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LICENSED ANARCHY : SOME PROBLEMS OF INFORMAL TRANSACTIONS IN LAND

by Graham Battersby

The late Professor F.H. Lawson regarded our land law as one of the greatest achievements of the English legal mind. "It is logical and orderly", he said, "its concepts are perfectly defined, and they stand in well recognised relations to one another .... the analysis of property rights ..[is] one of the most brilliant creations of English law."[1] I have no reason to dispute that assessment, but it is worth pointing out that it was written in 1951, before (though only a short time before) the Court of Appeal embarked on a course of decisions which have transformed the law relating to licences to occupy land.[2] If Lawson had been writing in 1984, I very much doubt if his praise would have been quite so fulsome.

The brilliantly rational structure which Lawson describes consists of a very complex series of interlocking rules and principles, which are certainly not designed to be understood by those without a legal training (and, as perhaps some students in my audience will confirm, not always understood by those with the benefit of even as good a legal education as that provided in this Polytechnic). Moreover, a high level of legal formalities is required for the creation of proprietary interests which will be recognised by the land law system, e.g. the creation or transfer of a legal estate requires a deed, except for certain short-term leases;[3] a contract for the disposition of land or of any interest in land is unenforceable by action unless evidenced in writing or supported by an act of part performance;[4] a declaration of trust relating to any interest in land must be proved by evidence in writing.[5] The law, in short, is aimed at formal transactions, normally backed by documentary evidence; professional advice will often be necessary in order to ensure compliance with the legal requirements.

Even then, the law, for reasons usually bound up with the conveyancing reforms of 1925, sometimes makes quite simple transactions operate in very complex ways, in a manner and with results which, I suspect, would astonish laymen. Let me take two simple examples. For the first, imagine an unsophisticated man who by his will leaves his small house to his widow for life and then to his son John. We all know that the testator, probably unknowingly, has created a strict settlement, governed by the beautifully rational but hideously complex Settled Land Act 1925. The result is that the testator's personal representatives should execute a vesting assent in favour of the widow, naming two or more persons as Settled Land Act trustees; the widow will then have wide statutory powers of disposition, and John's wishes can be entirely disregarded.[6] These results

would astonish our unsophisticated testator. For my second example, imagine a young couple, about to be married, who have contracted to buy a house to serve as their first matrimonial home. They have engaged a solicitor to do the conveyancing on their behalf, and have instructed him that they wish to hold the house in equal shares. To their astonishment, when their solicitor goes through the conveyance with them, they find that they are stated to be trustees for sale and therefore under an immediate binding obligation to sell the house and then to hold the proceeds of sale on trust for themselves in equal shares.[7] The solicitor will, I think, have difficulty in explaining to them the real effect of the conveyance, but no doubt his explanation will be along the lines that, as long as the house is required as a home for both parties (and probably for their children[8]) the trust for sale will not be enforced against the wishes of one of them, but that sale might well be enforced against the dissenting party if the marriage breaks down,[9] or if either of them becomes bankrupt.[10] He might continue, but probably will not, by telling them that for certain purposes, which no one can yet precisely define, the law will from the outset regard them as holding beneficial interests only in the proceeds sale, not in the house itself, and that certainly, if either of them should contemplate making a will, it should be remembered that for the purposes of devolution the interest will be regarded as subsisting in the proceeds of sale and therefore be treated as an interest in personal property, not real property.[11] Here too, I suggest that the legal results differ markedly from those which an uninstructed but intelligent layman would expect.

At least my two imaginary transactions fall neatly into pigeonholes that the law has defined, albeit with some surprising results. In the last thirty years or so, however, the courts have been faced with a variety of informal transactions, many of them arising out of family or neighbourly arrangements, which have posed one of two problems: (1) the transaction fits reasonably well into one of the existing legal categories, but there follow consequences which are remote from what the parties would have expected, or are manifestly unjust; (2) the transaction does not reasonably fit into one of the existing legal categories. Both kinds of cases have tested the imagination of the judges to the limit, and indeed, in some instances as I shall suggest, beyond breaking point. These pressures have led to major developments in three interrelated areas: licences, estoppel and constructive trusts.

Let us start with a case which confronts some of these problems in a slightly unusual form, viz. **E.R. Ives Investment Ltd.** v. **High**[12] (hereafter **Ives v. High**) In 1949 Mr. Westgate, a predecessor in title of the plaintiffs and neighbour of the defendant, started to build a block of flats on his land, but laid the foundations in a position where they trespassed twelve inches over the boundary into the defendant's land. Mr. High objected to the trespass, and the upshot was that he agreed with Mr. Westgate, by an agreement later evidenced by letters, that the foundations could stay in place but that in return Mr. High should have a

right of way across the proposed yard of the block of flats to a side road. Both parties acted on the agreement, Mr. Westgate by building his block of flats on the existing foundations, Mr. High by building his house in such a way that the only feasible access by car was across Mr. Westgate's yard. In 1950 Mr. Westgate sold his land to Mr. and Mrs. Wright, who were informed of the agreement although it was not mentioned in their conveyance. In 1959 Mr. High built a garage for his house, in such a position that it could be reached only across the yard. Mr. and Mrs. Wright watched the garage being built and complimented Mr. High on it. In 1960 the Wrights got Mr. High to re-surface the yard and he paid one-fifth of the cost. In 1963 the Wrights sold their land to the plaintiffs and the conveyance was made subject to the right (if any) of Mr. High over the yard. The plaintiffs discovered that the right of way had not been registered under the Land Charges Act 1972 (as it now is), and sought an injunction to restrain Mr. High from trespassing on their yard. The Court of Appeal held in favour of the defendant. There are different emphases in the three judgments, and Lord Denning takes an independent line,[12a] but the common thread of reasoning is that the defendant's right of way arose by way of estoppel or acquiescence, or alternatively on the doctrine of mutual benefit and burden, and rights so arising are not registrable under the Land Charges Act. On either view, the Wrights were estopped by their conduct from denying the defendant's rights, and that estoppel bound the plaintiffs as their successors in title. The usual explanation of the decision is that, though the equitable easement originally granted to Mr. High was indeed void for non-registration, nonetheless there arose phoenix-like from the ashes a **licence** in favour of Mr. High to use, having substantially the same characteristics as the destroyed easement, and in particular having the capacity in equity, without registration, to bind any purchaser who took with notice of it.[13] By some the decision is also taken to be authority for an even wider proposition, that estoppel can give rise to wholly new kinds of proprietary interests in land, sometimes resembling rights arising otherwise than by estoppel, sometimes bearing no such resemblance, but in any event interests of an equitable kind which lie completely outside the registration requirements of the Land Charges Act.[14] Let me say at once that I regard much of this as wholly fallacious. For one thing, it would drive very nearly a coach and four through the Land Charges Act. Take a simple example. V contracts to sell his house to P. P fails to register the estate contract. V then sells and conveys the land for money to X, who knows of the earlier contract with P. X takes free from the estate contract.[15] Suppose, however, that V had allowed P to go into possession, in order to do some decorating. That would seem to create an estoppel against V, and X as his successor in title would equally be bound, according to the above interpretation of **Ives** v. **High**. That surely cannot be right. In my view, the decision in **Ives** v. **High** is correct on its facts, but for the wrong reasons. I think that the correct approach would have been as follows: (1) the original agreement between Mr. Westgate and Mr. High created an equitable easement which was registrable as a D(iii) charge; failure to register it rendered it void against the first purchasers, Mr. and Mrs. Wright, and there-

fore against the second purchaser, E.R. Ives Investment Ltd.[16] (2) The plaintiffs were, however, estopped personally by their own conduct from relying on non-registration; since the agreement was not binding upon them, they could have chosen to remove the encroaching foundations and terminate Mr. High's right of way, but they chose not to do so, and thus became estopped from denying his right of way.[17] On this argument, the crucial point is that Ives Investment is personally estopped from relying on non-registration; it is wholly irrelevant that its predecessors, Mr. and Mrs. Wright, were also estopped. Equally, the fact that Ives Investment is estopped does not affect its successors in title, so that Mr. High would still be at risk against a subsequent purchaser, who could choose to remove the encroaching foundations and terminate his right of way. To prevent this, I suggest that the court should order retrospective registration of a D(iii) charge against the name of the original grantor, Mr. Westgate.[18] It will be observed that my reasoning here is very similar to that subsequently adopted in **Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.**;[19] it is also the way in which the case for the defendant was argued by his counsel.[20]

Let us now turn to the modern law relating to occupational licences. In one group of cases, the concept of a licence has been used by the courts as an escape from the consequences which would follow if the transaction were held to be a lease. By far the most significant effect is the use of the licence as a way of avoiding the statutory control over residential leases imposed by the Rent Act 1977; that was certainly a useful device when the courts employed it to the advantage of benevolent landlords or in cases of family relationships.[21] However, the courts themselves overstepped the mark when they extended the licence construction into some purely commercial transactions; I am not sure what the courts thought they were achieving, and certainly one result has been to inject an unacceptable degree of uncertainty into the process of construction.[22] Much more serious, however, is that the device of a licence has now been gratefully seized upon by landlords as a simple method of avoiding the Rent Act; it seems clear from **Somma v. Hazlehurst**[23] that a carefully drafted licence agreement is judge-proof, provided only that the landlord is punctilious in not stating at any time during the negotiations that a lease or tenancy is envisaged.[24] The courts have thus produced a device which is being ruthlessly exploited by well-heeled and well-advised property owners, to the great and obvious disadvantage of their poorer clients. It is notable that two modern statutes have conferred protection analogous to that provided by the Rent Act 1977 not only on leasehold tenants but also on residential licensees (I refer to the Rent (Agriculture) Act 1976[25] and the Housing Act 1980[26]); i find it quite remarkable that the Rent Act 1977 has not been similarly extended.

The concept of a contractual licence has also been put to a rather different use in order to confer a relatively secure right of occupation on persons, often within a family group, who would otherwise lack such a right. One can discern three

different problems in these situations: (1) does a contractual licence exist? (2) if so, what are the terms of the contract, and in particular, in what circumstances, if any, is the licence revocable? (3) does a contractual licence bind third parties? I shall argue that on each of these issues the present law is confused and unsatisfactory. Firstly, does a contractual licence exist? The contrast between Tanner v. Tanner[**27**] and **Horrocks** v. **Forray**[**28**] is well-known, but it vividly illustrates the present state of confusion. You will, I am sure, remember Tanner as the case of the energetic milkman. Eric Tanner was a milkman by day and a croupier by night. He lived with his wife and two children, then aged 19 and 12. He also found time to establish a relationship with Josephine MacDermott, who had her own Rent Act protected flat. She became pregnant by him and took the name of Mrs. Tanner. In 1969 she gave birth to twin daughters. Eric and Josephine decided she should have a house for herself and the babies; Eric bought one with a mortgage. Josephine surrendered her tenancy of the flat and moved into the new house, bringing quite a lot of her furniture and spending £150 on furnishings. Their relationship did not flourish, however, for it turned that all this time Eric had been associating with another women, a married woman named Mrs. Metcalfe, whom he married in, it would appear, 1973. That same year he started to seek possession of the house from Josephine. The Court of Appeal, reversing the trial judge, inferred a contract by which she had a licence to occupy the house for so long as the twins were of school age, but subject to any relevant change of circumstances such as her marriage. The licence would be protected by an injunction to restrain revocation in breach of contract, but as Josephine had left the house pursuant to the judge's order and had been rehoused, she was awarded damages in lieu of an injunction. Damages were assessed, on the basis of the surrender value of the licence, at £2,000, a rather ungenerous result in the end. **Tanner** contrasts strongly however, with **Horrocks** v. **Forray**,[**28**] decided only a few months later. This was an action for possession of a house in Kensington brought by the executors of William Sanford. Sanford was married in 1951 and a son of the marriage was born in 1952. In 1957 he began to keep the defendant, Maxine Forray, as his mistress, and a daughter was born of the relationship in 1961. Sanford was then a fairly wealthy man and he supported Miss Forray quite generously, to the extent of £4,000 - £5,000 a year plus accommodation. In 1973 he bought the house in Kensington for her, at a price of £36,500. He died in a motor accident in 1974, and by his will he gave all his property to his wife for life and then to their son. It was then discovered that he had lived so extravagantly as to dissipate most of his assets, so that, unless his executors could sell the Kensington house with vacant possession, his estate would probably be insolvent. In short, the contest over the house was between Sanford's lawful family and his mistress. In other respects the facts are virtually idential with those in **Tanner**, but here the Court of Appeal decided that there was no contract and therefore no licence, and Miss Forray was ordered to give up possession in 28 days. In reality the court decided that she had enjoyed enough of Sanford's resources during his lifetime and should have no more at his death (though, as a person being maintained by him at his death, she would now have a right to make a claim under the Inheri-

tance (Provision for Family and Defendants) Act 1975, and if there were enough assets in the estate she would have a reasonable chance of success). These two cases, however, are both judgments of a latter-day Solomon, and the commercially biased law of contract hardly seems a suitable vehicle for the resolution of such family problems.

The real policy underlying **Tanner** is an attempt by the courts to fill the gap caused by the lack of any statutory framework governing property rights between unmarried persons enjoyed a sexual relationship, in particular the lack of occupation rights conferred on spouses by the Matrimonial Homes Act 1983 and the absence of the property adjustment jurisidiction available on marriage breakdown under the Matrimonial Causes Act 1973, s.24. Where there are children of the relationship, these gaps would be partially filled if the proposals of the Law Commission in their report on Illegitimacy were to be implemented; briefly, it is proposed that the property adjustment jurisdiction should be added to the Guardianship of Minors Act 1971.[29]

Next, the courts have had acute difficulties in spelling out the terms of these contractual licences. **Tanner** is an example, since, as I have said, the Court of Appeal held that Josephine Tanner had a licence to occupy the house for so long as the twins were of school age, but subject to any relevant change of circumstances such as her marriage. If the parties had entered into an express contract containing such a term, the whole arrangement would, I fear, have failed for uncertainty. Similarly, in **Hardwick** v. **Johnson**,[30] where Mrs. Hardwick had bought for £12,000 a house for her son and daughter-in-law to live in. They agreed to pay her £7 a week, but it was not made clear whether that was rent or payment towards the purchase price, nor was anything said to Mr. and Mrs. Johnson about conveying the house to them if they paid off the purchase price (at £7 a week it would have taken them c.33 years just to pay the capital sum!). The couple made a few payments but then stopped paying, and Mrs. Hardwick did not insist on any more payments. The marriage started to break down after about a year but Mrs. Johnson became pregnant. In March 1975 Mr. Johnson left the house. In May or June Mrs. Johnson gave birth to a son. Meanwhile Mrs. Hardwick was seeking to recover possession of the house, with a view to selling it with vacant possession, and possession proceedings ultimately came before the court. The Court of Appeal held that the Johnsons had been granted jointly a licence to live in the house on condition that they paid Mrs. Hardwick £7 a week (or perhaps £28 a month)[31] - the two amounts differ by £28 a year!); the majority held it to be a contractual licence, whereas Lord Denning preferred to call it an equitable licence, whatever that term may mean! In any event, it was a joint licence, irrevocable if future payments were kept up, and therefore irrevocable at that time against Mrs. Johnson. It is intolerable, however, that the court refused to state what circumstances, other than non-payment, would

justify revocation of the licence. Witness Lord Denning: "Things may develop in the future. One cannot foresee when it may be possible to determine the licence, but it cannot be determined at this stage."[**32**] Similarly, Browne L.J. "I am not saying that the daughter-in-law is necessarily entitled to stay in the house indefinitely so long as she makes these payments; circumstances might arise in the future which entitle the mother to determine the licence, but it is not necessary to consider in this appeal what those circumstances might be."[**33**] At the practical level, that leaves the parties in a state of complete uncertainty as to the future, an intolerable situation when they have incurred the trouble, expense and trauma of journeying once as far as the Court of Appeal. At the theoretical level, it seems absurd that judges, having taken the view that a contract has been concluded between the parties, should then find that the terms of that contract are still shrouded in obscurity. Are not contracts supposed to be forward-looking, in the nature of self-imposed legislation, the parties planning their own future relationship?[**34**] If the courts are so willing to infer a contract where the arrangement is so informal and diffuse, they must be willing to follow through the logic of that position.

Consider next **Chandler** v. **Kerley**.[**35**] In 1972 Mr. and Mrs. Kerley had jointly bought a house for £11,000 with the aid of a building society mortgage. Two years later the marriage broke down and Mr. Kerley departed, leaving his wife and two children in the house. Mrs. Kerley formed a relationship with the plaintiff, Mr. Chandler. Mr. and Mrs. Kerley put their house on the market for sale, but failed to sell it at around £14,300. The building society threatened to foreclose the mortgage. The plaintiff then offered to buy the house for £10,000, saying that was all he could afford. In December 1975 the house was sold to him for £10,000, but on the understanding, since he and Mrs. Kerley were planning to marry once she was divorced, that she could continue to live there indefinitely. Mrs. Kerley even asked the plaintiff what would happen if they parted, and he replied that he could not put her out. Within six weeks of his purchase Mr. Chandler terminated his relationship with Mrs. Kerley, and he subsequently sought possession of the house. The Court of Appeal held that Mrs. Kerley had a contractual licence, but one which was terminable on reasonable notice, which in the circumstances amounted to twelve months. That seems pretty hard on Mrs. Kerley; the net result was that she lost perhaps £2,000 in selling to the plaintiff at an undervalue, in return for a licence lasting some 18 months. Solomonesque it may be, but lacking the wisdom of Solomon.

Now for the third problem, do contractual licences bind third parties? Up to Court of Appeal level the answer is now clear, that a contractual licence to occupy creates an equitable interest.[**36**] However, this proposition rests on the extremely curious basis that the court will impose a constructive trust on a purchaser who takes with notice of the licence, such notice usually arising from

the occupation of the licensee.[37] I could give numerous reasons for my view that the constructive trust theory is unacceptable,[38] but I shall confine myself to one. The basic question is whether a contractual licence is now to be regarded as creating a proprietary interest. No doubt equity is not past the age of child-bearing, although any court contemplating the invention of a new equitable interest in land has to find some way around section 4 of the Law of Property Act 1925.[39] A basic question of policy is obviously involved, and the interests of licensees have to be weighed against the interests of purchasers.[40] The question is not easily answered, but my own view would be against recognising licences as proprietary interests, if only because, even if a prudent purchaser could be expected to discover the existence of an occupational licence, there will be many instances where it will be quite impossible for him to discover its terms.[41] At any rate, that is the basic question, and the answer must be either that a contractual licence creates a proprietary interest or that it does not. If it does, then a constructive trust is not required in order to produce that result, any more than a constructive trust is required in order to give a restrictive covenant proprietary effect. If, on the other hand, the answer is that a contractual licence is merely personal against the licensor, then the imposition of a constructive trust cannot legitimately be used to reverse that answer. If it were so used, the device of a constructive trust would do nothing more than revive the old fallacy, long since exposed, that a right binds a purchaser in equity where the purchaser has notice of it; the fallacy is, of course, that the question of notice becomes relevant only where the right in question is of a proprietary kind and therefore capable of binding a purchaser.[42]

These doubts about the proprietary status of contractual licences, and about the validity of the constructive trust theory, have led many commentators to propose an estoppel theory in its place.[43] Now it is well established, indeed trite law, that where one person, A, induces another person, B, to believe that A will grant or has granted to B an interest in A's land, and B acts in reliance on that belief (it is not clear whether B must act to his detriment, as by spending money on A's land[44]), then an equity will arise in favour of B, and the court will decide how that equity shall be satisfied in all the circumstances of the case.[45] This doctrine has on occasion given rise to extravagant results, and I instance in particular Pascoe v. Turner.[46] The plaintiff and defendant were not married but lived together as husband and wife from 1964. In 1965 they moved to another house, bought by Mr. Pascoe, who also bought the contents. In 1973 he formed a relationship with another woman and he left Mrs. Turner later that year. She stayed in the house and on several occasions he told her that the house was hers. During the next couple of years she spent £230 out of her savings of £1,000 on various jobs around the house and on carpets and furnishings. In 1976 he demanded that she leave; she refused and he commenced these proceedings for possession. The Court of Appeal held, rightly, that he was estopped from denying that she should have some occupation interest, but held that in all the circumstances justice required that she should have the fee simple in the house; the plaintiff was ordered to execute a conveyance to her forthwith and at his expense. A remarkable contrast with Tanner v. Tanner,[47] Horrocks v. For-

ray[48] and **Chandler** v. **Kerley.**[49] Of particular interest, however, is that there are some cases which seem to show that a licence may arise by estoppel, and that such a licence will constitute a proprietary interest (the Court of Appeal seems to take that view in **Ives** v. **High**[50]). Now it seems perfectly clear that the doctrine of proprietary estoppel can give rise to proprietary interests, and therefore that this kind of estoppel can be used not only as a shield but also as a sword.[51] In such cases, however, it cannot be right for the court to purport to create as proprietary interests rights which the general law does not recognise as having a proprietary character; in short, estoppel interests are interests of a recognised and established kind, which happen to arise by estoppel rather than in some other manner. The most curious anomalies will arise if that proposition is rejected. For example, there will be circumstances where the dividing line between contract and estoppel will be narrow. Some people regard **Errington** v. **Errington**[52] as a contractual case, others contend that it is based on estoppel. **Crabb** v. **Arun District Council**[53] clearly has to be based on estoppel (there was, on the facts, no concluded contract, no written memorandum, and no authorised agent capable of binding the defendants[54]), but a relatively minor alteration of the facts would have made it a contractual case. My point is that the substantive outcome cannot rationally depend on whether the parties have actually reached agreement, inducing an expectation in the promisee, or whether that expectation is induced by the other party's representation and thus arises from estoppel. I contend that in both cases the ultimate and crucial question is whether a proprietary interest is created, and if so what kind of proprietary interest; once that question is decided, the general law will determine the characteristics of that proprietary interest. Since, in the case of estoppel, that question depends on the decision of the court as to how the equity shall be satisfied, it seems best to regard the proprietary interest as inchoate until it is crystallised by that decision (or agreement between the parties).Even so, a purchaser with notice (or its registered land equivalent) of the facts giving rise to the estoppel should take subject to those inchoate rights, and therefore subject to the proprietary interest as ultimately created; the position is analogous to the case of a purchaser taking subject to some pending land action in which a proprietary interest is claimed.[55]

In some cases the courts seem to have accepted that interests arising by estoppel must be fitted into the general proprietary framework. For example, consider **Inwards** v. **Baker**[56] and **Dodsworth** v. **Dodsworth.**[57] In the former case, Mr. Baker the father had in 1931 encouraged his son, the defendant, to build a bungalow on the father's land. The bungalow was built and the defendant had lived there ever since. The father died in 1951. Under his will the land vested in trustees holding for persons other than the son. The trustees appeared for some years to acquiesce in the position, for it was not until 1963 that they commenced these proceedings for possession. It would, of course, have been quite monstrous for the son to have been turned out of his home after living there peacefully for 34 years; the Court of Appeal's decision in his favour was absolutely correct, and the court was right to base it upon proprietary estoppel. Two

comments seem in order, however: (1) the court held that the son could remain in the house for so long as he wished as his home, which seems a remarkably ungenerous result and contrasts vividly with **Pascoe** v. **Turner**[58] (though, to be fair, it would seem that the son had not claimed anything more); (2) it is not clear whether the court regarded the son's occupation rights as resting upon a licence or whether he was to have a full life interest. In my view, it should not be regarded as a licence, since, under the general law, as I have argued, an occupational licence should not bind third parties, and estoppel cannot give it any wider effect; nor was there any personal estoppel against the trustees. In order, therefore, to bind the trustees, it must be a life estate. That has the effect, it is true, of involving the complicated machinery of the Settled Land Act 1925, but perhaps that is not wholly inappropriate, since it would give the defendant powers of control, including powers of disposition, over his own home during his lifetime. It would also give him the ability to move house without losing his financial stake, should that become necessary. Certainly, the Court of Appeal in **Dodsworth** v. **Dodsworth**[59] adopted the life estate interpretation of **Inwards** v. **Baker**.[60]

Just one more cautionary case (I might almost say misleading case) before I conclude, and that is **Hussey** v. **Palmer**.[61] Mrs. Hussey arranged with her daughter and son-in-law, the defendant, to go and live in the defendant's house. An additional bedroom was needed, and Mrs. Hussey paid £607 to a builder to finance the extension. No arrangements were made for re-payment by Mr. Palmer or his wife. Mrs. Hussey went to live in the house but the arrangement did not work out well. After 15 months Mrs. Hussey left and went to live elsewhere. She became short of money, but her son-in-law refused her request for financial help. She then claimed back her £607 as money lent. Her claim nearly became a procedural disaster, and its rather bizarre course probably helps to explain the unsatisfactory outcome. The claim came twice to court First time round the registrar indicated his view that the £607 was not a loan but was paid under a family arrangement (whatever that may mean); Mrs. Hussey accordingly submitted to a non-suit. The next year she instituted fresh proceedings claiming the £607 on the basis of a resulting trust. Mrs. Hussey gave evidence that the £607 was a loan to Mr. Palmer; he did not give or call evidence. The judge found that it was a loan; Mrs. Hussey's counsel then sought leave to amend the claim by adding an alternative claim for money lent, but leave was refused and Mrs. Hussey's case was therefore dismissed. If Mrs. Hussey understood anything of what had happened, she must at that point have been somewhat disappointed with her legal advisers. Her appeal was, however, successful, a majority holding that a trust should be imputed or imposed, and that she was entitled to an interest in the house proportionate to the £607 she had paid for the extension. My instinct is to think that it was right, the cohabitation agreement having broken down so quickly, that Mrs. Hussey should be repaid her £607, but I find it impossible to understand why it was thought desirable or necessary to invent a trust in order to bring about that result. All that was required was a

solution **inter partes,** but the creation of a trust necessarily involves third parties. In effect, the debt becomes secured, so that in the event of Mr. Palmer's insolvency Mrs. Hussey would have priority over his general creditors.[**62**] Further, Mrs. Hussey acquires an interest in the entire house, which can hardly have been intended by anyone, and difficult conveyancing problems ensue: since the court's decision has made (or appears to have made) Mrs. Hussey an equitable co-owner,[**63**] Mr. Palmer now holds the legal estate on a statutory trust for sale, and should appoint a second trustee in order to sell with vacant possession; if that were not done, and it seems an unlikely course in practice, a purchaser might be faced with difficult inquiries, especially if Mrs. Hussey were in occupation at the time of the sale (for then, whether the legal title were registered or unregistered, such occupation would be sufficient to impose a duty of inquiry on the purchaser). I think that Mr. Palmer would be very surprised to learn that his beneficial interest in the house had become converted, for certain purposes, into an interest in the proceeds of sale. I believe that property concepts were used unnecessarily or undesirably, presumably because the Court of Appeal thought that a satisfactory personal remedy could not be devised (that is a phenomenon familiar from the law of restitution, where **Sinclair** v. **Brougham**[**64**] had had a baleful influence, leading, as on its own facts, to the improper use of proprietary concepts). I believe that this assumption in **Hussey** v. **Palmer** was unfounded. What should the court have done? I believe that, rather than inventing a trust, it would have been far more satisfactory to have invented terms of a contract. Some imagination would have been required so as to cope with a variety of contingencies, but it might be along the following lines.[**65**] The contract would confer on Mrs. Hussey a personal and non-proprietary licence to occupy the new room, with ancillary rights over the remainder of the house, rent-free for life. If that arrangement proved satisfactory and she spent the rest of her days in the house, the debt would be extinguished. If the house were sold, she would then be entitled to be repaid the £607, perhaps with interest. If she were to leave, much would depend on the reason. If her departure was genuinely voluntary, for example if she intended to re-marry, I doubt if it would be right to compel re-payment at all. If, on the other hand, she was in effect forced out by Mr. Palmer, then immediate repayment of the £607 with interest would be appropriate. The licence itself would, of course, be protected by an injunction, if necessary, against Mr. Palmer, but if co-existence proved impossible then Mrs. Hussey could be compensated either by decreeing repayment of the loan with interest or by assessing the surrender value of her licence.[**66**]

Let me now conclude by attempting to draw together some of the threads that have run through this lecture. The last thirty years or so have seen the courts struggling to give legal shape to a variety of informal transactions which do not on their face readily fit into the logical and orderly structure of English land law, or, in some cases, without unacceptably unjust consequences. The response of the courts has been to engineer a significant development in the law relating to contractual licences, proprietary estoppel and constructive trusts. All three of

these concepts are largely unregulated by the property legislation of 1925, with its deliberate bias towards the purchaser of land and away from other claimants; the courts have therefore been able to swing the pendulum back a little towards occupants of land in particular, and in a case like **Ives** v. **High**[67] also back towards incumbrancers. The problem is, however, that the courts have not succeeded in welding these new ideas into any kind of rational structure. Indeed, in many instances, they have manifestly not even attempted to do so, being content to produce what they regarded as a fair result on the facts of the individual case and as between the particular parties to that litigation. I would argue that, in the sphere of property law in particular, that is too narrow a view; proprietary interests by definition bind third parties, and therefore do need to be accommodated in a wider property structure, including a system of conveyancing designed to enable a purchaser by reasonable inquiries to discover the existence and nature of proprietary interests which will continue to bind the land in his hands. **A fortiori** is this true under a system of comprehensive registration of title, to the virtues of which the present government is a latter-day convert.[68] In short, in property matters the courts' thinking must be three-party-dimensional, not two-party-dimensional. Far from that, however, in many of the cases which I have reviewed the courts have used one or more of the three concepts of licence, estoppel and constructive trust as nothing but a simple and essentially magic incantation: if Mrs. Evans does not otherwise have a proprietary interest entitling her to stay in occupation, call it a constructive trust and the problem evaporates;[69] if Mr. High does not otherwise have a right of way across his neighbour's yard, call it a licence by estoppel and, abracadabra, he is entitled to judgment.[70] As things stand, we are well on the way to recognising licences as a kind of shadow proprietary institution: we have licences for a term of years,[71] and licences for life;[72] we have licences for an indeterminate period,[73] we have, in **Ives** v. **High**,[74] an estoppel licence with most of the characteristics of an easement. There seems no reason in principle why there should not be a perpetual licence, analogous to a fee simple.[75] Of course, some of these cases have demonstrated various unsatisfactory features of the orthodox legal position. For example, I have always felt, with Megarry and Wade,[76] that a registrable interest should not be held void for non-registration against a purchaser with actual knowledge of it;it is the obvious immorality of the orthodox rule that underlies **Ives** v. **High**.[77] Again, it does seem extremely odd, in a case like **Binions** v. **Evans**,[78] that Mrs. Evans not only enjoys a measure of security in which to end her days peacefully but also wields the extensive powers of a tenant for life under the Settled Land Act. Perhaps we need some radical surgery to overcome the problem. I suggest that we abolish the entailed interest (and who would lament its passing?) and then repeal the Settled Land Act. After all it was, as every law student knows, the phenomenon of settlement and resettlement exploiting the power to bar the entail, which led to the Settled Land Act 1882, and rightly so; but, if entails were abolished, it would not be possible to tie up land for longer than one or more lifetimes within the time limits permitted by the rule against perpetuities. The threat to the public interest would then be slight and the complicated

structure of the Settled Land Act could be dispensed with.[**79**] Any such reforms are, of course, for the future. Meanwhile, I think that the courts' measures of avoidance have so far proved largely unsatisfactory. Indeed, I fear that I have demonstrated, at any rate to my own satisfaction, the truth of the pejorative phrase which forms the first element in the title to this lecture: ''Licensed Anarchy''.

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1 **The Rational Strength of English Law**, pp. 79, 105.

2 The starting point is **Errington** v. **Errington and Woods** [1952] 1 K.B.290.

3 Law of Property Act 1925, ss. 52(1), 54(2).

4 **Ibid.**, s.40.

5 **Ibid.**, s.53(1)(b).

6 Settled Land Act 1925, ss. 5, 6, 38-73, 75. Any attempt to impose an obligation on the widow to consult John's wishes would be made void by s.106. Compare the position under a trust for sale, where it is permissible to impose an obligation to consult or even to obtain a consent: Law of Property Act 1925, s.26.

7 This example assumes the common case where the conveyance contains an express trust for sale and declaration of trust; there would otherwise, of course, be a statutory trust for sale: Law of Property Act 1925, s.34.

8 See **Re Evers' Trust** [1980] 3 All E.R. 399, disapproving **Burke** v. **Burke** [1974] 2 All E.R. 944.

9 See, for example, **Jones** v. **Challenger** [1961] 1 Q.B. 176.

10 See, for example, **Re Lowrie (a bankrupt)** [1981] 3 All E.R. 353.

11 **Re Kempthorne** [1930] 1 Ch. 268.

12 [1967] 2 Q.B. 379.

12 See note 16, **post**.

13 See, for example, Dawson & Pearce, **Licences Relating to the Occupation or Use of Land**, p.38; Gray & Symes, **Real Property and Real People**, pp.140-142; Megarry & Wade, **The Law of Real Property**, 4th ed., pp. 778-779.

14 See, for example, Crane, **Estoppel Interests in Land** (1967) 31 Conv. (N.S.) 332.

15 Land Charges Act 1972, s.4(6); **Midland Bank Trust Co. Ltd.** v. **Green** [1981] A.C.513

16 The definition of "equitable easement" in Land Charges Act 1972, s.2(5), provides no justification for the very restricted interpretation adopted by Lord Denning M.R., [1967] 2 Q.B. 379, 395-396. His interpretation would have the manifestly inconvenient effect of creating two categories of equitable easements, one registrable, the other not.

17 See **Tito** v. **Waddell (No.2)** [1977] Ch.106, 295 per Sir Robert Megarry V-C.: "... with continuing benefits and burdens on both sides the burdens could be escaped at the price of ceasing to enjoy the benefits", citing also **Hopgood** v. **Brown** [1944'] 1 W.L.R. 215, 266, and **Parkinson** v. **Reid** (1966) 56 D.L.R. (2d) 315.

18 This highly artificial step seems necessary because the Land Charges Register is a names register, and priority for the incumbrance can be preserved only by registering against the name of the estate owner at the date of its creation: Land Charges Act 1972, s.3(1). In the case of registered land, the desired result can be achieved by straightforward rectification of the register, placing a notice in the charges section of the title to the servient land; see Hayton, **Registered Land**, 3rd ed., p.171.

19 [1982] Q.B. 133n.

20 The "personal estoppel" approach is favoured by Hayton, **op. cit.**, pp. 20, 162, 171; see also Jackson, **Security of Title in Registered Land** (1978) 94 L.Q.R. 239.

21 See the well known and much approved dictum of Denning L.J. in **Facchini** v. **Bryson** [1952] 1 T.L.R. 1386, 1389.

22 For example, see **Marchant** v. **Charters** [1977] 3 All E.R. 918 (the "stake in the room" test).

23 [1978] 2 All E.R. 1011. See also **Aldrington Garages Ltd.** v. **Fielder** (1979) 37 P. & C.R. 461.

24 See **Walsh** v. **Griffiths-Jones** [1978] 2 All E.R. 1002; **Demuren** v. **Seal Estates Ltd.** (1978) 249 E.G. 440; **O'Malley** v. **Seymour** (1978) 250 E.G. 1083.

25 S.1 and Sch.2, para. 1.

26 S.48.

27 [1975] 3 All E.R. 776.

28 [1976] 1 All E.R. 737.

29 See Law Com. No. 118, paras. 6.6 **et seq.** For a terrible illustration of the consequences for unmarried cohabitees of the lack of a property adjustment jurisdiction see **Burns** v. **Burns** [1984] 1 All E.R. 244.

30 [1978] 2 All E.R. 935.

31 See [1978] 2 All E.R. 935, 941 per Roskill L.J., 942 per Browne L.J.

32 **Ibid.**, 939.

33 **Ibid.**, 942. Similarly, **ibid.**, 940-941 per Roskill L.J.

34 See also **Williams** v. **Staite** [1979] Ch. 291, where Lord Denning M.R. and Cumming-Bruce L.J. seem to envisage (though for somewhat differing reasons) that sufficiently bad behaviour could preclude the arising of an equity under the doctrine of proprietary estoppel, or perhaps even justify the forfeiture of a proprietary interest which had earlier crystallised by court decision (there had been such crystallisation on the facts of the case).

35 [1978] 2 All E.R. 942.

36 **D.H.N. Food Distributors Ltd** v. **London Borough of Tower Hamlets** [1976] 3 All E.R. 462, per Lord Denning M.R. and Goff L.J., approving Lord Denning M.R. in **Binions** v. **Evans** [1972] Ch. 359; **Re Sharpe (a bankrupt)** [1980] 1 All E.R. 198; **Midland Bank Ltd.** v. **Farmpride Hatcheries Ltd.** (1980) 260 E.G. 493.

37 In the case of registered land the actual occupation of the licensee will protect the licence as an overriding interest: Land Registration Act 1925, s.70(1)(g).

38 For devastating and unanswered criticism see Oakley, **Constructive Trusts**, pp. 17-28.

39 "... after the commencement of this Act (and save as hereinafter expressly enacted), an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement" This provision seems not to have been considered by the court in any reported case; it evokes a very unclear comment Wolstenholme & Cherry's **Conveyancing Statutes**, 13th ed., Vol.1, p.60.

40 See Woodman (1980) 96 L.Q.R. 336.

41 **Cf.** the discussion of **Tanner** v. **Tanner** and **Hardwick** v. **Johnson, supra.**

42 See **National Provincial Bank Ltd.** v. **Ainsworth** [1965] A.C. 1175, 1253-1254 per Lord Wilberforce, citing **London & South Western Ry. Co.** v. **Gomm** (1882) 20 Ch. D.562, and **L.C.C.** v. **Allen** [1914] 3 K.B. 642. Equally, where a purchaser takes free from an interest owing to its non-registration, it is not legitimate to impose that interest on the purchaser through the medium of a constructive trust: **Midland Bank Trust Co. Ltd.** v. **Green** [1981] A.C. 513; cf. **Peffer** v. **Rigg** [1978] 3 All E.R. 745,

which cannot be correctly decided. The position is different, of course, if the conveyancing makes it clear that it is the purchaser's **intention** to take subject to an unregistered interest: **Lynns** v. **Prowsa Developments Ltd.** [1982] 2 All E.R. 953.

43 See, for example, Briggs [1981] Conv. 212, [1983] Conv. 285; Thompson [1983] Conv. 50, 471 (both assume that estoppel has a more efficacious proprietary effect than contract, but hold different views as to the relationship between estoppel and contract; the resulting debate generates more heat than light, and the final acrimony is simply wasteful).

44 See **Greasley** v. **Cooke** [1980] 3 All E.R. 710, 713f per Lord Denning M.R.

45 **Crabb** v. **Arun District Council** [1976] **Ch. 179, 192-193 per Scarman L.J.**

46 [1979] 2 All E.R. 945.

47 [1975] 3 All E.R. 776, discussed **ante**.

48 [1976] 1 All E.R. 737, discussed **ante**.

49 [1978] 2 All E.R. 942, discussed **ante**. The ultimate result in **Pascoe** v. **Turner** [1979] 2 All E.R. 945, is premised on the assumption that the court's choice lay between a licence for life and the grant of the fee simple; but there were various other intermediate possibilities which were not even considered, such as a life estate, importing the Settled Land Act 1925, or a lease for life at a nominal rent, as in **Griffiths** v. **Williams** (1977) 248 E.G. 947).

50 [1967] 2 Q.B. 379, discussed **ante**.

51 See, for example, **Pascoe** v. **Turner** [1979] 2 All E.R. 945, where the plaintiff was ordered to execute a conveyance to the defendant; equally, **Crabb** v. **Arun District Council** [1976] Ch. 179. Compare the negative estoppel which has been submitted to be the true explanation of **Ives** v. **High, supra**.

52 [1952] 1 K.B. 290.

53 [1976] Ch. 179.

54 See Millet Q.C. (who appeared as counsel for Mr. Crabb) at (1976) 92 L.Q.R. 342, answering Atiyah, **ibid**. 174. For another case where proprietary estoppel was invoked when the parties had failed to conclude a contract, see **Salvation Army Trustee Co. Ltd.** v. **West Yorkshire Metropolitan County Council** (1980) **41 P. & C.R. 179.**

55 It must be acknowledged that this analysis will give rise to some anomalies. For example, in a case like **Crabb** v. **Arun District Council, supra**, if the arrangement between the parties amounted to a contract and this created an equitable easement, the easement would be registrable under the Land Charges Act 1972 and would be void for non-registration against a purchaser of a legal estate for money or money's worth, unless that purchaser were personally estopped from relying on non-registration (**cf.** the discussion of **Ives** v. **High, ante**); if on the other hand, as on the actual facts, a contractual analysis is impossible, and the arrangement gives rise to a proprietary estoppel, the inchoate rights would not be registrable but would be governed by the doctrine of notice. In the case of registered land, the outcome on the contractual analysis depends on whether s.70(1)(a) of the Land Registration Act 1925 is construed as including equitable easements; plainly, inchoate rights over the council's land would require protection as a minor interest. Where the claimant is in actual occupation of the affected land, the claim would, it is submitted, fall within s.70(1)(g).

56 [1965] 2 Q.B. 29.

57 (1973) 228 E.G. 1115.

58 [1979] 2 All E.R. 945, discussed **ante**.

59 **Supra**.

60 **Supra**. Rather surprisingly, in **Dodsworth** Russell L.J. seems to take the view that the effect of the Settled Land Act in **Inwards** v. **Baker** was to confer upon the defendant a greater interest in the property than was evisaged by the parties. Of course, if in the particular case the Settled Land Act would produce an inappropriate result, a life estate must be avoided; for methods of avoidance see **Dodsworth** and **Griffiths** v. **Williams** (1977) 248 E.G. 947. See also the concluding remarks about the future of the Settled Land Act.

61 [1972] 3 All E.R. 744.

62 **Cf. Re Sharpe (a bankrupt)** [1980] 1 All E.R. 198.

63 There is confusion in the judgments of Lord Denning M.R. and Philmore L.J., since they both also state that Mr. Palmer could discharge the trust by paying £607, a proposition which seems inconsistent with holding that Mrs. Hussey was entitled to a proportionate share; the reason may well be that, on the pleadings, Mrs. Hussey's claim was restricted to the return of her £607. But in **Re Sharpe (a bankrupt)** [1980] 1 All E.R. 198, 201**c**, the decision was interpreted as conferring on Mrs. Hussey "something akin to a lien for the moneys advanced" (it cannot, however, be merely a lien since that would give Mrs. Hussey no right of occupation: **Garfitt** v. **Allen** (1887) 37 Ch.D.48); see also **Savva** v. **Costa and Harymode Investments** (1980) 131 New L.J. 1114.

64 [1914] A.C. 398.

65 The suggested solution is much influenced by two seminal articles by J.D. Davies: **Informal Arrangements Affecting Land** (1979) 8 Sydney L.R. 578; **Constructive Trusts, Contracts and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land** (1980) 7 Adelaide L.R. 200.

66 **Cf. Tanner** v. **Tanner** [1975] 3 All E.R. 776.

67 [1967] 2 Q.B. 379.

68 See the statement by the Solicitor General, Weekly Hansard, 17 February 1984, col. 347.

69 See **Binions** v. **Evans** [1972] Ch. 359.

70 See **Ives** v. **High** [1967] 2 Q.B. 379.

71 As in **Somma** v. **Hazlehurst** [1978] 2 All E.R. 1011, and **Marchant** v. **Charters** [1977] 3 All E.R. 918.

72 As in **Hardwick** v. **Johnson** [1978] 2 All E.R. 935, discussed ante.

73 As in **Tanner v. Tanner** [1975] 3 All E.R. 776, discussed ante

74 [1967] 2 Q.B. 379. If Mr. High's interest over his neighbour's land is truly to be called a licence, there seems no reason why it should be confined within restrictions characteristic of easements, and in particular no reason to insist that the licence should benefit a dominant tenement. The result, however, would be in substance to create an easement in gross. What, for example, would have been the position if Mr. Crabb had sold **all** his land?

75 "**Cf.** the view of Lawson & Rudden, **The Law of Prooertv**, pp. 217-223, that a licence will bind third parties only where it is equivalent to a recognised proprietary interest; they therefore seem to regard a licence as an informal method of creating one of the recognised interests, but they give no reasons why such informality should be regarded as desirable, nor do they explain how their view can be reconciled with the

Law of Property Act 1925, s.40. Much the same view has now been fully argued by Moriarty, **Licences and Land Law: Legal Principles and Public Policies** (1984) 100 L.Q.R. 376. I make just two comments: (i) persuasive arguments are presented in Part C for a "policy of informality", but it is difficult to see how even partial repeal of s.40 can be achieved judicially, (ii) it is not clear how the licences in such cases as **Tanner** v. **Tanner, supra,** and **Hardwick** v. **Johnson, supra,** can be fitted into the scheme of orthodox property rights''

76 **The Law of Real Property,** 4th ed., pp.1049, 1165. As Megarry and Wade point out, the present rule tempts judges to strain the law by adopting various devices. An example from registered land is **Peffer** v. **Rigg** [1978] 3 All E.R. 745.

77 [1967] 2 Q.B. 379. The Land Charges Act 1972 contains an extraordinary diversity in its provisions which protect purchasers from different kinds of unregistered interests, e.g. (1) land charges of Classes A, B, C (except an estate contract) and F, and deeds of arrangements are void against a purchaser for value of any interest; (2) estate contracts and land charges of Class D are void against a purchaser for money or money's worth of a legal estate (in both categories (1) and (2) even actual knowledge is irrelevant and good faith is not required: **Midland Bank Trust Co. Ltd.** v. **Green** [1981] A.C. 513); (3) a pending land action is void against a purchaser for value of any interest without express notice of the action; (4) a petition or receiving order in bankruptcy is void against a purchaser for money or money's worth of a legal estate in good faith and without notice of an available act of bankruptcy. It is difficult in all this to discern any rational policy. Compare the position under the Land Registration Act 1925, where (subject to the problem of interpretation considered in **Peffer** v. **Rigg** [1978] 3 All E.R. 745) all interests in the residual category of minor interests, which are not protected on the register, are void against a purchaser under a registered disposition who takes for value and in good faith.

78 [1972] Ch. 359. There is no justification for the puzzlement of Lord Scarman in **Chandler** v. **Kerley** [1978] 2 All E.R. 942, 946g, at the decisions in **Binions** v. **Evnas** and **Bannister** v. **Bannister**[1948] 2 All E.R. 133, that the Settled Land Act applied; once a settlement is shown to exist, the Act does apply, whether the parties or the judges like it or not. That passage in the judgment of Lord Scarman, and an odd statement at p.946b about the relationship between law and equity, slightly mar an otherwise admirable analysis.

79 The Settled Land Act can now be avoided by creating a lease for life at a nominal rent: see **Griffiths** v. **Williams** (1977) 248 E.G. 947; care must be taken so as to ensure that the lease does not fall within the Rent Act 1977 (or analogous legislation) or the Leasehold Reform Act 1967.

WOMEN'S RIGHTS AND POSITIVE ACTION THROUGH LEGISLATION: THE AMERICAN EXPERIENCE

by **Carolyn Ellis**

INTRODUCTION

During the last twenty years the women's movement in America has focused a great amount of attention on the problems of sex discrimination. As a result of legal changes in the last two decades, the role of women in American society has drastically changed, improved and expanded. This paper will address some of the conditions and legislation that played a prime part in increasing women's participation in modern society.

Contrary to popular thought, the women's movement did not begin in the 1960s. The 1960s, rather, brought a revival of feminism. The struggle for equality began earlier in the first half of the nineteenth century. At the time of the Republic's formation, the prevailing attitude about women's rights was summed up by no less than the author of the Declaration of Independence, Thomas Jefferson, in the following manner:

"were our state a pure democracy there would still be excluded from our deliberation women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."[1]

One of the first recorded advocates of women's rights in the new nation was Abigail Adams. Abigail was the wife of John Adams, who was a drafter of the Constitution and, later, second president of the United States. Left at home in Massachusetts, Abigail admonished John, who was in Philadelphia at the Constitutional Convention, to "forget not the ladies of this new country in your document, for if you do they will foment a revolution."[2] Adams' reply to his wife was a laughing chide. The new Constitution was approved, and women were purposely omitted.

Shock waves did not result. Only much later did an incident happen to some American women in London which fired their spirits to action. In 1840 the World Anti-Slavery Convention was held in London, and American women and men sailed to England as delegates. Women had been active in the abolitionist cause during the 1830s in America, so their participation in yet another abolitionist meeting did not initially seem startling. However, once at the convention they were advised that, inasmuch as they were women, they would be barred from receiving credentials as delegates. They were permitted to attend only as spectators in the gallery. Rankled by this indignity, Lucretia Mott and Elizabeth Cady Stanton left the convention hall and discussed the possibility of convening

a women's meeting to address the indignities and lack of rights suffered by women.[3] It was not until 1848 that the meeting envisioned by Mott and Stanton came to pass in Seneca Falls, New York. The American women's movement dates itself from the time of the Seneca Falls meeting. Initially, the women worked for abolitionist goals along with their own goals for equality. After the Civil War, they continued to work for the passage of the Fourteenth and Fifteenth Amendments to the Constitution in the vain hope that the civil rights included in those amendments would extend to them as well as to blacks.[4] Unfortunately for the women, their cause was not advanced through the amendments. Women as a class were totally excluded from the language of the amendments. The amendments' rights of equal protection, due process, and the right to vote were given only to black males. Moreover, for the first time the word "male" was specifically added to the Constitution, language that symbolized for women their second-class status.

The women were stunned and angered by the defeat. In the aftermath of this loss, they turned to the courts to redress their grievances. The first significant case was **Bradwell** v. **Illinois**, wherein Myra Bradwell sued the State of Illinois for its refusal to admit her to the practice of law because she was a woman.[5] The high court turned down Bradwell's claim, using language that reflected society's attitude toward women:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and women. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general consitution of things and cannot be based upon exceptional cases."[6]

Women's rights suffered another blow a year later when the United States Supreme Court rendered a negative decision in **Minor** v. **Happersett** holding that the right to vote was not a privilege and immunity subject to the Fourteenth Amendment.[7] After these two defeats women during the next 100 years did not to a great extent litigate the question of whether the Fourteenth Amendment applied to them. On those few occasions when they did, they invariably lost. Finally, in 1971, in **Reed** v. **Reed**,[8] the United States Supreme Court began a modernization of its constitutional analysis under the Fourteenth Amendment. The result was that women plaintiffs were the victors in a number of important sex discrimination cases in the ensuing years.[9]

Because the judicial process afforded virtually no redress until the 1970s, champions of women's rights directed their energies toward legislative reform. Consequently, four major equality bills were enacted into law which have been instrumental in reshaping women's roles in American life: the Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964; Title IX of the 1972 Education Amendment Acts; and the Equal Credit Opportunity Act of 1974. This article will focus upon the first three acts. The highly technical nature of the Equal Credit Opportunity Act renders as adequate discussion of it beyond the scope of this article.

EQUAL PAY ACT 1963

The first piece of federal legislation in modern times to speak specifically to women's problems was the Equal Pay Act of 1963.[**10**] Indeed, it is the first major bill enacted on behalf of women in America. This bill, whose simple mandate is that women be paid equal wages for equal work, was highly debated. In fact, it had been introduced and debated in Congress since 1945.[**11**] Although the Equal Pay Act can be utilized to protect either sex against wage discrimination, women constitute the class of plaintiffs who most greatly benefit. At the time of the passage of the Act, women's wages accounted for 63% of the wages made by men.

The Equal Pay Act has a twofold purpose. The first is to overcome the prevailing belief in the marketplace that women are men's inferiors. Its second purpose is to eliminate, to the extent possible, the depressing aspects of women workers' lower standard of living resulting from their depressed wage structure.[**12**] For a number of reasons the Equal Pay Act did not achieve its result. Statistics showed in 1980 that women earned 59% of what men earned, a decrease from the 1963 figure.[**13**] The figures showed that, while women with a high school education earned $8894, men who did not finish elementary school earned $9419; that while women with a college degree earned $11,609, men with an 8th grade earned $12,803, and men with a college degree earned $19,603.[**14**] These figures give us pause to consider why the Equal Pay Act did not achieve its goals.

The central criterion for the Equal Pay Act is equality of work. However, defining work equality creates interpretation problems. In an early Equal Pay Act case the court determined that "equal" work did not mean identical work; rather, to be equal the work only had to be substantially equal.[**15**] In order to ascertain if work is substantially equal, the court must examine whether the job performance calls for equal skill, effort and responsibility and whether the job is performed under similar working conditions.[**16**] Such factors as experience, training, education, and ability are then reviewed.

There were three problem areas inherent in the Equal Pay Act. The first is that the statutory defences are broad. Consequently, it has been relatively easy for employers to utilize them successfully. For instance, wage inequality between the sexes is permissible when it occurs as a result of "(i) a seniority system (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a **differential based on any factor other than sex ...**"[17] (emphasis added). These defences, particularly the broadly-designed fourth one, prevent successful pursuits of many claims.

The second problem inherent in the legislation is the difficulty the plaintiff has in meeting her burden of proof. The third and perhaps greatest deficiency in the legislation is that the Act does not address the pervasive problem of occupational segregation. Occupational segregation is the result of hiring practices which shunt female employees into one job category and male employees into another. Typically, the category composed predominately of women is the lower-paying of the two. The exclusion of occupational segregation from the protection of the Equal Pay Act allowed many employers to continue paying women lower wages. The unfortunate result has been a continuation of a depressed wage structure for women in predominately female jobs. As the court noted in **Schultz v. Wheaton Glass:**

"**Differences in job classifications were in general expected to be beyond the coverage of the Equal Pay Act. This was because in the case of genuine job classifications the differences in work necessarily would be substantial and the differences in compensation therefore would be based on the differences in work which justified them.**"[18]

The Equal Pay Act's enforcement procedure permits the aggrieved individual to initiate a suit within two years after the discrimination ceases. The complainant is not required to file a grievance with the Equal Employment Opportunity Commission (EEOC) but can file a complaint directly with the federal district court. If, however, the complainant does file a grievance with the EEOC, thereby permitting it to investigate and to sue on her behalf, the complainant is precluded from bringing an individual action against the employer.[19] If the complainant is successful, her lower wages can be raised to the higher wages enjoyed by the corresponding male employee.[20] The damages may be as high as double back pay for the last two years of violation. If the plaintiff can prove willful discrimination on the part of the employer, the damages can be set as high as double back pay for three years.[21] As is typical of modern civil rights legislation, attorneys' fees and costs may be awarded to the successful plaintiff.[22]

CIVIL RIGHTS ACT 1964

The second legislative act which has helped to end discrimination in the marketplace is Title VII of the 1964 Civil Rights Act.[23] Title VII has been the most

effective legislative tool women have had to combat economic discrimination. The 1964 Civil Rights Act was a Kennedy Administration bill which was designed to prohibit job discrimination primarily based on race, but also based on national origin and creed. The bill was perhaps one of the most filibustered bills in modern times. Southern members of Congress ardently opposed the passage of the bill. In a desperate attempt to gain support for a negative vote on the bill, a Southern Congressman, Howard Smith, humorously amended Title VII to include women in addition to blacks as a protected class.[**24**] Smith erroneously thought that by such an amendment he could gain anti-female allies who would then vote against Title VII. The ploy failed, and the bill was enacted into law. This legislation, never seriously considered as a plan to embrace women's rights, has become the best weapon available for women to fight economic sex discrimination.

Title VII provides in pertinent part that an employer, employing a minimum of fifteen persons, may not discriminate in hiring, discharging of the employee or in other terms and conditions of the employees.[**25**] Title VII is more extensive, but the main litigation has focused on these areas. The statutory language, "terms, conditions, or privileges of employment" has broad application. It governs not only hiring and firing, but also prehiring advertising, interviewing, placement, wages, promotions, job benefits, working conditions, working atmosphere, transfers and reassignments.[**26**] Title VII applies to employment agencies and labour unions as well as employers with over fifteen employees. What an employer is prohibited from doing, an employment agency or labour union is prevented from doing on its behalf.

The employer's chief statutory defence is a bona fide occupational qualification (BFOQ). A BFOQ can be raised in cases where there is facial sex discrimination. The courts have had some difficulty in specifying what actually constitutes a BFOQ, and they have been reluctant to accept many BFOQ claims. One amusing defense raised as a BFOQ occurred in **Diaz** v. **Pan Am World Airways, Inc.**[**27**] The plaintiff in this case was a man who had applied for a job with the airline as a flight attendant. Pan Am informed Diaz that the job was limited to females. Diaz filed a lawsuit alleging violation of Title VII, and Pan Am attempted to use the BFOO defence. Pan Am sought to show that "female" personality characteristics were essential for the job of flight attendant. The federal appellate court rejected that defence and stated that the BFOQ was designed as a business **necessity** rule rather than a business **convenience** rule. Pan Am's customers' preference for female flight attendants might make hiring women a business convenience but it did not make hiring women a business necessity. Courts have been somewhat conservative in defining a BFOQ. However, women's rights advocates tend to be even more narrow. Many go so far as to allege that the BFOQ is only available for wet nurses and sperm donors. Of course such a narrow interpretation of the defence would render it virtually non-existent.

Where there is a facially neutral policy which nonetheless has a discriminatory impact on women, the courts have fashioned a business necessity defence.[28] A facially neutral rule which has a discriminatory impact on a protected class may still be permissible if the rule serves a legitimate business necessity. The burden naturally falls on the employer to justify the rule as a legitimate business necessity.

In 1978, Congress amended Title VII by the adoption of the Pregnancy Discrimination Act.[29] By doing so, Congress effectively overruled the 1974 United States Supreme Court case of **General Electric Co.** v. **Gilbert.**[30] The Court in **Gilbert** had held that a classification based on pregnancy was not gender-based discrimination. The Pregnancy Discrimination Act corrects that decision and mandates that employers treat pregnancy as they would any other temporary disability.

One of the consequences of Title VII has been to effectively end protective legislation in the United States. Most state protective legislation centered on maximum hours, maximum weight, night hours, or prohibited types of work. The leading case striking down state protective laws is **Rosenfeld** v. **Southern Pacific Co.**[31] Rosenfeld, a female employee of the railroad, was denied a job promotion as agent-telegrapher while a male employee with less seniority was promoted to the position. Rosenfeld, alleging a violation of Title VII, sued. The railroad defended on the theory that California labour laws both prohibited a woman's work hours and restricted weight-loads that women could carry. Southern Pacific Company claimed that giving Rosenfeld the job would cause it to violate California's labour laws. The State of California intervened in the lawsuit. The Court of Appeals for the Ninth Circuit rejected both the railroad's and California's arguments and held that the non-discriminatory mandate of Title VII pre-empted discriminatory state law, even where the purpose of the state was ostensible protection rather than discrimination. The question was litigated in several jurisdictions before all protective laws were ultimately invalidated.[32] In truth, protective labour laws had become largely obsolete by the 1960s, and there was no public outcry at their demise.

As the case law began to develop under Title VII, the courts devised different methods to attack different forms of discrimination. The case of overt discrimination, with its relatively easy burden of proof, quickly became a thing of the past as employers eliminated blatant discriminatory language such as "no women need apply" The courts then recognized that facially neutral provisions could often be discriminatory in the disparate treatment afforded one class or the disparate impact on a class.

A case of disparate treatment arises when a plaintiff is treated differently because of her sex. In such cases the individual complainant may bring a Title VII action, but must prove a series of things before she has made a prima facie

case. In the important case of **McDonnell Douglas Corp.** v. **Green,** the Supreme Court laid out the precise guidelines for proving a prima facie case of disparate treatement.[33] The plaintiff first has to be a member of a protected class. The plaintiff must then introduce evidence that the employer was making some employment decision, for example hiring, and that plaintiff not only was qualified but applied. Plaintiff's next step is to show that the employer rejected her application but, nonetheless, thereafter continued to accept applications from others with her qualifications. Once she has accomplished this, the burden shifts to the defendant to prove a legitimate and nondiscriminatory reason for the applicant's rejection. If the employer successfully meets this burden, and it is not difficult to do so, the burden shifts back to the plaintiff who will then have an opportunity to attempt to prove that the reasons offered by the defendant were in fact a sham and served to cover up its discriminatory intent. Ultimately, the burden required of the plaintiff is to prove subjective discriminatory intent on part of the employer. Because of the difficulty of proving subjective intent, the courts permit the plaintiff to use circumstantial evidence to show discriminatory intent. To this end, the plaintiff may use statistical evidence to prove her case. **McDonnell Douglas** involved a black applicant, but the guidelines apply to any Title VII plaintiff with a disparate treatment claim. Disparate treatment cases can obviously go beyond the hiring questions; they can arise in the content of discharges, promotions, and other conditions in employment.

A second theory of recovery has developed around the concept of disparate impact. In an instance of disparate impact, a facially neutral employment rule or practice of the employer has a disproportionate effect on one group. A good example of such a rule occurred in the case of **Dothard** v. **Rawlinson.**[34] Rawlinson, a female, had applied for a job as a prison guard in the Alabama prison system. Rawlinson failed to meet the statutory minimum weight and height requirements for prison guards (respectively 120 lbs. and 5'2''). These requirements were facially neutral; they did not exclude women per se. However, they did serve effectively to disqualify a disproportionate number of females from the particular job of prison guard. The Supreme Court accepted Rawlinson's disparate impact argument. Nonetheless, Rawlinson lost the case on other grounds; the Court was persuaded by Alabama that a seperate state rule which provided the only male guards would be hired in maximum security prisons was a BFOQ and upheld Alabama's denial of a job to Rawlinson on that basis.

Generally, in a case of disparate impact, the defendant has available the judicially created defence of business necessity. The defendant's burden is met when it establishes that the rule in question is reasonably necessary for the essential operation of the business. Once that is established, the burden shifts to the plaintiff, who may take one of two lines of rebuttal - either that other means existed which would achieve the same business results without creating a disparate impact or that the employer's rationale is a disguise for discrimination. In a case of disparate impact, the plaintiff is freed of the obligation to prove discriminatory intent. Simply showing the results of the facially

neutral rule is sufficient to prove the case. Normally this can be done through the use of statistical evidence which shows the disproportionate effect on one sex. Disparate impact cases are particularly susceptible to class action claims.

Title VII has been applied to cover a variety of employment practices. One of these practices is sex harassment in the workplace. When first presented with the claim that sex harassment was prohibited by Title VII, courts were reluctant to accept it. However, in 1977, thirteen years after the passage of the legislation, the court of appeals in **Barnes** v. **Costle** held that sex harassment in the workplace was indeed sex discrimination prohibited by Title VII.[**35**] Guidelines later promulgated by the EEOC and relied upon by the courts have defined the somewhat ambiguous term ''sex harassment''.[**36**] While the guidelines are not binding on the courts, courts give great deference to them. The guidelines were designed to cover a host of activities, some overt and some more subtle. The key seems to be whether the behaviour is unwanted and offensive. If submission to an unwanted sexual advance is either explicitly or even implicitly a ''requirement'' of employment, that clearly constitutes sex harassment. The supervisor who pressures an employee into granting sexual favours with promises of job advancement or the supervisor who retaliates against an employee who does not yield to his advances both clearly violate Title VII. But the offensive activity need not be requests for sexual favours or unwanted sexual advances; it may also be ''other verbal or physical conduct of a sexual nature''.[**37**] Moreover, when such conduct has either the purpose or the result of causing significant interference with the harassed employee's job performance, it may be labelled sexual harassment. The guidelines even go so far as defining sex harassment as unwanted conduct of a sexual nature which creates an intimidating, hostile or offensive working environment. A major advance in the development of sex harassment cases occurred in **Bundy** v. **Jackson**.[**38**] In that 1981 case, the court of appeals held that a harassed employee was not required to show economic harm in order to prevail in her suit. Proof of the unwelcome activity alone was sufficient to win her case.

The guidelines also delineate when an employer may be liable for sexual harassment. If the harasser is an agent of the employer or in a supervisory position, the complainant need not establish that the employer had actual or constructive knowledge of the offensive conduct. For other employees whose conduct constitutes sex harassment, the employer is only liable if it knew or should have known of the harassing behaviour.[**39**] This latter provision covers situations where one employee harasses another employee of equal rank.

The most current and potentially the most significant theory being developed today under Title VII is that known as comparable worth. Comparable worth is an attempt to rectify the wage discrimination brought about by occupational segregation. In essence, it seeks to fill the gap in the Equal Pay Act. Since it was clear that the Equal Pay Act could not address the problem of wage disparity between jobs of comparable value to the employer, the next step was to deter-

mine whether Title VII was a possible weapon. Initial attempts to use the concept failed. However, the concept gained a foothold toward acceptance in the 1981 Supreme Court decision, **County of Washington** v. **Gunther**.[40]

In **Gunther**, the female prison guards in Washington County, Oregon, were paid 70% of what the male guards were paid. The plaintiffs' argument was not that there was a wage disparity in equal jobs. The women guards did not perform equal work to the male guards. Because the women guards had fewer inmates to supervise, they also performed clerical duties; the male guards, on the other hand, had more inmates to supervise. The county's own evaluations of the two jobs showed that the women should be paid at a rate of 95% of what the men received because of the differences in job requirements. The suit was brought because of the 25% wage difference. The plaintiffs did not pursue their claim as a direct comparable worth issue. They were, rather, claiming the right to use Title VII to attack the wage disparity as intentional sex discrimination. The Supreme Court, without mentioning comparable worth, held that wage discrimination based on sex is actionable under Title VII even when no member of the opposite sex has an equal job with higher wages. If the wage discrimination is, however, exempt from one of the four defences to the Equal Pay Act, it does not violate Title VII.[41] But, where the wage discrimination is not based on one of the Equal Pay Act's statutory defences, a claim may lie under Title VII for sex discrimination. With **Gunther** a door was opened for the emerging concept of comparable worth to enter.

The second significant step in the development of the doctrine occurred in 1983 in the federal district court case of **American Federation of State, County, and Municipal Employees** v. **State of Washington**.[42] The State of Washington had several years prior to the case at bar conducted a job evaluation of all state employees in the state classification system, and determined as early as 1974 that predominately female job categories were paid at a substantially lower rate than predominately male categories which were ranked at the same level in the job classification system. For instance, as the court noted, ''[f]or jobs evaluated at 100 points, men's pay was 125% of women's pay. For jobs evaluated at 450 points, men's pay was 135% of women's pay''.[43] The court determined that overall there was a 20% wage disparity between predominately female jobs and predominately male jobs at the same classified level and that such a disparity along with other factors peculiar to this case established intentional sex discrimination. The court held that either under the disparate impact theory or under the disparate treatment theory the State of Washington had discriminated on the basis of sex in violation of Title VII. The remedy fashioned by the court included a back pay order for the class of women victims. The total amount of back pay owed is still unclear, but it is in the range of several hundred million dollars. The case is currently on appeal, and may ultimately be headed for the Supreme Court.

The effectiveness of Title VII litigation in general has been a result of two things: the availability of class actions and the fact that the statute provides for significant remedies. A class action is a procedure used in American civil lawsuits in which one or more parties is permitted to represent a larger group. This is particularly important because a limited number of people can represent enormous numbers when it would be impossible or at best awkward to join them all using the usual procedures of joinder. By means of the class action, vast numbers of aggrieved individuals can be united in one action. There are both implicit and express prerequisites that must be met before a class action is permitted. Obviously there must be a definable class, for example, all owners of 1977 Fords or all women employees of the State of Washington. The person or persons bringing the lawsuit must be a member of that group. [44] If the representatives of the class can show the court that joining all members of the class is impracticable or impossible because of the number of people concerned, they must also demonstrate that the legal or factual questions before the court are common to all members. Having done this, the representatives must show that their claims are typical of the class and that they will adequately protect the interests of the members of the class.[45] Civil rights cases, including sex discrimination cases, often lend themselves to the class action. The use of the class action has expedited numerous claims, saved enormous sums of money and time and provided a certain psychological comfort to the named representatives of the class in sex discrimination cases.

The remedies provided by Title VII have also been a major cause for its success. The court has the full range of equitable remedies at its disposal. It may, for example, order injunctive relief; reinstate or hire the aggrieved employee under appropriate factual circumstances, with or without back pay. It may also award retroactive seniority; order a transfer; or devise an affirmative action order. Indeed, it may even use a variety of these remedies in one case. When the court does order back pay, it is not restricted to the three year maximum in the Equal Pay Act. Additionally, the court may award attorneys' fees and costs.[46] Title VII permits a private cause of action. Nonetheless, before the complainant is permitted to sue, she must first file a complaint with the EEOC. The EEOC will investigate and later attempt to conciliate. 180 days after the filing of a grievance with the EEOC, the complainant is eligible to get a right-to-sue letter from the EEOC. After acquiring the right-to-sue letter, she may file a complaint in the federal district court. However, she must file the complaint within ninety days after receiving the right-to-sue letter.[47] There is no statutory or constitutional basis for a jury case in Title VII cases.

EDUCATION AMENDMENT ACT 1972

While the Equal Pay Act and Title VII provide some relief in economic discrimination, Title IX of the Education Amendments Act of 1972 attacks discrimination in education.[48] Title IX of the Education Amendment Act of 1972, unlike Title VII of the Civil Rights Act of 1964, focuses solely on sex discrimination.[49]

It provides that no person "shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...."[50] The Act then enumerates a few specific exceptions to the general prohibition. Despite the exceptions, the variety of activities or programs protected is immense. Admission standards, scholarships awards, grants and loans, and residence halls, are only a few aspects of educational life that must be equalized. Additionally, sex harassment is deemed to be discriminatory behaviour under Title IX.[51]

The key to Title IX is that only institutions which receive federal funds are bound by it. It cannot be used to counter sex discrimination at institutions which receive no federal aid. To attack sex discrimination at those institutions, one would have to make a constitutional challenge. Federal aid, however, comes in all sizes and packages, direct and indirect, large and small. Even in cases where the federal government gives no direct aid to an institution, but rather makes loans to its students, the Court has held that such a nexus constitutes assistance to the institution and, therefore, subjects the institution to the structures of Title IX.[52] If the institution is in violation of Title IX, the remedy available is the termination of its federal funds. There have been three major Supreme Court decisions interpreting Title IX. The Court has held that Title IX includes a private cause of action as well as a public cause of action.[53] Additionally, the Supreme Court has held that Title IX protects employees of educational institutions as well as students from sex discrimination.[54]

The third case is **Grove City College** v. **Bell**, which, in addition to finding that direct aid to students constituted federal assistance to the institution, dealt with the question of whether the specific program receiving the federal assistance or the entire institution was subject to Title IX. The Court, in a decision which has the potential to render Title IX meaningless, held that only the program or activity which benefited from federal assistance was subject to the requirements of Title IX. By limiting compliance to the specific program, the Court has, in essence, relieved the institution of having to provide equal educational opportunities in other areas. This part of the decision flies in the face of Congressional intent, and it is anticipated that attempts will be made to amend Title IX to nullify that portion of the **Grove City College** decision.

CONCLUSION

During the last 20 years these three large pieces of federal legislation have made it possible for women to make considerable gains. While American women today have greater access to jobs and education, there are still significant gaps. The inability of the Equal Pay Act to address wage disparity has not yet been overcome. Whether comparable worth will be upheld on appeal is uncertain. Thus, the wage inequities rigidified in occupational segregation might not disappear. In education, the **Grove City College** case is a major retreat from the full pursuit of equal educational opportunities. Legislative action has been positive, but much more is needed before women gain full equality in American society.

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1 M. Gruberg, Women in American Politics, at 4 (1968).

2 Eleanor Flexner, Century of Struggle, at 15 (1974).

3 Id. at 70-74.

4 Section 1 of the Fourteenth Amendment of the U.S.Constitution states in pertinent part:

.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person cf life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment of the U.S. Constitution states:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.

5 83 U.S. (16 Wall.) 130, 21 L.Ed. 442 (1873).

6 83 U.S. (16 Wall.) at 141-42.

7 88 U.S. (21 Wall.) 162, 22 L.Ed. 627 (1874).

8 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

9 E.g., Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975).

10 29 U.S.C. 206(d)(1982).

11 U.S. Department of Labour, Equal Pay (1978).

12 Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970) cert. denied 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64.

13 Editorial Research Reports, The Women's Movement: Agenda for the 80s (1981).

14 U.S. Department of Labour, the Earnings Gap Between Women and Men (1979).

15 Schultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. denied 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64.

16 29 U.S.C. 206(d)(1982).

17 Id.

18 Schultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970); cert. denied, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed. 2d 64.

19 29 C.F.R. $ 1620.22 (1983).

20 The reverse can never happen. The higher wages cannot be reduced to equalize those of the discriminated party.

21 29 C.F.R. $ 1604.11 (1983).

22 42 U.S.C. $ 2000e-5(k)(1982).

23 42 U.S.C. $$ 2000e et seq.

24 Leo Kanowitz, Women and the Law: the Unfinished Revolution, at 104-105.

25 42 U.S.C. $ 2000e-2 (1982).

26 29 C.F.R. $ 1604 (1983).

27 442 F.2d 385 (5th Cir. 1971), **cert. denied**, 404 U.S. 950 (1971).

28 See **Griggs** v. **Duke Power Company**, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

29 42 U.S.C. $ 2000e-(k)(1982).

30 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 256 (1974).

31 444 F.2d 1219 (9th Cir. 1971).

32 See, for instance, **Richards** v. **Griffiths Rubber Mills**, 300 F.Supp. 338 (D.Or. 1969); **Garneau** v. **Raytheon Co.**, 323 F.Supp. 391 (D.Mass. 1971); **Local 246, Util. Workers Union** v. **Southern Cal. Edison Co.**, 320 F.Supp. 1262 (C.D. Cal. 1970).

33 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

34 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

35 561 F.2d 983 (D.C. Cir. 1977).

36 29 C.F.R. *f* 1604.11 (1983).

37 **Id.**

38 641 F.2d 934 (D.C. Cir. 1981).

39 29 C.F.R. *f* 1604.11 (1983).

40 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed. 2d 751 (1981).

41 42 U.S.C. *f* 2000e-2(h)(1982).

42 **American Federation of State, City and Municipal Employees** v. **State of Washing**, 578 F.Supp. 846 (W.D. Washing 1983).

43 Id.

44 E.g., **American Federation of State, City and Municipal Employees** v. **State of Washington**, 578 F.Supp. 846 (W.D. Washington 1983).

45 Fed. Civ. P.R. 23(a) and 23(b).

46 42 U.S.C. *f* 2000e-5 (1982).

47 29 C.F.R. *f* 1601 et seq. (1983).

48 20 U.S.C. *f* 1681 (1982).

49 Id.

50 Id.

5 **Alexander** v. **Yale University,** 631 F.2d 178 (2nd Cir. 1980).

52 **Grove City College** v. **Bell,** (1984).

53 **Cannon** v. **University of Chicago,** 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

54 **North Haven Board of Education** v. **Bell,** 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982)..

PLANNING PERMISSION: EFFECT ON EXISTING RIGHTS

by R M C Duxbury

An uncertain question in planning law is the extent to which a condition attached to a grant of planning permission can validly take away or otherwise restrict a landowner's existing rights without payment of compensation. The expression "existing rights" includes property rights and rights of user granted by the planning legislation. There will be many instances where such restriction represents good planning, but this may be insufficient in itself to confer legality. Nevertheless, the power given by the Town and Country Planning Act 1971 to impose conditions is, of necessity, a wide one, and must first be considered.

In determining a planning application, the local planning authority must have regard to the provisions of the development plan, so far as material, and to any other material considerations.[1] They may grant planning permission either unconditionally or subject to such conditions "as they think fit".[2] Further, and "without prejudice to the generality" of the above, under Section 30(1)(a) of the Act of 1971, an authority may impose conditions;

> "for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission ...[3]

In considering the validity of conditions, the courts have evolved certain criteria of which the most recent expression was by the House of Lords in **Newbury District Council** v. **Secretary of State**.[4] Thus planning conditions should;

(a) be imposed for a planning purpose and not for any ulterior one,
(b) fairly and reasonably relate to the development permitted,
(c) not be so unreasonable that no reasonable planning authority could have imposed them.[5]

It might also be added that a condition may be struck down if it can be given no sensible meaning.[6]

There was a spate of decisions in the mid-1960's, of which the most notable is the decision of the House of Lords in **Minister of Housing and Local Government** v. **Hartnell**,[7] where the courts took the line that a condition that derogated from existing rights was unreasonable and ultra vires. In some instances,[8] the courts expressly applied Lord Warrington of Clyffe's famous dictum in **Colonial Sugar Refining Co Ltd** v. **Melbourne Harbour Trust Commissioners**[9]

that a statute will not be held to take away private rights of property without compensation, unless the intention to do so is expressed in clear and unambiguous terms. These cases exemplify what Grant[10] and others have identified as the "private property" theory of planning under which

> "... planning control is an interference with established propreitary rights, and ... applicants are entitled to planning permission in the absence of cogent reasons to the contrary. The powers should be interpreted in such a way as not to deprive an applicant of any compensation entitlement, and not as to disturb private rights of ownership".[11]

This theory is reinforced by the fact that although there is no general right to compensation for refusal of planning permission,[12] there exists in the principal Planning Act statutory machinery for depriving a landowner of existing rights, but only on payment of compensation.[13] However, from 1968 onwards there are a series of decisions of the Divisional Court that take a different tack; abrogation of existing use rights without compensation is permissible providing the condition is otherwise valid; if, in effect, it fairly and reasonably relates to the permitted development.[14] Such decisions may well be informed by what has been described as the "privilege" theory whereby planning permission is a privilege rather than an entitlement; if the terms of the permission are disadvantageous, the developer need not implement the permission. If the developer does implement the permission with a restrictive condition, he voluntarily abandons his existing rights.[15]

In fact, Alder[16] rejects the above reasoning, arguing that it is entirely unsatisfactory except in the case where the terms of the developer's own application for planning permission are inconsistent with his existing rights. The Act of 1971 gives such rights a special status by imposing revocation procedures and a compensation requirement and therefore, he argues, the first instance decisions from 1968 onwards should not be followed and there can be no uncompensated restriction of existing rights by planning condition.

In order to test these views it is necessary to review the case-law in this area. The case may be categorised under the following heads:

(i) cases involving conditions that unreasonably interfere with property rights,
(ii) cases where a condition restricts existing or "established" use rights,[17]
(iii) restrictions upon permitted development, and
(iv) the restriction of activities "lawful" under planning law; principally, changes of use within a use class of the Use Classes Order 1972.

These categories will be dealt with in turn.

Unreasonable interference with the fundamental rights of beneficial ownership

Whereas planning control will obviously interfere with property rights to some extent, in this class of case the court is apparently prepared to strike down a condition on the ground that the interference is unreasonable in the narrow sense of being "manifestly unjust, partial or arbitrary"[18] or be such that no reasonable authority could have imposed it.[19]

In what is possibly the most discussed of all the decisions on the post-1947 planning code, **Hall and Co Ltd** v. **Shoreham-by-Sea Urban District Council**,[20] the developers were granted planning permission to develop a plot of land adjoining the busy Brighton Road in Shoreham. The permission was subject to a condition which required the developers to construct, at their own expense, an ancillary road over the entire frontage of their site and give right of passage over it to and from such ancillary roads as may be constructed on the adjoining land. Clearly, the council's objective here was sound from a planning viewpoint;[21] nevertheless the Court of Appeal, with some reluctance,[22] felt constrained to hold the condition bad on the ground that it was unreasonable.[23] The condition conflicted with the general law because it effectively required the developers to dedicate the road to the public; it has been described as the "expropriation of the applicant's entire beneficial interest".[24]

It is appropriate to ask, some twenty years later, how far the decision in **Hall** v. **Shoreham** has stood the test of time. It is suggested that the case rests on two principles, which clearly emerge from the judgments;

(1) The so-called doctrine of the "alternative code" whereby planning powers cannot be used to duplicate powers available under other legislation on terms less onerous to the local authority. In **Hall** v. **Shoreham**, the council had alternative powers under the Highways Act 1959 to achieve the same objective but only on payment of compensation; it was accepted that this would have been a more regular course.

(2) The presumption of statutory interpretation that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous words.[25]

The applicability of these two principles to planning permission has come under severe strain as a result of the decision of the House of Lords in **Westminster Bank** v. **Minister of Housing and Local Government**.[26] There the council refused the bank's application for permission to build an extension on the ground that the proposed extension might hinder the council's road-widening scheme. There was an alternative way of preventing development by the council, as highway authority, prescribing an improvement line but this involved the payment of compensation. The House of Lords upheld the refusal of plan-

ning permission, ruling that in the case of a refusal of permission, where there are two different ways of preventing development, one entailing the payment of compensation and the other not, a council is acting within its powers if it chooses the method which will deprive the owner of compensation.[27] In the **Westminster Bank** case, the House of Lords relied on Section 220 of the Town and Country Planning Act 1962 (now section 289 of the Act of 1971) which provides that the provisions of the Planning Act are to apply "notwithstanding that provision is made by any enactment ... for authorising or regulating any development of land''. This is somewhat obscure section was not cited in **Hall** v. **Shoreham** but it is suggested that this is not to cast doubt on the actual decision in that case. Apart from the narrow point that the **Westminster Bank** case involved a refusal as opposed to a conditional grant of planning permission, it was, arguably, a case in which the two methods of proceeding were equally appropriate.[28] But in **Hall** v. **Shoreham** the method adopted by the council resulted in the public being given a free highway at the developer's expense and over his land, a result clearly ultra vires the Act. However, whether the wider principles upon which **Hall** v. **Shoreham** was based apply generally to the imposition of conditions is now seriously to be doubted.[29]

If, then **Hall** v. **Shoreham** is a wholly exceptional type of case, it is perhaps surprising that the courts have had occasion to follow it more than once since 1964, most notably in the ''**Hillingdon-Royco**'' case.[30] Here, conditions were attached to a residential planning permission requiring that the dwellings should be occupied by persons on the local authority's housing waiting list and for a period of ten years should be occupied by persons enjoying security of tenure. At first sight these conditions smack of municipal socialism but the background to the case,[31] which was not before the court, was more mundane. It appears that the site in question was relatively small and the council had made a compulsory purchase order in respect of it in order to build council-housing. At the date of the planning permission, the order had not been confirmed. The purpose, therefore, of the conditions was to safeguard the authority's own scheme and, probably, to limit the amount of compensation payable.[32]

Whether knowledge of the background would have influenced the decision of the court is debatable, but nevertheless the Divisional Court, without hesitation, struck down the conditions on the ground of unreasonableness. The conditions required the appellants to assume at their own expense a significant part of the duty of the local authority as a housing authority. Lord Widgery CJ likened the case to **Hall** v. **Shoreham** and spoke of a ''fundamental departure from the rights of ownership''.[33]

It is sometimes said that the case could equally well have been decided on the basis that the council had used their powers simply to secure an ulterior ''housing'' objective.[34] Care should be taken, however, as to precisely what is meant by this; as Grant points out;

> "Simply to pursue a 'housing' objective would not in itself necessarily take a condition outside the powers of the planning Acts, because land use planning is centrally concerned with the issues of adequacy and quality of housing accommodation. The primary objection in the **Royco** case was ... not that the housing motive was ulterior, but that the purpose was to shift a financial burden from the authority to the developer, and that was an ulterior purpose".[**35**]

It should also be noted that normally conditions relating to the occupany of dwellinghouses will be upheld providing they serve some planning purpose. Thus in the recent case **of Alderson** v. **Secretary of State,**[**36**] a condition limiting the occupation of a bungalow to a person employed locally in agriculture or forestry was held valid by the Court of Appeal, following **Fawcett Properties Ltd** v. **Buckinghamshire County Council.**[**37**] The planning objective in this type of case is, to quote Lord Denning,[**38**] to prevent much needed agricultural dwellings being occupied by "people who go up and down to London every day"

Whatever the doubts about **Hall** v. **Shoreham,** it appears that the case has a continuing role in outlawing the "gift of land" type of condition. In the recent case of **M J Shanley** v. **Secretary of State**[**39**] a housing developer was required to donate land to the public as open space; Woolf J considered that the condition "fell four square within the situation ... in **Hall** v. **Shoreham**". It appears that if such a condition does not actually require the developer to dedicate the land to the public, it will be valid.[**40**]

Restriction of existing use rights

When a planning permission is implemented it may have the effect of destroying established use rights simply because it may well be physically impossible to carry on the former uses on the land in question; this may be so where a building is erected. It appears that, as a matter of planning law, this result will be reached where the implementation of the development amounts to a "new planning unit" or a "new chapter in the planning history".[**41**] The discussion that follows is concerned therefore with use rights that are not extinguished by the implementation of the development.

The trend of the early decisions was firmly to the effect that a planning condition could not derogate from such use rights without compensation. Thus in 1964, the same year as **Hall** v. **Shoreham,** Glyn-Jones J handed down a decision, **Allnatt London Properties Ltd** v. **Middlesex CC,**[**42**] in which conditions restricting the occupancy of an existing factory to firms already established within the county were struck down as unreasonable and void. It made no difference that the conditions were in pursuance of an approved development plan policy since, in the view of the learned judge, the conditions could only properly be applied to new factories. In **Minister of Housing and Local Government** v. **Hartnell,**[**43**] the House of Lords unanimously held that a local planning author-

ity were not entitled by condition to deprive a landowner of existing use rights without compensation. It might be thought that such a ruling would have decisively settled the matter, were it not for the fact that the case concerned an application for a caravan site licence by the owner of an existing site. By virtue of section 17(2) of the Caravan Sites and Control of Development Act 1960, such an application was required to be treated as an application for planning permission. The application for planning permission was not therefore a voluntary act but one which the owner of an existing site was obliged to make as a condition of obtaining a site licence. The council granted permission but imposed a condition limiting the number of caravans to six; this was held to be invalid. Despite the circumstances of the application, all their Lordships expressed the principle in the case in general terms[**44**] and it is therefore necessary to consider what authority the case has retained.

First, the authority of **Hartnell** may be affected to a greater or lesser extent by the House of Lords ruling in the **Westminster Bank** case, considered above. Secondly, in 1973, in the Divisional Court case of **Kingsten-upon-Thames Royal London Borough Council** v. **Secretary of State**[**45**], Lord Widgery CJ stated that

> "there never has been any general principle requiring a planning authority when granting planning permission to refrain from attaching a condition affecting existing use rights without financial compensation".

The facts that gave rise to this wide dictum were that the local planning authority had imposed a condition on a permission to reconstruct a railway station that certain other land of the applicants should be made available exclusively for parking. This interfered with an existing use. In upholding the condition, Lord Widgery CJ felt that **Hartnell** could be side-stepped; a case decided purely on its own facts "owing to the shape of the legislation then current with regard to the licensing of caravan sites". **Allnatt,** though correctly decided, was decided on the wrong principle and could be supported "if at all, on the ground that the condition ... did not reasonably relate to the development to be carried out" In fact the Divisional Court placed heavy reliance first on **Prossor** v. **Minister of Housing and Local Government,**[**46**] a case concerned only indirectly with the validity of a condition, and secondly upon Section 30(1)(a)[**47**] of the Act of 1971. The application of these authorities is not without its difficulties and it is proposed to consider each in turn.

Prossors case. In **Prossor,** a site had an existing use right for the sale of used motor vehicles and planning permission was obtained to rebuild the existing service station, subject to a condition that retail sales should be limited to car-accessories. The redevelopment having been implemented, second-hand cars were nevertheless displayed on the site for sale. An enforcement notice alleging breach of condition was upheld by the Divisional Court. Lord Parker CJ said;

> "by adopting the permission granted ... the appellant's predecessor ... gave up any possible existing use rights in that regard which he may have had. The planning history of the site, as it were, seems to begin afresh ... with the grant of this permission, a permission which was taken up and used and the sole question here is, has there been a breach of condition?"

These words, it is suggested, reveal the true basis of **Prossor;** that the implementation of the development had created a new planning unit which had the effect of extinguishing former use rights. Certainly this interpretation of the case seems to have won the approval of the House of Lords in **Newbury District Council** v. **Secretary of State.**[48] Thus **Prossor** is a case in which the court **assumed** the condition to be valid for the purpose of upholding the enforcement notice. Ironically, it seems that the same result could have been achieved (ie extinguishment of the right to sell used cars) even without an express condition. Nevertheless in the **Kingston** case, Lord Widgery CJ was able to say that

> "... what is clear beyond doubt from **Prossor's** case is that the proposition that a condition could not restrict existing uses in the absence of compensation is not sustained ..."[49]

The **Prossor** case was, it is suggested, correctly applied by the Divisional Court in **Petticoat Lane Rentals Ltd** v. **Secretary of State.**[50] In this case, a clear area of land was developed by the erection of a building over the whole of that land. It was held that a new planning unit, extinguishing all former uses, was created by the new building.[51] Where the new building did not cover the whole site, both Lord Widgery CJ and Bridge J reserved judgment as to whether the uses on the "open" land could be extinguished without a condition, thus indirectly recognising the validity of such a condition.[52]

The House of Lords had occasion to discuss these authorities in **Newbury District Council** v. **Secretary of State.**[53] The case concerned the validity of a condition requiring some buildings to be demolished at the end of a period of temporary planning permission for storage use. The House of Lords held that although the condition was invalid on the ground that it did not reasonably relate to the permission, the question was academic since planning permission had been unnecessary.[54]

In the Court of Appeal, Lord Denning had held that the company in question was bound by the permission (and the condition) because having applied for it, accepted it and implemented it, they were estopped from denying its validity; they could not "blow hot and cold".[55] Their Lordships unanimously rejected this and held, applying **Mounsdon** v. **Weymouth and Melcombe Regis Borough Council,**[56] that a grant of planning permission did not prevent it from being subsequently contended that no such permission had been necessary due to an existing use right. The only exception to this was where, in the words of Viscount Dilhorne,[57]

> "the grant of planning permission, whether it be permission to build or for a change of use, is of such a character that the implementation of the permission leads to the creation of a new planning unit, then I think it is right to say that existing use rights attaching to the former planning unit are extinguished. It may be that in **Prossor** the erection of the new building created a new planning unit. If it did, and it is not very clear from the report, then in my view the case was rightly decided".

In fact, in the **Newbury** case itself, the grant of planning permission had not created a new planning unit and therefore the company was not precluded from relying on the existing use rights attaching to the site. Indeed, as pointed out by Lord Fraser, the new planning unit doctrine would only seldom apply to planning permission for a change of use.[**58**]

It is these opinions of the House of Lords (on the "hot and cold" doctrine) that have led one distinguished commentator[**59**] to raise the question of the validity of a condition discontinuing or restricting previous authorised or established uses;

> "this is because they [the opinions] seem to proceed (except in the case of Lord Edmund Davies) on the basis that the **Prossor**, **Petticoat Lane**... line of cases establish that existing uses are extinguished, not by the condition, but by the creation of a new planning unit, or in other words, the bringing of one phase of the planning history of the site to an end and the start of a new one. The doctrine, according to the opinions, would normally only apply on the implementation of a planning permission for a new building but it might apply to a change of use which resulted in the creation of a new planning unit ... If this doctrine is correct then the only effect of a condition is to place restrictions on the future development or use of the land after the existing use rights have been extinguished by the creation of the new unit".[**60**]

If this interpretation is correct, then in the absence of a new planning unit, existing use rights cannot be extinguished by condition. Where there is a new planning unit, a condition will, of course, be redundant. Apart from the practical difficulties inherent in such an approach,[**61**] it is suggested that such an interpretation is the result of an over-literal reading of the opinions and that the House of Lords intended to say no such thing. Their remarks are addressed to the question of whether the **Prossor** line of cases is founded on estoppel or on the new planning unit doctrine. In opting for the latter, their Lordships do not rule out the possibility of a condition extinguishing existing use rights. Indeed, as Hamilton points out,[**62**] the House of Lords did not disapprove the **Kingston** case, although it was before them, and in any case, section 30(1)(a) would seem to give a wide power to impose conditions with no requirement that the land should be within any unit.

Finally, it should be noted that the **Prossor** line of authorities should now be seen in the light of the recent decision of the Court of Appeal in **Jennings Motors Ltd** v. **Secretary of State**[63] where that court unanimously held that the theory that a new building automatically creates a new planning unit starting with a nil use should be discarded. The better view is that, if a radical change occurs in the nature of the buildings on the site or the uses to which they are put, a new chapter in the planning history is opened up in respect of it, which would have the effect of extinguishing existing use rights. Whereas this is a welcome development, this case and the "new planning unit" cases that preceeded it have little bearing on the validity of conditions and confusion of the two lines of authority can lead only to unnecessary complications.

Section 30(1)(a) of the Act of 1971. In the **Kingston** case, Bridge J placed great reliance on section 30(1)(**a**), the very wording of which seemed to confirm a right to restrict use rights without compensation.[**64**]

In fact, higher authority as to the role of section 30(1)(a) is to be found in the decision of the Court of Appeal in **Pyx Granite Co** v. **Minister of Housing and Local Government**[**65**] as far back as 1958. Here conditions attached to a planning permission to quarry granite required, inter alia, that crushing and screening on a nearby site owned by the applicants should be limited to certain times. The Court of Appeal, relying on Section 30(1)(a), held the conditions valid.

The crucial question, under section 30(1)(a) is whether the conditions fairly and reasonably relate to the development - it might have been different if, in **Pyx Granite** the conditions related to land some distance away and therefore not sufficiently "in connection with" the permitted development. It seems clear from the recent case of **Peak Park Joint Planning Board** v. **Secretary of State**,[**66**] a case coincidentally very similar to **Pyx Granite** on the facts, that whether a condition fairly and reasonably relates to the permitted development is a question of fact and not one of law. Another requirement of section 30(1)(a) is that a condition can only be imposed relating to land which is "under the control" of the applicant this requirement has generated a considerable number of appeal decisions.[**67**] Care should be exercised, however, in construing Section 30(1)(a), not to allow the section to restrict or impose any limitation on the general power conferred by Section 29(1).[**68**]

It now appears to be settled law, at least at the level of the Divisional Court, that conditions may lawfully restrict existing use rights providing the restriction reasonably relates to the permitted development. It should be noted that the authorities of **Kingston** and **Pyx Granite** have been applied in recent years by the Divisional Court to restrict existing use rights in the following cases; **A I and P (Stratford) Ltd** v. **London Borough of Tower Hamlets**,[**69**] **Penwith District Council** v. **Secretary of State**[**70**] and **Peak Park Joint Planning Board** v. **Secretary of State**.[**71**]

Permitted development

Under the planning legislation, there is nothing to prevent several planning permissions being held in respect of the same land. It may therefore be asked whether a condition in a later planning permission may legitimately restrict the exercise of an earlier unimplemented planning permission, bearing in mind that compensation is normally payable if the local planning authority wish to revoke or modify a planning permission by order.

There is authority in **Hartnell** that a condition cannot validly achieve such a restriction without compensation,[72] but this must now be seen in the light of the **Westminster Bank** case and the general tenor of the post-**Kingston** line of cases relating to existing use rights. Moreover, if the earlier and later permissions relate to the same land and are, in terms, incompatible, it may be that by implementing the later permission, the developer evinces an intention to abandon the earlier one.[73] And in **F Lucas and Sons Ltd** v. **Dorking and Horley Rural District Council**,[74] Winn J stated, obiter, that a planning authority, without incurring any liability to compensation,

> "... could attach to any planning permission [a condition] that the permission then granted was not to be exercised in addition to ... an already granted permission but was to be treated as an alternative".

Such a condition would, of course, expressly prevent a developer from combining the benefits of two or more permissions but it may be that a condition is unnecessary since each planning permission is a separate decision of the planning authority.[75] Nevertheless, in **Lucas**, as is well-known to planning lawyers, two building permissions were combined in circumstances that were probably quite exceptional. It would seem, then, on the basis of these authorities, that a later permission may validly restrict rights under an earlier permission.

An important question in connection with permitted development is whether a condition may restrict permitted development granted by development order. The current order, the General Development Order 1977, as amended, grants automatic planning permission for various classes of development and there is a specific procedure for revoking such permission, an Article 4 direction, which carries a right to compensation. However, Article 3(2) of the order provides that nothing in the order is to operate so as to permit any development contrary to a condition imposed in any permission granted otherwise than by the order. In **East Barnet Urban District Council** v. **British Transport Commission**,[76] Lord Parker CJ, showing some reluctance to allow GDO rights to be restricted by condition, stated, obiter, that Article 3(2) only applied, in effect, to the situation where a specific permission is followed by the legislation of a development order in unqualified terms. This would mean, according to **Telling**[77] that the Article applies only to conditions imposed on a planning permission granted

before the GDO of 1950 came into operation. But as that author puts it,''Lord Parker's interpretation does not follow inescapably from the wording of Article 3(2) and one is entitled therefore to interpret this provision in the light of other circumstances''

A conflicting view (to Lord Parker's) is to be found in **British Airports Authority** v. **Secretary of State for Scotland**,[78] a decision of the Court of Session. Here, Lord Elmslie seemed to take the view that Article 3(2) of the equivalent Scottish order[79] would allow conditions in an express planning permission to override the fact that there were no such conditions in a planning permission for the same development granted by GCO. However, the point was obiter since, in the case itself, the applicants had not yet acquired the land and did not therefore have the benefit of the GDO permission. In any case, it is arguable that where a GDO permission is acquired, the developer would not be bound by conditions on a later express planning permission for the same development by virtue of the **Mounsdon** and **Newbury** cases.

Restrictions on changes of use within the Use Classes Order 1972

Section 22 of the Town and Country Planning Act 1971 makes it clear that the change from one use to another within a use class of the Use Classes Order is not development.[80] However, unlike the position with permitted development, there is no specific machinery in the Act for preventing such a change of use upon payment of compensation, except the catch-all disctoninuance order under section 51. For this reason, the argument against a condition restricting such a change of use is less strong than in the case of permitted development and such a restriction is in essence no different from, say, an occupancy condition of the type sanctioned by the House of Lords in the **Fawcett** case.[81]

In **City of London Corporation** v. **Secretary of State**[82] Talbot J upheld a condition prohibiting a change of use within Class II of the Use Classes Order (office use), thus putting the validity of such a condition beyond doubt. This decision would presumably apply to the restriction by condition of other matters which by virtue of Section 22(2) of the 1971 Act do not constitute development, such as the use of land for agriculture, providing such restriction is reasonably related to the permitted development. Whether the City of London case would cover restrictions on GDO permitted development is more debatable.

Conclusion

In conclusion it might be said that the trend of authorities over recent years is firmly towards permitting planning permissions to restrict ''planning'' rights without compensation, with the safeguard that where property rights are unreasonably interfered with, the courts will intervene.

However, the legal restraints on planning conditions discussed in this article have certainly frustrated planners with the result that local planning authorities have increasingly sought to achieve planning objectives by agreement.[**83**] Indeed Section 52 of the Act of 1971 (which gives local planning authorities contractual capacity) seems tailor-made to secure restriction of existing rights. Nevertheless, current practice with regard to planning agreements has come under heavy fire from lawyers[**84**] and although such agreements are less susceptible to challenge in the courts, this may well be the next arena of legal dispute involving planners, developers and interested third parties.

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1 Town and Country Planning Act 1971, s.29(1)

2 Act of 1971, s.29(1)(a). They have also, of course, the power to refuse permission under s.29(1)(b).

3 S.30(1)(b) of the Act of 1971 contains a further power to grant planning permission for a limited period only.

4 [1981]AC 578. See also **Pyx Granite Co** v. **Minister of Housing and Local Government** [1960] AC 260; **Fawcett Properites Ltd** v. **Buckinghamshire County Council** [1961] AC 636 and **Mixnam's Properties** v. **Chertsey Urban District Council** [1965] AC 735.

5 As to "reasonableness" in this context, see also **Associated Provincial Picture Houses Ltd** v. **Wednesbury Corporation** [1948] 1 KB 223. It should be noted that the Secretary of State may also review a condition that is unreasonable on the merits as opposed to the legal sense of unreasonable, meaning "arbitrary"; see criteria set out in MHLG Circular 5/68.

6 **Fawcett Properites** v. **Buckinghamshire County Council** [1961] AC 636.

7 [1965] AC 1134. See also **Allnatt London Properties Ltd** v. **Middlesex County Council** (1964) 15 P & CR288, **Hall and Co Ltd** v. **Shoreham-by-Sea Urban District Council** [1964] **1 All ER 1**, East Barnet Urban District Council v. British Transport Commission [1962] 2 QB 484 and **Esdell Caravan Parks** v. **Hemel Hempstead Rural District Council** [1966] 1 QB 895.

8 Eg **Hall and Co Ltd** v. **Shoreham-by-Sea UDC** and **Minister of Housing Local Government** v. **Hartnell**.

9 [1927] **AC 343, 359**.

10 Grant, "Urban Planning Law" Chapter 8. See also McAuslan, "The Ideologies of Planning Law", Chapter 1.

11 Grant, ibid. p. 334.

12 For the exceptional cases, see Telling, "Planning Law and Procedure" Part Two.

13 The machinery consists of orders under s.45 of the Act of 1971 to revoke or modify an unimplemented or partly implemented planning permission and orders under s.51 requiring the discontinuance of a use.

14 **Prossor** v. **Minister of Housing and Local Government** (1968) 67 LGR 109; **City of London Corporation** v. **Secretary of State** (1971) 23 P & CR 169; **Kingston-upon-Thames RLBC** v. **Secretary of State** [1974] 1 All ER 193; **A I and P (Stratford) Ltd** v. **L B Tower Hamlets** (1976) 237 EG 416; **Penwith DC** v. **Secretary of State** (j1977) JPL 371; **Peak Park Joint Planning Board** v. **Secretary of State** (1980) JPL 114. And see the decision of the Court of Appeal in **Leighton and Newman Car Sales Ltd** v. **Secretary of State** (1976) 32 P & CR 1, where that court affirmed **Prossor**.

15 **Grant, op cit p. 334.**

16 **[1973] JPL 701; "Development Control", p 105.**

17 ie use rights which enjoy immunity from enforcement under s.94 of the Act of 1971. These are "prescriptive" planning rights of which the most significant is a use which started before 1964 without planning permission and has not since been abandoned. Such rights are not "lawful" under the planning legislation; **LTSS Print & Supply Co** v. **Hackney LBC** (1976] 1 All E.R. 311; **Young** v. **Scretary of State** [1983] JPL:

For the purposes of this article, the expressions "existing use rights" and "established use rights" will be treated as synonymous.

18 See **Kruse** v. **Johnson** [1898] 2 QB 91, 99 per Lord Russell CJ.

19 **Associated Picture Houses** v. **Wednesbury Corporation** [1948] 1 KB 223.

20 [1964] 1 All ER 1.

21 Without doubt the objective could have formed the subject-matter of a valid planning agreement: see Telling, Trent Polytechnic Seminar on Section 52 Agreements, 1978. But c.f. Tucker (1978) JPL 806.

22 [1964] 1 All ER 1, 18 per Pearson LJ.

23 Because the condition was fundamental to the grant of planning permission, the whole permission fell.

24 Alder, "Development Control", p. 105.

25 The Court of Appeal in **Hall** v. **Shoreham** applied the dictum of Lord Warrington of Clyffe in **Colonial Sugar Refining Co Ltd** v. **Melbourne Harbour Trust Commissioners** [1927] AC 343, 359.

26 [1971] **AC 508.**

27 See also **Hoveringham Gravels Ltd** v. **Secretary of State** [1975]QB 754, 763 per Lord Denning MR.

28 Alder takes this view in [1972] 36 Conv. 421, 428.

29 It has further been suggested that the authority of **Hall** v. **Shoreham** has been eroded by the decision in **Kingston-upon-Thames RLBC** v.**Secretary of State** [1974] 1 All ER 193, considered below.

30 **R** v. **London Borough of Hillingdon ex pte Royco Homes Ltd** [1974] 2 All ER 643. See also **David Lowe** v. **Musselburgh UDC** (1974) SLT 5.

31 As told by Grant, op cit, p. 337.

32 ie to less than full development value.

33 [1974] 2 All ER 643, 651.

34 See Brown (1974) JPL 507.

35 Grant, op cit, p. 337.

36 (1984) 270 EG 225.

37 [1961] AC 636.

38 **Fawcett case**, [1961] AC 636, 680.

39 (1982) JPL 30.

40 **Britannia (Cheltenhem) Ltd v. Secretary of State** (1978) JPL 554. This distinction has been strenuously criticised; see editorial note (1978) JPL 558.

41 See **Newbury District Council v. Secretery of State** [1981] AC 578 and **Jennings Motors Ltd v. Secrotery of State** [1982] 1 All ER 471. This aspect will be considered more fully below.

42 (1964) 15 P & CR 288. See also the Bulletin of Selected Appeal Decisions V11/12.

43 [1965] AC 1134. See also **Esdell Ceraven Park Ltd v. Hemel Hempsteed RDC** [1966] 1 QB 512.

44 Except, possibly, Lord Reid at p. 1157.

45 [1974] 1 All ER 193.

46 [1968] 67 LGR 168.

47 Set out in the opening section of this article.

48 Discussed below.

49 [1974] 1 All ER 193, 201. For further comment on the **Pressor** case see **Gray v. Minister of Housing end Lecel Govarnment** (1969) 68 LGR 15. And see the decision of the Court of Appeal in **Leighton end Newmen Cor Saies Ltd v. Secratary of State** (1976) JPL 369.

50 [1971] 2 All ER 793.

51 But see now **Jennings Metors Ltd v. Secretery of State** [1982] 1 All ER, discussed below.

52 [1971] 2 All ER 793, 795, 796.

53 [1981] AC 578.

54 As the previous use and the permitted use fell within the same Use Class (Class X) of the Use Classes Order.

55 Applying the maxim, "qui sentit commodum sentire debet et onus".

56 [1960] 1 OB 645.

57 [1981] AC 578, 587.

58 [1981] AC 578, 598. The only cited instance is the creation of a new planning unit by the division of a single dwellinghouse into two separate dwellings.

59 R N D Hamilton, "Guide to Development and Planning", p. 208.

60 After raising this interpretation of **Newbury**, the author himself discounts it; ibid, p. 209.

61 The author indicates these, ibid, p. 209. For example, in the **Kingston** case, the permitted works were only alterations.

62 ibid, p. 209.

63 [1982] 1 All ER.

64 [1974] 1 ER 193, 211. For the wording of s.30(1)(a), see opening section of this article.

65 [1958] 1 QB 554. The case was ultimately decided by the House of Lords on a different point, [1960] AC 260.

66 [1980] JPL 114, 118 per Sir Douglas Frank QC.

67 See Markson (1980) 124 SJ 488.

68 See **Hall & Co Ltd** v. **Shoreham UDC** [1964] 1 All ER 1, 7 per Willmer LJ. And see Young [1983] JPL 357.

69 [1976] 237 EG 416.

70 [1977] JPL 371.

71 [1980] JPL 114.

72 [1965] AC 1134, 1155 per Lord Reid who included a grant of planning permission as one of the vested rights that could not be abrogated by condition in the absence of compensation.

73 See the decision of the Court of Appeal in **Slough Estates** v. **Slough BC** [1969] 2 WLR 1157. The point was left open by the House of Lords at [1971] AC 958. But see now **Pioneer Aggregates Ltd** v. **Secretary of State** (1984) JPL 651.

74 [1964] 62 LGR 491, 498.

75 See **Ellis** v. **Worcestershire CC** (1961) RVR 252; **Pilkington** v. **Secretary of State** [1973] 1 WLR 1527.

76 [1961] 3 All ER 878.

77 Telling, "Planning Law and Procedure" p. 129.

78 (1980) JPL 260, 262.And see editorial note at p. 264. See also Young, ibid; Markson (1980) 124 SJ 506.

79 Town and Country Planning (General Development) (Scotland) Order 1975.

80 Act of 1971, S.22(2)(f).

81 **Fawcett Properties Ltd** v. **Buckinghamshire CC** [1961] AC 636. I am grateful to Alder [1972] 36 Conv. 421, 424, for this point.

82 (1971) 23 P & CR.

83 See Jowell (1977) JPL 414; Hawke (1981) JPL 5.

84 See Heap and Ward (1980) JPL 631.

INTESTACY AND FAMILY PROVISION - TIME FOR A RE-THINK?

by John Thurston

Intestates Estates Act 1952

The Intestates Estates Act 1952 amended the intestacy provisions contained in the Administration of Estates Act 1925. The 1952 Act was passed as a result of the Report of the Committee on the Law of Intestate Succession under the chairmanship of Lord Morton.[1] This committee had made the following recommendations as regards the rights of the surviving spouse:-

> If the intestate left issue then the surviving spouse should be entitled to:
>
> (1) the personal chattels absolutely as defined in s.55(1) of the Administration of Estates Act 1925;
> (2) £5,000 free of death duties and costs with interest thereon from the date of death at the rate of £4 per cent per annum until paid or appropriated;
> (3) the remainder of the estate should be held on trust as to one half for the surviving spouse during his or her life and then to the issue on the statutory trusts,[2] and as to the other half on the statutory trusts for the issue.
>
> If the intestate left a spouse and one or both parents, brothers or sisters of the whole blood, or issue of deceased brothers or sisters of the whole blood but no issue, then the surviving spouse should be entitled to:
>
> (1) the personal chattels as defined above;
> (2) £20,000 free of death duties and costs with interest thereon from the date of death at the rate of £4 per cent per annum until paid or appropriated;
> (3) one half of the balance absolutely.

It was also recommended that the surviving spouse should be able to capitalize any life interest, and that he or she should have the right to purchase any freehold house owned by the deceased, or any house of which the deceased had a tenancy with two years or more unexpired at the date of death in which the surviving spouse was living at that date (the matrimonial home). The purchase price was to be the Estate Duty valuation of the matrimonial home.

All these proposals were enacted in the Intestates' Estates Act 1952 with the exception of the proposal with regard to the matrimonial home. In the House of

Commons, Mr Hylton-Foster (York), later a Speaker of the House of Commons, moving the second reading said,

> "The real trouble is that it is as a matter of practice so extraordinary difficult to enact any statutory provisions which are satisfactory in order to carry out this proposal".[3]

The bill as amended in the House of Lords included the second schedule which gave the surviving spouse the following rights in relation to the matrimonial home:-

(1) a right to have the matrimonial home appropriated in satisfaction of any absolute interest in the deceased's estate;

(2) a right when the surviving spouse was one of two or more personal representatives to purchase the matrimonial home, thus overriding the rule that a trustee may not purchase the trust property;

(3) an extension of the power of appropriation in s.41 of the Administration of Estates Act 1925 so that the matrimonial home could be appropriated partly in satisfaction of the surviving spouse's interest in the estate, and partly in satisfaction of money.

The first right was considered in **Re Phelps**[4] where the surviving spouse exercised her right of appropriation in respect of the matrimonial home. In fact, the house was worth more than the absolute interest. It was held that the surviving spouse could pay the difference. The main reason for the decision was that if the personal representative had exercised the right of appropriation under s.41 of the Administration of Estates Act 1925 as amended by paragraph 5(2) of the Second Schedule to the 1952 Act, (the third right referred to above), the surviving spouse could have paid the difference. This widening of s.41 also extended to the surviving spouse's right of appropriation under paragraph 1 of the Second Schedule of the 1952 Act (the first right referred to above).

In making their recommendations with regard to the legacy, the Morton committee took into account statistics obtained from the Probate Registries, which indicated that male testators gave "the whole or the major part of their estates to the spouses in the following proportions:-

> 73 per cent where the estate was under £2,000
> 65 per cent where the estate was between £2,000 and £5,000
> 45 per cent where the estate was over £5,000"[5]

They also relied on figures from the Commissioners of Inland Revenue for the years 1944-1945 and 1945-1946 which indicated that 88 per cent of all estates were under £5,000. In addition, they estimated that for the years 1948-1949 and 1949-1950, 87 per cent of all estates were under £5,000. The Committee

considered that the increased legacy could usually be set off against the matrimonial home by the surviving spouse. A proposal to reduce the legacy to £3,000 and to give the surviving spouse the matrimonial home was rejected on the ground that this would be an unfair distinction between those intestates who owned the matrimonial home and those who rented it.

Criticisms

Two criticisms can be levied at the conclusions of the Committee with regard to the matrimonial home:-

(1) There is no reference to the situation where the matrimonial home is vested in husband and wife as joint tenants so that the survivor automatically takes the whole in addition to his or her entitlement under the intestacy rules. However, it may be that joint ownership of the matrimonial home was not very common at the time of the report.

(2) Even in 1952, as the Committee acknowledged,[**6**] there was some protection for the surviving spouse of a statutory tenant, so that in these situations the surviving spouse would not only take the matrimonial home, but also whatever he or she was entitled to under the intestacy rules.

These criticisms are perhaps far more justified today than they would have been in 1952. There is an increasing tendency for the matrimonial home to be held by the spouses as joint tenants. A Social Survey conducted by the Law Commission, and referred to in their First Report on Family Property[**7**] found that in 1960-61 51 per cent of owner occupiers owned their home jointly; in 1970-71, the proportion had risen to 74 per cent. Even if the matrimonial home is not vested in joint names, it is now clear that the other spouse can obtain an interest in the property by direct or indirect financial contributions. Although the scope of the decisions of the House of Lords in **Pettitt** v. **Pettitt**[**8**] and **Gissing** v. **Gissing**[**9**] is uncertain,[**10**] there is a line of cases in the Court of Appeal to this effect. For example, in **Hargrave** v. **Newton**[**11**] the parties married in 1940, and there were four children. The wife worked from 1960, and used her earnings, and a reward she received for finding some stolen money, for family expenses. The matrimonial home was in the husband's sole name, and after the marriage broke up in 1967, it was held that the wife was entitled to a half share in it. Improvements to property are dealt with in s.37 of the Matrimonial Proceedings and Property Act 1970 which provides as follows:-

> "It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed, or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them, or in other proceedings)".

A member of the family or a surviving spouse can succeed to a protected tenancy under the Rent Acts.[**12**] There is now a right to succession to houses owned by local authorities, and various other bodies, under the **Housing Act 1980.**[**13**]

Furthermore, the effect of the decision in 1975 in **Robinson** v. **Collins**[**14**] can cause problems. There, the spouse elected to take the matrimonial home. At the date of death, it was valued for Probate purposes at **£4**,200. At the date of the hearing the house was worth about£8,000. It was held that the date for valuing the matrimonial home was the date of appropriation, not the date oif death. Pennycuick VC said,

> "There is no reason that I can see why the widow rather than the other next-of-kin should benefit from rising house prices or indeed, in the contrary case, less familiar in the circumstances of today, suffer from a fall in house prices."[**15**]

Whilst this decision may be correct legally, it can be criticized in practical terms. Although the house may have increased in value, the statutory legacy has not done so. At the relevant date, it was £8,750, most of which would have been

taken to pay for the house, whereas if the value at the date of death had been adopted, a substantial sum would have been left over. On the other hand, the higher value attributed to the matrimonial home would have resulted in an increase in value of the residuary estate, which would have benefitted the widow.

In the light of these comments concerning **Robinson** v. **Collins,** developments in the law, and the increasing tendency for the matrimonial home to be held by the spouses as joint tenants, it is suggested that serious consideration should be given to altering the intestacy rules so that the matrimonial home automatically passes to the surviving spouse, in addition to his or her entitlement under the Administration of Estates Act 1925 as amended by the Intestates' Estates Act 1952. Further support for this view can be found in the work of the Law Commission. In their First and Third[**16**] Reports on Family Property, they recommended that husband and wife should by statute become equal co-owners of any ownership interest in the matrimonial home. If this proposal were implemented, it would mean that the survivor would be entitled to the whole of the matrimonial home.

The Personal Chattels

Further criticism can be levied at the definition of personal chattels. This is set out in s.55(1) of the Administration of Estates Act 1925 in the following terms:-

> ''Personal chattels' means carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money''

This definition is frequently incorporated in wills, and a precedent is included in the Encyclopaedia of Forms and Precedents.[**17**] However, the reference to ''carriages, horses, stable furniture and effects'' is somewhat archaic, and the definition can cause some problems. In **Re Chaplin**[**18**] the definition was held to include a 60 foot motor yacht with a paid crew used exclusively by the deceased for pleasure cruises with members of his family. The definition can thus include almost valueless and very valuable items. There are two methods of resolving this problem:

(1) To impose an overall limit on the value of the personal chattels
(2) To specify a limit for each individual item.

An overall limit would mean that the surviving spouse would only get a proportion of the personal chattels, whereas if there is a limit on each item, the surviving spouse would get all the personal chattels with the exception of those above the limit, which can perhaps be regarded as investments. It is therefore suggested that the second solution is better.

Chattels used for business purposes are excluded. In **Re Ogilby**[19] the intestate had a herd of shorthorn cattle on a farm which she owned. She made no profit from breeding them. It was held that the cattle were not personal chattels within the definition.

Whilst **Re Ogilby** is an illustration of the problems which can arise, a further difficulty is the relationship between the words "not used for business purposes" which qualify "Carriages, horses, stable furniture and effects ... motor cars and accessories", and the words at the end, "but do not include any chattels used at the death of the intestate for business purposes". In a note in the Law Quarterly Review[20] the author poses the question of a motor car and an armchair both bought for business purposes, but then used for private purposes on the retirement of the deceased. He goes on to say:-

> "Neither is used for business purposes at the death, so the concluding words of the definition do not exclude either from it. Each, however, was acquired for business purposes and has been so used; and (unlike the armchair) the car is qualified by the words "not used for business purposes" Yet whatever verbal arguments there may be it seems quite unreal to suggest that either the car or the armchair falls outside the definition".[21]

He goes on to suggest that the relevant time for determining whether an article is used for business purposes should be the date of death.

What is the position if the chattel is used only partly for business purposes? It would appear that it does not come within the definition.[22] The chattel which is most likely to cause problems in this context is the motor car, which may be quite a valuable item, and may only be used occasionally for business purposes. It is suggested that the definition of "personal chattels" should be amended so that it only excludes chattels exclusively used for business purposes.

In view of these criticisms, it is suggested that the definition of "personal chattels" could be redrafted as follows:-

> "Personal chattels means carriages horses stable furniture and effects motor cars and accessories, garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical

and scientific instruments apparatus, and consumable stores but does not include any chattels used at the death of the intestate exclusively for business purposes nor money or securities for money nor any chattel having a market value at the date of death in excess of £10,000''

Children

If the surviving spouse is given a greater entitlement on intestacy, it could be argued that this would adversely affect any children, and in particular the children of first marriages. For example, suppose W1 dies, and the whole of her estate passes to H (who has no money of his own), either under her will or the intestacy rules. H marries W2, and dies, either intestate, or leaving a will giving a substantial part or the whole of his estate to W2. W2 will thus inherit the whole or a substantial portion of the property of W1, and it may be that W1's children will not benefit at all. To a certain extent, it may be possible for children in this situation to obtain relief under the Inheritance (Provision for Family and Dependants) Act 1975. In order for an application to succeed under this Act, a child has to prove that the deceased has not made ''reasonable financial provision'' for him or her. This is defined in s.1(2)(b) as

> ''such financial provision as it would be reasonable in all the circumstances for the applicant to receive for his maintenance''

In **Re Coventry**,[**23**] Buckley LJ said:

> ''I would venture to suggest that s.1(2)b might perhaps, in order to explain the interpretation that I would be inclined to put upon it, be paraphrased somewhat in this way; 'In the case of any other application made by virtue of subsection (1) above, 'reasonable financial provision' means such financial provision as would be reasonable in all the circumstances of the case to enable the applicant to maintain himself in a manner suitable to those circumstances''[**24**].

Goff LJ said,

> ''What is proper maintenance must in all cases depend upon all the facts and circumstances of the particular case being considered at the time, but I think it is clear on the one hand that one must not put too limited a meaning on it; it does not mean just enough to enable a person to get by; on the other hand, it does not mean anything which may be regarded as reasonably desirable for his general benefit or welfare''.[**25**]

It is thus clear that maintenance can in appropriate cases include luxuries. In **Millward** v. **Shenton**[26] the deceased left all her property to the British Empire Cancer Campaign for Research. The applicant, one of her sons, had a wasting disease, and was helpless. His wife had osteoarthritis. His application was successful. Lord Denning said,

> ''So far from state assistance being a ground for giving him less, it is a ground for giving him more by doing something to alleviate the distress under which he suffers. It may not necessarily be by increasing his income. It may be better by providing a lump sum as to enable him to have a television set, or a car, or even a better house''.[27]

In **Re Sivyer**[28] there was an application under the Inheritance (Family Provision) Act 1938 as amended by the Intestates' Estates Act 1952, and the Court was able to make some provision for the child of a previous marriage. The intestate had been married three times, and had a daughter, the applicant, by his second wife. The second wife had died intestate and he had inherited her estate. His third marriage was unhappy and did not last for very long. He then died intestate. The applicant was successful in her application. Pennycuick J said,

> ''So here, substantially the whole of the intestate's estate was derived from his second wife. I think that it is a relevant circumstance, and that I ought to give weight to it in deciding what is the lump sum which I should award to the plaintiff by way of maintenance. The exact amount to be awarded is impossible of ascertainment according to any precise formula, but on the best consideration I can give it, my conclusion is this. If the intestate's estate had not to any extent been derived from the plaintiff's mother, then I would have considered £2,000 reasonable provision. In the actual circumstances of the case, I think reasonable provision would be £2,500.''[29]

A further case is **Re Christie**.[30] There, ''maintenance'' for a child was interpreted in a very liberal manner. The deceased owned a house in Essex, and she also had a half share in a house in London. She made a will giving the Essex house to her son, and her interest in the London house to her daughter. She then gave her daughter the interest in the London house. Subsequently, she sold the Essex house, and bought another one. Although she intended to change her will to give the son her new house, she never did so. The son applied under the 1975 Act. The judge, Mr Vivian Price QC said,

> ''Nor in my judgment does the use of the word ''maintenance'' carry with it any implication that that the applicant, in order to qualify, must be in any way in a state of destitution or financial difficulty''.[31]

Later he said,

> "In my judgement, the word "maintenance" refers to no more and no less than the applicant's way of life and well-being, his health, financial security and allied matters such as the well-being, health and financial security of his immediate family for whom he is responsible"

It was ordered that the house purchased by the deceased should be transferred to the son. The unwritten wishes of the deceased were carried out; in effect the court re-wrote the deceased's will.

Re Christie was criticized in **Re Coventry.** In that case, a son returned to live with his parents after a time in the Royal Navy. Shortly thereafter, the conduct of the son and his father forced the mother to leave. The son and father continued to live in the house. He then married, but he continued to reside in the house with his wife, their children and the father. Eventually, the wife left with the children. The son remained in the house. His father died intestate, and his mother was entitled to the whole estate. The son, who was working as a chauffeur, was in arrears with maintenance for his children. The mother had no income other than that which she received from the state. The son's application under the 1975 Act failed. Goff LJ said as regards **Re** Christie,

> "I think that that case may well have gone too far, though it was a strong case, and one fully appreciates and sympathises with the deputy judge's desire to give effect to what appeared to be the clear wishes of the testator".**[32]**

It seems clear from **Re Coventry** that the Courts have very little scope to make awards to children who are capable of supporting themselves. If surviving spouses are given a greater entitlement under the intestacy rules, it may be necessary to amend the Inheritance (Provision for Family and Dependants) Act 1975 so as to give the Courts greater powers to make awards in favour of children. Even if the surviving spouse is not given a greater entitlement, such a reform may still be necessary. In **Re Sivyer**, if the daughter had been capable of supporting herself, it is doubtful if today the Court could have made any order. Such a reform could perhaps be achieved by applying the surviving spouse standard to children. This is defined in s.1(2)a of the Inheritance (Provision for Family and Dependants) Act 1975 as

> "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance".

The position in the United States of America

It may be of use to compare the position in the United States of America with that in England.

Under the Uniform Probate Code, which has been adopted in some states, section 2-102 provides that the surviving spouse is entitled as follows:-

> "(1) If there is no surviving issue or parent of the decedent, the entire intestate estate
> (2) If there is no surviving issue, but the decedent is survived by a parent or parents, the first [$50,000] plus one half of the balance of the intestate estate
> (3) If there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000] plus one half of the balance of the intestate estate
>
> (4) If there are surviving issue, one or more of whom are not issue of the surviving spouse, one half of the intestate estate".[33]

There are alternative provisions for community property states where both parties have rights in property acquired after marriage.

Under Section 2-103

> "that part of the intestate estate not passing to the surviving spouse under section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent, they take equally, if of unequal degree, then those of more remote degree take by representation".[33]

There then follows a list of other persons who would be entitled if there were no one previously entitled.

The surviving spouse is entitled under s.2-401 to a Homestead Allowance of a fixed monetary sum. If there is no surviving spouse, the allowance is divided between the minor dependent children.

In addition, under section 2-402 [Exempt Property] the surviving spouse is entitled from "the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances

and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property is less than $3,500, or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up $3,500 value''.[33]

Under Section 2-403 [Family Allowance]

> ''the surviving spouse and minor children whom the decedent was obligated to support, and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims''.[33]

The Homestead Allowance, the Exempt Property and the Family Allowance are all in addition to any entitlement under the will or intestacy rules.

There are therefore the following differences between the Uniform Probate Code and English Law:-

(1) Under S.46(1)(i)(3) of the Administration of Estates Act 1925 as amended by the Intestates' Estates Act 1925, the surviving spouse does not take the whole estate as he or she could under the American code if the deceased left a brother or sister of the whole blood or issue of a brother or sister of the whole blood.

(2) Under S.46)1)(i)(2) of the 1925 Act as amended, the surviving spouse is given one half of the estate absolutely and a life interest in the other half if there are issue. Under the American Code, if there are issue, the surviving spouse either gets a fixed sum and one half of the balance of the estate, or one half of the estate.

(3) English law does not distinguish between children of both the deceased and surviving spouse, and children solely of the deceased; the American Code does so distinguish.

(4) There is no comparable provision in England for a Homestead Allowance or Family Allowance.

(5) The provision relating to Exempt Property in the American Code corresponds with the entitlement of the spouse under English Law to the personal chattels, but there is an overall limit on the value of items passing to the surviving spouse under the American Code. It has already been suggested that a limit should be placed on the value of each item.

As the monetary limits vary from state to state, and because the cost of living may be different in America, it is difficult to assess whether a surviving spouse is better off under English law or the American Code.

Conclusion

Despite the criticisms contained in this article, it does not appear that there is widespread dissatisfaction with the English intestacy rules. One indication of dissatisfaction would be the number of applications under the Inheritance (Provision for Family and Dependants) Act 1975. The Judicial Statistics do not distinguish between applications in respect of testate estates and applications in respect of intestates estates; however, in 1980 the total number of applications was 601. For 1979, the number was 557. Probably, many of these applications would have related to the estates of persons who died testate.

The fixed sum to which a spouse is entitled was increased to £40,000 as regards persons dying after 28 February 1981.[34] Inland Revenue Statistics for 1981-82 show that 10.47 per cent of estates were over £40,000. It will be recalled that when suggesting a fixed legacy of £5,000 the Morton Committee relied on figures indicating that a very similar percentage of estates was over £5,000. However, in view of the increasing tendency for the matrimonial home to be owned jointly, the developments in the law which mean that it is possible to obtain an interest in a property by direct or indirect financial contributions and the right of a member of the family or a surviving spouse to succeed to a protected tenancy it is submitted that the surviving spouse should be entitled to the matrimonial home in addition to his or her entitlement under the Administration of Estates Act 1925 as amended.

Because the definition of personal chattels in s.55(1) of the Administration of Estates Act 1925 does not contain a monetary limit, it can include items which are almost worthless and items which are immensely valuable. It is suggested that a monetary limit should be placed on each item. There are also difficulties with regard to chattels used for business purposes, and it is submitted that a chattel should only be excluded from the definition if it is used exclusively for a business purpose.

If the surviving spouse is given a greater entitlement on intestacy, this could be unfair to the children, particularly the children of second marriages. This difficulty could be overcome by applying the surviving spouse standard to applications by children under the Inheritance (Provision for Family and Dependants) Act 1975.

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1 Cmnd 8310.

2 As defined in s.47 Administration of Estates Act 1925.

3 Official Reports Fifth Series Parliamentary Debates Commons 1951-52 Vol 498 P 1086.

4 [1979] 3 All ER 373.

5 Cmnd 8310 P7 Paragraph 18.

6 Cmnd 830 P9 Paragraph 24.

7 Law Com No 52 P8 Paragraph 23.

8 [1970] AC 777.

9 [1971] AC 886.

10 "In both cases, therefore, the claims of the spouses were not substantiated, but the House of Lords discussed the general principles to be applied in determining the proprietary interests. Unfortunately there was a difference of emphasis" "The Modern Law of Trusts" by Parker and Mellows 5th edition at p 141.

11 [1971] 1 WLR 1611.

12 Rent Act 1977 S.2. Under the Rent Act 1977 Schedule 1 there can be two such transmissions.

13 SS 30, 31. There can only be one transmission.

14 [1975] 1 AER 321.

15 Ibid, at p 326.

16 Law Com No 86.

17 Vol 23 P 838. "I give to my wife [name] absolutely all my personal chattels as defined in paragraph (X) of subsection (1) of section s.5 of the Administration of Estates Act 1925 not otherwise specifically disposed of by this my will or any codicil hereto"

18 [1950] 1 Ch 507.

19 [1942] Ch 288.

20 82 LQR 18.

21 Ibid, at pp 19-20.

22 See Parry and Clark, "The Law of Succession" 8th edition p 82.

23 [1980] Ch 461.

24 Ibid, p 494.

25 Ibid, p 485.

26 [1972] 1 WLR 711.

27 Ibid, p 715.

28 [1967] 1 WLR 1482.

29 Ibid pp 1488-1489.

30 [1979] Ch 168.

31 Ibid p 174.

32 [1980] Ch 461 at p490.

33 Unform Laws Annotated Vol 8.

34 Family Provision (Intestate Succession) Orders 1981 (No 225).

WESTMINSTER CONSIGNED TO THE FURNACE?

by Sheila E Foster

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be."

So said Lord Tomlin in **IRC** v. **Duke of Westminster** (1936).[1] In the light of recent revenue law developments in the courts, one may well rejoin "so long as that man is not a company". Or does the recent decision of the House of Lords in **Furniss** v. **Dawson** (1984)[2] have wider implications for taxpayers generally?

The Facts

Let us consider the facts of this already celebrated case. The taxpayers, shareholders in two family companies, negotiated the sale of their holdings to an independent company, Wood Bastow Holdings Ltd. This was part of what Lord Brightman, at p 159 of his judgment, described as "not a tax avoidance scheme, but a tax deferment scheme" a scheme devised to defer rather than totally avoid the liability of the taxpayers to capital gains tax, and to reduce stamp duty on the transfer of their shares. It also invoved the incorporation of an investment company, Greenjacket, in the Isle of Man. Pursuant to a prearranged plan, on 20 December 1971 the taxpayers exchanged their shares in the two family companies for shares in Greenjacket, which on the same day sold those shares to Wood Bastow at a sum previously negotiated by the taxpayers.

The taxpayers were assessed to capital gains tax on the basis that the exchange, immediately followed as it was by Greenjacket's sale to Wood Bastow, constituted a disposal of the shares by the taxpayers to Wood Bastow. In other words, the Revenue asserted that the 'middle man', Greenjacket, for fiscal purposes dropped out of the transaction.

On appeal, the Special Commissioners found that each step in the scheme had been genuinely entered into and that Greenjacket had acquired full legal and beneficial ownership of the shares in the two family companies prior to the disposal to Wood Bastow. Accordingly, the Commissioners determined that the exchange was exempt from capital gains tax by virtue of the relief afforded to company amalgamations by paras 4(2) and b, Schedule 7, Finance Act, 1965, and that Greenjacket had realised neither a gain nor a loss on the sale of the shares to Wood Bastow.

The Crown's Case

The Crown appealed to the House of Lords, contending

(1) (for the first time) that in the light of their Lordships' decisions in **W T Ramsay Ltd** v. **IRC**(1981)[2a] **Eilbeck [Inspector of Taxes]** v. **Rawling** (1981)[3] and in **IRC** v. **Burmah Oil Co Ltd** (1982)[4], the two transactions could not be considered in isolation but rather should be treated for fiscal purposes as part of a composite scheme, whereby the taxpayers effectively disposed of their shares to Wood Bastow, and

(2) that their Lordships were bound by their decision in the **Ramsay** case, where they had expressly approved the dissenting judgment of Eveleigh LJ in **Floor** v. **Davis** (1978)[5], thereby impliedly overruling the majority judgment of the Court of Appeal which would in the absence of such overruling have been conclusive against the Crown in the instant case.

The Decision

At first instance, Vinelott J dismissed the appeal on the basis that

(1) the new approach to tax avoidance schemes enunciated in the **Ramsay** and **Burmah** cases was only applicable where the steps forming part of the scheme were circular or self-cancelling, or where a change in the parties' legal position was merely a change of form lacking in enduring legal consequences, and

(2) on the facts found by the Commissioners both the exchange and the sale agreements had enduring legal consequences which could not be ignored, and that **Floor** v. **Davis** could be distinguished from the instant case because
   (i) there had been inserted into the scheme in that case steps having no enduring legal effect, and
   (ii) the court had there been considering a different question.

The Court of Appeal, finding in favour of the taxpayer, held that, applying the principles laid down in **Ramsay** and **Burmah**, and analysing the legal and practical effect of the scheme as a whole, the disposal by the taxpayers of their beneficial ownership in the shareholdings in the two family companies to Greenjacket was not to be regarded as fiscally ineffective. The Court attempted to restrict the "new" approach in **Ramsay** and **Burmah** by stating that it did not allow steps in a composite scheme to be ignored or reanalysed for taxation purposes where a transaction was intended to have an enduring legal effect regulating the position of the parties without any preordained intention or arrangement for its termination. However, this attempt to confine the decisions in **Ramsay** and **Burmah** to cases similar on their facts in other words to 'self-cancelling' transactions - was not accepted by the House of Lords, which found in favour of the Revenue, stating that

(1) if steps inserted in a preordained series of transactions had no commercial or business purpose other than to avoid tax, such steps should be disregarded for fiscal purposes even if the transactions were intended to achieve a legitimate commercial end

(2) the existence of a preordained series of transactions, and whether any steps inserted into them had any commercial or business purpose other than the securing of a tax advantage, were questions of fact for the Commissioners: if the latter's findings were inferences drawn from primary facts, they were nonetheless facts and therefore could not be questioned by the courts unless such inferences could not be justified by the primary facts. Lord Brightman, at p 167, quoted the judgment of Lord Denning MR in **Marriott** v. **Oxford and District Co-operative Society** (no 2) (1970)[6] as follows,

> " the primary facts were not in dispute. The only question was what was the proper inference from them. That is a question of law with which this court can and should interfere"

Thus, their Lordships found that the result of the correct application of the **Ramsay** principle to the facts ef the instant case was that there was a disposal by the taxpayers of their shareholdings in the two family companies, in favour of Wood Bastow, in consideration of a sum of money paid with the taxpayers' concurrence to Greenjacket. Hence capital gains tax was payable and the Crown's appeals allowed.

The consequences

What inferences can be drawn from the result of this latest bout between a taxpayer and the Inland Revenue? At first, reaction in some quarters[7] was that the fiscal efficacy of even the most hitherto uncontroversial transactions aimed at reducing a taxpayer's tax liability, such as payments under covenant by a parent in favour of a student child, was now brought into question. For it must be stressed that in **Furniss** v. **Dawson** the honesty and lack of sophistication of the scheme were not called into question: indeed, Lord Brightman described it as "a simple and honest scheme which merely seeks to defer payment of tax until the taxpayer has received into his hands the gain which he has made". His Lordship stressed[8] that the scheme had "none of the extravagances of certain tax avoidance schemes which have recently engaged the attention of the courts ... [involving] a string of artificial transactions"

Nonetheless, he later stated[9] that "the fact that the court accepted that each step in a transaction was a genuine step producing its intended legal result did not confine the court to considering each step in isolation for the purpose of

assessing the fiscal results'', quoting the judgment of Lord Wilberforce in **Floor** v. **Davis**:[10]

''Viewed as a whole, a composite transaction may produce an effect which brings it within a fiscal provision''.

The evolving attitude of the courts

In the wake of **Furniss** v. **Dawson** it is instructive to review the gradual development by the courts of their approach to tax avoidance, particularly recently; for the straws in the wind have been increasingly portentous of late. For example, in **IRC** v. **Joiner** (1975)[11] the House of Lords affirmed its determination to apply anti-tax avoidance statutory provisions in favour of the Revenue and not, as generally hitherto where ambiguity occurs in taxing statutes, in favour of the taxpayer.[11a] Thus, the wider Parliament's, and hence the Revenue's net is cast in anti-tax avoidance legislation, the smaller are the loopholes through which taxpayers of all types can pass. Hence arise the questions, following **Furniss** v. **Dawson**, as to the scope and extent of this still-evolving doctrine.

Of course it was in the case of **IRC** v. **Duke of Westminster** in 1936 that modern attitudes to tax avoidance took root, and it is noteworthy that in **Furniss** v. **Dawson** the House of Lords went out of their way to stress the simplicity of the facts in **Westminster**, involving as it did a single transaction, namely the Duke's covenant in favour of his gardener in lieu of wages, the bona fides of which transaction were, as Lord Bridge of Harwich said, never impugned. However his Lordship went on to state the view that when one moves from a single transaction to a series of inter-dependent transactions designed to produce a given result, it is perfectly legitimate to distinguish between the substance and the form of the composite transaction without in any way impugning the genuineness of the individual steps which make up the whole.[12]

Lord Brightman[13] quoted the judgment of Lord Wilberforce in **Ramsay**, as follows:

''To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated would be a denial rather than an affirmation of the true judicial process . . . the facts must be established''.[14]

This dictum clearly shows that, while the principle in the **Duke of Westminster's** case remains intact, the courts will not hesitate to look at the reality of situations where ingenious and sophisticated schemes are concocted with the aim of mani-

pulating that principle - that every man is entitled to arrange his affairs in such a way as to give rise to the least possible liability to taxation. Thus, as one writer[**15**] concludes, the message to taxpayers is perhaps that the principle may be used as a shield but not as a sword.

The UK Parliament's attitude to tax avoidance

Unlike most Commonwealth jurisidictions[**16**], the UK system contains no general anti-avoidance provision, the basic UK approach being that laid down by Lord Tomlin in the **Westminster case**[**17**].

Thus, a transaction which on its true construction is of a type which would escape tax is not taxable **merely** on the ground that the same result **could** have been effected by other means which **would** attract tax: this is tax planning avoidance of tax incidence and therefore of liability. It must be distinguished from evasion which is, of course, illegal. Avoidance of tax no matter how morally reprehensible some may think it is legal. Nonetheless, as already mentioned, recently the courts have been increasingly strict in their application of tax anti-avoidance provisions in favour of the Revenue.

The **Westminster** doctrine is that the courts are bound by the tax result of the transaction entered into - sometimes expressed as 'the court must look to the form of the transaction, not its substance'. However, this is misleading because

(1) it suggests that the form of the transaction (a matter probably in the control of the taxpayer) will be conclusive for tax purposes, whereas this is often not the case. If it is not, the court must look behind the transaction, at its substance, to determine the true tax consequences of the legal form adopted by the parties. Thus, by looking at the substance it may conclude that this form attracts as much tax as another. Here, the court is not giving the transaction a legal form it does not possess, but is attempting to find out its true character for tax purposes.[**18**] Thus, the court has held that a partnership existed even though the only document denied it[**19**], and that a person was still trading although he denied it[**20**]. Here, in refusing to allow documents to deny proven facts the court is looking at the reality of the transaction or series of transactions.

(2) The name, description or label given by the parties to a transaction does not necessarily determine its nature. Thus the description of a series of payments as an annuity or rentcharge does not determine their essential character.[**21**]

Thus, in **W T Ramsay Ltd** v. **IRC**(1981)[**22**], which involved a complex scheme to enable the taxpayer to offset the loss made as a result of the sale of a debt against an otherwise large chargeable capital gain, the House of Lords held that a court could look at the whole transaction, or series thereof and was accordingly entitled to conclude, in the instant case, that the taxpayer had in fact suffered a minimal loss rather than the huge one which, had the court been constrained to take each step of the series seriatim, he otherwise would have made. Lord Wilberforce, denying that this approach introduced a new principle, affirmed its application to "new and sophisticated legal devices" and declared

"While the techniques of tax avoidance are technically improved, the courts are not obliged to stand still".

His Lordship, emphasising the importance both in principle and in scope of the fundamental issue of the case, which was whether the court could indeed look at the transaction as a whole rather than at each separate step, observed that the House had been invited to take what might appear to be a new approach in respect of sophisticated and artificial tax avoidance schemes. Counsel for the Revenue had suggested that such schemes should be treated as a nullity, producing neither a gain nor a loss. This approach had been described by counsel for the appellants as revolutionary, as a result of which his Lordship felt that the time was opportune to restate the basic relevant taxation principles and case law, as follows:-

(1) A subject should only be taxed on clear words, not on 'intendment' or on the 'equity' of an Act. Any taxing Act of Parliament should be construed in accordance with this principle. What constituted 'clear words' should be ascertained by applying normal principles, which did **not** confine the court to literal interpretation: the context and scheme of the relevant Act as a whole might and, indeed, should be considered. Likewise its purpose, too, should be regarded. Here his Lordship cited **IRC** v. **Wesleyan and General Assurance Society** (1946)[**23**] and **Mangin** v. **IRC** (1971)[**24**], both cases concerning the Finance Act 1965 and the taxation of chargeable gains arising upon the disposal of assets.

Thus, this constituted a restatement by his Lordship that there is no equity, or fairness, in taxation: unless a taxpayer is brought fairly and squarely within the tax net, he cannot be taxed. Of course, as we have seen, their Lordships had already previously made clear that where Parliament has enacted an anti-tax avoidance provision the attitude of the courts would be different in that such a provision would be interpreted in favour of the Revenue. Arguably, however, this does not detract from the proposition that the subject is only to be taxed on clear words, not on the 'intendment' or 'equity' of the Act, as in the case of an anti-avoidance provision[**25**] Parliament has indeed made its intent apparent precisely **by** the use of clear words.

(2) It follows that, as his Lordship next stated, a subject is entitled to arrange his affairs so as to reduce his tax liability, and, unless a particular anti-avoidance provision aiming at a specific mischief has been enacted, the mere fact that avoidance of tax is the motive for a transaction does not invalidate it: it must be considered according to its legal effect. (In the light e decision in **Furniss** v. **Dawson**, it is apparent that it is now going to very difficult indeed for the taxpayer to escape liability in such circumstances although the House of Lords made it clear that each case will be decided upon its facts.)

(3) To ascertain whether a document or transaction is genuine or a sham is the function of the fact-finding Commissioners. In this context, a document or transaction will be a sham if it is in fact totally different from what it professes to be. That a document or transaction is genuine means, in law, that it what it professes to be - nothing more.

His Lordship observed that each of these three principles would be fully respected by the decision urged by the Revenue. However, the fourth called for more comment:-

(4) Given that a document or transaction was genuine, the court could not look behind it to some supposed underlying substance: this is the well-known principle enunciated in **IRC** v. **Westminster** (1963). Whilst being a cardinal principle, this must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it did not compel the court to look at a document or transaction in blinkers, isolated from any context to which it properly belonged.

Thus, if it was apparent that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there was nothing in the doctrine to prevent it being so regarded: to do so was not to prefer form to substance, or substance to form.

Thus, his Lordship is saying that the individual steps of a transaction, or individual transactions forming part of a series of transactions, do not have to be viewed by the court in isolation if by looking at them as a whole the court will be enabled to see and consider the effect of the whole transaction, or series thereof, and, consequently, its reality.

He continued that for the Commissioners, considering a particular case, it was a wrong and an unnecessary self-limitation to regard themselves as precluded, by their own finding that documents or transactions were not 'shams', from considering what, as evidenced by the documents themselves, or by the manifested intentions of the parties, the relevant transaction was. They were not, under the **Westminster** doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. This was particularly

the case where it proved that there was an accepted obligation, once a scheme was set in motion to carry it through its successive steps.

This appears an important factor in **Furniss** v. **Dawson** too: the exchange of shares and their subsequent sale, were all part of a prearranged plan and the series of transactions actually took place on the same day: in the words of Lord Brightman, the matter was probably concluded in time for lunch. This brings us to another important factor which may well be crucial to the court's decision: the speed with which the series of transactions was completed. One could even draw an anlogy here with the relevant 'badges' used to determine whether a taxpayer is trading or not, for tax purposes.

Of course, in the United Kingdom, we have no **general** anti-tax avoidance legislation such as exists in some jurisdictions for example in New Zealand, where s.103 of the Income Tax Act 1964 declares ineffective for tax purposes every contract, agreement or arrangement made or entered into whether before or after the commencement of the Act, for the purpose of directly or indirectly avoiding tax. As distinct from this so-called "shot gun" attitude, we have adopted a "sniper" approach to would-be tax avoiders, legislating to remedy specific ills, thereby plugging particular loopholes and then waiting to see what the taxpayer's ingenuity can devise next. This approach, however, has led to increasing frustration on all sides, the former Chancellor of the Exchequer Sir Geoffrey Howe, quoting Burke in his 1982 Budget Speech stating: "There comes a stage at which forebearance ceases to be a virtue".

It is strange that, from similar beginnings, the attitude of the courts to tax avoidance has differed so widely in the United Kingdom from that of the United States, where Learned Hand J, in **Helvering** v. **Gregory** (1931)[**26**] had said, shortly before **Westminster**,

"Anyone may arrange his affairs that his taxes shall be as low as possible, he is not bound to choose that pattern which will best pay the Treasury".

Whereas the American courts, however, have dynamically developed their approach to tax avoidance, the English judges have remained, as their Lordships stressed in **Furniss** v. **Dawson**, shackled by the **Westminster** case. It is from those shackles that the House of Lords has now sought to free them.[**27**]

Lord Scarman, emphasising that the law in this area was in an early stage of development, stated that the task of their Lordships and of the appellate courts in the United Kingdom was rather "to chart a way forward between principles accepted and not to be rejected than to attempt anything so ambitious as to determine finally the limit beyond which the safe channel of acceptable tax avoidance shelves into the dangerous shallows of unacceptable evasion"

However, it is also a hallmark of a democracy that the law should be certain: taxpayers, like other citizens, should know that if they break the law they incur sanctions laid down by Parliament. Yet here the Court acknowledged, as we have seen, the taxpayer's actions to be simple and honest - but penalised them none-the-less. The resultant uncertainty is unacceptable in a free society. Parliament should act to remedy it.

Lord Scarman's analogy to navigation is apposite. However, in law the public right of navigation, once established, is paramount.[**28**] The same ought to be true of the taxpayer's freedom to sail his fiscal boat through clear, charted waters, avoiding if he can the rocks of tax liability: he ought not to be constantly hampered by the shifting sands of Revenue persecution, relying only upon the relative uncertainty of judicial precedent as his pilot.

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1 (1936) A.C. 1

2 (1984) S.T.C. 1953; applied in **Young** v. **Phillips** (1984) T.L.R. 12th July 1984.

2 (1981) 1 All E.R. 865.

3 (1981) S.T.C. 174.

4 (1982) S.T.C. 80.

5 (1978) S.T.C. 436.

6 (1970) 1 Q.B. 186 at 192.

7 See eg Financial Times, 10 February 1984 at p.1.

8 at pp 159-160.

9 at p. 163.

10 (1982) A.C. 300 at 325.

11 (1975) 50 T.C. 419.

11 Contrast reliefs and exemptions, which the taxpayer must prove he is entitled to e.g. the married man's allowance in respect of income tax.

12 **Furniss** v. **Dawson** at p. 158.

13 at p. 163.

14 (1982) A.C. 300 at 326.

15 S Mayson: A Practical Approach to Revenue Law.

16 eg New Zealand: NZ Income Tax Act 1964, s. 108.

17 See para. 3, sched. 8, I.C.T.A. 1970, for an example of legislative reaction.

18 See eg dicta of Sir Wilfred Greene MR in **IRC** v. **Mallaby Deeley** (1938) 23 T.C. 153 at 167.

19 **Fenston** v. **Johnstone** (1940) 23 T.C. 29.

20 **J & R O'Kane & Co. Ltd.** v. **I.R.C.** (1922) 12 T.C. 303.

21 See e.g. **IRC** v. **Land Securities Investment Trust** (1969) 2 All E.R. 430.

22 (1981) 1 All E.R. 865.

23 (1946) 2 All E.R. 149 at 151, per Lord Green MR.

24 (1971) A.C. 739 at 746 per Lord Donovan.

25 eg s.40 ICTA 1970; s.44 FA 1975.

26 (1931) 69 F.2d 809.

27 See eg judgment of Lord Bridge of Harwich, at p. 159 **Furniss** v. **Dawson**.

28 Subject to reasonable user.

THE CONSTRUCTIVE TRUST: A SUBSTANTIVE INSTITUTION OR A REMEDIAL INSTITUTION?

by R M James

PREFACE

The following article consists largely of one chapter of a project submitted as one element of the requirements for the award of a degree in law of Trent Polytechnic (CNAA).

The chapter reproduced deals with constructive trusts imposed because of fraudulent or unconscionable conduct by the party upon whom the trust is imposed, and compares the American and English approaches, considering how far the English courts led by the former Master of the Rolls, Lord Denning, have moved towards the American approach and whether such changes are legitimate in terms of the English rules of precedent or, indeed, are necessary. For the sake of completeness extracts from the introduction and the chapter on resulting trusts are also included.

A substantial part of the project was devoted to an analysis of the case-law which has led to the apparent change in approach by the English courts, emphasizing in particular the confusion which now exists as to the distinctions between, and definitions of, resulting and constructive trusts repsectively. No part of this chapter is reproduced, for two reasons; firstly, within the confines of the space available for these extracts it is difficult to isolate appropriate portions of this chapter, and secondly, Miss J M Hooper, a lecturer in law at Trent Polytechnic dealt with this particular aspect of the subject in Volume 5 of the Trent Law Journal.

INTRODUCTION

Prior to 1970 the English constructive trust was generally conceived to be a substantive institution; arising in clearly defined circumstances only. However, during the 1970's there was a spate of cases, over which Lord Denning M.R. presided, which have caused legal analysts to review the status of the constructive trust and to consider whether there has been a shift, or indeed a complete mutation, in the judiciary's, or a section of the judiciary's, conception of the constructive trust to one analogous to the American notion of the constructive trust, that is, as a remedial instituion.

Lord Denning M.R. has been to the fore in the attempt to infuse the American approach to the imposition of the constructive trust into English law, advocating the adoption of the principle that a constructive trust should be imposed as a

remedy whenever it is just and equitable to do so. In **Hussey** v. **Palmer** [1972] 1 W.L.R. 1286, at p. 1290, his Lordship adverted to the constructive trust as "as equitable remedy by which the court can enable an aggrieved party to obtain restitution". And in **Eves** v. **Eves** [1975] 3 All E.R. 768, at p. 771, he talked of "a constructive trust of a new model"

Lord Denning M.R.'s recent retirement affords an excellent opportunity to take stock of the current position regarding the constructive trust. Therefore, the purpose of this thesis is to consider the justification for the imposition of the constructive trust as an equitable remedy and to analyse the cases in which Lord Denning M.R. invoked the aid of his constructive trust of a new model, so as to determine whether a decision could have been reached by the application of settled legal principles, in particular the traditional principles of constructive and resulting trusts.

RESULTING TRUSTS

Megarry J. (1) classified resulting trusts as being either "presumed" or "automatic" Regarding the former, certain circumstances give rise to a presumed intent to create such a trust. An automatic resulting trust, however, is not dependent on an intent, express or presumed, to create such, but is the automatic consequence of particular circumstances. What has to be emphasised is the fact that both presumed and automatic resulting trusts arise out of particular fact situations. Both types of resulting trust will be considered below, although greater attention will be paid to presumed resulting trusts. As will become clear, automatic resulting trusts are not entirely pertinent to the purpose of this thesis.

Automatic Resulting Trusts

Automatic resulting trusts are concerned with the situation in which property is transferred to an express trustee. Therefore, on a failure of the trust, the intended trustee will have no claim to the trust property and will hold on resulting trust for the transferor. Such is the automatic consequence of the particular circumstances. Broadly, there are two situations in which an automatic resulting trust will arise. First, where the trust never actually becomes constituted due to various reasons, such as uncertainty, the rule against perpetuities or the statutory requirement as to writing contained in section 53 (1)(b) of the Law of Property Act 1925. (2) Second, the trust, though completely constituted, fails to exhaust all, or dispose of any, of the equitable interest in the property.

However, in relation to the second situation, the undisposed of property will not be held to result back to the transferor should either of the following be found to be the case:

1. Being a charitable trust, the cy-pres doctrine applies.

2. The transferor departed with the property out and out without any intention of retaining an interest therein; in which case the property will pass to the Crown as bona vacantia.

3. Where, on the dissolution of a voluntary association, the property falls to be dealt with in accordance with the rules of the association.

4. The transferor intended a gift to the transferee subject to the carrying out of a particular trust. Therefore, on the failure of the trust, the transferee takes completely.

5. The trust is for the assistance of certain persons by stated means which are construed as being indicative rather than restrictive of the purpose of the trust.

Presumed Resulting Trusts

As stated above, resulting trusts arise out of particular fact situations. Some such fact situations give rise to the presumption that a resulting trust is the desired goal. That being so, what circumstances give rise to such a presumption? Where property is purchased and the title thereto is vested in another, or in the joint names of the purchaser and another, there arises a rebuttable presumption that that other holds the property on resulting trust for the purchaser.

CONSTRUCTIVE TRUSTS

A constructive trust arises independently and irrespective of the intention of the parties. It arises by operation of law as a consequence of the conduct of the party upon whom the trust is imposed. Professor Maudsley has said:

> "We may thus think of constructive trusts as existing wherever the legal title is in one person, but the beneficial entitlement is, by operation of the rules of equity and independently of the intention of the parties, in another".[3]

This is to be contrasted with resulting trusts which, as we have seen, have their basis in a presumed intent.

Traditionally, constructive trusts are seen in the same light as express and resulting trusts. "English law has always thought of a constructive trust as an institution, a type of trust".[4] It is a "substantive institution".[5] Therefore, "express trusts and constructive trusts are two species of the same genus".[6] The corollary of this is that the constructive trust is not regarded, from the traditional point of view, as a remedy. It is not regarded as being of a nature similar to specific performance and an injunction. This is the crucial distinction between

the English constructive trust and its American counterpart, which is "purely a remedial institution".[7] Professor Oakley attempted to illustrate this vital distinction:

> "English law demands, as a prerequisite of the imposition of a constructive trust, that some legal wrong should have been committed by the party upon whom the trust is to be imposed. The American courts, on the other hand, will impose a constructive trust in order to enable a party to recover that which is unfairly withheld from him to the benefit of the withholder. A plaintiff need show only that the defendant has been unjustly enriched at his expense".[8]

A constructive trust will arise on the occasion of the legal wrong. It is the task of the court to confirm that such has arisen in favour of a party. The court does not literally impose a constructive trust, it merely acknowledges the existence of such. Therefore, the equity predates the court order. On the other hand, American courts are not called upon to acknowledge the existence of a constructive trust, they are called upon to impose one. Therefore, in America the equity is contemporaneous with the court order. Therein lies the distinction between a "substantive institution" and a "remedial institution".

In England there are several distinct circumstances or situations in which a constructive trust is imposed; each situation being governed by a particular principle which is certain and sure in its scope. The several principles relating to constructive trusts are not, however, derived from any overriding or fundamental principle. "English law provides no clear and all-embracing definition of a constructive trust"[9] from which all the situations in which constructive trusts are imposed may be deduced. The position is best summed-up by Professor Scott, an American. Though talking of the position in America, his comments are also applicable to England. Professor Scott said:

> "It is sometimes said that a constructive trust is imposed in case of fraud. It is sometimes said that it is imposed in case of a break of fiduciary relation. It seems clear, however, that not only may a constructive trust be imposed in both of these cases, but it may be imposed in others too. How then shall we define a constructive trust? It is my belief that an exact definition cannot be framed. Indeed, I do not know that any legal concept can be exactly defined, that is, defined in such a way that it includes all that falls within the concept and excludes everything else... As to the concept of a constructive trust, I think that the best that we can do is to give a rough working description of it".[10]

Therefore, one can only look to those situations in which constructive trusts are imposed in order to ascertain the scope of the constructive trust in England. This thesis will concern itself only with constructive trusts imposed because of fraudulent or unconscionable conduct by the party upon whom the trust is imposed.

This is the area in which Lord Denning M.R. has centred his creativity, attempting to close the gap between the English and American conceptions of the constructive trust, that is, the mutation of the English constructive trust into an equitable remedy. However, the reader should be aware that the scope of the constructive trust extends to such areas as a breach of fiduciary duty and strangers knowingly intermeddling with trust property.[**11**]

The courts have always been willing to impose a constructive trust upon a person who attempts to retain property for himself by fraudulently or unconscionably taking advantage of statutory provisions,[**12**] for example, section 53 of the Law of Property Act 1925, or other legal principles, such as the doctrine of privity of contract. The case of **Bannister v. Bannister**[**13**] affords an excellent illustration of this principle. The defendant owned two adjacent cottages. She agreed to sell them to her brother-in-law, the plaintiff. It was orally agreed that he would permit her to live in one of the cottages rent-free for the remainder of her years. For this reason a lower price was paid. However, the conveyance failed to recite the oral agreement. Subsequently, the plaintiff served the defendant with a notice to quit and brought an action claiming possession of the cottage. The defendant counterclaimed for a declaration that the plaintiff held the cottage on trust for her for her life. The plaintiff sought to rely on the absence of writing which is required by section 53 (1)(b) of the Law of Property Act 1925. The Court of Appeal rejected the plaintiff's claim, imposing upon a constructive trust under which he was to permit the defendant to occupy the cottage during her lifetime. Scott L.J., delivering the judgment of the court, said:

> "The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available".[**14**]

Furthermore, and this a point which has caused great difficulty, the Court of Appeal held that a trust in the form ordered had the effect of creating a settlement, and, therefore, of constituting the defendant a tenant for life, within the meaning of the Settled Land Act 1925.[**15**] However, two arguments have been proffered which would avoid the creation of a settlement, whilst still ensuring the defendant complete protection. First, Professor Hornby[**16**] argues that there is adequate authority on which the Court of Appeal would have been entitled to determine that the agreement between the plaintiff and the defendant created a licence only. A trust imposed to give effect to a licence does not give rise to a settlement as the land cannot be said to be "limited in trust for any person by way of succession",[**17**] the term "limited" being apposite only to an estate in land.[**18**] It is submitted that Professor Hornby does not regard the licence created by the agreement as being contractual in nature, as then a

constructive trust would be unnecessary, an injunction being appropriate to protect the defendant. This is the basis of the second argument. J. Martin[**19**] argues that the arrangment could have been construed as creating a contractual licence, the reduction in price supplying the consideration. The plaintiff could then have been restrained by an injunction from evicting the defendant contrary to the terms of the agreement. It is regrettable that such a simple solution as this was overlooked and that resort was had to the principles of constructive trusts.

There have been several attempts to discern a fundamental principle linking the distinct situations in which constructive trusts are imposed, the most common epithet for such being 'the golden thread'. Edmund-Davies L.J. in **Carl-Zeiss Stiftung** v. **Herbert Smith & Co. [No. 2]**[**20**] stated that it is a "want of probity", whilst Goff and Jones[**21**] and Professor Scott[**22**] argue that the principle is that of "unjust enrichment"; that which is applied in America. However, the validity of these assertions need not detain us as such principles extend to situations in which constructive trusts are not imposed. The fact remains that in England constructive trusts are imposed only in certain defined, straight-jacket, situations. A constructive trust is not imposed because the circumstances of a particular case are within the ambit of a fundamental principle. In England the situations in which constructive trusts are imposed, and the particular principles applicable thereto, are necessarily antecedent to any universal principle that may be formulated. If circumstances are not analogous to those in which constructive trusts are generally imposed, there are no grounds on which a constructive trust can be imposed, unless, of course, there is a legitimate extension of the scope of the constructive trust. This is in stark contrast to the state of affairs prevailing in America, where the English position can be said to be stood on its head. In America the courts determine the scope of the constructive trust by deduction from a fundamental principle. This is another vital distinction between the two jurisdictions. Therefore, any such fundamental principle will be too great in its scope and futile as a guide to the situations in which constructive trusts are imposed in England.

Regarding the applicability of the principle of unjust enrichment in England, Lord Porter, in **Reading** v. **Att.-Gen.**, said:

> "My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated".[**23**]

However, this is not to say that the scope of the constructive trust has reached a stage of stagnation. Edmund-Davies L.J. has said that the boundaries of the constructive trust "have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular

case may demand''.[24] In England, however, it is argued[25] that any extension should be by way of additional specific self-contained, principles, which are certain in their scope, and not by reference to a vague general or fundamental principle applicable to all the situations in which constructive trusts are imposed.[26]

Such then is the traditional conception of the constructive trust and approach to its imposition. However, in recent years, Lord Denning M.R. has departed from this approach and advocated the adoption of ''a constructive trust of a new model''[27] which has an affinity with the American constructive trust. Thus, at this juncture it is pertinent to take a brief insight into the American constructive trust.

It has to be remembered when studying American law that it is based on a federal system, each state to a large extent being autonomous, particularly with regard to the development of equity. Therefore, the constructive trust being a creature of equity, its range of application will depend on the particular state in question. Therefore, it is only possible to present a generalised picture of the constructive trust in America. In America the constructive trust is regarded as being entirely separate and distinct from both express and resulting trusts as it does not arise because of a manifestation of intent, actual or presumed, to create such. It is not a division of the same fundamental concept. It is a ''remedial institution''.[28] American courts are called upon to impose a constructive trust upon a party, not to acknowledge the existence of such antecedent to the court hearing. Thus, the equity is contemporaneous with the court order. Therefore, constructive trusts are not a species of the same genus as express and resulting trusts.

The circumstances in which such a remedy is available are derived from the principle of unjust enrichment. The Restatement of Restitution (Para. 160), promulgated by the American Law Institute in 1936, states as follows:

> ''Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises''

Professor Scott has said that the ''provision in the Restatement does not purport to define a constructive trust but purports to state the circumstances under which a constructive trust arises''.[29] Thus, contrary to the position in England, the American courts are directed by a general principle applicable to all the situations in which constructive trusts are imposed. Furthermore, in such situations, the American courts impose a constructive trust as a remedy. The American Jurisprudence series affords a slightly more detailed exposition. A constructive trust is said to arise ''against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who

in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy''.[30] However, such are only particular manifestations of the underlying principle, namely, unjust enrichment, although indicators as to its scope.

The problem with the American constructive trust is plain to see. One is met with ''the difficulty, nay, the impossibility, of defining the concept''[31] of unjust enrichment. The limits of the concept depend entirely upon the subjective view of the particular court. Thus, there will be a penumbral area where it is impossible to say with certainty whether or not a constructive trust will be imposed; something which could not be said of the traditional English approach to the imposition of the constructive trust. A further, and probably more important, distinction between the two jurisdictions is the one referred to at the beginning of the chapter, namely that in England there is a prerequisite of a wrong having been committed before a constructive trust can arise, whereas American law demands no such prerequisite. In America the purpose of the constructive trust is the prevention of unjust enrichment. Unjust enrichment, however, does not require the performance of any wrongul act by the one enriched; what is required, generally, is that a party hold property under such circumstances that in equity and good conscience he ought not to retain it.[32]

During the last thirteen years, Lord Denning M.R. has advocated the use of a principle which erodes these two distinctions. The principle nurtured by his Lordship is that a constructive trust should be imposed ''whenever justice and good conscience require it''.[33] It is a principle of general application, dictating the circumstances in which a constructive trust will be imposed. Furthermore, and more funamental, his Lordship has transmogrified the species of the constructive trust. It is now to be used as a remedial institution, being imposed in order to produce a fair and equitable result. However, unlike other remedies available to the English litigant, there is no prerequisite of a wrong having been committed before the remedy is available. Thus, Lord Denning M.R. has stood the traditional English approach to the imposition of the constructive trust on its head. It could be argued, however, that Lord Denning M.R.'s principle extends further than the principle of unjust enrichment? For example, take the situation in which a couple, with the intention of marrying, acquire a house which is in great need of repair. The man provides the purchase price. The woman, on the other hand, undertakes much manual work, such as demolition. building and decorating, so as to improve their home. Assuming that her work is appraised at one-tenth of the value of the improved property, what interest would she be entitled to under both Lord Denning M.R.'s principle and the principle of unjust enrichment, on the occasion of separation before marriage? Under the American principle the man would hold on trust for the women an interest commensurate to the benefit he has received from her labours, namely, a one-tenth interest.

However, under Lord Denning M.R.'s principle the matter is not so clear cut. For instance, as the house was acquired on the basis that it was to be their future matrimonial home, and for this reason the women concentrated all her efforts into the improvement of the property, would it not be fair to award her an interest greater than one-tenth so as to enable her to make a fresh start in life after the upset of the separation?[**34**]

As justification for his extension of equitable principles Lord Denning M.R. quotes Lord Diplock in **Gissing** v. **Gissing** out of context. The passage cited is as follows:

> "A resulting, implied or constructive trust and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestue que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired".[**35**]

Lord Denning M.R. has stated that all forms of property are within Lord Diplock's exposition.[**36**] When viewed in isolation, this passage clearly affords justification to his Lordship's new approach. However, Lord Diplock immediately added the following qualification, which Lord Denning M.R. conveniently omits:

> "And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land"

When viewed in this light, Lord Diplock cannot be said to be countenancing the stance taken by Lord Denning M.R.

Lord Denning M.R. also seeks to justify his just and equitable principle on the ground that "it is entirely in accord with the precepts of equity".[**37**] To establish that this is so, his Lordship cites[**38**] Cardozo J., an American judge, in **Beatty** v. **Guggenheim Exploration Co.** where Cardozo J. said:

> "A constructive trust is the formula through which the conscience of equity finds expression".[**39**]

This statement, however, has not gone without criticism in the United States. Professor Scott has said that the principle of unjust enrichment, as set out in the Restatement of Restitution, "is a pretty broad statement. It is not, perhaps, as broad as that which Judge Cardozo made when sitting on the Court of Appeal of New York".[**40**] Notwithstanding the criticism from within America itself,

and the fact that the statement emanates from a jurisdiction distinct from England, the use of this statement is particularly worrying because it illustrates the wide girth which Lord Denning M.R. attributes to his "constructive trust of a new model".[41] No longer is his Lordship content with the several sure and settled principles which traditionally dictate the situations in which constructive trusts are imposed. They have been unjustifiably, from the point of view of precedent, exchanged for purely subjective notions of justice and fairness, which can only lead to uncertainty in the imposition of the constructive trust and the ensuing injustice in that clients cannot be adequately advised by their lawyers.

As noted in the preceding chapter, this principle of fairness and equitableness encompasses, and unjustifiably extends, the principles of both resulting and constructive trusts, necessarily blurring the real distinction between the two, which is both worrying and confusing in the area of the matrimonial, or quasi-matrimonial, home, where issues of fairness and equitableness are beyond the competence of the court. Judges do not have a discretion in determining property interests. In this context, Bagnall J.'s remarks in **Cowcher** v. **Cowcher** are particularly pertinent:

> "I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement".[42]

Over the last thirteen years, Lord Denning M.R.'s foot has grown to such a length that it is incapable of measurement. And this has been the problem. A once tranquil area of the law has been transformed into an area of judicial creativity. As Professor Maudsley has said of this transformation:

> "It is possible to read into recent decisions a rule that in cases where the plaintiff ought to win, but has no legal doctrine or authority to support him, a constructive trust in his favour will do the trick".[43]

CONCLUSIONS

The analysis of the cases in which Lord Denning M.R. has imposed a constructive trust as a remedy has shown that the facts of those cases permit the application of settled principles of law, (with the exception of **Heseltine** v. **Heseltine**)[44] It is, however, accepted, that the application of settled principles of law, in most cases being the principles of either constructive or resulting trusts, would not always lead to the award of a property interest commensurate with that awarded by Lord Denning M.R., although the beneficiary would not always

be disadvantaged.[**45**] Therefore, the law is not found to be wanting in the particular areas covered by those cases; there is no lacuna in need of plugging. Thus, as well as there being no authority for Lord Denning M.R.'s approach to the imposition of the constructive trust, there is no justification for it.

The analysis also reveals that Lord Denning M.R.'s principle that a constructive trust should be imposed whenever it is just and equitable to do so, has not gained general acceptance by other members of the Court of Appeal. Even in the majority of those judgments which are expressed to concur with Lord Denning M.R.'s views, one can detect a misapprehension as to the true grounds for his Lordship's decision; their being concurrence only with the result, not the route by which the result was achieved. Furthermore, apart from those Court of Appeal decisions over which Lord Denning M.R. presided, there is a dearth of cases decided on the basis of Lord Denning M.R.'s principle, or, indeed, in which the constructive trust has otherwise been used as a remedial instituion. Therefore, one can forecast with a large degree of confidence that Lord Denning M.R.'s retirement has rung the death knell for the principle that a constructive trust should be imposed whenever it is just and equitable to do so and that henceforth the constructive trust will not be imposed as a remedy. And as to the question posed by the title of this thesis, that is, whether the constructive trust is a substantive institution or wether it has been transformed into a remedial institution, it is clear that the constructive trust is, and always has been, conceived of by the judiciary, with the exception of Lord Denning M.R., as a substantive institution. However, Lord Denning M.R.'s retirement is unlikely to bring an end to the confusion of the principles of resulting and constructive trusts; a vice common to many members of the judiciary.

Notwithstanding the finding that there is no deficiency in the law in the areas covered by the cases considered, would not the law be enhanced by the addition of a constructive trust which is imposed as a remedy on the basis of Lord Denning M.R.'s principle?[**46**] Foremost in one's mind when considering the answer to this proposition is the fact that a beneficiary under a constructive trust is entitled to a proprietary interest. Thus, the remedy would have far reaching ramifications. For instance, the beneficiary would obtain priority over the general creditors of the trustee in the event of the trustee's bankruptcy. The beneficiary would also be entitled to trace property subject to the constructive trust into the hands of third parties, with the exception of a bona fide purchaser for value. Therefore, in a legal system which considers third party rights to be virtually sacrosanct, as is the case in England, the constructive trust is totally inappropriate as a remedial device. This is to be contrasted with America where the courts are much more ready to interfere with existing third party rights.[**47**]

Further, a remedy enjoying the scope which Lord Denning M.R. attributes to his constructive trust of a new model can lead to serious problems when viewed in the context of a legal system. In particular, one is concerned with the undermining of the principles of property law adverted to when considering **Binions** v. **Evans**.[**49**]

However, probably the most serious defect of a remedy which is to be imposed whenever it is just and equitable to do so, is its inherent uncertainty of application, which prevents lawyers from advising their clients with any degree of certainty. Here one is reminded of Bagnall J.'s remarks in **Cowcher** v. **Cowcher**:

> ''..... the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement....It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit''.[**49**]

These comments were echoed by Browne-Wilkinson J. in **Re Sharpe**:

> ''Doing justice to the litigant who actually appears in the court by the invention of new principles of law ought not to involve injustice to the other persons who are litigants before the court but whose rights are fundamentally affected by the new principles''.[**50**]

Therefore, instead of being enhanced, the law would be adversely affected by the general imposition of a constructive trust on the basis of Lord Denning M.R.'s principle. One might counter this conclusion with the argument that English courts do apply uncertain and vague concepts, such as the concept of reasonableness in the law of torts, in determining liability. Of course, this is accepted, but surely in the area of trusts, where third party rights are likely to be affected, certainty is fundamental.

However, this is not to say that the categories or situations in which constructive trusts arise, as opposed to being imposed as a remedy, should not be extended. But they should only be extended where the courts are prepared to lay down a principle which is certain in its confines and will apply generally, that is, another strait-jacket situation.

''The constructive trust is an instrument created by the law to do justice. It needs to be flexible, so that it can be used to meet new situations as they arise. But it needs to have some shape. Lawyers have to advise. Litigants need to know It is doubtful whether justice is done in the long run by fashioning a weapon of such force and such flexibility that a court is enabled, without authority, and without rule, to declare that one party is the winner (and in some cases the owner of real property) because there is a constructive trust in his favour''.[**51**] Therefore, it is to be hoped that in the very near future the House of Lords has the opportunity to finally lay to rest the principle that a constructive trust should be imposed whenever the court considers it just and equitable to do so.

1 **Re Vandervell's Trusts (No. 2)** [1974] Ch. 269, at p. 294.

2 The Law of Property Act 1925, section 53 (1)(b), provides that "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will"

3 (1959) 75 L.Q.R. 234, at p. 236.

4 Professor Maudsley, ibid., at p. 237.

5 P.H.Pettit, Equity and the Law of Trusts (4th Ed.) p. 46.

6 Ibid.

7 Roscoe Pound, (1920) 33 Harv. L.R. 420, at p. 421.

8 [1973] C.L.P. 17, at p. 18. The grounds on which American courts impose constructive trusts will be considered below.

9 Per Edmund-Davies L.J., **Carl-Zeiss Stiftung** v. **Herbart Smith & Co.** (No. 2) [1969] 2 All E.R. 367, at p. 381.

10 (1955) 71 L.Q.R. 39, at p. 39.

11 It is argued that the trust imposed upon a vendor of land and secret trusts are in the nature of a constructive trust. These are moot points and, therefore, this thesis proceeds on the basis that they are not true constructive trusts.

12 It is argued by some (See P.H. Pettit, Equity and the Law of Trusts (4th Ed.) p. 65) that this situation should be governed by the maxim, "Equity will not permit a statute to be used as an instrument of fraud", on the authority of **Rochefoucauld** v. **Boustead** [1897] 1 Ch. 196, where the Court of Appeal refused to allow the grantee to fraudulently plead a statute, so allowing the express trust to be enforced. However, modern cases are clearly decided by the application of the principles of constructive trusts. The change of route to a satisfactory decision is probably attributable to the removal of the adverse limitation period, which express trusts excaped, applicable to constructive trusts under the Judicature Act 1873, section 25 (2).

13 [1948] **2 All E.R. 133.**

14 **Ibid., at p. 136.**

15 **Ibid., at p. 137.**

16 (1977) 93 L.Q.R. 561. Professor Hornby also argues that the trust ordered in **Bannister** v. **Bannister** does not create a settlement because such cannot arise from a transaction which is not in writing. For a counter-argument on this point, see [1978] Conv. 250.

17 Section 1 (1)(i) of the Settled Land Act 1925.

18 See Cheshire's Modern Law of Real Property (12th Ed.) p. 367.

19 (1972) 36 Conv. 266, at p. 267.

20 Supra, at p. 381.

21 The Law of Restitution (1966).

22 (1955) 71 L.Q.R. 39, at p. 50.

23 [1951] A.C. 507, at p. 513.

24 **Carl-Zeiss Stiftung** v. **Herbert Smith & Co. (No. 2)**, supra, at p. 381.

25 See, for example, Professor Oakley, [1973] C.L.P. 17, at p. 20 and Bagnall J. in **Cowcher** v. **Cowcher** [1972] 1 All E.R. 943, at p. 948.

26 It is submitted that this is the path along which Slade J. proceeded in **English** v. **Dedham Vale Properties Ltd.** [1978] 1 All E.R. 382, although at times his judgment appears to be of wider import.

27 Per Lord Denning M.R., **Eves** v. **Eves** [1975] 3 All E.R. 768, at p. 771.

28 Roscoe Pound, (1920) 33 Harv. L.R. 420, at p. 421.

29 (1955) 71 L.Q.R. 39, at p. 39.

30 76 Am. Jur. 2d, p. 446.

31 Professor Scott, (1955) 71 L.Q.R. 39, at p. 40.

32 **Simonds** v. **Simonds** [1978] 45 NY2d 233.

33 Per Lord Denning M.R., **Hussey** v. **Palmer** [1972] 1 W.L.R. 1286, at p. 1290.

34 It is submitted that this is the basis for Lord Denning M.R.'s decisions in **Eves** v. **Eves**, supra, and **Cooke** v. Head [1972] 1 W.L.R. 518.

35 [1970] 2 All E.R. 780, at p. 790. Cited in **Heseltine** v. Heseltine [1971] 1 W.L.R. 342, at p. 346.

36 **Heseltine** v. **Heseltine**, supra, at p. 346.

37 **Biniona** v. **Evans** [1972] 2 W.L.R. 729, at p. 735.

38 Ibid., at p. 735.

39 [1919] 225 NY 380, at p. 386.

40 (1955) 71 L.Q.R. 39, at p. 39.

41 Per Lord Denning M.R., **Eves** v. **Eves**, supra, at p. 771.

42 Supra, at p. 948.

43 (1977) 28 N.I.L.Q. 123, at p. 123.

44 [1971] 1 W.L.R. 342.

45 See, for example, the consideration of **Eves** v. **Eves** (1975) 3 All E.R. 768 (in another part of the author's project), where it is argued that the application of the settled principles of constructive trusts would have resulted in the plaintiff being awarded a one-half share in the house, whereas the application of Lord Denning M.R.'s principle resulted in an award of a one-quarter interest.

46 For a general discussion see Oakley, Constructive Trusts, pp. 3-7.

47 For an illustration of the extent to which the American courts are prepared to interfere with existing third party rights see the Restatement of Restitution, (Para. 202), regarding the right to trace property.

48 [1972] 2 W.L.R. 729.

49 [1972] 1 All E.R. 943, at p. 948.

50 [1980] 1 All E.R. 198, at p. 204.

51 (1977) 28 N.I.L.Q. 123, at p. 137.

REFERENCES TO THE EUROPEAN COURT UNDER ARTICLE 177

I R Storey

Introduction

In the EEC, it is inevitable that provisions of 'EEC law', such as the EEC Treaty itself, regulations, and directives, will fall to be interpreted by the national courts of the individual member states of the EEC. In order to try and ensure a coherent development of the law and a consistent interpretation of such provisions, Article 177 of the EEC treaty provides a mechanism whereby the Court of Justice of the European Communities (the 'European Court') has jurisdiction to give 'preliminary rulings'. Paragraph 1 of Art 177 sets out the subject matter of such rulings:-

(1) The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty

(b) the validity and interpretation of acts of the institutions of the Community

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Paragraph 2 then explains how these rulings are to be obtained:-

(2) Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon'.

However, in respect of a court or tribunal against whose decisions there is no judicial remedy, the discretion implicit in paragraph 2 by the use of 'may' becomes a duty. Paragraph 3 states:

(3) Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice'.

Paragraphs (2)and (3) of Art 177 clearly pose a number of questions. To which courts will para 3 apply? Under what circumstances is a court obliged to refer to the European Court under para 3? What is the meaning of 'necessary' in para 2? How is the discretion inherent in para 2 to be exercised? This article attempts to offer answers to these questions and to examine the use made by courts in the United Kingdom of Art 177.

The actual wording of the English text of Art 177 poses some initial difficulties. Paragraph 2 refers to 'such a question' being raised, obviously referring back to paragraph 1, and to the types of question set out in that paragraph. Paragraph 3 then refers to 'any such question' being raised. Again there is clearly a reference back to paragraph 1. But is there also a reference back to paragraph 2; must the question raised be one which it is necessary for the court to decide in order to give judgment? In one of the first cases to come before the English courts where Art 177 was discussed, **H P Bulmer Ltd** v. **J Bollinger SA**,[1] the Court of Appeal seemed to think so.[2] This is a view shared by both the House of Lords[3] and the European Court itself.[4] Indeed, any other view would impose a duty on a court under para 3 to refer a question to the European Court, whether it needed to be decided or not. It does not however bode well for the interpretation by the UK Courts of Art 177 that on such a fundamental point, the wording of Art 177 is so loose.

Paragraph 3 of Art 177

Let us firstly consider para 3. The House of Lords is clearly a court to which para 3 is applicable rather than para 2, there being no possibility of a domestic appeal from a House of Lords decision. At the time of writing, there are two reported cases in which the House of Lords has made a reference to the European court **R** v. **Henn**[5] and **Garland** v. **British Rail Engineering Ltd.**[6] In **Garland** it seems clear that the House of Lords, as has been mentioned, took the view that it was only obliged to make a reference under para 3 if it felt that a decision on the question was necessary to enable it to give judgment. This gave the House of Lords some latitude under para 3, and leads one to speculate as to the factors the House of Lords could take into account in assessing whether or not a decision was 'necessary', and also as to whether there are any further circumstances in which the House of Lords could legitimately decline to refer under para 3 apart from finding that a decision is not 'necessary'. In **Garland**, Lord Diplock (with whom the other four Law Lords concurred) considered that the House of Lords would not have had to refer to the European Court if there had been 'so considerable and consistent a line of case law of the European Court ... as would make the answer too obvious and inevitable to be capable of giving rise to what could properly be regarded as ''a question'' within the meaning of Art 177.'[7] This echoes the views of the House of Lords, also expressed through Lord Diplock, in **Henn**, where his Lordship stated that where there was an 'established body of case law', the English court 'may properly take the view that no real question of interpretation is involved that makes a reference under art 177 necessary in order to give judgment',[8] In **Henn**, Lord Diplock went further and considered not only the effect of previous decisions of the European Court, but also suggested that if the provision to be interpreted was clear, the House of Lords might similarly not be bound to refer to the European Court; although Lord Diplock did issue a warning against judges being too ready to hold that no question of interpretation arose simply because of the apparent plain meaning of the English text.[9] **Garland** maybe

represents a modification of this line, in that the House of Lords made a reference to the European Court even though they had no 'serious doubt' as to the answer which the European Court would give.

Thus the House of Lords takes the view that under certain circumstances it is not bound to refer to the European Court under para 3 of Art 177, either if there are previous decisions of the European Court or perhaps if the meaning of the text to be interpreted is clear, apparently on the basis that no 'question' then arises under para 3.

These are issues to which the European Court itself has given some attention. In the submission of Advocate General Lagrange in **Da Costa en Schaake** v. **Nederlandse Belastingadministratie,**[10] he suggested that for Art 177 to be applicable in the first place, there must be a 'question ... relative to the interpretation of the text involved',[11] and that if the text is perfectly clear, or there is a constant line of decisions of the European Court, there is no 'question' requiring a reference. The European Court in **Da Costa** did not comment on the former point, but it did accept that if the question raised in a case is 'materially identical' with a question previously decided by the European Court, this would 'deprive the obligation (to refer, under para 3) of its purpose and thus empty it of its substance'.[12] The court which would otherwise be subject to para 3 would remain subject to para 2 and would have a discretion to refer to the European Court under that paragraph.[13] It might still wish to refer to the European Court, for example, if it thought that it would be desirable that the European Court examine the matter again; the European court is not strictly bound by its own previous decisions.

It is interesting to examine the views, expressed extra-judicially,[13] of Pescatore J, a judge of the European Court, He sees the functions of the national court as assessing the relevance of a question an oblique reference to the requirement that a decision on the question must be 'necessary' However he does not feel that the national court is competent under para 3 of Art 177 to form its own opinion on the substance of the question; it should refer the question to the European Court rather than decide the question itself. Pescatore acknowledges that there is an exception to the latter rule where there is already a decision of the European Court, per the **Da Costa** case, but sees no room for the doctrine of 'acte clair' - that is, that the national court need not refer a question if it thinks that the meaning of the text to be interpreted is clear - the exception suggested by the Advocate-General in **Da Costa,** but not taken up by the European Court. The relevance of the doctrine of 'acte clair' to para 3 of Art 177 has now come before the European Court itself in the recent case of **CILFIT** v. **Ministro del Santa,**[14] where the actual question referred to the court was the meaning of para 3. Advocate-General Capotorti suggested that the use of word 'question' in para 3 (and for that matter para 2) did not mean that there had to be some doubt or difficulty of interpretation. (This contrasts with Lord Diplock's approach in **Hann** and **Garland.**) Capotorti argued that all provisions need to

be interpreted, and that it is only on interpretation that their meaning will appear either clear or obscure. Like Pescatore, Capotorti therefore rejected the doctrine of 'acte clair' Nevertheless, the European Court (of whom Pescatore was of course a member) did not fully accept the Advocate-General's view. Firstly, they extended somewhat the 'previous ruling' exception originally acknowledged in **Da Costa**. They held that there was no obligation to refer a question under para 3 if there was a previous decision of the European Court on the point of law in question, 'even though the questions at issue are not strictly identical'. Secondly the court did recognise a limited application of the 'acte clair'doctrine to para 3. They held that if the point is 'so obvious as to leave no scope for any reasonable doubt' the national court will not be obliged to refer to the European Court. However, this broad principle is qualified quite severely. The national court must be convinced that the meaning is equally obvious to the courts of other member states and to the European Court itself. This will entail a study and comparison of all the different language versions of the text to be interpreted, and the text must be examined in the context of Community Law as a whole and the objectives thereof. Moreover, national courts should remember that the terminology and concepts of Community Law will not necessarily coincide with the terminology and concepts of the law of a particular member state.

Nonetheless, national courts under para 3 do clearly now have some latitude, some choice whether or not to refer, if the meaning of the provision to be interpreted seems clear. How can this be reconciled with the fundamental role of Art 177, reiterated in the **CILFIT** case itself, as being to ensure 'the proper application and uniform interpretation of Community Law in all member states'[**15**] The danger, expressed by both Pescatore and the Advocate General in **CILFIT**, is that the subjective opinion of one judge or court of judges may be that the meaning of a provision is quite clear, but that this may not be the view of another judge or court of judges in the same or a different member state. Hence the need for an authoritative ruling from the European Court. The field of statutory interpretation in the UK is littered with examples of judges disagreeing on the plain or literal meaning of a statutory provision.[**16**] On the other hand, the practical effect of a complete rejection of the 'acte clair' doctrine would mean that all questions of interpretation of EEC treaties, regulations etc would have to be referred to the European Court by the House of Lords if there was no previous ruling from the European Court on their meaning. The only limiting factor would be that a decision would have to be 'necessary', that is, that the answer to the question raised would have to affect the outcome of the case in some way.[**17**] Perhaps the decision in **CILFIT** is a sensible compromise, but UK courts will clearly have to be prepared to grapple with the different language versions of the text to be interpreted and must be prepared for decisions of courts of other member states to be cited to them with the object of showing that there is some disagreement as to the meaning of the text.

Application of paragraph 3

Before considering the effect of para 2 of Art 177, we must consider whether para 3 applies to any other courts apart from the House of Lords. In the wording of para 3, could there by any other court 'against whose decisions there is no judicial remedy under national law?' In **Costa** v. **ENEL**,[18] there was a reference from an Italian Justice of the Peace, against whose decisions there was no appeal because of the small amount involved - 1925 lire, or no more than a pound or two in English currency. The European Court accepted that the Italian court was governed by para 3 rather than para 2. However in the Court of Appeal in **H P Bulmer Ltd** v. **Bollinger SA**,[19] Lord Denning was quite certain that the House of Lords was the only English court subject to para 3.[20] Stephenson LJ was less certain, realising that, since leave is needed to appeal from the Court of Appeal to the House of Lords, it is arguable that para 3 should apply to the Court of Appeal, but declining either to agree or disagree with Lord Denning.[21] The approach of Lord Denning was followed by the National Insurance Commissioner in re **a Holiday in Italy**[22] where the Commissioner held that he was not subject to para 3 because his decision could be reviewed by certiorari in the High Court, even though such an application would need leave from the High Court. The matter came before the Court of Appeal again in **Hagen** v. **Fratelli D & G Moretti SNC**,[23] where Buckley LJ considered that para 3 did not apply to the Court of Appeal if leave to appeal to the House of Lords was not 'obtainable'. If by leave not being obtainable Buckley LJ merely means that there may exist no right to appeal to the House of Lords, this takes us no further. If however he means that the Court of Appeal should consider whether they will give leave to appeal and, if they will not, they should regard themselves as being governed by para 3, then he is clearly disagreeing with Lord Denning. If one assumes that the purpose of Art 177 is to ensure that, if all domestic avenues of appeal are pursued, then a question of Community Law (which needs to be decided to give judgment) will ultimately have to be referred to the European Court, in order to achieve uniformity amongst the various member states, then the latter approach appears more attractive. Otherwise one would have a situation in which the Court of Appeal exercised its discretion under para 2 not to refer and then leave to appeal was refused. It would be too late then for the Court of Appeal to make a reference, and the House of Lords, not even hearing the case, could not do so either.

Paragraph 2 of Art 177

Let us now consider para 2. The Court of Appeal is the highest court to which para 2 might apply, and so the Court of Appeal's attitude to para 2 will be an extremely important factor in the use, or lack of use, made of it by other courts. The earliest and arguably most influential case in the Court of Appeal was **H P Bulmer Ltd** v. **Bollinger SA**,[24] in which Lord Denning, supported to an extent by Stephenson LJ and Stamp LJ, purported to lay down guidelines as

to when a decision on a question would be 'necessary' and when the court's discretion to refer under para 2 should be exercised. It should be borne in mind that these can be no more than mere guidelines. The European Court has made it clear that national courts have an unfettered discretion to refer under para 2. In **Rheinmuhlen-Dusseldorf** v. **Einfuhr und Vorratstelle fur Getrude und Futtermittel**,[25] the European Court stated that 'national courts have the widest discretion' and that 'a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer ... questions ... involving such rulings'.

Lord Denning listed four guidelines as to whether a decision was 'necessary'. The first was that the point must be conclusive; by this he meant that the point must be such that, whichever way the point is decided, it is conclusive of the case. This gives 'necessary' a very narrow and limiting interpretation. Pennycuick V-C had not taken such a restrictive line in **Van Duyn** v. **Home Office**,[26] when making a reference under para 2 because 'it would be quite impossible to give judgment' without a decision on the question. Nor did such a narrow approach appeal to Ormrod LJ in **Pelydor Ltd** v. **Harlequin Record Sheps Ltd**[27] when he said, 'I would not ... be inhibited by any nice questions of necessity, and would regard the word "necessary" as meaning "reasonably necessary" in ordinary English, and not "unavoidable". There is clearly not full agreement with Lord Denning and there are instances where his view has not been followed, for example in **Kenny** v. **Insurance Officer**,[28] a case before the National Insurance Commissioner. The European Court, too, seems to prefer a wider view. Although the **CILFIT** case was primarily concerned with para 3, the 'necessary' requirement is common to both para 2 and para 3. In **CILFIT** the European Court thought that a decision would not be 'necessary' if the answer ... regardless of what it may be, can in no way affect the outcome of the case.[29]

Closely allied to this first guideline of Lord Denning's is a further criterion, that it is not normally possible to see whether it is necessary to decide a point until all the facts have been ascertained. Lord Denning's views obviously carry great weight, but have they been accepted by other judges in the Court of Appeal and lower courts? In **DDSA Pharmaceuticals Ltd** v. **Farbwerke Hoechst AG**,[30] the basis of the High Court's refusal to make a reference was that there had as yet been no pleadings and insufficient material on which to formulate a question to be referred. Two cases involving the scientology sect also illustrate this guideline in operation. The Court of Appeal in **Church of Scientology of California** v. **Customs and Excise Commissioners**[31] refused to refer a question to the European Court, because the question depended on the assumption of a fact which had not been found at first instance, in the VAT tribunal, namely that scientology was a religious or philosophical body. The appellant was left to take the point in fresh proceedings based on another VAT assessment. These proceedings were duly taken before the VAT tribunal,[32] but a request for a reference to the European Court was again refused because again at that stage there had been no finding of fact. A similar line was taken in **Lord Bethell** v. **SABENA**[33]

where Parker J held that it was much too early to make a reference where one of two defences had been delivered. However a rather different line was taken by Plymouth Magistrates Court, and the Divisional Court, in **R** v. **Plymouth Justices ex parte Rogers.**[34] The Magistrates Court had made a reference to the European Court at the stage of a defence submission of no case to answer, when no defence evidence had yet been given and there were therefore outstanding issues of fact. The Divisional Court held that the magistrates had acted properly. Even though this was clearly seen as a somewhat exceptional case, the court nevertheless rejected the argument that all facts must be either found or admitted before a reference can be made. The case again illustrates that the guidelines in **Bulmer** can be advisory only. Indeed the European Court seems to take a far less rigid view of the need to find the facts before making a reference. In **Irish Creamery Milk Suppliers Association** v. **Government of Ireland**[35] the Court stated that 'it might be convenient if circumstances permit, for the facts in the case to be established ... at the time the reference is made ... however those considerations do not in any way restrict the discretion of the national court'.

The need to decide the facts first comes to the forefront of consideration when a reference is considered on an interlocutory application. This was the situation facing Megarry VC in the Chancery Division in **Polydor Ltd** v. **Harlequin Record Shop Ltd**,[36] and he concluded that since there had been no pleadings and no findings of fact it was not 'necessary' to decide the question of Community Law raised and no reference to the European Court was made. A similar attitude was taken by Goulding J in **The Who Group Ltd** v. **Stage One (Records) Ltd**,[37] where on an application for an interlocutory injunction a reference to the European Court was not made, even though the judge accepted that a reference would probably be required at some stage. This contrasts somewhat with an earlier High Court decision in **EMI Records Ltd** v. **CBS United Kingdom Ltd**,[38] a case where all the material facts were admitted, when a reference was made on application for an interlocutory injunction even though the purpose of the reference - and therefore, the 'necessity' for the decision - was to secure a ruling of the European Court which could then be applied at the subsequent trial of the substantive issue. Although the case is not specifically referred to, support for this attitude can be found in the judgment of the Court of Appeal in the **Polydor** case.[39] Megarry VC's decision was reversed and a reference to the European Court was made. The facts were by this stage apparently virtually all admitted, and Ormrod LJ took the view that that court should deal with the broad issue between the parties;'the sooner the real issue between the parties is decided by the one final court which can decide it, the better'.[40]

The other two guidelines mentioned by Lord Denning in **Bulmer** are the existence of a previous ruling of the European Court, and the 'acte clair' doctrine. The European Court has now of course itself pronounced on both these matters. In the **CILFIT** case it was para 3 of Art 177 which was being considered, but whether their existence of previous rulings and 'acte clair' are relevant to their being a 'question' or to the 'necessity' of a decision, they are equally applicable

to para 2. There are examples of the United Kingdom courts applying the 'acte clair' doctrine well before the **CILFIT** case; in **R** v. **Henn**[41] the Court of Appeal had no doubt at all about the meaning of Art 9 and Art 30 of the EEC treaty and did not refer to the European Court, although the House of Lords on appeal did. In **re Virdee**[42] there was no reference because 'common sense' dictated the interpretation of Art 48 of the treaty. Against this, Templeman LJ was prepared to make a reference in the **Polydor** case despite the view he took of the meaning of Art 14 of the treaty, and in **R** v. **Johnson**[43] the Court of Appeal reminded itself of the warning of the Advocate-General in **Meyer-Burckhardt** v. **The Commission**[44] that 'national courts should exercise great caution before reaching the conclusion on any point of Community Law, that the answer to it admits of no possible doubt' No doubt the courts in the future will equally bear in mind the warnings about the 'acte clair' doctrine expressed in **CILFIT**.

Discretion under paragraph 2

Apart from the four guidelines as to when a decision would be necessary, Lord Denning in **Bulmer** set out six matters for a court to consider when deciding whether to exercise its discretion under para 2. Lord Denning suggested that the English court should hesitate before making a reference against the wishes of one of the parties and that if both parties wanted the point to be referred, the court should have regard to this, but not give it undue weight. The wishes of the parties do seem to influence the court. In **English Speaking Union of the Commonwealth** v. **Commissioners for Customs and Excise**[45] the VAT tribunal indicated that it was not making a reference because neither party wanted it, although it would have made a reference had either party requested one. This seems to be losing sight of the fact that the reference is for the benefit of the court, to give a correct decision on the law, rather than purely for the benefit of one or other of the parties. Perhaps the High Court was also going too far in **C Meijer BV** v. **Department of Trade**[46] when, a reference having been agreed, Donaldson J left the wording of the question to be referred entirely to the parties.

The wishes of the parties will be closely connected with two of the other factors mentioned in **Bulmer** - the expense to the parties of a reference and the delay resulting from awaiting the ruling. In **Maxims Ltd** v. **Dye**[47] Graham J referred to what he saw as a problem, of one party objecting to the reference on account of expense, and called for appropriate legal aid to be made available. In **Extrude Hone Corpn** v. **Heathway Machine Sales Ltd**[48] the parties' agreement that delay would be against their interests, and the public interest, influenced the Superintending Examiner of Patents not to refer. However, this attitude may be a little short-sighted, because if there is eventually a reference by a higher appellate court, the whole proceedings may turn out to be more expensive and time-consuming than if a reference had been made at an early opportunity. Thus in **McCarthy's Ltd** v. **Smith**[49] Lawton LJ favoured a reference from the

Court of Appeal because it would be cheaper than an appeal to the House of Lords. He did not add that if there were an appeal, the House of Lords might well be obliged to refer anyway under para 3. In the same vein Bingham J, making a reference in from the High Court in **Customs and Excise Commissioners** v. **ApS Samex**,[50] commented that the reference would be unlikely to take longer, nor cost much more than an appeal to the Court of Appeal, and that if a reference were made at the Court of Appeal stage, the delay and expense would be doubled.[51]

The remaining three factors suggested in **Bulmer** as being relevant to the exercise of the discretion in para 2 are, firstly, the need to formulate the question clearly. This would seem self-evident and is perhaps related to the need to establish the facts before referral. Secondly, there is the difficulty and importance of the point; Lord Denning suggested that unless the point were really difficult and important, the English judge should decide it himself. This has not always been the attitude of courts of other number states, as the **Costa** v. **ENEL** case illustrates. Thirdly, there is the need not to overload the European Court, although this seems a fairly spurious point and was not considered a legitimate consideration in the earlier **Van Duyn** case.

Which courts should refer under paragraph 2?

The dicta in cases such as **Samex** suggest that to avoid delay, references should be made by lower courts rather than leaving higher courts to make the references. However in **Bulmer**, Lord Denning appears to suggest that even the Court of Appeal should be reluctant to refer, leaving the House of Lords to refer if needs be. Stephenson LJ in **Bulmer** thought that a judge should exercise his right to refer sparingly and in cases of serious doubt or difficulty only. Lord Diplock in **Henn** said that it would rarely be appropriate in criminal trials for a Crown Court to make a reference, a view endorsed in the **Plymouth Justices** case by the Divisional Court in respect of magistrates courts. There have been allusions to the 'undesirability of cases being referred other than by higher courts'[52] and to the Court of Appeal being the 'appropriate time, if any, for the matter to be referred'[53] The Superintending Examiner of Patents in the **Extrude Hone** case thought it would be rare for him to refer to the European Court when the High Court on appeal could make such a reference.

Clearly a balance must be struck between the saving in time and expense which may result from a reference by a lower court, and the ability of the lower court to formulate a proper reference. In criminal trials there may be a special reason not to make a reference to avoid a long adjournment whilst the European Court's answer is awaited, but this is probably more of a problem in a Crown Court jury trial than in the Magistrates Court, and in each case it may be possible to make a reference before evidence is heard. It may even be that all the material facts are admitted. In High Court cases there is less of a case for a judge declining to refer on these grounds. However, the attitude of Bingham J in

Samex does seem to contrast with the rather negative approach of Lord Denning in **Bulmer**. If one examines both sets of guidelines in **Bulmer**, they are largely negative; reasons not to refer rather than reasons to refer. Indeed the most pervasive effect of **Bulmer** may not be that the guidelines are slavishly followed, because this is obviously not the case, although they were and still are influential; it is that they set a pattern for referral to the European Court being something of a last resort, or being in some way abnormal. Thus we find a Crown Court judge in **R** v. **Johnson**[**54**] saying in respect of community law, 'What am I to do ... Decide this question myself ... If I cannot ... it would be necessary to find somebody else to do it, and that somebody else, is ... the European Court'. Perhaps part of this negative attitude derives from the confusion between the necessity to decide a question of community law, which is of course part of paras 2 and 3 of Art 177, and the **necessity to refer** to the European Court, which Lord Denning refers to in **Bulmer** but which forms no part of Art 177. So we find Foster J in **BLMC Ltd** v. **Armstrong Patents Co Ltd**,[**55**] having considered Lord Denning's dicta in **Bulmer**, stating that he saw 'no necessity to refer'.[**56**] Foster J cited and followed two cases in which so called Euro-defences were treated with some scepticism. In the first, **BLMC Ltd** v. **TI Silencers Ltd**,[**57**] Walton J was concerned that English courts should not by Art 177 be reduced to 'mere fact-finders' and in **ICI Ltd** v. **Berk Pharmaceuticals Ltd**[**58**] Megarry V-C stated that courts should scrutinise a Euro-defence with care, and that if it was not 'viable', it should be struck out. The **TI Silencers** case went to the Court of Appeal[**59**] where it was held that the Euro-defences should only be struck out if they did not disclose a 'plausible argument' that there had been a breach of commnity law if the defendant's allegations were accepted; the appeal was allowed. As Foster J says in the **Armstrong Patents** case, in neither case is there any mention of referral to the European Court for a decision on the Euro-defences. There has now been a further decision of the Court of Appeal[**60**] which has emphasised that the court's role in deciding whether to strike out a Euro-defence is limited to seeing whether on the face of the allegations in the defence there is a breach of community law; whether the allegations are true is a matter for the trial.

Conclusion

It will be seen that **Bulmer** has had an influential effect on the approach of other judges to Art 177; an effect which on balance militates against use of the power to refer. Now that the House of Lords has pronounced on Art 177 in rather more sympathetic terms, it may be that the influence of **Bulmer** will wane, and that judges will be more ready to accept the value of a reference to the European Court.

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1 [1974] 2 All ER 1226, CA.

2 See ibid per Lord Denning at 1233, Stephenson LJ at 1241.

3 See **Garland** v. **British Rail Engineering Ltd, below.**

4 Most recently in **CILFIT** v. **Ministro Del Santa** [1983] 1 CMLR 472, CJEC, considered below.

5 [1901] AC 850

6 [1982] 2 All ER 402.

7 ibid at 415.

8 [1981] AC 850 at 905. It is of course the decision of the question which must be 'necessary', not the reference to the European Court.

9 ibid at 906.

10 [1963] CMLR 224.

11 ibid at 234.

12 ibid at 237.

13 Pescatore 'Interpretation of Community Law and the doctrine of acte clair in 'Legal problems of an enlarged European Community' ed Bathurst and Simmonds.

14 [1983] 1 CMLR 472, CJEC:

15 ibid at 489.

16 See for example **Nothman** v. **London Borough of Barnet** [1977] IRLR 398, EAT; [1978] 1 All ER 1243, CA; [1979] **1 All ER 142, HL.**

17 This is the meaning of 'necessary' adopted by the European Court in **CILFIT**; it is discussed in more detail below.

18 [1964] CMLR 425, CJEC.

19 [1974] 2 All ER 1226, CA.

20 ibid at 1233.

21 ibid at 1241.

22 [1975] 1 CMLR 184.

23 [1980] 3 CMLR 253.

24 See note 19, above.

25 [1974] 1 CMLR 523 at 577/578.

26 [1974] 1 CMLR 347 at 357.

27 [1980] 2CMLR 413 at 428.

28 [1978] 1 CMLR 181.

29 [1983] 1 CMLR 472 at 490.

30 [1975] 2 CMLR 50.

31 [1981] 1 All ER 1035.

32 [1982] 1 CMLR 48.

33 [1983] 3 CMLR 1

34 [1982] 2 All ER 175.

35 [1981] 2 CMLR 455 at 473.

36 [1980] 1 CMLR 699.

37 [1980] 2 CMLR 429.

38 [1975] 1 CMLR 285.

39 [1980] 2 CMLR 413.

40 ibid at 428.

41 [1978] 3 All ER 1190.

42 [1980] 1 CMLR 709.

43 [1978] 1 CMLR 390.

44 [1975] ECR 1171.

45 [1981] 1 CMLR 581.

46 [1978] 2 CMLR 563; see also **British Beef Co Ltd** v. **Intervention Board for Agricultural Produce** [1978] 2 CMLR 83.

47 [1977] 2 CMLR 410.

48 [1981] 3 CMLR 379.

49 [1979] 3 All ER 325, CA.

50 [1983] 1 All ER 1042.

51 One of the reasons given by Graham J in the **EMI** case for making a reference at the interlocutory stage was to avoid the delay and expense which would otherwise follow if a reference were made at the trial.

52 **Jenkins** v. **Kingsgate (Clothing Productions) Ltd** [1980] 1 CMLR 81 at 85.

53 **Roberts** v. **Tate and Lyle Food Distribution Ltd** [1983] ICR 521.

54 [1978] 1 CMLR 226 at 237.

55 [1982] FSR 481.

56 ibid at 503.

57 [1980] 1 CMLR 598.

58 [1981] 2 CMLR 91.

59 [1981] 2 CMLR 75, CA.

60 **Lansing Bagnall Ltd** v. **Buccaneer Lift Parts Ltd** [1984] 1 CMLR 224, CA.

ASSESSMENT OF LAW FINALS

by J Craven-Griffiths

Synopsis

In this article I shall be analysing the role of examinations in the assessment of law at finals level, looking both current practice and possible alternatives. I will also be investigating the structure and composition of examination papers, and considering alternative formats.

Introduction

As part of my investigation, I carried out a survey of United Kingdom institutions (excluding Scotland) which assess law at finals level. The interim results of this survey are tabulated in Appendix I and are used in the discussion.

The purpose of Final Assessment

This is a summative assessment, that is assessment which is designed to sum up a person's performance over a period of time. It has teaching and learning implications because of the desire to gain as many marks as possible, but not because it is in itself a teaching tool. This has implications for the choice of assessment method, since student behaviour will be affected by the knowledge of the purpose for which assessment is being used.

Currently it would appear that all undergraduates are awarded degrees (or are failed) according to the traditional system of classification. Close study of the working and grading process might produce agreement with Rowntree that "grades are hopelessly inadequate"[1] or even sympathy with the words from St Augustine's Lament,[2] "For so it is, O Lord my God, I measure it, but what it is I measure I do not know" Nevertheless, the demands of the academic world and of employers for precise labels, however accurate or inaccurate they actually are, seem likely to persist. I shall therefore be addressing myself to the system of assessment by classification as we know it, leaving the wider and more radical discussion for another time.

The Consequences of Assessment Methods

Only the most irrational or perverse teacher or student will actually ignore the method by which the course is to be assessed for final classification. In its extreme form this becomes assessment-led teaching and studying, the entire

course being a practice for the finals. Where course work is part of the final assessment the student may concentrate on it to the detriment of the rest of the syllabus. Similarly examination-led courses can lead to extremes of question spotting and examination practising, students sometimes attempting to rote-learn set answers to questions they hope or expect to find on the paper. Such practices are clearly detrimental to any real understanding of the course. Equally the questions asked are very important, since those which can be answered by copying (for course work) or rote-learning (in examinations) will encourage such practices. It can be quite salutary to stop and ask ourselves exactly what it is we want to assess and what our questions are in fact assessing. Questions which are meant to test higher level cognitive thinking can be marred by relying heavily on remembered factual knowledge.

Creating a teaching and learning response to the form and nature of the assessment being used cannot be avoided. It is therefore important to use that process in as positive a fashion as we can, so that we measure what we really want to measure and also promote the aims and objectives of the course.

The Choices of Assessment Methods

What can different assessment forms achieve?

Different forms of assessment will tend to test different aspects of student knowledge and skill and will therefore also tend to produce different forms of behaviour in the student. Each type of assessment procedure can be viewed in terms of what it can and cannot test and its positive and negative aspects.

Possible Forms of Assessment

Major forms of assessment are course-work essays, the dissertation (or thesis or project), the viva voce, tutorial or seminar performance, and examinations. Within these groupings are further alternative structures, which will be considered.

(i) **Assessed course work**

This is a method commonly used in conjunction with examinations.[3] Advantages of this method include testing on titles on which students can do research and write up in their own time. Schemes which allow the best marks out of a number to be used allow for improvement and for difficulty in some areas to be disregarded. In other words, students are judged on their best work. Against this have to be set the difficulties which are sometimes found; possible overload of work on students and staff[4] and the students concentrating so much on their assessed work that they fail to come to terms with the course as a whole.[5]

(ii) **The dissertation** (or thesis or project)

This method is popular and may be gaining in popularity.[6] It is the only form for undergraduate assessment that appears to be able to fully test basic research

and editing skills. Carefully supervised, this method can test student skills of research, analysis and comprehension whilst also testing editing and communication skills. These may be important skills in the legal field.

Given that it will test these skills some students may do rather badly in this assessment. This is perhaps something that we have to accept if we do mean to teach and assess these skills. Thought needs to be given here to what is being tested and to the student's own abilities and needs.

There are difficulties with this method. The sheer volume of work created by the supervision can be a problem. Suitable titles can be difficult for students to find, especially where the popular or well known areas appear to have been covered previously. Plagiarism is sometimes considered a difficulty, particularly where a student honestly produces of piece of work which is mainly derived from the work of others, without direct attribution. Apart from vigilance by staff, students do need to understand excactly what is required of them and indeed need some instruction as to how to proceed.

(iii) **The Viva Voce**

This does not appear to be used as a part of normal assessment at undergraduate level.[7] This method might be used to check a student's ability to discuss the implications of his/her thesis, or where a student's classification in a subject is marginal, but it does suffer from the problems of bias from which all interviewing suffers. For this reason two interviewers would be used. As a method it also penalises the less articulate or shy person, when this may well not be part of the assessment test.

(iv) **Tutorial or Seminar Assessment**

This is not commonly used.[8] It is a form of **continuous** assessment, since it includes bad as well as good. It can be subject to tutor bias and can penalise students who do not perform well in groups or who are slow learners.

(v) **Examinations**

This is used universally.[9] Its great advantage is relative ease of administration and the relatively useful way in which marks can be used to achieve a range of classification. Examinations are frequently criticised[10] yet they remain very popular in usage if not in terms of approval.[11] There are real advantages to examinations; they can test basic knowledge across the syllabus and can test various levels of skills in a subject efficiently. They can assist in avoiding plagiarism and in motivating learning. However, claims that "examination-caused" stress is a test of stress that occurs in the world of employment are not backed up by any evidence: one form of stress is not necessarily related to another and such claims for examinations tend to be unhelpful. Some of the difficulties found with examinations may be avoidable, such as questions which are answerable by rote-learned material. Examination stress may be lessened by changing the nature of the examination itself and by reducing its role in final assessment.

Alternative methods of Examination

There are two basic choices when using examinations; firstly whether or not to have a traditional unseen three hour paper, and secondly whether or not to vary the construction of the paper.

Taking these questions separately:-

(a) (i) **Seen papers:**

This is uncommon.[12] If it is a system which allows the completed paper to be returned at a later date it is difficult to distinguish from assessed course work. If it is a seen paper which is then sat in timed conditions it does raise questions of difficulties with available library facilities before the examination and of the possibility of rote-learning of answers.[13] This method could increase stress rather than decrease it, if more than "thinking" time is allowed.[14]

(ii) **Seen materials[15]**

This can be useful, for example, for compulsory questions. It could remove memory stress, especially if basic notes were allowed.

(iii) **Library based examinations**

This does appear to be a purely theoretical choice.[16] It does present enormous administrative difficulties.

(iv) **Open time examinations**

This does not appear to be used currently.[16] It does not disadvantage slower candidates, but it would also possibly encourage students to meander through a paper and be repetitive rather than succinct and to the point. Substantially more than three hours at a time might involve a student in exhaustion and loss of concentration.[17] Possibly it is more important to write papers which can be sensibly dealt with in three hours.

(v) **Open Book Examinations**

This is not commonly used[18] and might be difficult in some legal areas because of the difficulty of out of date materials. While it prevents "write all you know about ..." questions, it also prevents testing of basic knowledge.

(iv) **Provision of Materials in Examination Room**

This is a difficult question: while providing materials (statutes, reports, treaties usually) would seem to be essential to remove pointless memory testing, and sensible, to prevent questions of the "what does it say" variety, there comes a point where it may prove impracticable. Many institutions already find it expensive or indeed too expensive[19] and in statute or treaty based papers, the students may have a desk full of documents with which to contend. This can be

unhelpful as the student is deemed to have access to materials which s/he may find impracticable, particularly if the materials are not annotated.[20]

Some institutions provide some statutes and materials in some examinations and allow students to bring in their own in others.[21] This is sometimes done by "core" and "option"; but this only solves financial problems for the institution. Some "options" may be heavily based on statutes and other materials.

(b) **Internal Structure of the examination paper**

Examination papers are commonly based on a 4 or 5 answer paper,[22] sometimes using papers divided into sections[23] but less often using compulsory[24] or other forms of questioning.[25]

Using a more mixed paper may allow examiners to test out their aims and objectives more fully. The possibilities within examination papers are to vary the type of question asked and to use papers divided into sections or compulsory questions, to compel students to answer different types of question and/or questions from across the syllabus.[26]

(i) **Multiple Choice Questions**

These are very rare in law papers.[27] In practice they are very difficult questions to set although they are very useful in testing across a wide knowledge base in a short space of time.

(ii) **Short Answer Questions[28]**

These are unknown in law papers,[29] yet they offer potential for testing across the syllabus at a level of both basic knowledge and of analysis and logical skills. This form of questioning can also test those areas of the syllabus which are likely to be rather neglected in a four answer paper. To effectively cover the syllabus these questions (or a mixture of these questions and multiple choice questions) should take up approximately half of a traditional three hour paper (possibly more where course work assessment is also used).

(iii) **Full Answer Questions**

These questions should be aiming to test higher levels of cognitive thinking, including applied knowledge and conceptual understanding. In order not to overlead such questions they should be used to test thinking skills and abilities rather than basic knowledge. Provision of relevant materials may be useful here. These questions also test literacy and communication. It is important to agree how much of this testing is deliberate and will be marked as such; students should also have this information.

(iv) **Half Questions**

These questions are possibly less useful than any of the others because they lack the ability to test across the syllabus yet neither can they test higher level cognitive thinking as thoroughly as a full answer question.

Choosing an Assessment Structure

In order to decide upon an assessment structure it is important first to agree on the aims and objectives for the course as a whole. In legal circles some basic agreement may be found that, amongst other criteria, the course team will be looking for:[30]

(i) a basic knowledge across the syllabus
(ii) an ability to use that knowledge in new situations
(iii) analytical and logical skills within the subject
(iv) an understanding of basic concepts
(v) an understanding of how theoretical law relates to law in practice and to societal needs.
(vi) an ability to evaluate new developments and to postulate future possible developments
(vii) an ability to understand the underlying principles in the subject as a whole so as to use that understanding to research questions that arise and to think creatively.

Having agreed aims and objectives the possible assessment procedures will need to be "matched" against these, bearing in mind practical constraints. The resulting assessment procedures seem likely to be a combination of methods, enabling testing and motivated teaching and learning of a variety of knowledge levels and skills across the syllabi. The most common current combination is of examination papers with assessed course work,[31] but this cousework element rarely exceeds 30% being commonly 20% or 25% of the total mark, although it can be as much as 50% or even replace a paper.[32] While this combination of procedures seems a useful one, no particular ratio of course work to examinations seems to be obviously a "best buy" The Universities of Warwick and Southampton vary their procedures from course to course, and the University of Warwick allows students in some papers to choose themselves between a range of minimum and maximum assessment.

There is a clear divergence of practice between Universities and Polytechnics, 12/22 universities using assessment on at least one paper, but only 4 of those universities using assessed course work on most papers. In the polytechnics 11/19 use assessed course work on all or most papers, none using it on only one paper. This clearly reflects the CNAA validation procedure, where a course must be argued and dealt with as a whole and by the entire course team. While experimentation and innovation are apparently more straight-forward matters in a University, changing a course as a whole may be very difficult indeed. However, there is also the possibility that the CNAA validation procedures have been a discouragement to polytechnics considering using a mixed or flexible scheme as at the Universities of Southampton and Warwick. It seems quite plausible that different subject areas require a different balance of assessed course work to examination, research and discussional subjects (including possibly Jurisprudence, Criminology, Welfare Law) possibly needing more course work assessment than the more knowledge/skill based subjects. There does seem to be some merit in having a basic common framework of assessed course work and examination papers for all subjects, set between a minimum of, say, 25% and a maximum of 50%[33] course work for the course as a whole, individual subjects being set by agreement within the framework.[34]

There are difficulties with assessed course work that must be considered; the amount of coursework set must have a relationship to the percentage of the total marks for the subject that it carries.[35] Given that course work assessment is often based on the "best work", if the assessed course work element is high, the number of pieces of work will be high, say five for 50%. That means students may have to actually write say seven or eight pieces of work, resulting in possibly an over concentration on certain parts of the syllabus and possibly an overload of writing and marking on students and staff. However for some subjects a combination of, for example, a 50% course work assessment and a two hour "short answer" paper may be appropriate.

Other difficulties with creating an assessment structure include the questions of student choice in assessment procedures and of the use of dissertations. In some institutions, students can opt for how much assessed work they do in a subject. This seems attractive in some ways, but it does present the difficulty that students in the same subjects are being tested differently. This does seem undesirable, testing being most appropriately decided according to the particular aims and objectives of the subject, rather than the whim of the students.

The dissertation (or thesis or project) is used frequently now, but only by polytechnics is it normally seen as additional and compulsory.[36] This means that some students can choose to replace an examination with assessed work. This seems to place coverage of the syllabus as a whole at some risk, unless seminar work is also included.[37] There is still the problem that this does not test basic knowledge across the syllabus.

Current Procedures - The Survey

The survey was undertaken in May 1984 and the results are as at July 1984.

All the institutions in England and Wales examining law for law degree finals were asked to complete a questionnaire on their assessment procedures. Scottish institutions were not approached because I wanted to compare courses that were as alike as possible. Initial replies showed a 77.6% response.

The Results

The Courses

Most institutions offer single honours law degree courses while 15/45 offer joint degrees. There were seven part time courses, one sandwich degree[38] and two modular degrees, all offered by polytechnics.

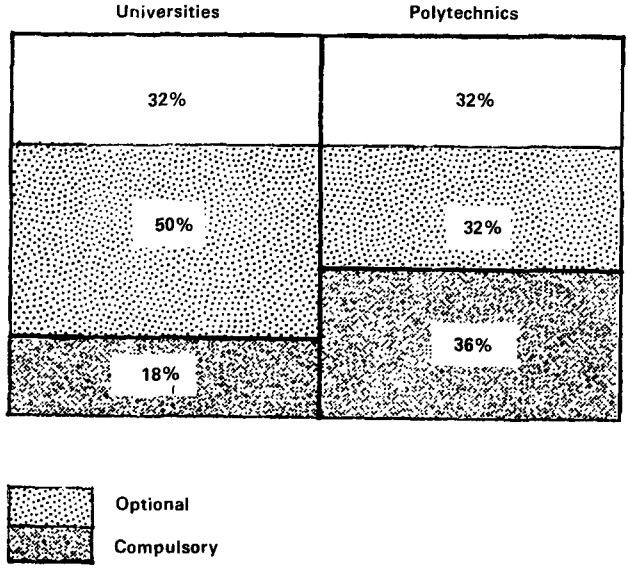
Single Honours Law degrees

Virtually all the finals are taken over two years.

Numbers of Finals Papers

Where finals are taken over two years, there are four or five examination papers in each year. For Part I five papers is most usual, while for Part II it is almost equally likely to be 4 or 5 papers. When totals are used, including compulsory projects, then a clear divide emerges between universities and polytechnics, the former normally setting 8 or 9 finals papers, whilst the latter set 10 papers more frequently than any other total.[39] This is apparently the result of the polytechnics "adding on" compulsory projects.

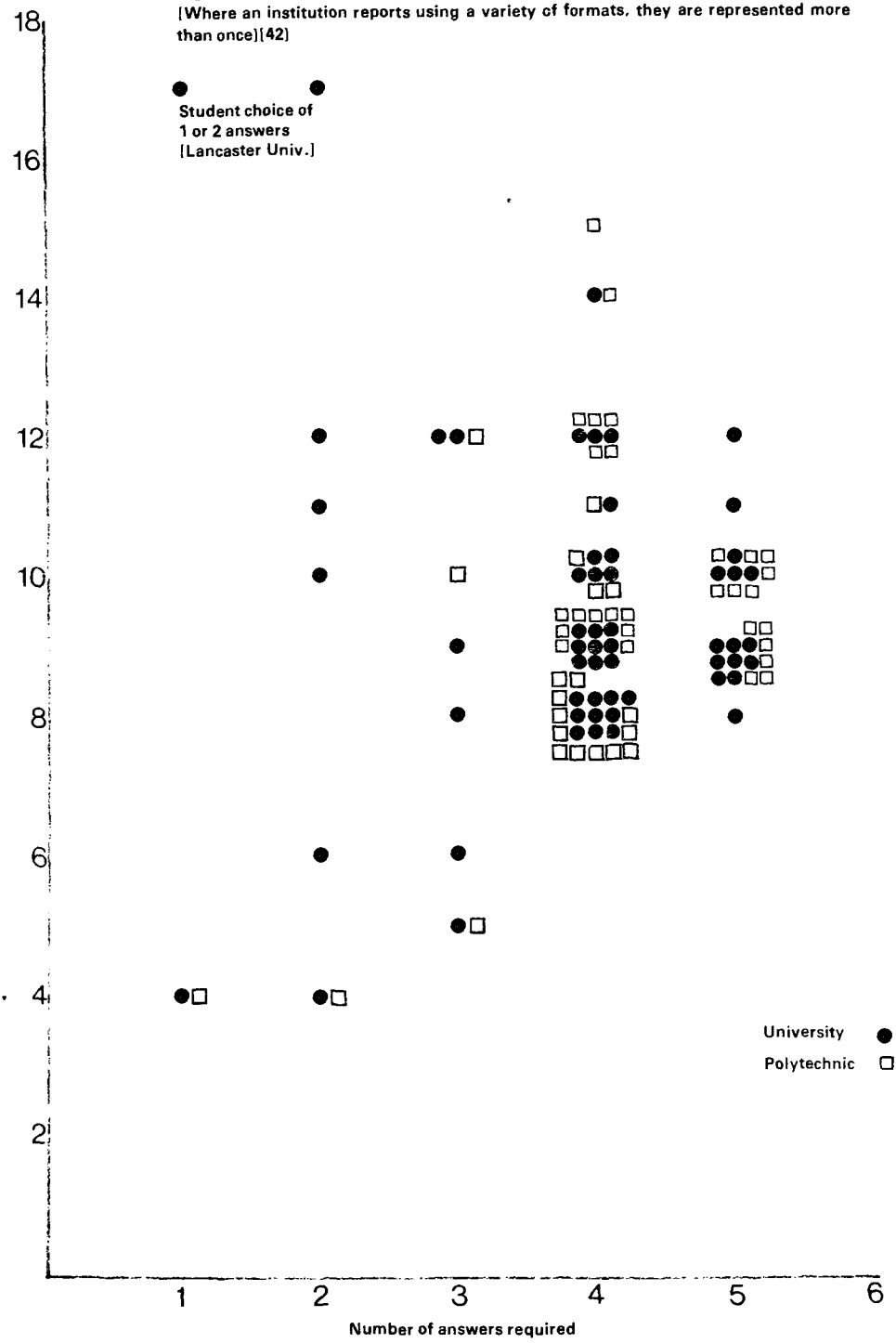
Figure I Use of Projects



Weigbting of final year results

Despite the importance which most institutions appear to give to these results, only ten institutions have fixed rules, twenty five relying on informal discretion. While giving predominance to final year results appears to be highly favoured, it is perhaps unfortunate that the means of achieving this are not more formal. It may be worth considering whether the students understand the informal process.

Figure 2: Number of answers required/Number of questions on paper
[Where an institution reports using a variety of formats, they are represented more than once][42]



Materials in Examination Papers

Only 5 institutions examining single honours law do not supply or allow in any materials at all into examinations. There does therefore seem to be some agreement on this point, yet in practice the provision of materials is clearly "patchy" and sometimes relies very heavily on students supplying their own.[**40**] Clear policies and decisions may be needed on materials, although different subjects may have quite different needs.

Questions on Examination Papers

Papers are almost entirely composed of traditional "full answer" questions, requiring usually 4 or 5 answers.[**41**] The number of answers required is shown in fig.2.

Preseen Papers

This is used only by a few institutions and is used at Wolverhampton Polytechnic for one question only on one paper. It is a technique which can be useful, particularly for "thinking time"[**43**] and, for example, for material for compulsory questions. The University of Kent use this technique for Taxation.

Conclusions

Examinations are still the basic method used for assessment of law at final degree level. This may be the result of many factors, including practical difficulties as well as reluctance to introduce change. Innovation within the examination paper itself should be considered, to ensure the best use of this method. There is some readiness to introduce other forms of assessment, the most popular being the dissertation and assessed course work. These other procedures can cause administrative problems and these are important considerations in planning an assessment structure. While there cannot be a prescribed model I am suggesting that most course teams will wish to assess across a range of aims and objectives and will need to use a mixture of methods. These are likely to be a combination of examinations, including a variety of structures, assessed course work and an additional piece of research work (not in place of another paper).

Ideally while a course would have a framework combining these (and other) elements, each subject could find its own agreed balance of elements. This balance should allow subjects to assess a common pool of aims and objectives whilst giving predominance to the particular needs of the subject. Testing across the syllabus for basic knowledge and analytic skills will mean that examinations will contain at least some multiple choice and/or short answer questions, building up in appropriate cases to a complete paper.

Senior Lecturer in Law, Trent Polytechnic.

1 Rowntree, "Assessing Students"

2 Quoted by Rowntree, op cit.

3 Of 45 institutions replying in the survey 23 use at least partial assessment by course work.

4 In the survey two institutions were cutting down their course work demands and Nottingham University also described it as not altering final grades and therefore not worth the work.

5 A problem that I have met.

6 In the survey 28/45 institutions were using some form of this method.

7 In the survey no institution reported using this as a normal part of assessment. Some may have provision to use it exceptionally.

8 It is used at Cambridge University. At Warwick University there is a 50% assessment on the "Legal Practice" paper for "clinical element"

9 Used by 100% of institutions replying in the survey.

10 See discussion in article by Downes, Hopkins and Rees, "Methods of Assessment in British Law Schools" 1982 Law Teacher, p 77.

11 19/41 institutions use examinations alone (or examination + dissertation) for assessment in law finals.

12 But is used for example at University of Southampton and is being planned by City of London Polytechnic. University of Lancaster use it on their General Paper.

13 Something that I have seen done when setting "seen tests"

14 At University of Southampton this varies from 1 week to 1 month. At Lancaster there is five hours thinking time.

15 This is done by Bristol Polytechnic, where a patent design is preseen for the intellectual Property paper.

16 No institution reported using these methods.

17 Although extended examinations are sometimes unavoidable for handicapped students and have been used in the School of Human Sciences, Trent Polytechnic.

18 Used at University of Warwick.

19 Allowing students to bring in statutes is one way of avoiding institutional expense and this is done to some extent by 22/41 institutions.

20 Materials at Kingston Polytechnic are partially annotated.

21 In the survey 10 universities and 6 polytechnics use this combined system.

22 Sometimes 3, for example, at University of Warwick, see figure 2 below.

23 Used by 29/41 institutions in the survey.

24 Used by 16/41 institutions in the survey.

25 Used by 4/41 institutions in the survey.

26 University of Hull sets two examinations courses on each syllabus, one "problem" and one "essay"

27 Use reported by Bristol and South Bank Polytechnics, and Universities of Sheffield and Southampton.

28 These are designed to be answered briefly, ie in approximately 1/4 of time normally allotted to a full answer.

29 No usage reported at all in the survey.

30 I am not here going to repeat "Bloom's Taxonomy of Educational Objectives", which is thoroughly discussed for law courses by Downes, Hopkins and Rees, in their article, op cit.

31 This is used by 23/41 institutions in at least one subject.

32 As at University of Warwick.

33 More than 50% assessed course work may encourage an over emphasis on this aspect of the course at the expense of coverage of the syllabus as a whole.

34 The Law Society will apparently accept a maximum of 25% assessed work for a core subject - see comments by Downes, Hopkins and Rees in their article, op cit.

35 At University of Warwick this relationship is 1250 words: 10%

36 See Appendix I: these were used by 28/41 institutions in the survey, but were compulsory in only 4/15 universities and 7/13 polytechnics. 4 polytechnics used projects to award honours on part|time degrees.

37 As at Cambridge.

38 Brunel University also offers a sandwich degree but did not reply.

39 See Appendix I.

40 22/41 institutions relied to some extent upon student supply.

41 University of Birmingham use wide variation, particularly of choice.

42 This relates to reported usage by respondent institutions and does not relate to frequency of use within an institution or to the number of institutions.

43 As at Lancaster University, see footnote 12, where the General Paper is preseen for 5 hours.

Appendix I Tabuletion of Survey Results

	Universities	Polytechnics	Totals
Institutions written to: 58			
Institutions replying to: (July 1984)	23	22	45
1. **The Courses**			
Single honours law	22	19	41
(Joint courses only at University of Keele, Plymouth, Oxford and Hatfield Polytechnic)			
Part-time Degrees		7	7
Joint Degrees	7	8	15
Modular Degrees		2	2
Sandwich Degrees		1	1
Finals taken over 2 years - (law degrees)	20	18	38
1 year	2	1	3
			41
Projects:			
Compulsory (equal to 1 paper)	4	7	11
Optional	11	6	17
			28
2. **Numbers of Final Examination Papers**			
Part I	7	6	13
	13	11	24
Part II	9	10	19
	10	8	18

NOTES:

Part I information not available for one Polytechnic.

North Staffs Polytechnic recorded as per 1986 scheme

Queen's Belfast set 8 "units" in Part I and 7 "units" + 1 project in Part II

Wales (Aberystwyth) sets 6 papers in one exam

Oxford University sets 8 papers in one exam.

City of London modular degree sets 6 papers in Part I, 5 papers + 1 project in Part II.

3. **Total number of Papers over two years, including compulsory projects:**

		Universities	Polytechnics	Totals
Total numbers of papers	8	9	3	12
	9	6	5	11
	10	4	9	13
	11	1	1	2

(City of London Modular is 12)

4. **Weighting to Final Year**

"informal discretion"	12	13	25
fixed rules	3	7	10
totals	15	20	35
No weighting	3	-	3
No information	3	-	3

NOTES:

Cambridge classifies Parts I and II separately.

City of London Polytechnic is tabulated for both degrees; on its Modular degree, the rule is "best 10 out of 12"

5. **Examinations and Assessed Course Work**

Totally examined	10	9	19
At least minimum use of assessed course work	12	11	23
Assessed course work on most papers	4	11	15

NOTES:

City of London Polytechnic tabulated twice for both degrees.

University of Nottingham reports testing assessed course work and rejecting it as not useful.

Preston Polytechnic is to introduce assessed course work in 1984/85.

Manchester Polytechnic is considering introducing assessed course work.

Huddersfield and Lanchester Polytechnic are reducing the amount of assessed course work.

6. **Length of Papers and Reading Time**

Examination papers are all based on a three hour standard, half papers being two hours. Where "thinking time" or reading time is added, it extends from 5 minutes to 30 minutes. Reading time is only found in nine institutions and is usually ten or fifteen minutes. Where there has been assessed course work, some examinations are reduced in time.

7. **Statutes and Materials in Examinations**	**Universities**	**Polytechnics**	**Totals**
Supplied only	4	9★	13
Allowed in only★★	5	1	6
Both supplied and allowed in	10	6	16
	19	16	35
No statutes at all in examinations	1	4	5
No information (Cambridge)	1		1

★ Preston only supplies for 2 papers

★★ Exeter only allowed in for Revenue

8 **Range of Questions and Answers on Papers** (where an institution uses a variety of formats they are represented more than once.)

	Universities	**Polytechnics**	**Totals**
1 out of 4	1	1	2
2 out of 4	1	1	2
2 out 6	1	-	1
2 out of 10	1		1
2 out of 11	1		1
2 out of 12	1	-	1
1 or 2 out of 17	1	-	1
Totals	7	2	9
3 out 5	1	1	2
3 out of 6	1		1
3 out of 8	1		1
3 out of 9	1		1
3 out of 10		1	1
3 out of 12	2	1	3
Totals	6	3	9

	Universities	Polytechnics	Totals
4 out of 8	10	12	22
4 out of 9	9	9	18
4 out of 10	5	3	8
4 out of 11	1	1	2
4 out of 12	3	5	8
4 out of 14	1	1	2
4 out of 15	-	1	2
Totals	29	32	61
5 out of 8	1	-	1
5 out of 9	8	6	14
5 out of 10	4	7	11
5 out of 11	1	-	1
5 out of 12	1	-	1
Totals	15	13	28

9. **Question Techniques**

Compulsory questions ever used	5	11	16
Multiple choice or other non-standard Questions	2	2	4
Papers divided into sections	12	17	29
Preseen Papers or Questions	2	3	5

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