004, where the Court found that a national rule prohibiting any reference to the fact that goods originated from an insolvent estate, where those goods no longer constituted part of the insolvent estate, satisfied the two *Keck*

criteria: the rule applied to all the operators concerned who carried on their business on Austrian territory and the rule was not discriminatory. For good measure the Court added that “In any event, there is no evidence in the file forwarded to the Court by the national court to permit a finding that the prohibition *has had* such a [discriminatory] effect” (para. 42 emphasis added). This reinforces the view that the national rule must have actual, rather than potential, disparate impact.

CATHERINE BARNARD

DAMAGES FOR NON-ECONOMIC HARM IN UNFAIR DISMISSAL CASES

IN *Dunnachie v. Kingston-upon-Hull City Council* [2004] EWCA Civ 84, the Court of Appeal (Sedley L.J. and Evans-Lombe J., Brooke L.J. dissenting) established that a compensatory award for unfair dismissal under the Employment Rights Act 1996 can include damages for non-economic harm.

One of the remedies for unfair dismissal under the Employment Rights Act 1996 is an award of damages, which includes a “compensatory” element that should be “such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant ... in so far as that loss is attributable to action by the employer” (section 123(1)), but which is currently subject an overall limit of £55,000. The issue in *Dunnachie* was whether the “compensatory” element covers only quantifiable pecuniary losses.

Ever since the Industrial Relations Act 1971 introduced a right not to be unfairly dismissed, compensation for unfair dismissal has been required by law to be such amount as the tribunal considers just and equitable in all the circumstances. Until recently, the orthodox view established in *Norton Tool Co. Ltd. v. Tewson* [1973] 1 W.L.R. 45 was that the statutory formula for compensation is not wide enough to include damages for non-economic harm in unfair dismissal cases. However, in *Johnson v. Unisys* [2001] UKHL 13, [2003] 1 A.C. 518 Lord Hoffmann expressed the view that this was wrong, and stated that he could “see no reason why in an appropriate case ... [the tribunal should not award] compensation for distress, humiliation, damage to reputation in the community or to family life”.

In *Dunnachie*, Sedley L.J. held that Lord Hoffmann’s view was part of the ratio of *Johnson*, and therefore of binding authority, since Lord Bingham and Lord Millett had both expressed their

agreement with it in *Johnson*. Sedley L.J. added that, even if he was wrong about the authority of *Johnson*, the correct interpretation of the statutory formula now found in section 123 of the Employment Relations Act 1996 “embraces non-pecuniary losses caused (in the sense associated with the ordinary principles of remoteness) by an unfair dismissal”, and that *Norton Tool* had been wrongly decided to the extent that it holds otherwise.

Although Evans-Lombe J. thought that what Lord Hoffmann said in *Johnson* about the correct interpretation of section 123 was obiter and therefore not binding on the Court of Appeal, he agreed “that the *Norton Tool* case must be treated as wrongly decided and that section 123(1) should be construed as empowering employment tribunals to award compensation for non-pecuniary damages flowing from the circumstances of unfair dismissal”.

In his dissenting judgment, Brooke L.J. held that the Court of Appeal was not bound by Lord Hoffmann’s view about section 123 expressed in *Johnson* because it was obiter, and added that *Norton Tool* had provided “a very natural [and correct] interpretation” of Parliament’s instructions.

Hull City Council is expected to take the case to the House of Lords (*The Guardian*, 14 February 2004). In the meantime, does the decision open the floodgates to a tide of claims for the recovery of compensation for non-pecuniary damages flowing from the circumstances of unfair dismissal? Sedley L.J. stated that he was not saying “that every upset caused by an unfair dismissal carries a compensatory award”; he was merely holding that “the power is there to permit tribunals to compensate an employee for a real injury to his or her self-respect”. However, *Dunnachie* is likely to encourage an increase in such claims, since it overturns *Norton Tool* in such an unequivocal manner, notwithstanding the fact that the statutory cap will remain on all awards of compensation under section 123.

Does *Dunnachie* make the law fairer? It will presumably receive the support of Hugh Collins, who observed in 2001 that Lord Hoffmann’s remark in *Johnson* concerning the correct interpretation of section 123 meant that we might now see a “compensatory award that is truly just and equitable” (“Claim for Unfair Dismissal” (2001) 30 I.L.J. 305, at 307). Collins’ point is that, instead of viewing contracts in purely economic terms, the law should recognise that the value of contracts to the parties may also encompass benefits that cannot be assessed merely in terms of financial loss. This is correct: jobs are often not just sources of money but also sources of self-esteem, and an employee may experience severe emotional suffering because of an unfair dismissal.

The claim in *Johnson* was a common law one, brought solely for the recovery of damages for financial loss, albeit damages that arose because of an inability to find work due to a mental breakdown caused by the manner in which the plaintiff was unfairly dismissed. According to Lord Hoffmann in *Johnson*, the claim failed because allowing it to succeed would have defeated Parliament's intention when setting up industrial tribunals, which was that there should be a remedy for unfair dismissal, but that it should be limited in application and extent by a special statutory framework. In contrast, Mr. Dunnachie made a statutory claim. He was the victim of a prolonged and severe case of workplace bullying on the part of his colleague and sometime line manager, compounded by an equally serious refusal by management to deal with it. Although there was no expert evidence that he had developed a recognised psychiatric condition because of the bullying, it had reduced him to a state of overt despair (at one point, he was so traumatised that he ended up crouching on an office floor with his hands around his head, shouting "No!"). This treatment amounted to constructive and unfair dismissal. Is there a good reason why he should not have received compensation for the distress he suffered because of it?

Brooke L.J. raised the point that compensation for psychiatric injury "still bristles with difficulties: very significant difficulties relating to causation have yet to be resolved". Since it is for the applicant to prove that he has suffered a psychiatric injury, it is difficult to understand the relevance of this point. Should the fact that it may be difficult for an applicant to prove causation mean that those who can prove causation should not be able to recover compensation for non-pecuniary loss flowing from unfair dismissal? If so, why? Moreover, would such an approach be consistent with *Fairchild v. Glenhaven Funeral Services Ltd.* [2002] UKHL 22, [2003] 1 A.C. 32? In *Fairchild*, the House of Lords acknowledged the difficulty some claimants have in proving causation in the tort of negligence. However, instead of ruling out all claims for negligence because of this difficulty, it held that it is sometimes just to allow a claimant to recover full compensation even though he cannot establish that his injury probably would not have occurred "but for" the defendant's negligence.

In *Dunnachie*, Sedley L.J. discussed the argument that employment tribunals are unequipped to adjudicate on contests of psychiatric evidence. However, he rightly dismissed this concern. As he pointed out, even if section 123 only embraces damages for economic harm, "it still includes the proximate economic consequences of psychological harm—for instance, the cost of

counselling to enable a badly distressed employee to get back to work". Thus, the evaluation of conflicting psychiatric evidence is on any view within the jurisdiction of employment tribunals. There therefore seems to be no reason why Mr. Dunnachie should not have received compensation for the distress suffered because of the treatment that constituted his unfair dismissal.

JESSE ELVIN

TERMINATING CARE

It could easily be one of *Emergency Room's* most memorable episodes. A 12-year old child—let us call him David—is rushed to hospital. He is severely mentally and physically handicapped. For the third time in the last couple of months, he suffers acute respiratory failure. The doctors tell the child's mother that her son is dying, and that they need to administer diamorphine to him to ease his distress. The mother believes that the doctors are wrong and fears that the administration of diamorphine will compromise her son's chances of recovery. She strongly disagrees with the proposed course of treatment. Other members of the family accuse the doctors of covert euthanasia. A police officer is called in to monitor the dialogue between the hospital and the patient's family. She tells the family that if they try to move the patient, they will be arrested. Against the mother's wishes, diamorphine is administered to her son throughout the night. A "Do not resuscitate" (DNR) order is put into his notes without her knowledge or consent. In the morning, the doctors are pleased with the diamorphine's effects. The mother is horrified by them. She demands that the diamorphine be stopped. The doctors tell her that this is only possible if the family agrees not to disturb David, making no attempts to resuscitate or otherwise stimulate him on his supposed deathbed. Some members of the family "lose it" and attack the doctors. During the ensuing tumult, the mother successfully resuscitates her son, who seems to have stopped breathing. An evacuated children's ward, two injured doctors and several injured police officers later, the child has sufficiently recovered to be discharged into home care on that very day.

These are the "disturbing and unbelievable" (Judge Casadevall) facts of *Glass v. United Kingdom*, Application no. 61827/00, 9 March 2004, where the European Court of Human Rights found that David Glass's right to physical integrity, protected under Article 8 of the Convention as an aspect of his right to respect for

his private life, had been violated by the administration of diamorphine to him in the absence of prior consent. While taking no view on whether the administration of diamorphine to David despite her refusal to consent also engaged David's mother's right to respect for family life, the Court awarded David and his mother jointly 10,000 Euros as non-pecuniary damage (which incidentally raises the interesting and novel spectre of a compensatory award for a "secondary victim" of a human rights violation).

The outcome is clearly the most commendable aspect of the European Court's decision. After the English courts had shown themselves more than disinclined to pronounce on the lawfulness or unlawfulness of David's treatment, which they were invited to do in connection with Mrs. Glass's thwarted endeavours to get a ruling which would ensure that no drugs would on future occasions be administered to David without her consent (*R. v. Portsmouth Hospitals NHS Trust, ex parte Glass* [1999] 2 F.L.R. 905, at 909), it was high time for a judicial organ to declare that this was no way to treat either David or his mother. But the legal construction which the Court places on the case in order to produce this welcome outcome is of doubtful value for preventing instances of premature terminal care for severely handicapped patients recurring in the future. At the same time, the ruling has some important procedural implications for the future treatment of child patients.

The Court's reasoning focuses on the question whether the administration of diamorphine to David—an interference with David's physical integrity by the hospital, a public institution whose conduct is capable of engaging the responsibility of the UK government—was "in accordance with the law" and "necessary" in a democratic society for the protection of David's health. The Court accepts that the doctors at Portsmouth hospital pursued a legitimate aim in treating David with diamorphine, since the action they took "was intended, as a matter of clinical judgment, to serve [his] interests" (para. 77). The Court also confirms that the treatment was "in accordance with the law", since domestic law gives doctors emergency powers. But, in a rather surprising move, the Court then finds that the applicants' contention that domestic law failed to discharge its positive obligation to protect David's life by allowing the administration of diamorphine to him in the circumstances "in reality amounts to an assertion that ... the dispute between them and the hospital staff should have been referred to the courts and that the doctors treating the first applicant wrongly considered that they were faced with an emergency". According to the Court, this aspect falls to be dealt with under the "necessity" requirement of Article 8 para. 2 (para.

76). Considering that there was sufficient time for the hospital to get a court ruling prior to the administration of diamorphine to David, and that in view of the prolonged and increasingly confrontational discussions about the proper course of treatment for David, “the onus was on the Trust” to take this step (para. 79), the Court concludes that “the decision of the [hospital] authorities to override the second applicant’s objection to the proposed treatment in the absence of authorisation by the court resulted in a breach of Article 8” (para. 83).

Contrary to what a recent commentary in *The Times Law Supplement* suggests, this case will not affect a doctor’s competence to provide emergency care to minors in the face of parental refusal without applying for a court ruling first. However, it does make it clear that this competence is restricted to genuine emergencies. In practice, there may well be more occasions now where hospitals must make an application to the court. Such a move is expected whenever, as in the *Glass* case, there is real and continuing disagreement between parents and doctors about what kind of treatment is appropriate for the child. It is no longer open to the hospital to keep discussing with the parents what is to be done until the child’s condition has deteriorated to a point where the hospital feels entitled to dispense with their consent, acting under emergency powers to do as it sees fit.

What makes the European Court’s “solution” so unsatisfactory is rather the lingering suspicion that, if the hospital had sought prior court authorisation for the proposed course of treatment, the courts would almost certainly have authorised it. To pretend that the real issue in the case was that David had been given diamorphine without his mother’s consent in a situation where emergency powers could not justify this step is legalistic shadow-boxing. The real issue, on which Judge Casadevall puts his finger in his brief but scathing separate opinion, is the appropriateness of a DNR-order combined with the administration of diamorphine to a child who was, as a subsequent letter from the hospital ominously put it, “dying, albeit that this is in the sense of terminally ill rather than immediate”.

The case thus stirs up the muddy foundations of treatment choices for severely handicapped patients. The hospital never denied that they intended to put David under a regime that was meant to ease his death, not to maximise his lifespan. In this approach they persisted even after the events which formed the subject-matter of this case, writing to David’s mother that “all we could offer [on future occasions] would be to make his remaining life as comfortable as possible and take no active steps to prolong life”.

In the light of David's mind-boggling transfer from supposed deathbed to effective home care, it is forgivable to wonder whether the initial medical assessment of David's prospects might have been partly influenced by the view that his life was a pointless continuation of a burdensome existence. Is perhaps the truth behind what in retrospect appears to have been an obvious misdiagnosis that the doctors really thought poor David had the opportunity of a lifetime to end a miserable existence naturally, and should be allowed to make the most of it?

The European Court went out of its way to pretend that this was not the question. In its admissibility decision of 18 March 2003, it disallowed the complaint under Article 2 (the right to life). But the pressing issues this case raises will not be resolved unless the Court is willing to address the question of the weight that should be given, in the context of end-of-life decisions, to a severely handicapped child's interest in survival.

ANTJE PEDAIN

THE MEANING OF AN "AVAILABLE" FORUM

IN *Gheewala and others v. Hindocha and others* [2003] UKPC 77, [2003] All E.R. (D) 291, the Privy Council had to consider an aspect of the *Spiliada* test which is not often in dispute, namely, when an alternative forum is "available" to the claimant.

The litigation arose out of a complex family dispute as to the beneficial ownership of the Gheewala family fortune. Nine of the ten defendants were members of the Gheewala family. Some were resident in Kenya and some in England. The claimant, who was also a member of the family, brought a claim in Jersey alleging that the family property was held under a Hindu co-parcenary and seeking a partition and distribution of the property. The tenth defendant was a Jersey trust company alleged to hold family property. The claim was brought as of right against the Jersey company and the claimant obtained leave to serve the claim on the other defendants outside the jurisdiction. A number of the defendants immediately applied for a stay on the grounds of *forum non conveniens* on the basis that Kenya was the more appropriate forum for the hearing of the dispute. That stay was granted at first instance, was overturned by the Court of Appeal in Jersey and was eventually reinstated by the Privy Council.

Lord Goff formulated the first stage of his classic test in the *Spiliada* in the following terms: "the basic principle is that a stay

will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some *available forum, having competent jurisdiction*, which is the appropriate forum for the trial of the action” (emphasis added).

Accordingly, the first step, before the court could even begin to consider whether Kenya or Jersey was the more appropriate forum, was to establish that Kenya was indeed an “available” alternative forum.

Two questions arose: first, since not all of the defendants were resident in Kenya, was it sufficient for purposes of the *Spiliada* test that the Kenyan court would grant leave to serve out of the jurisdiction?; and second, what is the relevance of a defendant submitting to the jurisdiction of the foreign court, and what constitutes submission for these purposes?

The first question does not appear to have arisen directly before. It seems to have been accepted by the parties that the claimant could have served Kenyan proceedings out of the Kenyan jurisdiction on those defendants not in Kenya on the basis of Kenyan rules for service with leave analogous to those in CPR 6.20. Their Lordships noted that this was a point of some importance since “it is clear that an alternative forum is not available (in the relevant sense) unless it is open to the plaintiff to institute proceedings *as of right* in that forum” (emphasis added). The authority given for this general proposition was Dicey and Morris, *The Conflict of Laws*, 13th ed., para. 12-023 which, their Lordships said, was upheld by the House of Lords in *Lubbe v. Cape plc* [2000] 1 W.L.R. 1545.

However, neither of the two Court of Appeal decisions nor the House of Lords’ decision in *Lubbe v. Cape plc* is authority for such a broad proposition. In fact, the issue did not arise directly there as the defendant was not present and had no assets in South Africa. The question of whether the South African courts were an available forum was thus entirely dependent upon prorogation and accordingly on the validity of the undertaking to submit to the jurisdiction (this aspect of the case is discussed further below). On the contrary, what indications there were were against such a broad general proposition. Tuckey L.J. in the Court of Appeal ([2000] 1 Lloyd’s Rep. 138, 168) stated: “I think it is clear that by referring to ‘another available forum’ the court was simply referring to some other tribunal having competent jurisdiction. The rules which gave that tribunal jurisdiction are unimportant.” On that basis, in a case where the foreign court has given leave to serve out of the jurisdiction (and, perhaps, when time for an appeal to set aside such leave has passed), it is very difficult to see why that forum

should not be an available forum even though not technically exercising jurisdiction as of right. If that is right, clear evidence that the court would grant leave to serve out if proceedings were brought ought to be sufficient.

Given the Privy Council's finding on the first question, Kenya could be an available forum only on the basis of submission. The House of Lords in *Lubbe v. Cape plc* established that an express undertaking to submit to the alternative jurisdiction was sufficient to show that the forum is available even if given after the application for a stay. However, the way in which this decision was applied by the Privy Council is again potentially far-reaching. In the proceedings before their Lordships there were no express undertakings to submit to the jurisdiction of the Kenyan courts, but their Lordships accepted that it was arguable that the decision of two of the defendants to rest "à la sagesse de la cour" in Jersey, having initially supported the application for a stay, amounted to an implied submission to the jurisdiction of the Kenyan court. The basis for that decision was that the evidence submitted by those defendants in support of the application clearly contemplated that there would be a full trial of the action in Kenya; consequently, if they had been asked to give a formal undertaking to submit to the jurisdiction of the Kenyan courts it is hard to see how they could refuse.

Their Lordships did not expressly consider the position of the other defendants, who were not resident in Kenya, but who had made the application for the stay and who had not made any express submission to Kenyan jurisdiction. This appears to be because their Lordships took the view that similarly if those defendants had been asked to give a formal undertaking to submit in Kenya, they could not have refused in a manner consistent with their stay application, *i.e.* a form of implied submission would have arisen from the stay application. Such a concept of implied submission could give the decision in *Lubbe v. Cape* potentially far reaching consequences. Indeed, at least in cases where all the defendants are parties to the application for a stay, there would seem to be little room for arguing that the forum they advocate as being more appropriate is not an available forum.

LOUISE MERRETT

ACCESS TO JUSTICE AND PARALLEL PROCEEDINGS IN EUROPE

THE avoidance of parallel litigation is a primary purpose of the European jurisdiction regime, embodied principally in the Brussels I Regulation on jurisdiction and the enforcement of judgments. Normally, the court first seised has priority (under Articles 27 and 28). But even the court first seised must decline jurisdiction where a contractual agreement confers exclusive jurisdiction upon another court under Article 23. What, however, if a court asserts jurisdiction despite a contrary jurisdiction agreement? What if it misapplies Article 23; what if Article 23 is never considered; what if it believes the jurisdiction agreement to be invalid, or non-exclusive? Any judgment obtained in such proceedings is enforceable in another Member State, even if jurisdiction was asserted mistakenly (Article 35). But what if the agreed court purports to assert exclusive jurisdiction notwithstanding that another court is first seised? Which has precedence, the *prior* jurisdiction of the first court, or the *exclusive* jurisdiction of the second court? Does the existence of exclusive jurisdiction justify parallel proceedings?

These complex issues were addressed by the Court of Justice in Case C-116/02 *Erich Gasser GmbH v. MISAT Srl* (judgment, 9 December 2003). MISAT sued in Italy for a declaration that its contract with Gasser had terminated. Gasser subsequently sued MISAT in Austria under the contract, relying partly upon a contractual agreement to the Austrian court's jurisdiction. The case squarely raised the tension between Articles 17 and 21 of the 1968 Brussels Convention (Articles 23 and 27 of the Brussels Regulation), and the Austrian court referred the issue to the Court of Justice. The Court readily found that Article 21 prevailed, ousting the Austrian court's jurisdiction despite Article 17.

Everything turned upon whether exclusive jurisdiction under Article 17 differs in effect from exclusive jurisdiction under Article 16 (concerning, for example, jurisdiction over title to land). In Case C-351/89 *Overseas Union Insurance* [1991] E.C.R. I-3317, the Court of Justice held that a court cannot review the jurisdiction of a court already seised, save where the second court has jurisdiction under Article 16. But nothing was said of Article 17. In *Gasser* the Court confirmed that Articles 16 and 17 operate differently. Both remove jurisdiction from any other court. But, unlike Article 16, Article 17 does not trump Article 21 if another court has accepted jurisdiction. This was supported by the scheme of the Convention. Under Article 28 (Article 35 of the Regulation), judgments obtained in breach of Article 16 (now Article 22) are unenforceable,

suggesting that the jurisdiction of the court first seised is vitiated. But judgments contrary to Article 17 remain enforceable, implying that the first court is entitled to proceed to judgment regardless. If the first court's jurisdiction is thus unimpeachable, how can a second court be allowed to embark upon parallel proceedings?

This textual argument proved decisive in *Gasser*. But the outcome might have been different had the Court attended to the procedural rights of the defendant. Any jurisdictional regime should respect the rights of claimant and defendant alike. It should uphold a defendant's right to be sued in accordance with a previous agreement, and protect defendants from the unjust consequence of tactical litigation. This implements the right of access to justice, articulated in Article 6 of the European Convention on Human Rights, which the European jurisdiction regime is surely intended to defend.

Concern for procedural justice might have supported two more radical solutions to the problem in *Gasser*. Arguably, the second court should be entitled to disregard proceedings in the first court where they are tactical, and unjust to the defendant—subordinating Article 21 to higher considerations of justice. More persuasively, a party to a jurisdiction agreement might be seen as having a right to have the agreement's effect determined in the nominated court. The first court might thus be required to discontinue proceedings once the second, agreed court is seised, but permitted to resume should the second court decline jurisdiction. This differs from saying that a defendant has a right to have the agreement enforced, which begs the question which court should do so. Nor does it imply that the second court is best placed to enforce the jurisdiction agreement, on grounds of expertise or efficiency, which controversially undermines the assumption that all national courts are equally proficient. It merely enforces the defendant's right to have the issue determined in the agreed court.

Such an argument is sustainable if the value of access to justice is regarded as superior to the goal of avoiding parallel proceedings in the scheme of the European regime. But, as *Gasser* confirms, the Court of Justice has a narrower vision. Promoting predictability, efficiency, and simplicity in adjudication are its overriding goals. But these are the values of process, not outcome; to prize them subordinates ends to means. Certainly it is striking that a regime of jurisdictional rights should be read as expressing such a narrow, inflexible and formulaic theory of procedural justice—one in which the European regime becomes a self-sufficient measure of justice; one which denies equal access to justice by favouring claimants at the expense of defendants.

But *Gasser* also implies an answer to a different question: may a court restrain by injunction proceedings in another Member State which infringe a jurisdiction agreement? The Court of Justice recently held that proceedings in other Member States can never be restrained, in Case C-159/02 *Turner v. Grovit*. But *Gasser* foreshadows that decision. Superficially the issue in *Gasser* looks distinct. Where antisuit relief is sought to enforce a jurisdiction agreement, Article 27 is irrelevant. Substantive proceedings elsewhere do not involve the same “cause of action”, as Article 27 requires. But, even if an injunction remains available, *Gasser* now prevents the second court from entertaining substantive proceedings. So in a practical sense *Gasser* makes such relief pointless. Again, the restraint of foreign proceedings is designed to prevent injustice to the defendant in foreign proceedings, even if access to jurisdiction asserted by the foreign court is thereby prevented. But, if such jurisdiction derives from the European jurisdiction regime, *Gasser* implies that it must be respected whatever the prejudice to a defendant. Certainly (like *Turner*), it suggests that strict adherence to the European regime must be prized above broader considerations of procedural justice.

RICHARD FENTIMAN

JURIES: THE FREEDOM TO ACT IRRESPONSIBLY

If the jury that convicted you behaved improperly—reaching its verdict by spinning a coin, for example, or basing it not on the evidence but on the colour of your face—can you appeal? The answer, you might think, is “Yes, of course!” (see this commentator’s notes on *Young* [1995] C.L.J. 519 and on *Quereshi* [2002] C.L.J. 291). In *R. v. Mirza* [2004] 2 W.L.R. 201, however, a majority of the House of Lords has ruled that investigating alleged misbehaviour of this sort would break the secrecy of the jury-room, a value it is essential to maintain: so the defendant, if convicted wrongly in these circumstances, must put up with it.

The most convincing argument in favour of this position is that, if the jury are to do their job properly, they must know that they are completely free to speak their minds, which they would not be if their remarks could be the subject of public scrutiny by the legal system afterwards (or harassing enquiries by defendants or the lawyers as a preliminary step). It seems to have been this that convinced the majority; but in course of being convinced by it, they threw in some unconvincing arguments for good measure.

Thus the speeches of the majority also make mention of the need for finality (which if taken to extremes would justify the abolition of all criminal appeals); the risk that such allegations might be manufactured (which surely does not justify ignoring them where they are demonstrably true); the fact that jury misbehaviour is rare (which means, apparently that it can be discounted, like other rare events: explosions at nuclear power-stations, for example, and crashing jumbo-jets!); that acquittals of the guilty are as serious as convictions of the innocent (wrong!), which means that allegations of jury misbehaviour would have to be investigated at the behest of disappointed prosecutors too (and so they should be—even if perverse acquittals are not as bad as perverse convictions!); and by the fact that the public has faith in juries (as its mediaeval predecessors had, of course, in trial by battle, compurgation and ordeals).

Lord Steyn delivered a powerful dissent. The argument that “the residual possibility of a miscarriage of justice is the necessary price for the preservation and protection of the jury system” he found both morally unacceptable, and contrary to the European Convention on Human Rights.

In my view it would be an astonishing thing for the ECHR to hold, when the point directly arises before it, that a miscarriage of justice may be ignored in the interests of the general efficiency of the jury system. The terms of article 6(1) of the European Convention, the rights revolution, and 50 years of development of human rights law and practice, would suggest that such a view would be utterly indefensible.

But even if the argument were morally acceptable, he thought that it was false.

The effect of the ruling of the majority will in the long run damage the jury system. Leaving aside the jury, we have reached a position where it is recognised that all actors in the criminal justice system, and notably the judge, prosecuting counsel, defence counsel, police, expert witnesses, as well as lay witnesses, can be the cause of miscarriages of justice. But the consequence of the ruling of the majority is that a major actor, the jury, is immune from such scrutiny on the basis that such immunity is a price worth paying. This restrictive view will gnaw at public confidence in juries. It is a system likely in the long run to increase pressure for reducing the scope of trial by jury. A system which forfeits its moral authority is not likely to survive intact. The question will be whether such a system provides a better quality of justice than trial by professionals.

The majority had the grace to feel uncomfortable with the more startling implications of the uncompromising rule they had laid

down, and some sought to mitigate the worst of them. So building on a concession by the Crown that an appeal would lie if a jury in a murder case used a ouija-board to ask the spirit of the murder victim how he really died (cf. the facts of *Young* [1995] Q.B. 324), Lord Hope suggested that an appeal might perhaps also lie if the jury reached their verdict on the toss of a coin.

Lord Hope also proposed an extra safeguard that he thought would solve the problem, if there is one: in future, judges should tell jurors that “they are under a duty to inform the court at once of any irregularity which occurs while they are deliberating”. This proposal has now been acted on (see the Practice Direction, [2004] 1 W.L.R. 665). But how this will help if all the jurors are involved in the irregularity has yet to be explained; and similarly, how it will prevent miscarriages of justice where those who are not involved in the irregularity are too timid to complain at the time.

What underlies the decision of the majority is the practical difficulty of establishing what actually happened in the jury room when an allegation of misbehaviour is made, perhaps a long time afterwards.

This problem is a real one, but I believe there is a simple way of solving it. The discussion of the jury should be tape-recorded. If this were done, then when an allegation of improper conduct is made, it would be a relatively simple matter to check whether it is founded.

Before this idea is rejected out of hand as likely to inhibit the discussion, we should remember that the same objection was made, a quarter of a century ago, to tape-recording police interviews with suspects, a practice that is now routine, and universally accepted. That tape-recording inhibits the police is undoubted: it inhibits them from threatening and bribing suspects, and inventing confessions they never made. If it inhibited juries from using ouija-boards, tossing coins and expressing racial hatred, so much the better.

J.R. SPENCER