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THE TRENT LAW JOURNAL

SHIELDS & SWORDS**

by Tony Weir*

To invite people to deliver a lecture and then publish it in a law review is not a bad idea at all: the lecturer may be stimulated by the threat of publication, and the fact of delivery may render the lecture readable when it is published. The prospect of an audience, alive or even alert, is something of a help to style: writers would surely not publish their legal articles in the form they do if they were required to declaim them first. This may be why the published lecture sometimes appears as an oasis in the desert of the law reviews. Yet, as always, there are countervailing considerations. Writing for the ear is rather different from writing for the eye: what sounds decent enough may be difficult to read. For example, the speaker can bring out a word or phrase by mere inflection, whereas the writer must resort to typographical variation or syntactical cunning. Perhaps this is why the worst of all pieces to read are those which have been dictated to a machine and then transcribed, for then there is neither the discipline of the pen nor the embarrassment of an audience.

It is harder to explain why so much legal writing in English is as poor in substance as in style. In part it seems to me to result from our being dominated by cases. Having one's feet on the ground may be a source of strength, as Antaeus knew, and some civilian writing, especially in Italian and Spanish, is unduly abstract and so unrealistic, but there is also a danger in being too concrete. As Sir Joshua Reynolds put it, "to paint particulars is not to paint nature: it is only to paint circumstances".(1) We tend to be so fascinated by the case which has just arisen that we put out of mind the cases which might yet arise. We think about cases too much: we should put more effort into thinking them up. For example, it calls for no great effort to imagine a person buying a thing in poor condition, spending a lot of money on it, and then finding to his dismay that the thing is not his but someone else's. The situation must have occurred countless times since 1066, but when the case finally came before the courts in 1972, it was found that the legal aspects of this common occurrence had not been ventilated at all.(2) Nor, indeed, had it been provided for by statute. That is less

**A slightly edited version of the Trent Law Journal lecture delivered on Wednesday 8 December 1982.

surprising. But when the case did finally arise, we get not only a decision, but also an enactment.(3) The civilians are better than us here. They state a proposition and then think up a telling example. And the ancient Roman lawyer was stimulated by an actual case into considering all its hypothetical variants.(4) The Americans are better than us, too, in this respect, at least in the classroom.

But whatever the reason for the poor quality of so much law review writing in English, one does occasionally come across a really splendid piece. Such an article, brilliantly conceived and beautifully written, was presented as a contribution to a symposium some 20 years ago by Jack Coons, now a Professor at the University of California at Berkeley.(5) I want to draw on it heavily tonight, and if that seems unoriginal, I shall just say that it seems better to purvey the gold of others than peddle one's own trash; in any case, not everyone will have the fifty-eighth volume of the Northwestern University Law Review quite to hand.

The author observes that in many disputes the merits of the parties seem evenly balanced; sometimes this is because the evidence on the two sides is equally cogent, sometimes because, though the facts are clear, the situation is one where the pull of the two opposing rules is about equal. He observes that in such evenly balanced cases the natural solution would be to effect a compromise: one would split the difference. This, however, the common law is extremely reluctant to do: it much prefers to grant or, more usually, reject a claim in toto. The author concludes that in many such cases the law should ordain a compromise, a fifty-fifty split, especially because, if it does not, it is not affording the parties equal treatment.

Of the two classes of case which Professor Coons distinguishes, we shall be dealing with those where the rules are in tension, cases of rule-indeterminacy. Cases of fact indeterminacy are also fascinating. The simplest instance is where the plaintiff claims to own the pig which the defendant possesses, and the evidence is such that one simply cannot tell which of them is entitled to it. Professor Coons pointedly asks why we behave as if pig-claimants were more mendacious than pig-possessors. A more familiar example of this problem is the complaint always raised by those who object to the general rule in personal injury cases that there is no liability without negligence. They object that many victims fail to obtain damages simply because they cannot prove that the defendant was negligent. This argument is delusive, since it assumes that the unprovable negligence existed, and the numbor of cases in which that is true simply cannot be known. Thus the argu-

ment simply comes to this, that the complainant regrets that the plaintiff whose injuries are not (provably) due to the defendant's negligence obtains no compensation, which is simply to restate, not to support, the complainant's view that negligence should not be required.

Another instance of fact indeterminancy given by Professor Coons is the paternity suit in which it appears that the mother slept, on the critical night, with both A and B, whose blood groups are identical and consistent with that of the child's. This, of course, recalls the maternity suit in which Solomon rendered his famous judgment. The wise king elicited the truth (after which he awarded the child to the true mother) by threatening to impose a compromise, i.e. splitting the baby. May it not be that the common law, in refusing to impose a compromise, actually induces the parties to settle? After all, if one risks losing everything, whether it be one's claim to the loaf or the loaf itself, it may be sensible to accept, or give up, half the loaf.

How frequently compromises are in fact arrived at by the parties on the ground that it is 'only fair' was brought home to me recently in the College kitchens. A supplier who was to deliver a gross of trout to the kitchens had been told that they must be delivered before eight in the evening since after that time there would be no one there to take delivery. The supplier was unavoidably delayed on route, and it was nine o'clock before he could deliver the trout. He left them outside the kitchen door, but inside the College. When the kitchen staff arrived the next morning, twenty of the trout were missing. When I asked how the matter had been resolved, I was told that the parties had split the difference: the kitchen paid for ten trout they never got, and the supplier got nothing for ten of the trout he had left. The parties thought that this was fair, and it seems fair, or fairly fair, to me. But what is quite certain is that it is not a solution that any common law judge could arrive at. One must ask whether a compromise which is fair when voluntarily arrived at is any less fair when it is imposed.

Now in saying that the common law is reluctant to impose a compromise Professor Coons is quite clearly right, if, as he does, we exclude from the common law for this purpose both equity and legislation. Examples may help. There are some in the tort books. First, if a person suffered harm and it was due partly to his own fault, he got not a penny, even though the defendant was equally to blame, or more so: the merits of the parties might be equal, but the judgment between them was not. That was the rule of contributory negligence and it was in force in

England until the legislation of 1945.(6) Judicial modifications of the rule sometimes gave the plaintiff a total indemnity, although he was in part to blame,(7) but it was still all or nothing, never a split, until the legislator stepped in. Secondly, if the plaintiff was not to blame for the harm and the defendant was, though only slightly, the plaintiff got judgment against him for the whole amount, even if the damage was preponderantly caused by something for which the defendant was not liable at all:(8) harm which was physically indivisible could not be financially apportioned. The defendant might be released from liability altogether if a third party's intervention was extremely potent and unexpected,(9) but usually it was not, and the defendant had to pay the whole bill. Again, it was all or nothing. This rule is still in force, save as between ships on the high seas.(10) Thirdly, if, under the rule just mentioned, a person was held liable for harm for which a third party was equally liable, he could not sue that third party for any contribution towards the damages he had had to pay the victim; tortfeasors might be equally guilty, but the law did not make them pay equally. No compromise. This rule remained in force until 1935.(11)

The picture is similar if we move from tort to contract, from accidents to transactions. As you know, a transaction normally consists of payment against performance. Let us take the performing plaintiff first. According to the common law rule of entire contracts, if a person who had promised to do something did not do it all, he could not claim anything for what he had done, even if he had done quite a lot: he had to do it all or he got nothing, though his failure to complete the job might not be his fault in the least. Thus the widow of a sailor who had promised to sail all the way from Barbados to England got nothing for his last voyage because he died two-thirds of the way across.(12) This rule seemed unfair to judges, so they modified it, but they modified it simply by reversing it in some cases, and letting the plaintiff claim the whole fee though he had not done the whole job the doctrine of substantial performance.(13)

Now let us take the case where the plaintiff is the payer, trying to get back the money he paid in advance. Here the rule was that if he had received any part of what he was paying for, however small a part, he got none of his money back. It was all or nothing once again: the lack of consideration had to be total.(14) Even then the payer might not get his money back if the transaction was illegal and he knew it:(15) the pathological saying here is 'In pari delicto potior est conditio defendentis: where the demerits of the parties are equal, the plaintiff loses entirely'. This is surely a little surprising. One would expect that if the parties' merits or demerits were equal, the loss would be equally

split. There was another case where the payer might not get his money back, though he had actually received nothing, namely where the payment was due when he made it but subsequent performance was rendered impossible by **force majeure.(16)** The House of Lords changed this rule in 1943, but again simply by reversing it: instead of saying that the payer could not get any of his money back though he had got nothing for it, they said that he could get all of it back even if the other party had been put to expense in preparing for performance.**(17)** Apportionment is now possible under the Law Reform (Frustrated Contracts) Act 1943.

So Professor Coons is certainly right to say that the common law judges have traditionally been reluctant overtly to impose a compromise. It is win-or-lose, never draw. Equity is much more flexible. Quite apart from its famous preference for equality when there is something to be divided, equity can tailor, suspend or condition its orders as the merits of the case seem to require, or award a sum of money instead. This flexibility makes common lawyers a little uneasy, as is shown by their hesitancy about **Solle v. Butcher,(18)** where the defendant's claim for rescission of a lease was only allowed on the terms that he offer the plaintiff a new lease at a different rent. Very fair, but quite different in temper and style from the cases we have instanced.

It must be conceded that while the common law judges do not overtly impose compromises, they do go some way towards splitting the loss when they can do so by stealth. The hint is given by an observation of Lord Mansfield's, otherwise rather surprising: "...an action upon the case ... is in the nature of a bill of equity..."**(19)** When the claim is for damages, as opposed to debt, the judges have a lot more room for play:**(20)** "You should have mitigated your loss", "This item is too remote", "You must give credit for that benefit", "You can only claim for what the defendant was bound to confer", "You would have suffered that harm anyway" This flexibility in damages claims at common law is especially important in England because we use the claim for damages where other systems would use a real action: in our system the dispossessed owner of a chattel usually claims damages rather than the chattel itself. In a real action, if one existed, the result must be all or nothing, for either the owner gets his thing back or he doesn't, but since we use a damages claim, a compromise is technically possible. The compromise used not to be made in conversion cases, but now it sometimes is. Take **Wickham Holdings,** for example.**(21)** The defendant bought a car from a person who had it on hire-purchase from the plaintiff finance company. Undoubtedly the plaintiff still owned the car, and the defendant took no title to it at all. But as the hire-purchaser had

paid most of the price, the finance company was allowed to claim only the difference. So, too, a compromise is imposed between the owner of a chattel and the bona fide purchaser who improves it: the owner can get it back if he pays for the improvement, or can claim damages equal to the unimproved value. This compromise was achieved by the courts and is now confirmed by statute.(22)

But even in conversion cases the common law judges were reluctant to use the power of stealthy compromise which the form of action facilitated. It was in such a case that a rare plea for a fifty-fifty split was heard in 1961.(23) The facts were simple and classic. Three ladies in Bournemouth had a car for sale. A man came to look at it the Saturday before the August Bank Holiday and offered to buy it from them. They demurred at taking the cheque he proffered, but when he said that his name was P.G.M. Hutchinson and that he lived at Stanstead House, Caterham, they seem to have supposed that if a P.G.M. Hutchinson did indeed live at Stanstead House, Caterham, the man in their parlour must be he, so they looked in the telephone directory and then accepted the cheque. They gave the man the car and he drove merrily off. When the bank opened after the holiday, the cheque naturally bounced, but by then the rogue had sold the car to a bona fide purchaser, from whom the ladies now claimed its value. By a majority the Court of Appeal gave judgment for the ladies, on the ground that as their acceptance was addressed to the true Hutchinson, there was no contract with the fake one, and that therefore no title, not even a voidable one, passed to the latter. Lord Devlin said that in a dispute between innocent parties such as this the obvious solution was to split the loss between them, but he was in a minority, so although the plaintiffs and the defendant were equally bona fide, or stupid, which comes to much the same thing, the whole loss was thrown on the bona fide purchaser.

It is true that the bona fide purchaser no longer suffers in such a situation, because in a later case a vendor who trusted a stranger on the peculiar ground that he claimed to have publicly impersonated a robber (your own Robin Hood, forsooth) was held to have contracted with the liar and not the screen star.(24) But even now the loss is not split, just left where it lies. Whether it should be split as Lord Devlin suggested has been considered by the Law Reform Committee. The Committee had before them the views of interested parties, among whom the lawyers were in favour of apportionment and the others (mainly insurers?) not, but without giving any very cogent reasons the Committee held the proposal impracticable.(25)

In case you may suppose that the 'all-or-nothing' approach is a thing of the past, let me refer to a very recent decision of the Court of Appeal.**(26)** The plaintiff had by mistake paid money to the defendant. The defendant had spent some of it, but not all. Obviously the plaintiff should be able to recover what the defendant still had. The Court held that the plaintiff could recover the full sum paid unless he was estopped (we shall deal with this point later) but that if the plaintiff was estopped from claiming the whole sum, he could not claim any; he could get the whole amount (though that might be unfair on the defendant) or none at all (though that might be unfair on him).

Whichever way they go, the law's all-or-nothing solutions clearly cause some unease. This must be why some of these rules have been modified by legislation. As another contributor to the Coons symposium put it "...in certain kinds of case the 'all-or-nothing' judicial outcome can leave litigants, lawyers, teachers, philosophers and legal theorists with a sense of injustice - the solutions generated are unfair".**(27)**

Professor Coons of course agrees with that, but, himself fair to a fault, he rehearses some possible arguments in favour of the attitude of the common law judges. One is as follows: "...It may ... be said that 'winner-takes-all' is an aspect of a healthy judicial conservatism which stands in balanced inertia until impelled by sufficient proof to move to the aid of a litigant seeking its intervention. It is a preference, in other words, for doing nothing".**(28)** In my view there is a good deal to be said for this argument, so I should like to devote the remainder of this talk to the view that it is, and should be, easier to defend than attack, that there are, and ought to be, more shields than swords in the legal armoury, and that, when in doubt, the judge should, as he usually does, do nothing, that is, give judgment for the defendant.

The reason for this is not simply indolence, though there is more to be said for indolence than its supporters can muster the effort to say. The proposition can be put more positively by saying that in a case of doubt it is better to leave a possible injustice uncured than to cause one: it is worse for a judge to cause an evil than to let one subsist. David Hume made a very strong point which we may take from two quotations found by Professor Atiyah,**(29)** who has kindly read and digested so many difficult authors for us: "...it would be greater cruelty to dispossess a man of any thing, than not to give it to him" because "Men generally fix their affections more on what they are possessed of than on what they never enjoyed".**(30)** In other words, even if the merits of the parties

are exactly equal, it is wrong to make the defendant pay or disgorge, because it is worse for him to give up what he has than it is good for the plaintiff to get what he wants. There is a proverb about it, apart from possession being nine points of the law: birdwise, so to speak, the defendant's hand is the plaintiff's bush.

As Hume indicates, the plaintiff's case is strengthened if the thing he is claiming is something he has previously had: 'getting one's own back' is more than a puerile satisfaction. Our law recognises this distinction. If you buy a thing in a shop and leave it there, perhaps to collect it later, the thing will admittedly be yours, but if the shopkeeper sells and delivers it to someone else before you collect it, you will not be able to claim it from the second purchaser:(31) you will not be able to claim it because you are not claiming it back: you never actually had it. **Contra**, if you take your car to a garage for repair and the garageman sells and delivers it to someone else, you can claim it, because now you are claiming it back. The distinction is neatly made in the Criminal Law Act 1977 where it deals with squatters who move into houses to which others are entitled. A person may evict the squatters **propria manu** if he had resided there prior to their incursion; otherwise he must call the police.(32)

Let us now see if the proposition that in evenly balanced cases the defendant tends to win casts any light on some quite familiar rules of law. First, let us revert to the con-man, the fake Robin Hood. Now whereas a thief obtains no title whatever to his swag, the con-man gets a sort of title, a title in law which is voidable in equity. The contract whereby the dupe transfers the car to the con-man can be rescinded, since it is induced by the con-man's fraud, but if the con-man has resold the car before the dupe exercises his right to rescind, the bona fide purchaser takes a clear title, for equity will not rescind at the expense of a bona fide purchaser.(33) As we say, the bona fide purchaser takes free of equities. But if the purchaser of a chattel takes free of equities, the purchaser of a debt does not.(34) Suppose that the fake Robin Hood cons the dupe into **buying** a car, rather than into selling one, and then assigns to a bona fide purchaser the right to claim the price promised by the dupe. The dupe's right to rescind is not barred by the assignment, or even by his learning of it: the purchaser of a debt takes subject to equities, not free of them. Why is this? The opposition between the rules that the purchaser of a chattel takes free of equities and the purchaser of a debt takes subject to them seems blatant. Does it turn on any deep difference of policy, on a preference for one type of property over another, perhaps for the tangible over the invisible? I think

not. It is only when they are stated in static terms that the rules are in opposition at all. In dynamic operation they produce the same result - judgment for the defendant.

The dupe who cannot recover his chattel need not pay his debt: the bona fide purchaser who can keep the chattel cannot get the money. Only, as I believe, by observing the results in the light of the litigational posture of the parties can one understand the apparent schizophrenia of the law on this point.

Let us now take the case of the agent. An agent is a person you get to contract on your behalf. The commonest contract is sale. So agents commonly buy and sell for their principals. Selling involves actual disposition, buying involves assuming pecuniary obligations. Suppose that the principal wishes to disavow his agent's act. If the agent sold, the principal will be a plaintiff, seeking to revoke a conveyance. If the agent bought, the principal will be a defendant, strenuously denying his liability to pay. The rules are stated in terms of the agent's authority, and consequently do not distinguish between the two situations. Yet I believe that the decisions would make more sense not much sense, admittedly, but more - if one paid some attention to the question whether the principal is suing or being sued.(**35**) The principal may often resist where he could not recover, or, to put it another way, the conveyance may stand where the contract would not be enforced, or, to put the proposition in a third form, it is commoner to be precluded by one's agent than rendered liable by him.

Another instance. Suppose I let my car on hire to X. Does X become my agent? The question seems absurd. If he gets the car repaired on credit, the garageman certainly cannot sue me for the bill. But suppose my car is still in the garage and the garageman has not been paid. Do I have to pay to get it back? Yes, I do.(**36**) Why? Because, forsooth, the bailee is suddenly said to have 'authority'. It is a queer kind of authority: it precludes me without binding me. These cases make no sense unless you see that it really matters who is suing whom. The litigational posture of the parties is a factor which affects their rights.

We have already mentioned the bona fide purchaser who improves the chattel at his own expense, and have seen that if the owner is the claimant, he must give credit for the value of the improvement. But suppose that after the improvement the car is accidentally destroyed, and the insurance company pays the owner its value. Can the improver bring a claim against the owner for the value of the improvements? I fancy not.(**37**) The improver wins as defendant but loses as plaintiff. That would not surprise a Roman lawyer.

By dealing with the con-man and the agent we have been considering a relatively complex, triangular situation. Let us now glance at the simpler case where only the two parties are involved. Suppose a contract contains a penalty clause. As you know, penalty clauses are void. A person needn't pay the promised penalty. He will be sued for it in vain. Judgment for the defendant. But suppose there is a clause for prepayment and its forfeiture on breach. Here the person who pays cannot recover.**(38)** Judgment for the defendant once again. The judge will refuse to remedy in this case the hardship which in the other case he would refuse to create. Professor Atiyah says: "...there is in substance little distinction between a penalty provision and provision for forfeiting sums already paid. The only difference is that the roles of the plaintiff and the defendant are reversed. But despite dicta in the Court of Appeal in favour of some form of equitable relief, it has recently been held that there can be none."**(39)** A reversal of the roles of the parties may be the only difference, but it is enough when the merits of the parties are quite comparable, as they are here: for if one party is seeking to have more than he lost, the other is seeking to pay less than he agreed.

Penalty and forfeiture clauses are both methods by which parties to a contract may try to vary the normal legal consequence of breach, namely compensation for the foreseeable damage attributable to it, and no more. Another method is the limitation or exemption clause, which seeks to diminish liability just as a penalty clause seeks to increase it. Now the judges who invalidated penalty clauses as unreasonable refused to nullify unreasonable exemption clauses.**(40)** Is this odd? No, it isn't. Penalty clauses are relied on by plaintiffs, exemption clauses by defendants. In both cases the defendant wins. There is no occasion for surprise.

Take now the contractor who, in the course of negotiations, says something wrong, the misrepresentor, the person who, in Conrad's phrase, shows that "irresistible impulse to impart information which is inseparable from gross ignorance".**(41)** Nowadays we have the Act of 1967 which treats fools as liars,**(42)** but at common law the position was that while the misrepresentor could not sue on the contract he had induced, he could not be sued for inducing it, unless he was very wicked

indeed.(43) The misrepresentor failed as plaintiff, but won as defendant. For the misrepresentee, in other words, the misrepresentation was a shield, not a sword.

These words bring me to what you must have expected long since, namely the exciting doctrine of equitable or promissory estoppel, the doctrine of the **High Trees** case.(44) I do not plan to spend long on it, important though it is, since the only surprising thing about it is the confusing way it is dealt with in the books. The truth is that the courts will sometimes refuse to help you exercise your rights if you are acting unfairly in doing so. Frequently, but not always, the rights in question arise from a contract; frequently, but not always, the reason it is unfair of you to be asserting your rights is because you had said you wouldn't. However, since rights arising otherwise than by contract may be adversely affected by conduct which is not easily reducible to promissory language, the treatment of the doctrine in contract books, where students meet it for the first time and therefore think it belongs, misleadingly suggests that the question is "How can a promise be binding when it is not supported by consideration?" We should feel no surprise now to learn that some such promises, while not actionable (judgment for the defendant), are nevertheless preclusive (judgment for the defendant). It is part of a general picture, not something exceptional or aberrant, for the law will often refrain from causing a hardship it would refuse to redress.

I should like in conclusion to consider one or two situations where the courts have deviated from their normal principle of inertia, the principle which leads them to find for the defendant more easily than for the plaintiff, to require less of the defence than of the attack. If these deviant cases seem unsatisfactory, that may lead you to consider that the principle of inertia is a beneficial one, supposing always that the merits of the parties are equally strong or equally weak, or nearly so.

Take first another aspect of exemption clauses the **Midland Silicones** syndrome. The defendant stevedore carelessly drops a package shipped by the plaintiff under a contract with the shipowner, a contract which contains a clause purporting to benefit all persons dealing with the goods by limiting their liability to a certain sum per package. Must the stevedore pay the full value of the goods he drops, or only the sum mentioned in the document? Note that here the plaintiff is claiming a sum he said he would not claim, and claiming it from a person who dealt with the goods in that knowledge, and that though the defendant was doubtless negligent, like everyone else these days, still the plaintiff

is going back on his word and, what is more, is asking the court to help him do so.(45) This seems a very good case for doing nothing, i.e. giving judgment for the defendant. But in **Midland Silicones** the House of Lords said that the stevedore was fully liable because he wasn't a party to the contract which contained the limitation clause: the stevedore could be sued despite the contract because he couldn't sue on the contract.(46) Their Lordships relied on the cases which had held, quite rightly, that only a promisee can sue in order to hold that only a promisee can defend: although all the defendant needed was a shield, the House of Lords gave judgment against him because he had no sword.

But there is some aesthetic justice in the world. Foolish decisions cause trouble for judges, and the trouble caused by **Midland Silicones** can be seen in the unedifying gyrations of **The Eurymedon** and **The New York Star.**(47) The courts now clearly feel that in such cases the stevedore should win, and so hold, but you will go mad if you try to find a contract between the shipper and the stevedore, because of course there isn't one and there is no need for one. One normally contracts with only one person at a time, but one can waive at quite a lot, especially from shipboard. The same principle which gets round the want of consideration in **High Trees** can get around the want of privity in **The Eurymedon.**

Next let us consider again the owner whose goods have got out of his possession. He wants them back or, failing that, their value. Of course there is no point in asking for your goods back unless the defendant actually has them, but in England the owner may sue anyone who dealt with them, even if he no longer has either the goods or their price. And just as the owner's action against the unentitled possessor is one of strict liability for it is hardly an answer to the claim 'Those are my goods you've got' to say 'Well, it's not my fault I've got them' so also (oddly enough) the claim against any intermediate dealer is one of strict liability. Now it is a well-established rule that even if it was through the owner's own carelessness, even gross carelessness, that the goods got out of his hands into those of the defendant, the owner's claim is unaffected. When one comes to think of it, the result of this rule is simply astonishing: it is to make a defendant strictly liable for a loss which the plaintiff himself has negligently occasioned. What reason is given for not precluding the careless owner? The reason given is that one cannot be liable for negligence unless there is a duty to take care, and that no one owes anyone else any duty to take care of his own property.(48) You will see that this is not a reason for the conclusion. We can accept, for what it is worth, that no one owes

anyone else a duty to look after his own goods, but it really does not follow that the owner's carelessness should have no effect on his claim.(49) The fact that he would win as defendant doesn't mean that he must win as plaintiff: he might, like many other people, be precluded though not liable. Consider personal injury cases. There a plaintiff's claim is indubitably affected by his failure to look after himself properly regardless, and expressly regardless, of the question whether he owes the defendant any duty to take care of his own person.(50) In such cases, indeed, the plaintiff used to get nothing, and even now he does not get full damages, for they are reduced under the 1945 Act. It is a perplexing anomaly that the same does not apply to an action in respect of goods, surely a lesser value, even in a late capitalist society. Yet the Law Reform Committee in its Eighteenth Report approved of this anomaly.(51) Subsequent judges, if left to themselves, would surely have disagreed with the Committee, but now they do not have the chance to disagree, for Parliament has spoken. It has ordained that 'Contributory negligence is no defence in proceedings founded on conversion ...'.(52) In the marginal note this is termed a 'Minor Amendment'. In my view it is a major disaster. It was quite wrong for Parliament to legislate at all on this topic, and it has legislated to the wrong effect.

May I add a final point in this connection. The decision which, as much as any, established the irrelevance of the owner's negligence in letting his goods get lost or stolen was **Farquharson Bros.** v. **King**, where Lord Halsbury, in one of the testiest speeches ever reported, said ''A servant has stolen his master's goods, and the question arises whether the persons who have received those goods innocently can set up a title against the master. I believe that is enough to dispose of this case.''(53) Some things have changed since 1902. At that time it was possible to say that people must be unaffected by their servant's thefts, since no one was liable for theft by another, even if the thief was his servant. For example, the bailee was not liable to the bailor if the bailee's servant stole the bailed goods.(54) That rule has now been changed, for in 1965 the Court of Appeal held a bailee liable when the bailed goods were stolen by the person to whom the bailee had entrusted them.(55) Now if a person can be made liable for theft

by his trusted servant, I cannot for the life of me see why he should not, indeed **a fortiori**, be precluded from asking the judges to inflict on an innocent defendant a loss for which he himself is, in this passive sense, responsible. To the claim 'You bought goods stolen from me' it should surely be a good answer to say 'Yes, but it was your own man who stole and sold them'.

Now when an owner carelessly lets his goods get stolen and the thief, instead of **selling** them to the defendant, makes a **gift** of them to him, we have no hesitation at all in making the defendant disgorge. The reason is that the owner's carelessness has not caused the defendant to change his position for the worse. Whereas the purchaser will be out of pocket, the donee is no worse off if he has to disgorge than he would be had there been no carelessness. Now apply that to the case of payment by mistake. It is accepted that the person who pays another by mistake can recover what he has paid, even if he was careless in making the payment.**(56)** I have no objection to that. The rule is necessary to avoid unjust enrichment. But if the defendant has spent the money unprofitably,**(57)** he is no longer enriched, and he will be actually impoverished if the payer is enabled to claim his money back. Here the common law goes too far and makes the defendant liable even if he is no longer enriched. The defence of change of position is not fully accepted. For the defence of estoppel, the courts once again seem to require that the plaintiff must have owed the defendant a duty to take care:**(58)** negligence in the payer and detrimental reliance in the payee are not enough. Surely the result should be that the person guilty of a negligent mistake in payment should be barred from recovering it if the bona fide payee has unprofitably spent it. As Goff and Jones observe, "As between two innocent parties, the loss should lie where it falls, in circumstances where the defendant has altered his position in good faith in consequence of the payment to him."**(59)**

I must sum up, though the sum be ever so small. If it is true that the common law has often refused to impose a compromise too often, perhaps, in view of the fact that in many cases where the merits of the parties seem evenly balanced a compromise seems the fair result, indeed, one sometimes brought about by the legislature yet when the all-or-nothing approach results, as it often does, in judgment for the defendant and the dismissal of the plaintiff's claim in toto, one must remember that the defendant, as a result simply of his posture as such, starts with a moral advantage admittedly one which is often outweighed namely, that the claim to retain is in itself stronger than the claim to obtain (because it is worse to give up what one has than

not to get what one wants), and that this moral advantage becomes a tactical advantage in that the claimant, who is seeking to get what the defendant has, must show a better than evens case or the judge, even if he imposes a compromise, may well find himself creating an injustice rather than resolving one. In the instances where we have seen the common law operating unfairly when it uncharacteristically fails to give judgment for the defendant, the unfairness would not be greatly reduced if it split the difference.

But even if the jurisprudent could not justify the common law's tendency to give judgment for the defendant, the jurist can learn something from it, since it helps to explain some rules which, if seen in purely static and substantive terms, seem difficult to reconcile. We have instanced the fact that the purchaser of a chattel takes free of equities while the purchaser of a debt takes subject to them, the fact that penalty clauses are invalid while forfeiture and exemption clauses may be upheld, and the fact that an agent's contract is easier to disavow than his conveyance. I have no doubt that one could find other instances.

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(1) Oxford Companion to Art (ed. Osborne) (Oxford 1970) 978.

(2) **Greenwood** v. **Bennett** (1973) 1 Q.B. 195, noted (1973) Camb. L.J. 23.

(3) Torts (Interference with Goods) Act 1977, c. 32, s. 6.

(4) A good instance is Tryphoninus on finding treasure in D. 41.1.63. With regard to treasure the Emperor Hadrian imposed a compromise, by giving half to the finder and half to the owner of the land where it was found. For things found on land to which the public has access the common law requires a kind of compromise in time, not amount: the occupier should be entitled to the thing for a period (so that the owner can find it) and then, if it is not claimed, the finder should have it. Of course this is the kind of rule the common law cannot make: see **Parker** v. **British Airways Board** (1982) 1 All E.R. 834.

(5) John E. Coons, Approaches to Court Imposed Compromise The Uses of Doubt and Reason, 58 Northwestern U.L.Rev. 750-794 (1964).

(6) Law Reform (Contributory Negligence) Act 1945, 8 & 9 Geo. 6 c. 28.

(7) **British Columbia Elec. Ry. Co.** v. **Loach** (1916) 1 A.C. 719.

(8) In **Bonnington Castings** v. **Wardlaw** (1956) 1 A.C. 613 the employer was liable for only a small part of the dust which caused the plaintiff's illness, but he was held liable **in toto**. The French Cour de Cassation once caused consternation in upholding a decision whereby a shipowner who was responsible for the harm done by his ship was held liable to a drowned passenger's survivors only as to 20% since the ship had sunk in an unusually bad storm. Cass. civ. 19 June 1951, D. 1951.717.

(9) E.g. **The Oropesa** (1943) P. 32 and, more recently, **Knightley** v. **Johns** (1982) 1 All E.R. 851.

(10) Maritime Conventions Act 1911, 1 & 2 Geo. 5 c. 57, s. 1.

(11) Now Civil Liability (Contribution) Act 1978, c. 57.

(12) **Cutter v. Powell** (1795) 6 T.R. 320, 101 E.R. 573.

(13) **Boone v. Eyre** (1779) 1 Hy.Bl. 273 n., 126 E.R. 160; 2 W.Bl. 1312; 96 E.R. 767. The rule can operate unfairly on the customer by unfairly protecting the sloppy tradesman: see **Hoenig v. Isaacs** (1952) 2 All E.R. 176. The common lawyer's antipathy to compromise is evident in his neglect of one of the few instances where his system provides for one, namely abatement of the price for breach of warranty under Sale of Goods Act 1979, c. 54. s. 53(1). It also applies in contracts for work and materials but not otherwise: **Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.** (1974) A.C. 689, 717, per Lord Diplock.

(14) If the plaintiff got no part of what he was paying for, he can claim all his money back, even though he obtained a collateral advantage: **Rowland v. Divall** (1923) 2 K.B. 500. This refusal to compromise seems unfair to the Law Reform Committee, which accordingly proposes the abolition of the 'money-back' claim in favour of a damages claim: Twelfth Report (Cmnd. 2958, 1966) para. 36. Note that it is easier to resist a claim for the promised sum ('You, the plaintiff, did only part of what you promised') than to claim money back ('You, the defendant, did no part of what you promised'): this is an instance of the 'defendant wins' syndrome, to be discussed later.

(15) See Grodecki, In Pari Delicto, 71 L.Q.Rev. 254 (1955).

(16) **Chandler v. Webster** (1904) 1 K.B. 493.

(17) **Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd.** (1943) A.C. 32. The Act is 6 & 7 Geo. 6 c. 40.

(18) (1950) 1 K.B. 671.

(19) **Bird v. Randall** (1762) 3 Burr. 1345, 1353, 97 E.R. 866, 870. Slightly differently worded at 96 E.R. 218.

(20) The **stricti iuris** nature of a debt claim is well seen in **White & Carter (Councils) v. McGregor** (1962) A.C. 413 where the plaintiff obtained judgment for the full amount promised by the defendant although he had doubtless acted unreasonably in rendering performance when he knew the defendant no longer wanted it. Had the claim been for damages at common law or for equitable relief, the plaintiff would not have been so successful.

(21) **Wickham Holdings** v. **Brooke House Motors** (1976) 1 All E.R. 117, reversing previous holdings.

(22) **Greenwood** v. **Bennett** (1973) 1 Q.B. 195; see now Torts (Interference with Goods) Act 1977 c. 32 s. 6.

(23) **Ingram** v. **Little** (1961) 1 Q.B. 31.

(24) **Lewis** v. **Averay** (1972) 1 Q.B. 198.

(25) Law Reform Committee Twelfth Report (Cmnd. 2958, 1966) para. 8-12.

(26) **Avon C.C.** v. **Howlett** (1983) 1 All E.R. 1073.

(27) Professor Snyder at 58 Northwestern U.L.Rev. 731, 803 (1964).

(28) Ibid. at 756.

(29) Atiyah, The Rise and Fall of Freedom of Contract (Oxford, 1979) 107.

(30) Hume, Treatise, Book III, Part II, Sect. I.

(31) Sale of Goods Act 1979, c. 54 s. 24. The claimant's position is (rightly) even worse if he has not even paid for the goods he has not collected: s. 48(2).

(32) Criminal Law Act 1977 c. 45 s. 6-13.

(33) Sale of Goods Act 1979 c. 54 s. 23.

(34) Law of Property Act 1925, 15 Geo. 5 c. 20 s. 136 **Stoddart** v. **Union Trust** (1912) 1 K.B. 181.

(35) The Factors Act 1889, 52 & 53 Vict. c. 45 validates unauthorised dispositions by a mercantile agent in possession of the goods with the owner's consent. See, in this connection, **Ismail** v. **Polish Ocean Lines** (1976) 1 All E.R. 902, 908, per Lord Denning M.R.

(36) **Tappenden** v. **Artus** (1964) 2 Q.B. 185.

(37) In **Greenwood** v. **Bennett** (1973) 1 Q.B. 195 only Lord Denning was ready to give the improver an action. Parliament has not given him one.

(38) S. 49(2) of the Law of Property Act 1925 empowers a court to order the refund (and probably also a partial refund) of a forfeited deposit in a land contract. In **Universal Corp.** v. **Five Ways Properties** (1979) 1 All E.R. 552 Walton J. astonishingly said that this provision was not "designed to do justice between vendor and purchaser". The Court of Appeal held that it was, but implied that the **whole** deposit must be refunded, if any, and that the purchaser in such a case must counterclaim for damages. So this is another 'all-or-nothing' case, despite the statute.

(39) Atiyah, Sale of Goods (ed. 6, 1980) 405, referring to **Stockloser** v. **Johnson** (1954) 1 Q.8. 476 and **Galbraith** v. **Mitchenall Estates** (1964) 2 All E.R. 653.

(40) Lord Denning sought to maintain that unreasonable exemption clauses were void in **Gillespie Bros.** v. **Roy Bowles Ltd.** (1973) 1 All E.R. 193, 200-201; The Unfair Contract Terms Act 1977 c. 50 generally makes them so.

(41) Outcast of the Islands, p. 3.

(42) Misrepresentation Act 1967 c. 7.

(43) **Derry** v. **Peek** (1889) 14 App.Cas. 337.

(44) **Central London Property Trust** v. **High Trees House** (1947) K.B. 130; see now **Amalgameted Investment & Property Co.** v. **Texas Commerce International Bank** (1981) 3 All E.R. 577.

(45) For a clear example of a judge's indignation at being asked to help the plaintiff break his word, see **Snelling** v. **John G. Snelling** (1973) 1 Q.B. 87. That a court will never help a plaintiff to break his word is stated (erroneously) by Megarry J. in **Hounslow London** B.C. v. **Twickenham Garden Developments** (1971) Ch. 233, 248.

(46) **Scruttons** v. **Midland Silicones** (1962) A.C. 446.

(47) **The Eurymedon** (1974) 1 All E.R. 1015; **The New York Star** (1980) 3 All E.R. 257.

(48) In **Johnson v. Credit Lyonnais** (1877) 3 C.P.D. 32, where the question was whether the plaintiff's negligence affected his claim, Cockburn C.J. said (correctly but quite irrelevantly) "Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of negligence owed to him" (at 42). And in **Moorgate Mercantile Co. v. Twitchings** (1976) 2 All E.R. 641 at 659, Lord Edmund-Davies said, with equal irrelevance "Liability has to be based on a legal duty not to be careless, and I can find none in this case". In the Court of Appeal Geoffrey Lane L.J. had said "There seems no logical distinction between the duty necessary to establish an estoppel and that in negligence" ((1975) 3 All E.R. 314, 332). Yet not long before that Lord Wilberforce had aptly said of an argument that it "confuses the kind of careless conduct which disentitles a man from denying the effect of his signature with such legal negligence as entitles a person injured to bring an action in tort. The two are quite different things in standard and scope". They are indeed. See **Saunders v. Anglia Building Society** (1970) 3 All E.R. 961, 972, where the distinction between actionable and preclusive negligence was also taken by Lord Hodson (at 966) and Viscount Dilhorne (at 969).

(49) In **Willis (R.H.) & Son v. British Car Auctions** (1978) 2 All E.R. 392, 395 Lord Denning M.R. regretted that the careless owner could sue.

(50) **Nance v. British Columbia Elec. Ry.** (1951) A.C. 601.

(51) Law Reform Committee Eighteenth Report (Cmnd. 4774, 1971) para. 79-82.

(52) Torts (Interference with Goods) Act 1977 c. 32 s. 11(1).

(53) (1902) A.C. 325, 239. Lord Macnaghten said: "How can carelessness, however extreme, in the conduct of a man's business preclude him from recovering his own property which has been stolen from him?" (at 336).

(54) **Cheshire v. Bailey** (1905) 1 K.B. 237.

(55) **Morris** v. **C.W. Martin & Sons** (1966) 1 Q.B. 716.

(56) **Kelly** v. **Solari** (1841) 9 M. & W. 54, 152 E.R. 24.

(57) On the requirement (only apparently odd) that the money have been wasted, see **United Overseas Bank** v. **Jiwani** (1977) 1 All E.R. 733 (MacKenna J.)

(58) **R.E. Jones Ltd.** v. **Waring & Gillow** (1926) A.C. 670, 692 per Lord Sumner.

(59) Goff & Jones, Law of Restitution (ed. 2, 1978) 551.

ETHNIC ORIGINS AND RELIGIOUS DISCRIMINATION - THE MANDLA CASE

by R N S Saunders*

Introduction

The publicity given by the popular media to the decisions of the Court of Appeal(1) and the House of Lords(2) in **Mandla** v **Dowell Lee(1)** illustrates vividly both the rarity(2) and the impact(3) of attempts to eradicate racial discrimination by individual court decisions, particularly outside the employment field. It will be argued that the Lords' decision is generally correct and largely welcome. Reservations will be expressed, however, over the approach adopted and attitudes expressed or to be implied. Further, the case leaves unfilled a crucial gap in the coverage of British discrimination law, namely the lack of a remedy for religious discrimination. Some recent arguments in favour of closing this loophole will be critically examined and an attempt at a fresh justification advanced.

The Decisions

The respondent ran a private school. Pupils came from a variety of racial and religious backgrounds, but the respondent maintained it was his aim to run a Christian school into which pupils were expected to integrate regardless of background. In particular, pupils were expected to wear school uniform. Mr Mandla, the first appellant, a Sikh, applied to send his son, the second appellant, to the school. He stated that, being a Sikh, his son would not be able to cut his hair, and would wear a turban. The respondent rejected the appellants' application on the basis that this would be against the school uniform rules. He pointed out that there were already Sikh boys at the school who did not wear turbans.

The appellants complained to the Commission for Racial Equality (the C.R.E.) that they had been unlawfully discriminated against on racial grounds in the field of education contrary to S 17(a) of the Race Relations Act 1976. After an investigation by the Commission the C.R.E. supported a County Court action alleging both direct discrimination under S. 1(1)

(a) and indirect discrimination under S. 1(1) (b) and claiming both a declaration and damages. The claim was dismissed on the grounds that Sikhs were not a racial group within S. 3(1) and so the appellants had not been discriminated against on unlawful, racial grounds.

The appellants then appealed to the Court of Appeal on the ground only of indirect discrimination, there being no evidence of the intention to discriminate needed for direct discrimination. The appeal failed, the Court of Appeal affirming the view that Sikhs were a religious not a racial group. The definition of such a group for the purposes of S. 3(1) was to be decided by the group's ethnic origins, and this implied the existence of common racial characteristics of an inherited nature, not purely the result of choice such as political or religious allegiance.

The House of Lords unanimously allowed the Mandlas' appeal, holding that 'ethnic origins' meant that a group was distinguished from others by a combination of characteristics derived from a common or presumed common past, even if not from a biologically common stock. The appellants were indirectly discriminated against since a requirement, namely the no-turban rule, had been applied to them with which for the purposes of S. 1(1) (b) (i) of the Act they could not comply, and which was not justifiable under S. 1(1) (b) (ii).

The Issues

1. Ethnic Origins

To quote Michael Banton(**4**) ''over the past fifty years there has been a tendency for the word 'race' to be superceded by 'ethnic group'..... underlying the change from race to ethnicity has been the recognition that the shape of such groups is not decided by their physical make up, as if they were social projections of biological units, but by the human readiness to utilise physical differences as signs to differentiate groups. Ethnic groups are really political units since they bring together those who share material interests as well as elements of common culture''. Expert sociological evidence that Sikhs were an ethnic group because of their ''distinctive cultural traditions'' was put before the Court of Appeal.

However in matters of statutory interpretation courts tend first to look at precedent and in the common event of this not supplying a sure guide, to the established ''rules'' of interpretation.

There was no binding authority here, since the point had not been disputed in the other Sikh turban cases of Panesar v **Nestle Company Limited(5)** and **C.R.E. v Genture Restaurants.(6)** 'Origins', however, had been considered by the House of Lords in **Ealing London Borough Council v Race Relations Board,(7)** a much criticized(8) decision when the House had held that 'national origins' in Ss 1 (1) and 5 (c) of the Race Relations Act 1968 did not cover nationality as the latter was subject to change at the choice of the person concerned and was not entirely involuntary as the result of descent, as 'origins' impliedly required.

Nevertheless, most commentators,(9) and even Government spokesmen(10) assumed that much religious discrimination would be covered by the 1976 Act, at least where religion was merely a pretext and not the ground of discrimination. This optimism was perhaps, misguided in the light of the vagueness and inconsistency of the understanding of race and ethnicity underlying the 1968 Act,(11) which have been carried over into the 1976 Act.

In these circumstances it was likely that the courts would initially adopt the literal or ordinary meaning approach to interpretation. Oliver LJ,(12) stressing that the 1976 Act creates a criminal offence (incitement to racial hatred - although this was not in fact alleged here), stated that Parliament must have used the word 'ethnic' in its popularly accepted meaning and not a sense which would take extensive etymological research to discover. All three members of the Court of Appeal stressed that the looser contemporary usage of ethnic as meaning 'possessing distinctive cultural traditions' was inappropriate because of its coupling with 'origins', which, following the Ealing Case, implied a connection arising from descent and not from the exercise of choice. Lord Denning, and perhaps also Kerr LJ, were reinforced in this view by the older definitions to be found in dictionaries.(13) Lord Denning also suggested that 'ethnic origins' was intended by Parliament to cover primarily Jews, and that the distinguishing characteristic of Jews as an ethnic group was a racial characteristic.

Inevitably, the Court of Appeal's decision received widespread criticism, not only from the Sikh community, but also from other potentially affected groups such as Jews(15) who pointed out the problems caused by the decision for eg. converts to Judaism, who could not claim any Jewish 'racial origin'.

The Lords' decision, rejecting the Court of Appeal's definition of 'ethnic' was therefore welcomed, but in fact the House, like the Court of Appeal,

took a cautious approach. While rejecting both anachronistic and wider modern dictionary meanings on the ground of inappropriateness and vagueness respectively,(16) and affirming that the Act was not concerned with religious discrimination, Lord Fraser in the leading speech decided that ethnic 'conveys a flavour of race but not a strictly racial or biological sense.' This was largely due to the practical difficulties, not so much of etymology but of scientific proof of the possession of relevant biological characteristics (assuming such existed, which Lord Fraser largely doubted).

The popular sense, used by Parliament required a group to regard itself and be regarded by others as a distinct community by virtue of certain characteristics. A long, continuously shared history, and a separate cultural tradition were essential. Others that would often be found were common geographical or ancestial origin, a common language, a distinctive literature or religion, and being a distinct part of a wider community. This wider definition could cover converts and was consistent with direct discrimination under paragraph (a) (where belief that the victim belonged to a particular group, rather than his actual membership of it is the test).(17) Sikhs had all these characteristics and so were an ethnic group, even though biologically indistinguishable from other inhabitants of the Punjab.

Lord Templeman, however, was even more cautious.. He specifically agreed(18) with the Court of Appeal that ethnic origins "have a good deal in common with the concept of race" (which concept he accepted uncritically) but race and ethnic origin, though related, were different concepts, ethnic origin implying "**some**" (my emphasis) "of the characteristics of a race, namely group descent, common geographical origin and a group history." Sikhs possessed all these characteristics and thus were 'almost a race, almost a nation".(19)

As Lords Edmund-Davies, Roskill and Brandon agreed with both speeches, it is difficult to know whether there are significant differences in these definitions, and if so which reflects the view of the majority. Normally, of course, the narrower ruling would have to be preferred but support for the wider view, less tied to concepts of a 'common racial stock' is to be found in Lord Fraser's acceptance of the definition by Richardson J in the New Zealand case of **King-Ansell v Police(20)** which held that Jews were an ethnic group for the purpose of the New Zealand Race Relations Act.

In conclusion, it is to be hoped that the wider approach will be followed since it should allow for those marrying or otherwise entering ethnic

groups by choice, and for those groups such as gypsies(20A) whose biologically common ancestry is scientifically questionable. It brings the law more into line with current popular and scientific usage and with that in other jurisdictions. Finally, as even Lord Templeman pointed out, it is (probably) what Parliament intended; it is certainly required to give effect to the purposes of the 1976 Act.

2. The ability of the 'victim' to comply

Having found that Sikhs were an ethnic group, the Lords then had to consider whether a condition or requirement (that he not wear his turban) had been applied to Mr Mandla with which he could not comply (S.1 (1) ((b) (i)). On this point, Lord Fraser, with whom the rest of the House agreed, held(21) that Parliament must have intended the words to mean not "can physically" comply as a theoretical possibility, but as "can in practice" or "can consistently with the customs and cultural conditions of the racial group". This was the approach adopted by the Employment Appeal Tribunal in **Price v Civil Service Commission**(22) (on the similar provision in the Sex Discrimination Act 1975).(23) Such confirmation is welcome since it recognises that the claim that the 'victim' has freedom of choice eg in the manner of his dress, is frequently unreal and a mask for discrimination. The courts and potential discriminators must take account of current social facts and 'current usual behaviour' without making value judgments.(25)

3. The Requirement or Condition must be justifiable.

Even if the complainant cannot comply with the condition, the defendant has a defence under S. 1 (1) (b) (ii) if he can show that the condition was 'justifiable'. Whereas in the USA the courts had formulated a relatively narrow defence of 'business necessity'(26) the British Government when preparing the Sex Discrimination Act 1975 had considered a necessity test "too hard".(27)

Accordingly, there was a danger that a defence which already represented a compromise between the principle of fairness to minorities and the policy of encouraging business efficiency,(28) could be widened and the law diluted by reference to current and past employment practice. Not surprisingly, the courts have wavered in their approach. In **Steel v Post Office**,(29) Phillips J in the Employment Appeal Tribunal explicitly approved the Griggs approach, holding that the condition must be one which was necessary, not merely convenient. However, in **Singh v Rowntree Mackintosh Limited**,(30) the Tribunal accepted that a "no beards" rule was justifiable on grounds of hygiene, Lord MacDonald saying that mere convenience of the employer was not enough and

that necessity might be the proper test "provided that term is applied reasonably and with common sense." This broader approach was confirmed by the Court of Appeal in the similar case of **Panesarv Nestle(31)** and followed by **Eley (IM) Kynoch Limited v Powell,(32)** but not in **Hurley v Mustoe(33)** or **Chin v British Aerospace.(34)** The confusion is typified by the judgment of Eveleigh in **Ojutiku and Oburon v M.S.C.(35)** that reasons should be such as to be "acceptable to right thinking people as sound and tolerable", though he added that the test came "close to necessary", while at the same time approving **Panesar.**

In **Mandla,** the House's only clear statement was that necessity was not the test and that purported justification must be independent of the ethnic origins of the complainant.**(36)** Here the headmaster objected to the wearing of the turban precisely because it was a manifestation of the appellant's origins (the respondent was trying to run an "integrated Christian School") and so the defence failed. **Panesar** was quoted merely as an example of a possible justification, but it is hard to resist the conclusion that the broader approach to justification was implicitly taken, particularly as Lord Fraser also suggested**(37)** that "prohibitive cost" of eg. special meals for a particular group might be a defence.

Thus, although the decision will obviously have repercussions in the field of education, in employment it is hard to be as confident as the Commission for Racial Equality**(38)** that the test will be "appreciably tougher than it had become".

4. The Role of the C.R.E.

Perhaps the most alarming aspect of **Mandla** in the lower courts was the courts' hostility to discrimination law and, in particular, to the C.R.E. Lord Denning not only criticised**(39)** the difficulty of understanding and interpreting discrimination laws but said they should not be used to interfere with the discretion of schools in the "proper management" of their affairs, particularly over the "difficult" matter of "keeping a proper balance between the various pupils who seek entry". This surely reflects at best**(40)** an 'integrationist' approach to achieving 'harmony' rather than the object of achieving justice through ending discrimination. It also reflects the courts' concern for management problems already referred to.

Oliver and Kerr LJ's went even further, Oliver LJ saying**(41)** that the statutory machinery had operated as an "engine of oppression although no doubt with the loftiest of motives". Kerr LJ said**(42)** that the interview

was "more like an inquisition", that there was no basis for the "harassment" of the headmaster, which had only created racial **"discord"** where there was none before. The school was demonstratably conducted **"harmoniously"** on a multi-racial basis. (My emphases).

This dislike of the enforcement agencies has been found in some sex discrimination cases**(43)** and also in the series of restrictive decisions on the procedures the C.R.E. must go through in the conduct of its investigations eg. as to the width of terms of reference **(R v C.R.E. ex P Hillingdon LBC)(44)** and the need to give an opportunity for representations before issuing a non-discrimination notice **(R v C.R.E. ex P. Cottrell and Rothon)(45)** and the need to serve a statement of facts relied upon when serving a non-discrimination notice **(C.R.E. v Amari Plastics Ltd).(46)** It is ironic that the Court of Appeal should make such comments at the same time that the C.R.E. was being criticised by the House of Commons Home Affairs Committee for its slow progress with formal investigations (45 undertaken when the Committee began its inquiry but only 10 then completed)**(47)** which is the result both of these procedural obstacles and the C.R.E.'s desire to "stay on cosy terms with the people it is investigating".**(48)**

The courts, rooted in nineteenth century individualism, seem to be unaware of the distinct nature of discrimination law as a collective remedial device for regulating relationships between groups**(49)** and, in particular, of the decisive role played by the C.R.E. in assisting individual complainants.**(50)**

It was therefore welcome, at a time when the C.R.E. is about to ask Parliament to strengthen the law and streamline procedures, that the House did not take up the Court of Appeal's strictures. Lord Templeman stated**(51)** that the C.R.E.'s conduct was not oppressive and Lord Fraser said**(52)** that the criticisms were "entirely unjustified", that the respondent had not complained of his treatment and the interviews were "perfectly proper". Nevertheless, it must be noted that their Lordships had specifically questioned the respondent as to his treatment by the Commission, and Lord Fraser ominously accepted,**(53)** that "opinions may legitimately differ as to the usefulness of the Commission's activities". It is hard to resist the conclusion that in a politically controversial field the House is attempting to show its neutrality by making decisions based on "technical accuracy",**(54)** rather than on arguments of substance or policy, which leaves if not a pretext at least potential for future discrimination.

5. The Law and Religious Discrimination

Throughout Mandla the judges reiterated(**55**) that discrimination based only on the ground of religion was not covered by the 1976 Act. Lord Templeman speculated(**56**) that this was because of the smaller amount of discrimination on such grounds, outside Northern Ireland (where such discrimination is covered by the Fair Employment (Northern Ireland) Act 1976). It has recently been suggested by Anthony Hofler(**57**) that in the light of Mandla this loophole should be closed. It is suggested that this conclusion is correct but that Mr Hofler's arguments are untenable.

Mr Hofler's main arguments rest on a criticism of the points made by the Law Commission in their Working Paper No. 79. "Offences against Religion and Public Worship".(**58**) Unfortunately, such arguments fail to appreciate the difference between using the law positively to buttress particular religious faiths, and using it to ensure even handedness between individuals by making inadmissible certain criteria for the allocation of goods, services and opportunities. If it is accepted that the basis for moral rights is equality of concern and respect,(**59**) it is arguable that the latter but not the former is a legitimate goal of the law.

Taking Mr Hofler's points in more detail, he correctly refers to the Commission's failure to produce empirical proof that there is insufficient incidence of religious discrimination to justify use of the criminal law. However Mr Hofler himself produces only anecdotal evidence. Mr Hofler is, of course, correct in stating that arguments of principles are distinct from factual questions of the incidence of the conduct in question, but his perception of the role of law as an "encouragement to virtue" is redolent of Lord Devlin's arguments(**60**) for the preservation of the distinctive features of a society's mores, the dangers of which for individual liberty have been so trenchantly pointed out by HLA Hart.(**61**)

The same opposition to the possibility of the law accommodating social change is found in his criticism of paragraph 7. 17 of the working paper, which he says, states that "legal penalties should be avoided for fear of provoking defiance by dissenters". What the paper actually says is that such an offence might be seen by some as discriminatory or impeding freedom of expression. Without an objectively ascertainable social need for such an offence there might be a tendency for some people to demonstrate both the **unacceptability** and the **unenforceability** of the law in ways that would bring the law into disrepute. (**My emphases**). It must be particularly remembered that we are talking here about the criminal law, rather than civil law which is the principal(**62**) legal method of preventing racial discrimination.

Somewhat inconsistently (and very dubiously given the literature on the extent of racial prejudice in Britain)(62) Mr Hofler then claims there is anyway almost complete agreement in Britain that "background" is not an adequate reason for disliking someone or treating him less favourably than others. Again Mr Hofler fails to distinguish between feelings with which the law arguably ought not to be concerned, and unfair behaviour. Hofler concludes: "The important question is what a persons stands for, ie **what his principles are** are (not) some principles so worthy of reverence it is similarly indefensible to penalise their possessor?" He goes on to tie his argument to the claimed value not just of religion as opposed to other patterns of thought,(63) but of specific religious beliefs, because of the need for a public policy defence for discrimination against socially undesirable cults.

The last point emphasises that for all the apparently radical terms of Mr Hofler's argument in fact the result would be essentially to strengthen the position of the majority and not that of minorities. It is, in fact, arguable that cases such as **Ahmad v I.L.E.A.(64)** cited by Mr Hofler are incompatible with a full commitment to a plural multi-cultural society since there the needs of educational administrative efficiency over-rode individual religious freedom. The background assumption is surely the 'integrationist' model that 'immigrants' must settle here on the terms of the dominant 'host' group.

A better argument for a law against religious discrimination is that a person's moral, political and religious (or non-religious) laws are or may be important aspects of a person's personality and humanity, and we prima facie fail to treat people with equal respect(65) if we treat them differently according to the different views they hold, in the absence of special justification.

Thus, the state is not entitled to use the law deliberately to discriminate between such systems of thought, either by positive assistance or negative criminal sanctions against deviant thought or misconduct not likely to cause real physical harm.(66) Finally, it is arguable that ordinary utilitarian considerations(67) such as those raised in **Ahmad** and in many of the "justification" cases are insufficient to override this position.

There is much support for this approach. Mr Hofler himself raises the possibility of the U.N. Universal Declaration of Human Rights(68) being incorporated here, and Lord Scarman has advocated giving statutory force to the European Convention on Human Rights, which covers politi-

cal and religious views.(70) It is true that the characteristic features of British approach to anti-discrimination law are its "caution and specificity",(71) but given the political framework of the Bill of Rights debate in Britain the liberal ambivalence(72) to such change is understandable. However, national legal systems having discrimination laws covering religious and/or political views include the U.S.A.,(73) Canada,(74) and Northern Ireland (though the Fair Employment (Northern Ireland) Act 1976 covers only direct discrimination). The omission of religion from the Race Relations Bill was criticised by the Commons select Committee.(75) Its importance is already recognised in principle in English law in employment, both in teaching by S.30 of the Education Act 1944,(76) in medicine by S.4. Abortion Act 1967(77) and generally in the unfair dismissal provisions,(78) though the law has compromised the principle with the claims of managerial efficiency. In education there is also the right to withdraw the child from school worship and and religious instruction, and a qualified right to send the child elsewhere for such purposes.(79)

Three major possible difficulties in extending the law have been suggested. Firstly, it is said(80) that consequential changes, such as to ss.19 and 35 of the Sex Discrimination Act,(81) would be needed. Indeed, a move towards the neutral American approach of "protecting freedom from religion as well as freedom of religion"(82) would have major implications for the law of child custody (which at present generally favours the religious to the non-religious)(83), for the "Agreed Syllabus" of religious education which must advance religion at present,(84) and for the "public good" ground for refusing entry to the U.K.(85) to eg. "Ministers" of fringe cults. These areas are, however, already the subject of public debate, and the possibility of change should not be further forestalled. Perhaps the greatest controversy is likely to arise over the charitable status of religious bodies and their special status in tax law.(86) Even in the U.S.A. the economic pressures on such organisations, and their political strength, have led the courts to accept(87) exemption from taxation as not violating the first Amendment anti-establishment provisions. Secondly, it has been suggested(88) that there may be practical difficulties of enforcement. However, the difficulties encountered in Northern Ireland seem to be the result not so much of the enforcement procedures, but the vastly greater problem of religious discrimination there than on the mainland.(89)

Thirdly, it has been suggested(90) that jealousy might be aroused if religion led to too many privileges. However, this would be largely prevented if the law took so far as possible a neutral stance between individual religions and between the religious and non-religious, and

allowed exceptions to this only in the name of some essential community need.(91) It must be remembered that the present law itself entrenches many privileges of the dominant culture, no doubt to the displeasure of groups smaller in number though, perhaps more active in their adherence.

Finally, it must be stressed that the 'treatment as an equal' ensured by such a neutral position would be quite different from the spurious equality afforded by the New Soviet Constitution of 1977,(92) which while giving a right to religious worship allows the publication of only atheistic and not religious propaganda, and subjects religious activities to the control of registration enforced by the criminal law.

6. Conclusions

Given the genesis of the 1976 Act the rulings of both the Court of Appeal and House of Lords were predictable. They both followed the conventional approach to statutory interpretation and though it is submitted the House of Lords achieved the more socially desirable result, it did so by reasoning which is inherently little more satisfying than that of the Court of Appeal. Though, perhaps, conscious of the social policy needs in this area, the House deliberately continued to adopt a 'formal' rather than a 'grand'(93) style of reasoning, no doubt because of its desire(94) to preserve public confidence in the judiciary's independence in a controversial area. It is submitted that such a posture is both undesirable, since such largely symbolic(95) law must rely for its effect on the support of the institutions applying it, and also doomed to failure since victims of discrimination will inevitably interpret 'neutrality' as support for the status quo of institutionalised racism.(96)

While the Lords' rulings on 'ethnic origin' and 'can comply' are welcome their views on 'justifiability' are much less helpful and reflect the utilitariansim already remarked upon. Overall, therefore, Nicholas Timmins was right to say that the case will only marginally ease the C.R.E.'s task in producing an effective body of law against racial discrimination. Furthermore, the case has underlined the need for a remedy against religious and political discrimination. Such a change will undoubtedly raise difficult questions of law, politics and administrative practice, but it is submitted that none of these should allow this serious lacuna in English law to remain unfilled any longer.

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(1) (1982) 3 WLR 932 (C.A.); (1983) 2 WLR 620 (H.L.).

(2) By 30th March 1981, there had only been 62 successful complaints of employment discrimination to Industrial Tribunals: Memorandum by Commission for Racial Equality to House of Commons Home Affairs Committee (para 6.8 HC 46 II H.M.S.O. 1981).

(3) On litigation as an anti-discrimination strategy See Hansen 1981 LAG Bulletin p.229, S. Feuchtwag 4 (1981) Politics and Power pp. 108-9 and generally on the limits of law on this area See Rosenblum in Pennock (ed) NOMOS 1980.

(4) (1982) New Community p.142.

(5) (1980) I.C.R. 144.

(6) Unreported Court of Appeal decision transcript No. 7972165. (15th April 1981).

(7) (1972) AC 342.

(8) See eg. J. Kodwo Bentil (1973) PL 157 at p.174.

(9) eg I. McDonald Race Relations, The New Law (1977) para 61 and A. Lester and G. Bindman Race and Law (1972) p. 155.

(10) eg. Mr Brynmor John, Minister of State, in Commons Standing Committee A. Cols 84-92 (29th April 1976), Cols 93-118 (4th May 1976) quoted in L. Lustgarten, (1979) ICLO pp 236-7.

(11) See the suggestion of Sir Frank Soskice, Home Secretary, that ethnic origins implied innate genetic differences. HC Debs. vol 716 col..971 (16th July 1965).

(12) Op. lib. note 1, at p.941.

(13) Though cf. Oliver LJ at p 940 who took the more generally accepted view that dictionaries were of very limited value in these circumstances:- See Walker and Walker, The English Legal System (5th ed. 1980) p 119 and cases there cited.

(14) Probably rightly see remarks by Sir Frank Soskice HC Debs vol 106 cols 932 - 3 (3rd May 1965) though cf. Jewish Employment Action Group, doubting that Jews constitute a distinct racial group (1983) Public Law pp 6-7. The case of gypsies is perhaps similarly uncertain - see Lustgarten, Op. Cit. note 10 p. 236.

(15) Pearl (1982) New Community p.288.

(16) Op. Cit. note at pp 624-5.

(17) Lester and Bindman, Op. Cit. note 9 p 157.

(18) Op. Cit. note 1 at p. 631.

(19) Op. Cit. note 1 p. 632.

(20) (1979) 2 NZLR 531.

(20A) See Mills v Cooper (1967) 2 Q13, 459, DC holding that gypsy in Highways Act 1959 S.127 meant a nomadic person not a person 'of the Romany race'.

(21) Op. Cit. note 1 p.628.

(22) (1977) 1 WLR 1417.

(23) S. 1 (1) (b) (i).

(24) See Price Loc. Cit. note 22.

(25) See MacRudden (1982) Oxford JO of Legal Studies p.349 and L. Lustgarten (1978) Public Law p.188.

(26) Griggs v Duke Power Co. 401 US 424 (1971).

This case was influential in the development of the concept of indirect discrimination in the Race Relations Act of 1976 - See McRudden, Op. Cit. Note 25, pp 336-343.

(27) H.C. Standing Committee on Sex Discrimination Bill col. 70 (22nd April 1975).

(28) See Lustgarten Op. Cit. note 25, p.195.

(29) (1978) I.C.R. 181.

(30) (1979) I.C.R. 554.

(31) (1980) I.C.R. 144.

(32) The Times, 28th September 1982.

(33) (1981) I.C.R. 490 (EAT).

(34) (1982) I.R.L.R. 56.

(35) (1982) I.R.L.R. 418.

(36) Lord Fraser, Op. Cit. note 1 at p.629.

(37) Loc. Cit. Supra.

(38) Quoted by Nicholas Timmins, The Times 28th March 1983.

(39) Op. Cit. note 1 at p.939.

(40) Cf. the reaction to Lord Denning's allegation of 'jury packing' in cases involving black defendants in 'What Next in the Law' (1982) amended after the book had been withdrawn from sale: See The Times June 1982.

(41) Op. Cit. note 1 at p. 944.

(42) Op. Cit. supra at p. 950.

(43) eg Twambley v Jamal Nouri Fattah t/as 'Jamal's Wine Bar' The Times 2nd October 1982 (County Court). The Court of Appeal may be more sympathetic to the Sex Discrimination Act - See Gill and Cotte v El Vino Limited (1983) 2 WLR 155 and Jones v Royal Liver Friendly Society, The Times 2nd December 1982 discussed by Pannick at New Law Journal, 13th May 1983 at p.451. Sed quaere whether, if this is so, it is because the object of sex discrimination law coheres better with attempts by judges such as Lord Denning to improve the position of women in property law, and because of the exclusive use of civil law in its enforcement. The Equal Opportunities Commission has also been more cautious in eg. its use of formal investigations.

(44) (1982) I.R.L.R. 424.

(45) (1980) 1 WLR 580 D.C.

(46) (1982) I.R.L.R. 252.

(47) H.C. 46 vol. 1. para 43 (HMSO 1981). The Equal Opportunities Commission had completed five investigations at this time.

(48) Coote and Phillips New Statesman 13th July 1979 at p. 52.

(49) See Lustgarten, Legal Control of Racial Discrimination, Passim, and Feuchtwag loc Cit. note 3.

(50) See note 2 supra. In 55 of these cases the C.R.E. had provided representation or assistance.

(51) Op. Cit. note 1 at p. 632.

(52) Op. Cit. supra at p. 630.

(53) Loc Cit supra.

(54) See Lustgarten Op. Cit. note 10 pp 244-5.

(55) Lord Denning Op. Cit. note 1 at p 935, Kerr LJ at p. 946, Lord Templeman at p. 631.

(56) Loc Cit. supra.

(57) Law Society's Gazette 27th April 1983, p. 1043.

(58) HMSO 1981.

(59) See R. Dworkin, Taking Rights Seriously (Revised edition 1980) esp. Ch. 7.

(60) in "The Enforcement of Morals" (1965) Ch. 1.

(61) in Law, Liberty and Morality (1963).

(62) Cf the offence of incitement of racial hatred now contained in S.5 (A) Public Order Act 1936 both because of practical difficulties of proof and the exceptional nature of the actus reus viz act likely to stir up 'hatred' rather than objective acts of public disorder: See Leopold (1977) Public Law 398.

(63) See eg A. Phizacklea and R. Miles in R. Miles A. Phizacklea (eds) Racism and Political Action in Britain (1979) p. 117 of D.J. Smith Racial Disadvantage in Britain (1977) p. 312/3.

(64) (1978) 1 All ER 578.

(65) See Dworkin, Op. Cit. note 59.

(66) See Hart Op. Cit. note 61 pp 44-48 written before R v Lemon (1979) 1 All ER 898 when the House of Lords held that the likelihood of a breach of peace was not a necessary ingredient of the Offence of blasphemous libel.

(67) ie. a marginal overall utilitarian gain would not be sufficient. See Dworkin loc Cit. note 59. The writer does not subscribe to Dworkin's later attempts to distinguish between personal preferences (for allocation of benefits to oneself) and external preferences (as to the manner of distribution to others): See Hart, Between Liberty and Rights, (1979) Columbia Law Review pp. 836-346.

(68) Article 2.

(69) English Law - the New Dimension (1974) pp 10-21.

(70) Articles 9 and 14 though Article 9 "freedom of thought, conscience and religion" is qualified by savings for, inter alia, the protection of public morals and this has been restrictively interpreted: See R v Lemon (1979) 1 All ER 989 unsuccessfully appealed to the European Commission of Human Rights under Article 10 (freedom of expression); Lemon v UK 5 E.H.R.R. 123 criticised by Leader at (1983) MLR 338.

(71) Lustgarten Op. Cit. note 10 p. 222 and see M.A. Fazal, Drafting a British Bill of Rights (unpublished paper 1981) pp. 80-83.

(72) See eg P. O'Higgins Cases and Materials on Civil Liberty (1980) Ch. 3 and works there cited.

(73) First and Fourteenth Amendments.

(74) Ontario, Nova Scotia, North West Territories - see I.A. Hunter in R. St MacDonald and J.P. Humphrey (eds) The Practice of Freedom (1979) p. 85.

(75) H.C. Select Committee 'A' 29th April 1976 Col. 84.

(76) Preventing disqualification from any advantage as a teacher by reason of religious opinion or worship.

(77) Conscientious objection to participation in abortion.

(78) Employment Protection (Consolidation) Act 1978 SS 54-80 amended by Employment Act 1980. Note especially S. 7 (2) (1980) Act (dismissal for conscientious (not just religious) objection to membership of any trade union automatically unfair).

(79) Education Act 1944 ss 25 (4) (5).

(80) St J. A. Robilliard. (1981) New Community 261 at 263. On the present law in more detail see Robilliard (1981) Human Rights Review 90.

(81) Exempting acts done to conform with religious beliefs.

(82) L. Pfeffer, Religious Freedom (1977) p. 91 discussing Torcaso v Watkins 367 US 488 (1961).

(83) Re K (1977) Fam 179.

(84) Robilliard (1981) HRR 90 at pp 92-3.

(85) Robilliard Op. Cit. supra pp 94-6 discussing Schmidt v Secretary of State for Home Affairs (1969) 2 Ch. 149.

(86) Robilliard Op. Cit. supra pp 102-3.

(87) Walz v Tax Commissioners 397 US 664 (1970)

(88) Robilliard (1981) New Community 263.

(89) McRudden 45 MLP 617.

(90) Robilliard loc cit. note 88.

(91) On justifications for over-riding rights see note 67 supra.

(92) R. Sharlet. The New Soviet Constitution of 1977. I am grateful to A.K. Lall graduate of Trent Polytechnic for this reference.

(93) K. Llewellyn, the Common Law Tradition and see Lloyd, Introduction to Jurisprudence (4th ed. 1979) pp 461-5.

(94) Lord Devlin (1976) MLR 1 and Lord Radcliffe 'Not in Feather Beds' (1968) and generally P.S. Atiyah (1980) Israeli LR 346.

(95) Freeman and Spencer (1979) CLP. 127.

(96) Freeman and Spencer loc. Cit. supra and McRudden Op. Cit. note 25.

(97) The Times, 28th March 1983.

COUNCILLORS AND THE COUNCIL FILES

by Penelope Pearce*

How far can a councillor insist on seeing all the information in the possession of the local authority?

Officers and Councillors

One of the most far-reaching postwar changes in the structure of local government, recognised and given effect to in the Maud Report(1), has been the great increase in importance of officers of a local authority as against elected members. Many of the functions of a local authority require particular professional expertise of a high order and it would be ludicrous to expect elected councillors to carry them out. We do not require councillors as such to teach in schools or inspect the foundations of new buildings or mend the roads or bath the elderly, though these are all functions of various local authorities. Clearly the role of councillors, acting together, is to formulate policy, raise and allocate the necessary resources and appoint suitable people as officers of the authority to carry out these tasks.

The increased use of the power to delegate decision-making not only to committees, but also to individual officers(2) has emphasised the separation between councillors and officers and the virtual autonomy of the professional department. Supervision of "field workers" is undertaken in the management layers of the relevant department and, within the budgetary constraints and general policy laid down by the council, many decisions are also taken in the department. Those matters which go to the committee go there with advice and recommendations of the department, supporting papers are prepared by the department and unless the committee members are themselves very hard-working and knowledgeable the department's view is very likely to prevail.

Officers in many areas of local government, conscious of their specialised training and expertise, increasingly expect to be accorded professional status. Accountability they see as arising not through the

traditional line of responsibility to the elected councillors but through the hierarchy of the department and their own professional standards of practice and conduct and disciplinary bodies.

In this situation, what is the role of the councillor? Some local authority officers would say that the political complexion of the council substantially determines this. Some would claim that a strongly and consistently Conservative council concentrates on broad matters of policy and leaves departments free to run their area of work; a strongly and consistently Labour council, it is claimed, is far more likely to wish to be involved in individual day-to-day decision making within departments. Whether or not these generalisations are true, it is clear that individual councillors see their jobs very differently. Some are most concerned with the broad issues of policy thrashed out in group meetings and on the open floor of the council chamber. Others see their main role as concern for the welfare of individual constituents(3). Most councillors will be members of a few, but not many, committees. Some study hard to learn the intricacies of the work of the department, get to know the officers, raise questions; others attend committee meetings and do little more. Many committees are effectively in the hands of the Chairman and vice-chairman. In politically volatile areas, particularly, there may be a high turnover of elected councillors so that few have opportunity to become expert; the continuity and experience of the officers become even more important.

Yet the ultimate responsibility for the manifold activities of the authority is usually seen by the electorate (through the local newspaper) as lying with the councillors. Liability for collective policy decisions is clear; responsibility for legal commitments entered into by the authority or for legal actions brought by or against the authority is fair; liability for the professional acts of officers in a department of the authority for example when a child is tragically killed or injured during physical education classes at school or while in the care of the local authority may seem unfairly onerous and unrealistic. Yet in law this is normally the case; delegation of a function to a committee or officer does not absolve the authority as a whole from liability. It follows that as councillors have the ultimate responsibility, they are entitled, and even bound, to supervise the activities of officers at all levels.

"although a council may have power to delegate the performance of their statutory duties to others, responsibility for the due discharge of those duties remains with the council, and that fact seems to me to import the necessity for a measure of control by the council,

who are primarily responsible for the due discharge of the duties, over the persons to whom the actual performance of those duties is delegated''.**(4)**

The Right to Information

Even the most enthusiastic of councillors (at least in any authority larger than a parish council) could not expect to read everything. The Maud Committee discovered that hardly any 'average' member received fewer than a hundred sheets of typewritten foolscap each month; some had as many as six hundred. With ever easier copying facilities no doubt the average is now higher. These are the papers he is supposed to read! Furthermore, the law does not require the councillor to spend his time officiously hunting out problems, or assist him if he wishes to do so. In the often quoted words of Lord Alverstone C.J.

> ''a councillor has no right to a roving commission to go and examine books or documents of a corporation because he is a councillor. Mere curiosity or desire to see and inspect documents is not sufficent''.**(5)**

However, the basis of a councillor's right to information is the common law rule that one who has a public duty to perform is entitled to information reasonably necessary to enable him to carry out that duty.

It has been pointed out judicially that the councillor's duty must be limited, at least in relation to large authorities, by the committee system since

> ''to hold that each councillor ... is charged with the duty of making himself familiar with every document in the possession of (the council) would be to impose an impossible burden upon individual councillors''.**(6)**

Nevertheless, Lord Brightman, giving an unanimous judgment of the House of Lords, has said

> ''I would deprecate any suggestions that the committee system in the absence of clear statutory provision to the contrary, in any way fragments the responsibility of the council of the local authority as a whole''.**(7)**

It should be clear from these principles that if a councillor is seeking information to help him decide on a matter to be voted on in full council he has a right to that information. Indeed it has been held that an officer may not refuse to make disclosure even if threatened by the council leader with dismissal!**(8)** It was conceded in the **Southwold** case that a councillor who had made it clear that he opposed the majority decision to enter into a contract could not be prevented from seeing the contract (which had been read out in an earlier council meeting) since

"if he was desirous ... of raising the question whether or not this was a prudent and proper bargain ... he had a sufficient interest"**(9)**

In other words, part of his function as a councillor may be to challenge present policy.

Similarly it should be clear that if the councillor is seeking information to help him decide on a matter before a committee of which he is a member he has a right to that information. Normally this is no problem. All papers put before the committee are sent in advance to the members of the committee or, if particularly confidential, may be laid on the table at the meeting. But what if the member wishes to go behind the papers prepared for the committee? The officers may have prepared a report based on the relevant file. May the councillor insist on seeing the office file? It so happens that all the litigated cases before 1980 concerned documents which had been before the council (the **Southwold** case) or a committee (**Barnes**, **Woodward**(10) and **Hook**(11)) and the impression may therefore have grown up that only such papers are within a councillor's right. For example, an analysis of the cases by Professor Street(**12**) drew a distinction between documents of the council and documents of the committee but ignored the possible third category of documents of the department. The documents achieve their categorisation by being presented to the council or committee. The important question of non-presented documents was not raised. Others have not ignored the question but made their position clear. As one journal editorial has said

"Councillors have a right to full knowledge about their authority's activities but the form in which this is conveyed to them may be disputed. If files were open to inspection they would soon become less informative and less useful to officers for whose work they are maintained ... office files are not the source from which members should glean their information ... Both politicans and officers must be free to choose their methods of communication with one another".**(13)**

The British Association of Social Workers rather optimistically made a similar point

"Councillors and committee members need information to enable them to make decisions which affect clients and families and the use of resources. This information can almost certainly be provided by members of the staff in summary form and direct access to the files by councillors and committee members will not be necessary".**(14)**

Many local authorities have reflected these views by copying the Model Standing Order number 26 which provides that a councillor's right to information is restricted to documents which have been considered by a committee or by the council.**(15)** Certainly the question of access by councillors to information other than that presented for their use by officers is a controversial one in practice, however clear it may seem from the general common law principle. The House of Lords has now purported to set the matter clear.

"In the case of a committee of which he is a member, a councillor as a general rule will ex hypothesi have good reason for access to all written material of such committee"

Thus far, the question is begged. Are the files material of the committee or not? But the judgment continues.

"So I do not doubt that each member of the social services committee is entitled by virtue of his office to see all the papers which have come into the possession of a social worker in the course of his duties as an employee of the council. There is no room for any secrecy as between a social worker and a member of the social services committee".**(16)**

The "Outsider" Councillor

The councillor who is not a member of the relevant committee may be in a different position. The tenor of the Barnes case suggested that he would never have a right to the information of the committee and indeed, in that case his claim was rejected. A writ had been issued by the ratepayers' association against the council, and, as is common practice, the council had resolved that a special committee should have full conduct of the litigation. Mr Conlan has expressed his opposition to the defence of the action and refused to join the committee. The council rejected his claim to see the documents on the ground that

their interest in the litigation might be prejudiced by disclosure and the court upheld this view. Considering that the committee was empowered to act as agent of the council and that the documents in question would be privileged against discovery in the action(17) this seems a fair decision.

The **Birmingham** case was the first where a councillor claimed to be interested in a matter referred by statute for consideration by another committee. The social services committee exercised powers delegated to them by statute(18) and had sub-delegated adoption matters to an adoption panel consisting entirely of officers.(19) Mrs Willetts was not a member of the social services committee but knew of a proposed adoption. In her position as a member of the housing committee she learned facts about the proposed adopters which led her to feel that the adoption should be questioned. Discussion with the committee chairman did not ease her alarm. She claimed to see the file, the council agreed but the proposed adopters, alerted by the social workers concerned, sought an order prohibiting disclosure. The House of Lords, reversing the Court of Appeal and upholding the Divisional Court, held that as the local authority was the Adoption Agency, any member had potentially an interest in an adoption. An "outsider" a councillor not on the committee must show a goed reason for access to the information but if the council were reasonably satisfied the court would not interfere. Indeed the decision went further. Lord Brightman said

"In the case of a councillor with a bona fide and reasonably based concern for a problem of this sort, who is not a mere busybody, it seems to me that the bias, if any, should be in favour of allowing access to information rather than concealing information".(20)

An outsider councillor would not be able to show a good reason, it is suggested, in the unusual cases where a committee has full power without any residual power remaining in the council. **Barnes** is one example and the police committee (which is itself the police authority) in Hook is another.

The Council's discretion

A straight reading of the **Birmingham** case, then, suggests two clear rules. Firstly the councillor who is a member of the relevant committee is entitled to access to all the documents of that department without

having to show a specific need. Secondly the outsider councillor must show a need to see the document and then access depends on the decision of the council that it is reasonably necessary to enable him to do his work, with perhaps a bias in favour of access. Unfortunately, despite this clear and unanimous decision there is still room for argument. The statement in the **Birmingham** case about committee members was technically obiter and it is not immediately reconcilable with the slightly earlier Court of Appeal decision in **Hook** which was not mentioned. In that case a councillor member of the police committee was refused permission to see a report commissioned for and presented to the committee before he became a member. On counsel's advice the new members were shown only parts of the report though their predecessors had seen the whole. The majority of the Court of Appeal upheld the committee's decision that the new members would not be hampered in carrying out their duties by seeing only the truncated report. Is there any room for such exercise of discretion since the **Birmingham** case or was Lord Denning's dissenting judgment right in law when he said that each member of the committee has the right to inspect all documents of the committee whether they arose before or after he became a member, unless he is not acting bona fide?

There are two possible, though unsatisfactory, ways of reconciling the two decisions. The first is to say that the apparently wide right given to the committee members in the passage first quoted is still subject to decision by the committee (or council) that access should not be given. The only difference between the committee member and the outsider councillor is that prima facie the former has a right. If that were a matter for judicial decision the distinction might be a tenable one but the niceties of prima facie rights may receive little protection in the political forum of the council chamber. It may be of fundamental importance to the individual councillor, in opposition perhaps to the majority of councillors, to know whether he has a right to information sought in good faith or whether he must persuade his fellow councillors that he has a need. It is significant that in the **Birmingham** case the decision to disclose had been given on advice that there was no ground for refusal; had the council been advised that they had an open discretion it might well have gone the other way and the court would have been unlikely to challenge it. It is also significant that many of the members of the police committee who voted that Mr Hook did not need to see the report had not themselves seen it and so could hardly judge its relevance. Voting on the party whip is not always a great safeguard of individual rights.

An alternative argument is that the essence of **Hook** is that the report had been received and considered at a previous meeting and was no longer relevant, in its entirety, to the work of the newly constituted committee. Professor Street suggests that the councillor may only see documents which arise or come into existence before he is a member if he can show a need, whereas he has a right to see those which arise or come into existence while he is a member. This rule would be difficult enough to apply when the only documents considered are those placed before a committee or the council but would be impossible to apply once it is conceded that a committee member may see the office files. Professor Street points out the difficulty of deciding when a document "arises" or "comes into existence" and whether it is a document of the council or only of a committee. But what of the office file? Is there any sense in allowing a councillor to read only those items placed on the file during his term of office? Or only files opened during his term of office? Neither can one argue that the test is whether the matter is an item on the agenda of the relevant committee during his term of office for the essence of the **Birmingham** case is that the right is not limited to matters being decided by the committee.

It is submitted that neither of these solutions is satisfactory either in law or in practice. The House of Lords decision in the **Birmingham** case should be given its natural reading. The councillor who is a member of the relevant committee should have access to all the information in the hands of that department regardless of when it arose and regardless of whether a decision relating to that matter has come or will come before the committee or has been or will be decided by a sub-committee or an officer. After all, the responsibility for all that area of work lies primarily with the members of that committee and they should not be required merely to react to matters brought to them. A desire even to browse through the files should be seen as a legitimate familiarisation activity and not as seeking "a roving commission". This right of access is, of course, subject to the councillor acting in good faith and calls for the drafting of Codes of Conduct for councillors to mitigate the risks of excessive dissemination. The decision in **Hook**, insofar as it conflicts with this principle, is wrongly decided and by implication overruled.

Whose discretion?

Earlier cases introduced discretion on the basis that the remedy for wrongful refusal to disclose was mandamus, a discretionary remedy. The court was prepared to go outside the resolutions passed by the

council and decide for itself whether the basic right should or should not be enforced in the particular case. Thus in **Southwold,** the council had resolved to refuse disclosure because the councillor "might use it in a way antagonistic to council policy". The court held he was entitled to use it to challenge the policy. In **Barnes,** on the other hand, the court agreed with the council's decision to refuse disclosure but made it clear that it was the court's own discretion.

"Moreover, if the facts should disclose some indirect motive ... not consistent with the interests of the council as a whole this court would rightly exercise the discretion ... in the direction of refusing to compel the council to give disclosure".**(21)**

In **Woodward,** a decision of a strong Divisional Court but which was not referred to in the **Birmingham** case, the court again made it clear that it was exercising its own discretion to refuse mandamus. It may be arguable whether judges are best equipped to decide what are a councillor's proper functions the **Woodward** decision seems to suggest that helping an individual resident in his struggle against the authority is not his job, despite all arguments to the contrary.**(22)** But **Hook** and the **Birmingham** case have retreated from ·'icial discretion and placed the decision firmly in the hands of the council. Waller LJ was happy that the decision was not

"one at which no reasonable committee could properly arrive"**(23)**

and Dunn LJ added

"the court should be slow by the exercise of a prerogative power to interfere with a decision democratically arrived at in that way. The committee might have dealt with the matter differently. But ... I cannot say they were in error".**(24)**

The **Birmingham** decision is even stronger

"The decision whether the outsider councillor has a good reason for access to the information is ultimately one to be taken by the councillors themselves sitting in council ... The court has no jurisdiction to substitute its own opinion. The decision of the council is the final word, subject only to an application for judicial review under section 31 of the Supreme Court Act 1981 on **Wednesbury** principles".**(25)**

The **Wednesbury** Principle is a well-established and salutory one, ensuring that the courts do not substitute their discretion for that of the elected local authority in matters where the discretion is given by statute to the local authority

"The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament have confided in it".**(26)**

It is submitted that reliance on this Principle took the House of Lords down a blind alley. Since Parliament has never conferred powers on local authorities to decide on the right of individual members to see information the Principle is not relevant in this area. The minority, perhaps unpopular, member who wishes to challenge the majority view is as much a member of the authority and has the same public duties to perform as the majority members and the common law should be ready to protect his right to information against that very majority. The earlier cases have shown the judges prepared to do this. Of course the courts should take account of the council's view of what is the councillor's function and whether refusal would be likely to impede his duty but the court should not abdicate its own responsibility as the House of Lords appears now largely to have done.

Challenging the discretion

The only grounds of challenge allowed by the Wednesbury Principle are that

1. the authority took into account matters which it ought not to take into account;
2. it refused or neglected to take into account matters which it ought to take into account;
3. in some other way the conclusion is one to which no reasonable authority could have come.

In **Hook**, the majority accepted as relevant the argument that disclosure might lack qualified privilege and so lead to libel actions. This argument is circular; if disclosure is required, qualified privilege would not be lost.**(27)** In the author's view, Lord Denning was right to reject it. In **Birmingham** it was suggested that the authority might take into

account that the information included identities of informers or personal information about individuals. The fact that information was given in confidence was not, in itself, a sufficient reason for non-disclosure.(28) That the document is relevant to existing litigation may be a sufficient reason but not, it is suggested, that the councillor is seeking to help a resident.

One may recognise that other grounds may arise for wishing to refuse disclosure of the office files. The individual councillor may be a particular nuisance, either generally or on a particular matter or area; the officers may argue that disclosure will make it impossible for them to record honest judgments and give candid advice;(29) third parties may threaten to withhold information if it is to be disclosed; premature disclosure may have political or financial repercussions; the information may have come from central government to named officers; there may be a statutory prohibition on disclosure outside an officer's work; the documents may reveal advice given to a previous council which may be damaging to present policy or relations between councillors and officers.(30)

These are all difficult questions which do not readily come within **Wednesbury** principles. Legal advice on an uncertain area, whether probably right or probably wrong, cannot be described as irrelevant. In many respects these problems are analogous to the area of public interest privilege where the courts balance conflicting aspects of the public interest. It is to be hoped that the courts will not retreat from these problems when they arise but will reassert that the right of individual councillors to information to enable them to perform their job and the conflicting interests in non-disclosure are public interest matters which must be weighed judicially rather than being decided on political grounds in a political forum.

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(1) Committee on Management of Local Government 1967.

(2) Local Government Act 1972 Section 101.

(3) One in four councillors studied in Sheffield considered acting for constituents was their main task. Hampton: Democracy and Community 1970 page 198.

(4) **Manton** v **Brighton Corporation** (1951) 2 All ER 101, 105 (Slade J.)

(5) R v **Barnes Borough Council ex parte Conlan** (1938) 3 All ER 226, 230 (Humphreys J.).

(6) R v **Southwold Corporation ex parte Wrightson** (1907) 97 L.T. 431.

(7) **Birmingham City District Council** v **O** (1983) 1 All ER 497, 499.

(8) Re **Hurle-Hobbs ex parte Riley and Another** (1944) unreported.

(9) Above note 5.

(10) R v **Hampstead Rural District Council ex parte Woodward** (1917) 116 L.T. 218.

(11) R v **Clerk to Lancashire Police Committee ex parte Hook** (1980) 2 All ER 353.

(12) Local Government Chronicle 24 July 1981. This was before the **Birmingham** case.

(13) Local Government Chronicle 20 September 1974.

(14) B.A.S.W. Policy Statement: Confidentiality in Social Work (1976) para 2 17(b).

(15) Comment in Local Government Review 19 March 1983.

(16) **Birmingham City District Council** v **O** (1983) 1 All ER 497, 505.

(17) **Bristol Corporation** v **Cox** (1884) 26 Ch. D. 678.

(18) Local Authority Social Services Act 1970 section 3, since amended by Local Government, Planning and Land Act 1980 section 183.

(19) This should have been a case committee including councillors: Adoption Act 1958, 1970 Act section 5.

(20) (1983) 1 All ER 497, 507.

(21) (1938) 3 All ER 226, 230 (Humphreys L.J.).

(22) Birkinshaw: Freedom of information, the elected member and local government. 1981 Public Law 550. and work there cited.

(23) (1980) 2 All ER 353, 365.

(24) Ibid at 367.

(25) (1983) 1 All ER 497, 505.

(26) **Associated Provincial Picture Houses Ltd.** v **Wednesbury Corporation** (1947) 2 All ER 680, 685 (Lord Greene M.R.).

(27) **Adam** v **Ward** (1917) A.C. 303; Dunn L.J. thought the defamatory matters might be irrelevant.

(28) Reversing the Court of Appeal, Donaldson LJ dissenting, (1982) 2 All ER 356.

(29) The candour argument appears at least to have received its quietus: **Science Research Council** v **Nasse** (1979) 3 All ER 673; **Campbell** v **Tameside Metropolitan Borough Council** (1982) 2 All ER 791 (education department reports).

(30) There is no local government equivalent of the central government convention of non-disclosure though political realities may in practice enforce it.

HOMOSEXUAL PARENTS: CUSTODY AND ACCESS

by P M Knott*

It is proposed in this article to examine recent caselaw relating to custody and access applications by homosexual parents, with a view to establishing whether any discernible principles or trends have emerged. It is intended to consider both lesbian mothers and homosexual fathers, but the initial emphasis will be on the former, simply because most of the caselaw relates to maternal applications. The relevance of any such principles to homosexual fathers will be considered later in the article.

All disputes relating to both custody and access are governed by Section 1 of the Guardianship of Minors Act 1971, whereby the child's welfare is the "first and paramount consideration". The essential question facing the courts in these cases, therefore is whether, and if so to what extent, one parent's homosexuality will have an adverse effect on the child. The parent's conduct in itself is not in issue. (**Re K(1)**)

Custody

A group named 'Action for Lesbian Parents' clearly feel that the courts are biased against them, and that where homosexuality is raised as an issue in custody cases "there is only a slim chance of winning a case where both sides are equally matched".

The case of **Re S(2)**, in which the mother had an admitted lesbian relationship, would appear to confirm this view. The children were young (a girl aged seven and a boy aged six), and both wished to be with their mother; the welfare officer recommended that she have custody; the father would have difficulty catering to the children's material needs; and two psychiatrists agreed that there was no risk of the children being led into sexual deviance.

Against this background, custody was awarded to the father on the sole basis that his psychiatrist referred to the "embarrassment and hurt" that would be caused to the children if it became known in the locality that their mother had a lesbian relationship. This factor was felt to be of overriding importance in determining the children's welfare, sufficient to outweigh all the other factors in the mother's favour.

However, on a search of LEXIS three unreported Court of Appeal decisions appear to reveal a more balanced approach to the welfare principle. In the first, **Eveson v Eveson(3)**, the mother was living with her "lesbian friend" and the trial judge's decision to award custody to the father was upheld. The parties were both able to offer a good home so far as physical conditions were concerned, and each was able to provide grandparental support.

Although the mother and her partner were both regarded as "kindly and sincere", the court was again influenced by the inevitability of taunts and consequential anxieties as the six-year old boy and others became aware of the unusual structure of his household. In such an evenly-balanced situation, it is perhaps not at first sight surprising that the mother's homosexuality and its perceived effects should have influenced the court in the father's favour, even though the welfare officer had recommended otherwise. Nevertheless, Dame Elizabeth Lane was at pains to point out that,

> ". . . there is no rule or principle that a lesbian mother or homosexual father cannot be granted custody of a child. Indeed, I myself sitting at first instance have committed custody of children to such parents more than once".

The second case, **Re P (a minor)(4)** is somewhat different in that the father's initial claim for custody was abandoned, leaving a straight choice between custody to the lesbian mother, and local authority care. The mother was found to be "a sensible, articulate and understanding" woman who was discreet in her behaviour: she and her partner did not flaunt their sexuality. In the circumstances, the judge held that it would be "entirely wrong" to remove the five-year old girl from the secure warm environment provided by her mother, and place her in care. His decision to award custody to the mother was upheld by the Court of Appeal, although Watkins LJ expressed strong reservations which will be referred to later.

In his judgment, Sir John Arnold P clarified the issues involved in such cases by distinguishing between the "Corruption" and "Reputation" factors. The former refers to any influence or tendency towards sexual deviance in the child, and it seems that little evidence has been adduced before the courts as to whether there is any inherent danger of corruption due to exposure to a homosexual environment. In individual cases it suggests that both the homosexual parent and the child may have to submit to psychiatric examination as happened in **Re S.** (supra)

As for the "Reputation" factor, we have already seen that at work in **Re S** and **Eveson** v **Eveson**, and clearly the courts regard the potential embarrassment and anxiety to the child as being of significance. Nevertheless, in the instant case this factor was outweighed by the high quality of care offered by the mother.

The development of judicial attitudes has continued in the third LEXIS case, **Griffiths** v **Dunn** (1983).**(5)** The wife in this case was living in an overtly homosexual household, and in 1980 the trial judge awarded custody to the father (who had remarried) despite the fact that the two girls (then aged 5 and 6) had been with their mother virtually all their lives. It was felt that the long-term interests of the children would better be served by their being brought up in an "ordinary household".

However, nearly three years later, the arrangements having proved unsatisfactory, the judge varied his original order by making a joint custody order in favour of both parents with care and control to the mother. This was upheld by the Court of Appeal, on the basis that the children did not want to live with their father and step-mother, and that it would be wrong to force them into a way of life which they disliked. Sir Roger Ormrod, having discovered no evidence that the children had suffered as a result of their mother's homosexuality, concluded that the judge's order represented

> "by far the less emotionally tense situation".

It is evident then that a parent's homosexuality is

> "a factor that one has to take into account and think about very hard". (Sir Roger Ormrod.)

and as the welfare principle constitutes essentially a 'balancing operation' it is hardly surprising that where the parties are otherwise equally matched it may be the single factor that tips the scales. It is submitted, however, that the cases indicate that custody will normally be awarded to the heterosexual parent if (s)he can provide a viable home, even if in some ways unsatisfactory. Even in **Griffiths** v **Dunn** the two girls were initially taken away from their mother, and only returned to her when the father's arrangements proved unsatisfactory.

Thus far, the relevance of homosexuality as a factor in custody disputes, has been viewed in relative isolation. Yet its true weight on the welfare scales can only be determined by considering the above decisions in

the context of custody disputes generally, for it has become a well-established principle that young children usually belong with their mothers:-

"Effect should be given to the dictates of nature which make the mother the natural guardian, protector and comforter of the very young" per Stamp LJ in **Re K** (supra) (Children aged 5½ and 2)

Indeed, in 85% of divorce cases, custody is awarded to the mother (Judicial Statistics, 1980). Bearing in mind that in all the cases cited the children were agreed between five and seven, the mothers homosexuality is revealed as not so much tipping as overturning the scales in favour of the heterosexual parent.

It is submitted therefore that despite apparent judicial objectivity, there is in fact evidence of bias against lesbian mothers in the cited cases. Although purporting to regard homosexuality as a factor in the scales, the courts are in fact allowing it to override the very great weight normally accorded to the mother's "natural" parenting role.

Conditions

If a lesbian mother does succeed in obtaining custody of her children, what controls can she expect to be imposed, to ensure her continuing suitability as a parent? In **Re P** (supra) a supervision order was imposed, a term of which was that as a minimum quarterly reports should be submitted by the supervising authority to the Official Solicitor. Watkins LJ emphasised this need for constant review and indicated that the conditions imposed in an Australian case **Campbell v Campbell(6)**, might in the future become necessary. These conditions were threefold: that the two women did not sleep together overnight; that there be no acts of a sexual nature before the children, and that the children visit a child psychiatrist annually. The potential stringency of such conditions is self-evident, and does not indicate a neutral attitude to homosexuality.

Thus it is apparent that justifiably or otherwise, the law places great obstacles in the path of the homosexual parent seeking custody. All one can state with confidence is that homosexuality does not of itself preclude custody that it does not "constitute a total and inevitable embargo". (per Sir John Arnold P in **Re P**)

Access

The likelihoed of a homosexual parent obtaining access, including stay-

ing access, is much greater. Indeed, in **Eveson v Eveson** (supra) staying access was encouraged and a clear distinction was drawn between regular visits, and incorporating the child into a homosexual household on a daily basis. The former did not cause the court any concern.

In the case of **G v G(7)** a transexual father was granted access to his young daughter on condition that he should not be accompanied by his friend, Mr S. The condition was hardly surprising as it might have somewhat confused the girl to meet a man posing as her father's husband! A further condition that the father should wear male clothing, without jewellery or cosmetics, was deleted as being impracticable, but the father was warned that if he failed to show sensitivity in minimising his daughter's confusion, the whole question would be reconsidered.

As with custody therefore, conditions may well be attached to access orders, but it is noteworthy that in this instance the court rejected the second more detailed condition, preferring instead to emphasise the possibility of a future review of the whole situation.

Before leaving the question of access, reference must be made to the House of Lords decision in **Re D** (1977)**(8)**. This was a step-parent adoption case in which the homosexual father of an eight-year-old boy sought unsuccessfully to veto the adoption application. The effect of exercising the "statutory guillotine" of adoption was irrevocably to deprive him of access to his son. It is clear from the judgments that homosexuality was effectively the sole issue and the trial judge's view, upheld by the House of Lords, was that

> "this father has nothing to offer his son at any time in the future".

However, this draconian approach to access by a homosexual parent appears to have been tempered over the past few years by the Court of Appeal decisions referred to above.

Homosexual fathers

Consideration of **Re D** leads conveniently to a specific examination of how homosexual fathers are likely to fare in applications relating to their children. In one vital respect they face a clear obstacle arising from the general presumption in favour of awarding mothers the custody of young children (see **Re K,** supra). It is difficult enough for a heterosexual father to overcome this "natural" disadvantage, and I submit that it would be virtually impossible for an overtly homosexual father to load the scales sufficiently to obtain custody of his dependent children.

As for access, Re D (supra) is illustrative of difficulties involved, and in that case Lord Simon of Glaisdale was explicit in stating that

". . . the claim of a mother, who has gone through the pain and peril of bringing her child into the world, is more resistant to erosion".

Nevertheless, the subsequent case of **G v G** does demonstrate a more tolerant attitude to such fathers and is, it is submitted, more consistent with the view that it is the child who has the prima facie right to enjoy access to both parents (**M v M(9)**).

Unreported decisions

To conclude tangentially, the advent of the LEXIS information retrieval system providing, inter alia, transcripts of all Court of Appeal judgments since 1980, is likely to lead to a proliferation of caselaw, particularly in such rapidly-developing areas as family law. Thus the writer welcomes the House of Lords decision in **Roberts Petroleum Ltd v Bernard Kenny Ltd** (1983)**(10)**, in which the general use of unreported decisions was deprecated. Their Lordships in fact decided that no such decisions should be cited before them without leave, such leave only to be granted if the transcript contains a substantial principle of law not to be found in any fully-reported decision. Nevertheless, it is submitted that in any case relating to homosexual parents and their children such leave would be given due to the dearth of reported cases in this area. Could it be that their omission from the Law Reports constitutes a further example of discrimination?

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(1) Re K 1977 1 All ER 647.

(2) Re S 1980 FLR 143.

(3) Eveson v Eveson 1980 (Lexis)

(4) Re P (a minor) 1980 D 1200 (Lexis)

(5) Griffiths v Dunn 1983 D 502 (Lexis)

(6) Campbell v Campbell 6 FL p. 127.

(7) G v G 11 FL p. 148.

(8) Re D 1977 1 All ER 145.

(9) M v M 1973 2 All ER 81.

(10) Roberts Petroleum v Kenny 1983 1 All ER 564.

INTERNATIONAL CHILD ABDUCTIONS - THE USA SETS THE EXAMPLE

by Anne Richmond*

The Background to the Uniform Child Custody Jurisdiction Act

The United States of America has experienced a large number of international child abductions, but the Uniform Child Custody Jurisdiction Act ("UCCJA") has grown out of concern at the increasing level of inter state abductions.

The United States has of course a Federal constitution. Each state has its own legal system and its own court structure. The actual rules of law on some topics, of which Family Law is a notable example, may vary dramatically from state to state.(1)

The existence of 49(2) jurisdictions within the "continental" USA constitutes an almost open invitation to child abduction. Suppose that on the break-up of a marriage the parents and children are all living in state X. The father is anxious to have custody of the children, but feels that the courts of state X are unlikely to be sympathetic to his claim. He abducts the children to neighbouring state Y, thinking that the courts in that state are more likely to favour his case. The result may well be that the courts of both states assert jurisdiction over the children, and perhaps make conflicting orders. The UCCJA is a concerted attempt by the USA to discourage child abduction and to avoid the problems illustrated by the above example.

The UCCJA is the work of a body known as the "National Conference of Commissioners for Uniform State Laws" ("NCCUSL"). This body, to which all states belong(3), exists specifically for the purpose of unifying law in the USA by means of "Uniform Laws" These "Uniform Laws" are drafted by NCCUSL, but whether they are adopted by the individual states is entirely up to them. On the whole NCCUSL has not been too successful. The UCCJA, first promulgated in 1968, is a notable exception. It has now been enacted by 48 of the 50 states, and the states have (unusually when compared with other "Uniform" laws) strictly adhered to the text laid down by the Commissioners.

The two states still out of line are Massachusetts and Texas**(4)**. In Massachusetts the State Supreme Court has indicated that, as a matter of Common Law, it will apply the principles which underlie UCCJA. In Texas the state legislature has enacted legislation which, while having the same aims as UCCJA, does differ in substance.

Leaving aside the problems created by the attitude of Texas and Massachusetts it should also be borne in mind that the fact that 48 states have almost identically worded legislation does not guarantee that the law applied in the courts will be uniform. The interpretation of the UCCJA is a matter for the courts of the individual states and there is a very real danger that identical words will be interpreted differently in different states. This seems to be happening with the "Continuing Jurisdiction" provision in section 14.**(5)**

The "Full Faith and Credit Clause" and the Federal Parental Kidnapping Prevention Act

Article IV section 1 of the USA Constitution, usually called the "Full Faith and Credit Clause", runs as follows.

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

On first reading it may be thought that the Clause renders the UCCJA unnecessary. However in **May v Anderson(6)** the Federal Supreme Court held that the Clause did not apply to child custody judgments. State X is not bound to recognise the custody judgments of state Y as the Clause only applies to "Final" judgments. Custody judgments are never "Final" because they can always be varied (in the best interests of the child) if circumstances so require.

Thus under the Constitution states were free to ignore each other's custody judgments. Equally they were and are free to recognise each other's custody judgments if they so wish. By enacting the UCCJA the vast majority of the states have shown their willingness to recognise other states' custody judgments.

The **Parental Kidnapping Prevention Act** ("PKPA")**(7)** is a bold measure enacted at the very end of 1980. This act of Congress enacts as Federal law the key provisions of the UCCJA, though with some modifications.

The Act is remarkable in two ways. Firstly it is the very first time Congress has enacted a law originating from NCCUSL. (It should be borne in mind that most "Uniform Laws" are in fields in which it would be **ultra vires** for Congress to legislate.)

Secondly it is the first significant occasion on which Congress has invoked the rather ill-defined power in the second sentence of Article IV Section 1 to enact "general laws" regarding the recognition between states of judgments etc. Partly because of this fact there are doubts about the consitutional validity of PKPA, doubts which the Federal Supreme Court may not resolve for several years.**(8)**

If valid the PKPA has three important effects. Firstly it imposes UCCJA on Texas and Massachusetts.**(9)**

Secondly it overrules, without the need for Constitutional Amendment, **May v Anderson.**

Thirdly it at least in theory enables the Federal Supreme Court to ensure uniform interpretation of the UCCJA (as incorporated in the PKPA) throughout the USA. This point is subject to the very big reservation that the Court would have to be willing to spare some of its extremely scarce time to hear UCCJA cases.**(8)**

The Basic Structure of the UCCJA

The main object of the UCCJA is to discourage inter-state child abudction. The UCCJA seeks to achieve that object in four ways. Firstly by spelling out clearly when a state **does** have jurisdiction over a custody dispute, while banning jurisdiction on the basis of mere physical presence (section 3). Secondly it requires an order of a "decree state" made in compliance with section 3 to be recognised in the other states (section 13). Thirdly it prevents the courts of other states from modifying the order of a decree state (section 14, "Continuing Jurisdiction"). Fourthly it provides for the summary enforcement of orders of a decree state in the courts of the other states (Sections 15-20).

The key provision in the UCCJA is section 3, which sets out the circumstances in which a state has jurisdiction to decide a custody issue.

UCCJA Section 3 - When Can a Court Take Jurisdiction Over a Custody Dispute?

> "(a) A Court of this state which is competent to decide child

custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this state (i) is the home state of the child at the time of the commencement of the proceeding or (ii) had been the child's home state within 6 months before the commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."

The concept of "home state" used in section 3(a)(i) is all important, and this is defined by section 2(b).

" 'home state' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in

which the child lived from birth with any of the persons mentioned . . ."

The operation of section 3, in conjunction with section 2(b), can be illustrated by the following hypothetical example.

The parents of a seven year old boy, who have just been divorced, used to live in California with the child. Custody of the boy is awarded to the father by the Californian divorce court. The father remains in California with the child. The mother moves to New York, where her parents reside. A few months after the custody order in favour of the father the mother returns to California, purportedly to exercise her visitation rights. Instead she "snatches" the son, and returns to New York, where she immediately commences custody proceedings. How then should the New York court approach this situation?

The main head of jurisdiction under UCCJA is section 3(a)(1), "home state". New York is clearly not the "home state" in our example, as the essence of home state jurisdiction is that the child has been resident within the state for at least six months prior to the commencement of proceedings.

Can New York claim jurisdiction under section 3(a)(2), the "significant connections" heading? This jurisdiction only arises if the child and his parents or the child and at least one contestant have significant connections with the state AND there is substantial evidence available in the state concerning the child's future care, education and protection.

It is submitted that the New York courts should decline jurisdiction under section 3(a)(2). Section 3(a)(2) has generally been restrictively interpreted. In particular mere physical presence of a child within a state with one of the contestants is insufficient to found jurisdiction, even if other relatives live there as well. In **Bacon v Bacon(10)**, for example, a father had snatched his son from the son's home in California and taken the child to Michigan. Although the child had been attending school in Michigan for some months, and was living with his father and an aunt, these facts did not amount to "significant connections" sufficient to give a Michigan court jurisdiction under section 3(a)(2).

Returning to our example the New York court clearly does not have jurisdiction under section 3(a)(4). As the New York court does not have jurisdiction under heads (1) or (2) either, it should therefore summarily

dismiss the mother's custody proceedings, unless she can show that there is an "emergency" within the meaning of section 3(a)(3). Courts in the USA are generally reluctant to hold that an "emergency" situation exists.

The same result should follow with our example even if there had been no California custody order in favour of the father, but rather he had been simply exercising de facto sole custody of his son when the mother snatched the child. In **Bacon** v **Bacon** (supra) no Californian custody order had yet been made; proceedings in California were only pending at the time of the Michigan hearing at which the Michigan court declined jurisdiction.

Inter-State Enforcement of Custody Orders

In our example the father will no doubt be extremely pleased when the New York court dismisses the mother's proceedings. He will however also want the California order in his favour enforced in New York. Machinery for inter-state enforcement of custody orders is provided by sections 15-20 of the UCCJA. Sections 15 and 16 permit the California order to be registered in New York, and sections 17-20 permit the enforcement of the California order in New York, without the father having to go to the trouble and expense of travelling all the way across the continent.

The Problems of Continuing Jurisdiction

Suppose in our hypothetical example the mother had not snatched her son in defiance of the California order, but rather she had been voluntarily given de facto custody by the father for a certain period. If this period is short, then the New York courts would not acquire jurisdiction under section 3. But if the period of residence in New York is at all lengthy then New York courts may **prima facie** acquire jurisdiction over the custody of the child, either under the "significant connections" head or, if the stay in New York is longer than six months, under the "home state" head.

If however the mother, after an extended period of de facto custody in New York, commences proceedings in that state, the "continuing jurisdiction" provision of UCCJA, section 14(a), will come into operation. This section is as follows.

> "If a court of another state has made a custody decree, a

court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction."

In the context of our example this means that so long as California has jurisdiction over the custody of the child under section 3 (whether or not that jurisdiction is invoked) New York may not vary the California order, even though it is now clearly the "home state" of the child, and even though New York may also satisfy section 3(a)(2), "significant connections".

The Extreme Continuing Jurisdiction Theory of Brigitte Bodenheimer

The late Brigitte Bodenheimer (one of the drafters of the UCCJA) was of the view that so long as one parent resides in the original decree state that state continues to have jurisdiction **(to the exclusion of all other states)** however long the child has been absent from that state.**(11)** Her reason for favouring this extreme rule is that such a rule is necessary to promote a major object of the UCCJA, the discouraging of interstate kidnapping.

It is undoubtedly true that on occasions a parent kidnaps a child in defiance of a custody order of the "original decree state", and then disappears for a long time, perhaps several years. Eventually the kidnapping parent reappears and applies for custody in what may be termed the "refuge state". On Bodenheimer's view the refuge state must decline jurisdiction, however long the absence from the original decree state.

That there is some wisdom in Bodenheimer's view is shown by the events in the case of **Van Haren v Van Haren.(12)** In that case a New Jersey court (which undoubtedly had jurisdiction under section 3) made a custody order in favour of the mother. The father immediately snatched the children and disappeared for fourteen months. He then emerged and petitioned for custody in his "refuge state", South Carolina. The South Carolina courts, ignoring the fact that New Jersey had at least arguably continuing jurisdiction under section 14, awarded custody to the father. The mother then snatched the children back and returned with them to New Jersey. Not surprisingly the New Jersey courts asserted that they had continuing jurisdiction over the children, refused

to recognise the South Carolina decision and re-awarded custody of the children to the mother.

While Bodenheimer's view does have a considerable attraction, it does not seem to fit the literal words of sections 14 and 3. If an original decree state ceases (for whatever reason) to be the "home state" of the child the original decree state has jurisdiction, if at all, under section 3(a)(2). But section 3(a)(2) requires **both** at least one contestant and the child to have significant connection with the state asserting jurisdiction. Can it really be said that a child who has been completely absent from the original decree state for a considerable period of time still has a "significant connection" with that state?.

Bodenheimer's view has met with considerable opposition from other academic writers, notably Professor Ratner.**(13)** Ratner's view is that an original decree state loses jurisdiction over the child if it has been absent from that state for a considerable period. This view is supported by the Uniform Commissioners' own note to section 14 which indicates that the original decree state would lose jurisdiction if the child had been absent for "several years".

In **Re Leonard(14)** the California Court of Appeals (First District) considered section 14, the Commissioners' own note and Ratner's views. In 1974 a Georgia court had awarded custody of an infant girl to her mother. In 1978 the mother voluntarily relinquished de facto custody to the father, who took the child to California, where he now resided. After the child had been with him for fourteen months the father applied to the California courts for custody. The California courts held that they had jurisdiction and that Georgia had lost "continuing jurisdiction" over the child, because of the child's prolonged absence from Georgia. The Californian courts firmly rejected Bodenheimer's views. On the other hand can it really be said that a fourteen months absence was long enough to destroy all the child's links with Georgia?

The uncertainty over the interpretation of section 14 is unquestionably a major weakness in the UCCJA, and the events in both **Van Haren** and **Re Leonard** are not the best advertisement for the Act. The difficulties in which the various courts found themselves in those cases might well have been avoided had the courts invoked the powers given to them by sections 6 and 7 of the Act. Under these provisions if it appears that two courts are both trying to assert custody jurisdiction over a child the courts may communicate with each other in an effort to decide which court should hear the case. If this communication procedure is used then it is to be hoped that the two courts, applying sections 3 and 14, will

come to an agreement as to which court is the "appropriate forum".**(14a)**

The Emergency Jurisdiction Under Section 3(a)(3)

It is a cardinal principle of UCCJA, set out in section 3(b), that a state may not exercise jurisdiction over a child simply because he is present within the state. Section 3(a)(3) creates an exception. A state can exercise jurisdiction on the basis of mere presence if there is an "emergency". "Emergency" is defined as a situation where the child has been abandoned, or has been subjected to or threatened with mistreatment or abuse or is otherwise neglected.

This "emergency" exception is readily understandable but does open up a possible loophole which a kidnapping parent might try to exploit. Fortunately the courts seem to have given "emergency" a narrow interpretation. A typical case is **De Passe** v **De Passe(15)**. In that case the emergency alleged by the mother was that the father drank excessively, spent much of his time away from home and had unreasonable spending habits. The New York court held that these facts did not constitute an "emergency" justifying its asserting jurisdiction. This case indicates that a wayward lifestyle of a custodial parent is not an emergency. On the other hand physical child abuse by the custodial parent, as in **Breneman** v **Breneman(16)** will constitute an emergency.

Conclusion - The UCCJA as a Model for International Action

One of the most interesting and heartening provisions of UCCJA is section 23

> "The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees ... of other nations if reasonable notice and opportunity to be heard were given to all affected persons."

The case of **Woodhouse** v **District Court(17)** dramatically illustrates the operation of this provision. An English court awarded custody of a child to its mother. The child's "home state" was England. The child was abducted by its father to Colorado, where he commenced custody proceedings. The Colorado Supreme Court held, applying UCCJA, that the district court (ie first instance court) must decline to hear the father's application.

The UCCJA is not perfect (as the controversy over section 14 shows) but it does seem to be workable. The problem of international child abduction grows apace but could be much alleviated by an international treaty to which all states adhered. It is respectfully submitted that the UCCJA (with necessary adaptations) could form the basis of such a treaty.

Each nation would not only have to sign the treaty but also enact the necessary municipal law. There would still be the problem of ensuring uniformity of interpretation throughout the world, something which could only be achieved by the creation of some form of international tribunal empowered to give binding interpretations.

The idea of a worldwide treaty is, unfortunately, rather a Utopian dream. Yet even without such a treaty the UCCJA could have effect outside the USA. There is absolutely no reason why a non-American legislature should not unilaterally enact a suitably adjusted version of UCCJA. The United Kingdom Parliament could perhaps set the example, taking advantage of the fact that adjustments of language rather than complete translation would be all that was needed. In interpreting "UCCJA" our courts would be able to draw on the already extensive American case law.

It may be argued that it would not be appropriate for the United Kingdom to unilaterally enact UCCJA, while other countries refuse to do so. Yet unilateral action has already been taken by the USA in enacting UCCJA, complete with section 23. Moreover the effectiveness of UCCJA does not depend on reciprocity. In **Woodhouse v District Court** Colorado recognised the English decree, even though the United Kingdom has not, as yet, enacted UCCJA(**18**)

If the United Kingdom Parliament gave the lead, other western nations (eg our Commonwealth or EEC partners) might well feel encouraged to follow suit. The more nations which followed the lead, the more difficult international child abduction would become. The problem may never be entirely eliminated but there is no need to wait for an international treaty. We should make a start now.

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The article is based on chapter 2 of the writer's undergraduate project "Taking Child Abduction Seriously". I am grateful to Mr. R. N. Sexton, LLM (Lecturer in Law at Trent Polytechnic), for undertaking the necessary editing.

(1) Congress can do very little about these variations in law. It would be ultra vires for Congress to enact laws in the field of Family Law. Note however the Parental Kidnapping Prevention Act.

(2) **i.e.** the 48 mainland states (excluding Alaska), together with the Federal enclave of the District of Columbia.

(3) The important Federal jurisdictions of District of Columbia, Puerto Rico and the Virgin Islands also belong.

(4) The District of Columbia and the Virgin Islands have also adopted UCCJA, but Puerto Rico has not.

(5) see infra, pp

(6) 345 US 528 (1953).

(7) United States Code 28-115-1738A. The measure (also known as Public Law 96-611) was one of the last Bills signed by President Carter before relinquishing the Presidency.

(8) The Supreme Court has referred to it about 4,500 cases annually. It gives a full oral hearing to only about 160 cases per year.

(9) PKPA also extends to Puerto Rico and the other small United States "territories" such as Guam. PKPA Section 8(b)(8).

(10) 6 FLR 2709 (1979).

(11) She expounds this view in an article, "Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA" 14 Fam LQ 203 (1981).

(12) 407 A. 2d 1242 (1979). The report relates to the later New Jersey proceedings.

(13) See "Procedural Due Process and Jurisdiction to Adjudicate", 75 NWL Rev 363 (1981).

(14) 7 FLR 2676 (1981).

(14a) Interestingly UCCJA uses the phrase "appropriate forum" rather than the phrase "convenient forum" usually used by Conflicts Lawyers.

(15) 421 NYS 2d 497 (1979) (New York Supreme Court, Appellate Division.)

(16) 284 NW 2d 804 (1979, Michigan Court of Appeals).

(17) 587 P.2d 1199 (1978, Colorado Supreme Court).

(18) See also Hovav v Hovav 9 FLR 2383 (1983). In this case the Pennsylvania Superior Court (the equivalent to a Court of Appeals in most other states) refused to hear a case where Israel was the "home state" of the two children.

REMEDIES IN ADMINISTRATIVE LAW - AN EVALUATION OF THE RECENT REFORM

by M A Fazal*

Introductory

The Law Commission in its Report on "Remedies in Administrative Law"(1) recommended a single procedure to be known as "Application for Judicial Review" to replace the existing varities of common law remedies against unlawful actions of the public authorities. This was initially implemented in 1977 by an amendment to Order 53 of the Rules of Supreme Court (R.S.C.). Further amendments were made in 1980. These later amendments have discarded the arbitrary division between a case being dealt with in term time by the Divisional Court of the Queen's Bench Division and in vacation by a single judge and replaced it by the distinction between civil and criminal proceedings. In the normal course a single judge should deal with ex parte applications for judicial review and he should do so preferably without a hearing. In the normal course in civil cases the substantive applications for judicial review should be heard by a single judge in open court and in criminal cases they should be heard by the Divisional Court. Under the reformed procedure declarations, injunctions and damages may be applied for in the alternative with the prerogative orders of certiorari, prohibition and mandamus so that the choice of wrong remedies would not be fatal to the case.(2) The key provisions of the reformed Order 53 have been incorporated in the Supreme Court Act 1981, s.31.

Judicial Response to the Reform

The Law Commission on whose report the reformed procedure of the application for judicial review is based was clearly of the view that the new remedy should not be the exclusive means of challenging actions of public authorities before the court.(3) The Report stated

> "Public law issues concerning the legality of acts or omissions of persons or bodies do not arise only in applications to the Divisional Court for prerogative orders. They may be the direct subject of an injunction; and they may also arise collaterally in ordinary actions or indeed in criminal proceedings... We are clearly of the opinion that

the new procedure we envisage in respect of applications to the Divisional Court should not be exclusive in the sense that it would become the only way by which issues relating to the acts or omissions of public authorities could come before the courts''.

Indeed neither Order 53 nor s.31 of the Supreme Court Act 1981 provide that the new remedy should be exclusive of others including ordinary actions for a declaration and injunction. Yet the court has ruled in a series of cases(4) that the use of ordinary action in proceedings involving issues of public law avoiding the new remedy of ''Application for Judicial Review'' would amount to an abuse of judicial process. The ordinary action for a declaration had many advantages from the plaintiff's point of view. However, the judges in their eagerness to protect the executive from legal challenge are finding defects in them. Thus Lord Denning M.R. said in **O'Reilly** v. **Mackman(5)**

''The action for a declaration had many defects. It could be started, as of right, without the leave of the court. It could be started years and years after the event. It could involve long trials with discovery, cross-examination and so forth... now that the new procedure has been introduced, there should no longer be recourse to the remedy by action for a declaration. If a complaint is brought by ordinary writ, without leave it can and should be struck out as an abuse of the process of court''.

With respect to His Lordship's view, the choice of the remedy by way of an action for a declaration in preference to summary procedure of judicial review is not an arbitrary one for the plaintiff. As Peter Pain J. pointed out in **O'Reilly** v. **Mackman(6)** while speaking for the Divisional Court.

''It might be thought that the plaintiffs have made their choice of procedural route capriciously. This is not so. I was told by their counsel that they anticipate in each case that there will be a substantial dispute as to fact and they have therefore chosen a route that provides for oral evidence as a matter of course rather than a route in which the evidence is nearly always taken on affidavit. This is clearly a rational choice''

The ordinary trial process with its interlocutory stage of discovery and interrogatories as well as the right of oral evidence and cross-examination is well-suited for a resolution of disputed questions of fact. Furthermore a private citizen while seeking to challenge an admini-

strative action does not know and has no means of knowing on what factual basis a decision adverse to him has been taken. Some of the landmark cases in administrative law illustrate this. Thus in **Barnard v. Dock Labour Board(7)** it was only during discovery that the dockers came to know that their suspension had been ordered by the port manager (whose action was ultra vires) and not by the Dock Labour Board. Had they applied for certiorari they would have been unable to obtain leave because without this information they could not have shown that they had a good case. In certiorari proceedings they would not have obtained discovery of documents. Furthermore the six months' time-limit then applicable to certiorari (now three months only) had expired.

Anisminic Ltd. v. Foreign Compensation Commission(8) was another landmark case in English administrative law. Lord Diplock has recently acknowledged that "Anisminic was an action commenced by writ for a declaration, in which a minute of the commission's reasons for their determination adverse to the plaintiff company did not appear on the face of their determination, and had in fact been obtained only on discovery.... If it had been an application for certiorari those who were the plaintiffs in Anisminic would have failed; it was only because by pursuing an action by writ for a declaration of nullity that the plaintiffs were entitled to the discovery by which the minute of the Commission's reasons which showed that they had asked themselves the wrong question, was obtained".**(9)**

In **O'Reilly v. Mackman** Lord Denning M.R. said

"The Law Commission in its Report on Remedies in Administrative Law in March 1976 (Law Com No. 73, Cmnd 6407) suggested that the new remedy by judicial review should not exclude any of the former remedies : see paras 34 and 58(a). But that suggestion does not appeal to me, at any rate so far as the remedy by action for a declaration is concerned. It was invented so as to avoid the technical limitations on certiorari. Now that those limitations have been swept away by Ord. 53, the remedy by an action for a declaration should be scrapped".**(10)**

Ackner L.J. and O'Connor L.J. disagreed with **Lord Denning M.R.** on the ground that neither Order 53, nor s.31 of the Supreme Court Act 1981 can be construed to support that proposition. The fact that declaratory relief is a discretionary remedy is sufficient as a safeguard against its possible abuse. However, Lord Denning's view has, in the main, prevailed with the House of Lords.**(11)**

The explanation for the predominance of this view is judicial euphoria over the soundness of the new remedy "Application for Judicial Review.(12) Lord Denning M.R. added a postscript to his judgment in **O'Reilly v. Mackman** as follows.

"Postscript

I cannot refrain from referring to a few words I said in 1949 at the end of my Hamlyn Lecture on Freedom under the Law (1949) p.126:

'Just as pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and action on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions, and actions for negligence... We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge'.

Now, over thirty years later, we do have the new up-to-date machinery. I would say with Lord Diplock in **I.R.C. v. National Federation of Self-Employed** (1981) 2 All E.R. 93 at 104, (1982) A.C. 617 at 641:

'To revert to technical restrictions... that were current thirty years ago or more would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime'.

So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting s.31 of the 1981 Act in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty".**(13)**

Lord Diplock said in the same case speaking for the House of Lords**(14)**

"My Lords, Ord.53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does s.31 of the Supreme Court Act 1981".

Nonetheless Lord Diplock concluded

"The position of applicants for judicial review has been drasti-

cally ameliorated by the new Ord.53. It has removed all those disadvantages particularly in relation to discovery that were manifestly unfair to them and had in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as abuse of their powers resort to an alternative procedure by way of an action for a declaration or injunction .... Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review ... it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means evade the provisions of Ord.53 for the protection of such authorities''.

Thus an action for a declaration of nullity of the determination of the Board of Visitors of Hull Prison (a statutory tribunal) was held to be an abuse of the process of the court. Lord Diplock conceded that there could be exceptions to the general rule as stated above ''particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties object to the adoption of the procedure by writ or originating summons'' (p.1134). However, the question whether there should be other exceptions was ''left to be decided on a case to case basis'' (p.1134).

Scrutiny of the Reasons for Order 53 as an Exclusive Remedy

At this point it is appropriate to attempt a close examination of the justifications advanced by the courts for disallowing ordinary action procedure to challenge administrative actions and decisions. Lord Denning M.R. referred to these reasons when he said

''When considering the merits of judicial review as against an ordinary action, it is important to notice that judicial review has some safeguards against abuse which are not available in ordinary actions''**(15)**

(a) Leave to be granted

The procedure under the new Order 53 involves two stages : (i) the application for leave to apply for judicial review, and (ii) if leave is granted, hearing of the application itself. The former or 'threshold'

stage, as it is called, is regulated by Order 53 rule 3. The application for leave to apply for judicial review is made initially ex parte but may be adjourned for the persons or bodies against whom relief is sought to be represented. The justification for this two-stage procedure was offered by Lord Scarman in **I.R.C. v. National Federation of Self-Employed(16)** in the following words

"The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busy bodies, cranks and other mischief makers".

Lord Diplock said

"Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative errors and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived..."(p.105)

Lord Diplock returned to this theme in **O'Reilly v. Mackman** where he said

"The application for leave ... had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying facts relied on ; so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make an oath a full and candid disclosure of material facts was itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Ord.53 of 1977. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. In contrast, allegations made in a statement of claim or an endorsement of an originating summons are not on oath, so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular

decision is a nullity. There was also power in the court on granting leave to impose terms as to costs or security".(17)

The requirement of leave has the effect of removing a large number of cases from judicial scrutiny. In the five years, 1965-69, over 20% of applications for leave to apply for certiorari were refused.(18) The Law Commission offered interesting findings on this. Their findings show that the merits of the applications rarely receive serious attention during the 'threshold' stage. Thus the Law Commission stated in their Report

"One of the important differences between prerogative order proceedings and ordinary actions is that only the former require leave to initiate proceedings. In this connection we have had made available to us the preliminary findings of the empirical study undertaken by the Legal Research Unit of Bedford College, London, into the working of the Divisional Court. The first point which is brought out by these findings when considered in connection with the official statistics available to us is that the necessity in prerogative order applications to apply for leave removes at the outset a substantial number of cases. In the years 1971 to 1975 inclusive the proportion of cases in which leave was refused amounted to little over one-third of the applications made. Secondly, since 1947 applicants for leave to bring prerogative orders have been able to appear in person and a not insignificant number of applications have been made in this way. Thirdly, it appears that, as the affidavits which have to be filed before the application for leave is heard are usually read by the Court in advance of the hearing, the actual hearing is relatively short; thus in 1972, for example, of the applications for leave which were granted, only approximately 10 per cent, and of those refused only approximately, 15 per cent took more than twenty minutes".(19)

The same trend concerning the proportion of applications refused leave has continued in subsequent years.(20) The claim that the requirement of 'leave' to apply for judicial review protects public authorities from harassing litigation does not stand up to scrutiny. There is no such 'filtering' process on the ordinary actions on contracts and torts including those under the Crown Proceedings Act 1947. No 'leave' is required for commencing an ordinary action for a declaration or injunction but the defendant can have the proceedings struck out on the grounds that no reasonable cause of action is disclosed, that the proceedings are scandalous, frivolous or vexatious, that the particular matter objected to may prejudice, embarrass or delay the fair trial

of the action or otherwise that the proceedings are an abuse of the process of the court.(21) Furthermore the courts possess an inherent power to strike out an action as abuse of the process of the court to prevent misuse of its procedure.(22) One cannot see why additional safeguards in the form of 'leave' to apply are called for in proceedings for judicial review.

Parliament has not thought it fit to impose such a requirement on statutory appeals to the High Court against administrative authorities. The court has treated such statutory appeals as interchangable with the proceedings for judicial review. Thus in **Chapman** v. **Earl(23)** and **Metropolitan Properties Ltd.** v. **Lannon(24)** the court granted leave to apply for certiorari in proceedings on appeal under s.9 of the Tribunals and Inquiries Act 1958 where the prerogative remedy was thought to be the appropriate remedy. Challenges to administrative actions by way of statutory appeals to the High Court (including statutory applications to quash Minister's decisions on planning appeals and compulsory purchase orders) are numerous. It is worth comparing their relative figures. For the year 1980 the number of applications for judicial review was as follows: Mandamus : 210; Prohibition : 19; certiorari : 262. During the same period the number of appeals to the Queen's Bench Division under various enactments on point of law from the decisions of Ministers, government departments and tribunals stood at 136. Furthermore there were 101 appeals to the Chancery Division from inferior tribunals under the Taxes Management Act 1970, ss.56 and 100.**(25)** The remedy by way of statutory appeals is as much a remedy against public authorities as that of judicial review.

Many principles of law enunciated by the courts in statutory appeals have been adopted in the law of judicial review. Thus in **Edwards** v. **Bairstow** (f.m. (1956) A.C. 14), a case of statutory appeal to the High Court from a decision of the Commissioner for General Purposes of the Income Tax it was held that the findings of fact made by the Commissioners could be interfered with by the appellate court where they were based on no evidence or on a view of the facts that could not reasonably be entertained. This principle was adopted by Lord Diplock himself in **O'Reilly** v. **Mackman** (f.n. (1982) 3 All E.R. at 1132) for the purposes of judicial review when he said

"The facts ... can seldom be matter of relevant dispute on an application for judicial review since the tribunal or authority's findings of fact ... are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in **Edwards** v. **Bairstow** (1955) 3 All E.R. 48 at 57-58, (1956) A.C. 14 at 36".

This again shows the close relationship between statutory appeals and judicial review which destroys the case for subjecting only the latter to the requirements to obtain 'leave' to apply.

This is why the Law Commission considered the question of assimilating them(26) but was unable to make a recommendation in their final report owing to their limited terms of reference.(27) **Yet they are not subject to 'filtering' by the requirement to obtain 'leave'.**

Far more numerous are the challenges mounted against administrative actions by way of appeals to tribunals. A few examples will give an indication of the volume of such proceedings. The figure for the year 1980 of the cases filed before the General Commissioner of Income Tax was 940,879, of those before the Supplementary Benefit Appeal Tribunals was 46,332, of those before the Immigration Appeal Machinery (adjudicators) was 10,550 and those before the Lands Tribunal was 1,353.(28) Yet these remedies have not been subjected to the requirement of 'leave' or any other 'filtering' process even though their decisions are just as binding on public authorities as those of the courts.

Lord Diplock (in whose judgment other Law Lords concurred) in **O'Reilly v. Mackman(29)** ignored the fact that it is not always possible to decide whether an applicant has a good case to proceed at the 'threshold' stage. In other words the viability of an application for judicial review cannot be satisfactorily determined in course of the hearing for 'leave' This is evidenced not only from cases such as **Barnard v. National Dock Labour Board(30)** and **Anisminic Ltd. v. Foreign Compensation Commission(31)** but also from the experience of the courts in handling the issues of judicial review. Thus, for instance, Order 53, rule 3(7) provides "The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates". This has now been codified by s.31(3) of the Supreme Court Act 1981. In other words the question of **locus standi** has to be determined at the 'threshold' stage. This was acknowledged by Lord Diplock in **I.R.C. v. National Federation of Self-Employed(32)** when he said "Rule 3(5) specifically requires the court to consider at this stage whether 'it considers that the applicant has a sufficient interest in the matter to which the application relates'. So this is a 'threshold' question...". Nonetheless the House of Lords held that this question cannot be determined at the 'threshold' stage. It has to be decided "when the application itself had been heard and the evidence of both parties presented" i.e. at the second stage. This was because the court did not find it possible to decide on the issue of **locus standi** on the basis

of evidence presented at the 'threshold' stage without reference to the merits of the application to be considered at the second stage. Thus Lord Diplock himself said

" ... if in the instant case, what at the threshold stage was suspicion only had been proved at the hearing of the application for judicial review to have been true in fact ... I would have held that this was a matter in which the Federation had a sufficient interest in obtaining an appropriate order..."(106).

The reason for the impracticability of determining **locus Standi** at the 'threshold' stage becomes clear from the judgment of Lord Scarman who said

"It is wrong in law...for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint ..... the Divisional Court was right to grant leave ex parte. Mr. Payne's affidavit of 20th March 1979 revealed a prima facie case of failure by the Inland Revenue to discharge their duty to act fairly between taxpayer and taxpayer. But by the time the application reached the Divisional Court for a hearing inter partes (i.e. the second stage) two very full affidavits had been filed by the Revenue explaining the management's reasons for the decision not to seek to collect the unpaid tax from the Fleet Street casuals. At this stage the matters of fact and degree on which depends the exercise of the discretion whether to allow the application to proceed or not became clear. It was now possible to form a view as to the existence or otherwise of a case meriting examination by the court. And it was abundantly plain on the evidence that the federation could not show such a case. But the Court of Appeal was misled into thinking that, at that stage and notwithstanding the evidence available, locus standi was to be dealt with as a preliminary issue and assumed illegality (where in my judgment none was shown) and on that assumption, held that the Federation had sufficient interest. Were that assumption justified, which on the evidence it was not, I would agree with the reasoning of Lord Denning M.R. and Ackner LJ." (pp. 113-114).

The case of **I.R.C. v. National Federation of Self-Employed** demonstrates most clearly that the division of proceedings of judicial review into two stages : (i) threshold stage ex parte and (ii) the hearing stage inter partes is unworkable, and was abandoned by the House of Lords as far as the locus standi issue was concerned. The Law Commission's findings on the sketchy nature of the 'threshold' stage proceedings have already been noted.**(33)**

(b) **Discovery in Judicial Review**

In **O'Reilly v. Mackman(34)** Lord Diplock noted the 'disadvantages' caused by the absence of interlocutory order for discovery in the proceedings for prerogative orders under the pre-reform procedure. He said

" ... the procedural disadvantages under which an applicant for this remedy laboured remained substantially unchanged until the alteration of ord. 53 in 1977. Foremost among these was the absence of any provision for discovery. In the case of a decision which did not state the reasons for it, it was not possible to challenge its validity for error of law in the reasoning by which the decision had been reached".**(35)**

The Law Commission stated possible options for a solution on this as follows:

"Some provision for discovery of documents should be made. But it is difficult to make such provision in the absence of a full interlocutory process. We would hesitate to recommend the introduction of such a process because of the delay it would entail, a delay moreover which would affect the large number of cases where discovery is not essential. It might therefore be best to provide that the court should order discovery of documents only on special application by a party seeking review; there would in that case be no provision for automatic discovery of documents..."**(36)**

The Law Commission conceded that "this solution may not be sufficient to enable the applicant to get at the true facts in all cases; in particular the absence of provisions for discovery by the parties without court order will mean that the applicant for review has to have at least some suspicion that the facts are concealed from him, or otherwise he will not make the special application for discovery of particular documents or documents of a specified class. It is doubtful if the applicant in **Barnard v. National Dock Labour Board** (1953) 2 Q.B. 18 C.A. would have discovered the true facts on this limited approach".**(37)**

Nonetheless the Law Commission adopted**(38)** this limited approach for their recommendation which was implemented by the amended Ord. 53, rule 8. Lord Diplock spoke optimisitically of this reform : "Those disadvantages, which formerly might have resulted in an applicant being unable to obtain justice in an application for certiorari under ord. 53, have all been removed by the new rules introduced in 1977.... The position of

the applicants for judicial review has been drastically ameliorated by the new ord. 53. It has removed all those disadvantages, particularly in relation to discovery that were manifestly unfair to them...'''**(39)**

We have already noted that the solution adopted for the reform was one of limited approach and not that of a full interlocutory process as available under Order 24, rule 2 for ordinary civil actions. Consequently Lord Diplock's claim of ''drastic amelioration'' removing ''all those disadvantages'' is less than factually correct. Furthermore how 'drastically' the plight of the applicants for judicial review has improved will depend on the view of the scope for discovery in proceedings for judicial review.

Let us consider this.

Lord Scarman said in **I.R.C.** v. **National Federation of Self-Employed(40)**

''On general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty, and it should be limited to documents relevant to the issue which emerge from the affidavits''

It is worth pointing out that had the plaintiffs in **Barnard** v. **N.D.L.B.(41)** and **Anisminic Ltd.** v. **Foreign Compensation Commission(42)** applied for certiorari they would not have in their possession the evidence alluded to by Lord Scarman to justify discovery. Similarly in **I.R.C.** v. **National Federation of Self-Employed(40)** an attempt to obtain discovery under the reformed procedure for judicial review failed**(43)** (owing to the reason given by Lord Scarman). Lord Scarman also pointed out that the public authorities would be entitled to plead 'public interest' immunity in answer to the claim for discovery in judicial review.**(44)**. In **Air Canada** v. **Secretary of State (No. 2)(45)** the House of Lords circumscribed the power of the court to inspect documents and order their production. It is no longer possible to have disclosure ordered simply by showing that disclosure is necessary to enable the courts to dispose of the case fairly (i.e. that it is necessary in the interest of justice to do so). The party seeking discovery must further show that the disclosure would help his own case or damage his adversary's case. This may well have the effect of limiting the scope of discovery against the public authorities. As Lord Scarman said in his dissenting judgment

''The judge rejected, in my view rightly, the view which has commended itself to the Court of Appeal and to some of your Lordships

that the criterion for determining whether to inspect or not is whether the party seeking production can establish the likelihood that the documents will assist his case or damage that of his opponent. No doubt that is what he is seeking ... But it would be dangerous to elevate it into a principle of the law of discovery.... It is not for the Crown but for the court to determine whether the document should be produced'' (.. 924-925).

All these go to disprove the claim of Lord Diplock that the plight of the applicants for judicial review has been 'drastically ameliorated' as a result of the recent reform.

(c) Cross-Examination in Judicial Review

One of the most pertinent questions in this context is: how far should the trial process with extensive right of cross-examination that goes with it be introduced in proceedings for judicial review. Lord Diplock tried to support his claim of 'drastic amelioration' of the procedure by pointing out that "There is express provision in the new r.8 (of Ord. 53) for interlocutory applications for discovery of documents, administration of interrogatories and the cross-examination of deponents to affidavits''.(46) Lord Diplock sought to stress the point by saying

''... Your Lordships might think this is an appropriate occasion on which to emphasise that whatever may have been the position before the rule was altered in 1977, in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents on application for judicial review is governed by the same principles as it is in actions begun by originating summons; it should be allowed whenever the justice of the particular case so requires''.(47)

However, this seems to have been no more than an expression of a pious wish. Lord Diplock himself said in the same case I ''... it will only be on rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review''.

Prior to the reform in 1977 Order 53 did not provide for cross-examination. However, under Order 38, rule 2(3) the court had power to order cross-examination of the deponents of affidavits. Yet in practice it permitted cross-examination only in very exceptional circumstances. In **R. v. Kent JJ ex p. Smith**(48) Lord Hewart C.J. said that there was no precedent for allowing such cross-examination in the previous fifty or sixty years. In **Franklin v. Minister of Town and Country Planning**(49) both Lord Oaksey

and Morton L.J. indicated their willingness to allow cross-examination but no application was made. Possibly the only case where it has been allowed this century is R. v. **Stokesley, Yorkshire Justices ex p. Bartram(50)** where the Divisional Court suspected that an attempt had been made to mislead it.

It does not appear as though the judicial attitude has changed over this question, since the reform of the remedies. Thus Lord Denning M.R. said in **George** v. **Secretary of State(51)**

"... in general cross-examination shall not be allowed in ... proceedings for judicial review ... There are very good reasons for this rule. First, the affidavits speak as to what took place before the determining body. It may have been before a planning inspector, or a magistrate, or someone of that kind ... It is undesirable that he should be subjected to cross-examination .... Secondly, experience shows that on these procedural questions there is very little conflict on the affidavits. Thirdly, one party might, by means of cross-examination, try to undermine the actual findings of the inspector or other officer holding the inquiry".

While Lord Denning M.R.'s observations concerned mostly officials exercising judicial or quasi-judicial functions Lord Bridge seems to have extended this immunity to administrative officers generally in **Khawaza** v. **Secretary of State(52)** thus his Lordship observed referring to the immigration officers

"I understand all your Lordships to be agreed that nothing said in the present case should be construed as a charter to alleged illegal entrants who challenged their detention and proposed removal to demand the attendance of deponents to affidavits for cross-examination". (p. 792).**(53)**

It is submitted that while there is a case for protecting members of judicial or quasi-judicial bodies(54) or officials from cross-examination there is no such case for protecting officials exercising administrative powers affecting individuals' rights particularly where "issues of fact, or law and fact, are raised which it is neither just nor convenient to decide without the full trial process"".(55)

This distinction is evident in the practice of ordering costs. If the court decides to quash an administrative decision it will in appropriate cases award costs against the authority.**(56)** The court will not accept the general rule protecting members of tribunals.**(57)**

The Choice of the Appropriate Model for Reform

The Law Commission considered two basic solutions. One was to assimilate the remedies including ordinary actions for declarations and injunctions to the procedure of prerogative orders. Adopting the name of the reformed remedy from the Ontario Judicial Review Procedure Act 1971 this was to be called an "Application for Judicial Review". Under this procedure a litigant should be able to obtain any of the prerogative orders or in appropriate circumstances a declaration or an injunction. This is the solution that the Law Commission eventually adopted for recommendation.(58) The British Columbia Judicial Review Procedure Act 1976, the Canadian Federal Court Act 1970 and the New Zealand Judicature Amendment Act 1972 are also based on this model(59) with some important differences.(60)

The Australian solution i.e. to abolish the prerogative orders and to replace them with a statutory scheme of judicial review with the grounds of review specified in the reforming legislation(61) was not considered by the Law Commission in the initial consultative document(62) and could not be considered in their final report owing to the limited terms of reference.(63)

However, the Law Commission did consider an alternative model which was as follows:

"Under this the prerogative orders certiorari, prohibition and mandamus would be retained, but their procedure would be assimilated to that of ordinary civil proceedings begun by writ or originating summons. The procedure for a declaratory judgment and injunctions and the prerogative orders would, therefore, be the same and they could be applied for in the alternative. As a consequence the difficulties caused by **Punton** v. **Ministry of Pensions and National Insurance (No. 2)**(64) would disappear ; if a declaration were applied for in the circumstances of that case, the court would simply award certiorari. The difference in the criteria for **locus standi** would also be irrelevant, since the court could in its discretion award certiorari or prohibition where on a strict interpretation of the law, the applicant lacked standing for a declaration or an injunction".(65)

The Law Commission saw the merits of this approach. Thus they said

"The result of assimilating the procedure of the prerogative orders to that of declarations and injunctions is that there would be at least the opportunity for full interlocutory process on applications for

certiorari and mandamus with provision for mutual discovery of documents and interrogatories. Where the facts are not in dispute, as would often be the case, the application could be made by originating summons. The provision as to discovery and interrogatories will apply if the application is made by writ, or if made by originating summons, the court orders the proceedings to continue as begun by writ''.**(66)**

Had this model been adopted for the reform of the remedies in administrative law many of the difficulties that have since arisen could have been avoided. Let us address ourselves to some of these.

(a) Remedy against Domestic Tribunals

In **R. v. B.B.C. ex p. Lavelle(67)** involving a disciplinary action against an employee of the B.B.C. it was held that under the reformed procedure as confirmed by s. 31(1) of the Supreme Court Act 1981 certiorari and other prerogative remedies were inappropriate to impugn a decision of a domestic tribunal such as an employer's disciplinary tribunal. Similarly judicial review by way of an injunction or a declaration was confined to review activities of a public nature as opposed to those of a private or domestic character. Under the pre-reformed procedure the declaration was always available to challenge the decision of an employer's disciplinary tribunal.**(68)** Unlike certiorari and prohibition the declaration was the appropriate remedy to review decisions of domestic bodies generally.**(69)** The fault lies with the model of reform as adopted. The difficulty of applying the single remedy as reformed was foreseen by the Law Commission.**(70)**

This seems to contradict the tendency of the courts to expand the principles of public law to the sphere of domestic bodies such as trade unions. Thus in **Cheall v. A.P.E.X.(71)** Lord Denning M.R. sought to extend the principles firmly developed in the field of public law to cover expulsion of members from trade unions. He suggested that trade union rules ought to be regarded as by-laws as such challengeable on grounds of unreasonableness and uncertainty.**(72)** Again in **R. v. Committee of Lloyds(73)** judicial review was sought and successfully against the Committee of Lloyds, a body similar to the General Medical Council, the disciplinary Committee of the Law Society etc. against whom prerogative orders of certiorari, prohibition and mandamus have not been available on the ground that they were not public bodies falling within the scope of these remedies.

The question arises as to what would be the correct procedure to challenge an unreasonable rule of a domestic body such as a trade union. Are these to be regarded as public bodies any more than B.B.C?

(b) Public Law vs. Private Law Distinction

The courts have now firmly established that protection of rights that arise under public law as opposed to private law can only be sought by way of an application for judicial review. Use of ordinary actions for declarations and injunctions has been ruled out.(74) This dochotomy between public law and private law rights was the direct consequence of the model adopted for the reform of the remedies viz. assimilation of the remedies of judicial review to the procedure of prerogative orders. The Law Commission explained this in the following words:

"The vital difference of the proposed system ... from the present system under Order 53 i.e. the pre-reform Order 53 would be that the litigant's choice of remedies in the Divisional Court would not be limited to the prerogative orders but would also ... include in appropriate circumstances a declaration or an injunction. **Broadly speaking, the circumstances when it would be appropriate for a litigant to ask for a declaration or an injunction under the cover of an application for judicial review would be when the case involved an issue comparable to those in respect of which an application may be made for a prerogative order i.e. when an issue of public law is involved".(75)**

However, the Law Commission itself made it clear that it is not possible to establish a private law/public law distinction for this purpose without reference to the substantive law of judicial review which fell outside their terms of reference. Thus the Law Commission said

"We have ... to find a formula which will sufficiently indicate the circumstances in which a declaration or injunction may be sought under cover of an application for judicial review, by reference both to the public character of the person or body against whom relief is sought and to the nature of the matter in respect of which that relief is sought. To attempt to provide a detailed definition of the circumstances in which an application for judicial review could be made (i.e. not only for any of the prerogative orders but also for a declaration or an injunction) would inevitably involve us in considering the scope of, and not merely the procedure applicable to, remedies for judicial review. This is a task which is clearly outside the terms of reference of this report".(76)

This is why Lord Diplock said in **O'Reilly v. Mackman(77)**

"I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating

summons a remedy against infringement of rights of the individual that are entitled to protection in public law''

As a result the courts have been driven into classifying issues into those of public law and private law on an ad hoc basis. The courts' attempt to draw a public law/private law distinction on an ad hoc basis in the sphere of substantive law has proved highly unsatisfactory in administrative law as elsewhere.**(78)**

The absurdity of turning Order 53 into an exclusive remedy was shown in **R. v. Jenner(79)** where the trial judge had ruled that it was not open to the accused (who was prosecuted for using land in contravention of of a stop notice) to plead invalidity of stop notice and that the validity of such notice could only be challenged in proceedings for judicial review. The Court of Appeal (Criminal Division) rejected this view on the ground that ''The process of judicial review, which rarely allows of the reception of oral evidence, is not suited to resolving the issues of fact involved in deciding whether activity said to be prohibited by it is caught by s. 90 (of the Town and Country Planning Act 1971). These issues could not possibly be decided on the contents of affidavits, which is the form of evidence usually received by the Divisional Court'' (p. 50).

If the facts were not in dispute the accused would be prevented from putting forward the defence that the stop notice was invalid. On the same footing the accused could be denied the right to plead invalidity of by-laws or of delegated legislation in criminal proceedings a defence that has traditionally been open to the accused**(79a)**. That this might be so is reinforced by the decision in **Davey v. Spelthorne(80)** where the plaintiff claimed in an ordinary action that an enforcement notice be set aside and damages for negligent advice by the council. The Court of Appeal struck out the parts of the claim which attacked the validity of the enforcement notice as an abuse of judicial process. The notice having been issued by a public authority for public purposes raised issues of public law which are reserved exclusively for the proceedings of judicial review. However, the court left outstanding the part of the claim concerning damages for negligent advice on the ground that it arose out of the plaintiff's private rights.

These two cases demonstrate the dilemma. While the validity of an enforcement notice or of stop notice raises issues of public law it might involve disputes about questions of fact which could not be satisfactorily resolved in the summary proceedings of judicial review. Insistence on

Order 53 as an exclusive remedy also denies the accused his rights to plead defences otherwise recognised by law.

(c) Limitations on Declarations and Injunctions as Remedies in Administrative Law

Under the pre-reform procedure the declaration and injunction had many advantages notwithstanding the fact that their locus standi requirement was construed somewhat restrictively(81) and the declaratory judgment was not appropriate for errors of law intra vires.(82) They could be granted with respect to domestic tribunals(83); they were effective to resolve disputed questions of fact(84); they were used to obtain legal recognition of the parties' rights,(85) privileges,(86) entitlement and status.(87) There was no time-limit on the declaratory remedy. The scope of these remedies was considerably wider than at present. The normal interlocutory procedure (including discovery of documents) which applied in all civil actions was available.

Now as a result of assimilating these remedies to the procedure of prerogative orders many of these advantages have been lost. They are now subject to a three-months' time-limit.(88) The courts are refusing to issue declarations where there is a substantial conflict of evidence as to the manner in which the powers in question were exercised.(89) Categories of fresh evidence admissible in judicial review are strictly limited and they do not extend to demonstrating that a deciding body would have come to a different conclusion.(90) Now that the declaration is a public law remedy the courts in their desire not to usurp an appellate jurisdiction over public authorities would not make a declaration of an applicant's right or entitlement. Thus Lord Scarman said in **Shah v. Barnet London** B.C.(91)

> "Declarations are appropriate to declare an entitlement or a right or duty. But this is exactly what the courts cannot, and must not do in these cases (i.e. in judicial review). It is not for the courts to say either that the students are entitled to an award or that the authorities are under a duty to make an award".

This limitation of the declaratory remedy presented a serious headache to the House of Lords in **Chief Constable of the North Wales Police v. Evans(92)** where a probationary constable was forced to resign in breach of the rules of natural justice. Lord Brightman stated

> "Judicial review is concerned, not with the decision, but with

the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power'' (p. 154).

In the light of this statement Lord Brightman was constrained to formulate the remedy in terms of ''a declaration affirming that, by reason of such unlawfully induced resignation, the respondent thereby became entitled to the same rights and remedies, not including re-instatement, as he would have had if the appellant had unlawfully dispensed with his services under reg. 16(1)'' (p. 156)

The House of Lords considered the question of ordering reinstatement Thus Lord Bingham said

''One possibility would be to add to that declaration an order of mandamus. The respondent has one desire and one desire only, namely to be reinstated in the police force. This would be secured if an order of mandamus were to issue, directed to the chief constable ... requring him ... to restore the respondent to the office of probationer constable as held by him on 8 November'' (p. 155).

However, the House of Lords restrained itself to the granting of a declaration as formulated above, together with the declaration that the chief constable had acted unlawfully in inducing the respondent's resignation. This the House of Lords did with regret an expression of regret with which all the Law Lords agreed unanimously. Lord Brightman who delivered the leading judgment said

''I feel that the choice of remedy is a difficult one. It is a matter of discretion. From the point of the respondent who has been wronged in a matter so vital to his life, an order of mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would in the circumstances be a remedy proper to be granted. But it is unusual, in a case such as the present, for the court to make an order of mandamus, and I think that in practice it might border on usurpation of the powers of the chief constable, which is to be avoided. With some reluctance and hesitation, I feel that the respondent will have to content himself with the less satisfactory declaration that I have outlined''(p. 156)

It is worth pointing out that under the pre-reform procedure the court would have no difficulty in granting a declaration in the above set of circumstances that the forced resignation was void. The effect of such a declaration would be to put the respondent back in his position, the

purported resignation having never taken effect in law. In **Ridge** v. **Baldwin,(93)** by the time the House of Lords decided the case declaring that the dismissal had been void the age of retirement of the dismissed chief constable of Brighton had been reached with the consequence that he became entitled to all the past salary and emoluments that went with his post as well as his pension rights. He accepted an offer of a settlement for a lump sum of well over £67000 in 1963.

The genuine case of a declaratory remedy under the reformed remedy seems to be one where the prerogative orders would be inappropriate for some reason or other e.g. where an order for prohibition would infringe Parliamentary Privileges.**(94)** Even in such a case an interim declaration is not permissible as before.**(95)**

Concluding Remarks: Possibility of Further Reform

We have indicated above that the choice of the model for the reform by the Law Commission and subsequently by Parliament in enacting s.31 of the Supreme Court Act 1981 was an unsatisfactory one. Inevitably there would be cases where the question of legality of administrative actions or decisions could not be determined simply on the basis of contested affidavits in judicial review. Here the resolution of disputed questions of fact would require a trial process. Neither the Law Commission's Report nor their Draft Procedure for Judicial Review Bill (1976) contained any provision for such cases. However, the revised Order 53, rule 9(5) provides

"Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ ... the Court may, instead of refusing the application order the proceedings to continue as if they had been begun by writ".

I.R.C. v. **Rossminster Ltd.(96)** raised such factual issues as could not be resolved in the summary proceedings of judicial review. In that case an officer of the Board of Inland Revenue obtained search warrants (alleging that there were reasonable grounds for suspecting that an offence involving tax fraud had been committed) and seized numerous files, papers and documents of all kinds. The applicants sought under Order 53 certiorari to quash the warrants and a declaration that the seizure was unlawful. They argued that the articles were so numerous and the inspection of the bulk of them so cursory that the officer could not at this

time of the seizure have had reasonable grounds for believing that they might be required as evidence of the offence in question.**(97)** The House Lords held that because there was a substantial conflict of evidence as to the manner in which the searches were carried out the issue of a declaration under Order 53 would be inappropriate. Certiorari was also denied, the warrants being upheld as valid under the terms of the statute.

Lord Salmon said (at p. 101)

"I also agree that having regard to the conflicting evidence, it was wrong to hold that ... the seizure of documents by the officers of the Board was unlawful because their failure properly to examine the documents which they seized made it impossible for them to have reasonable cause to believe that the documents might be required as evidence. **Such an issue could only be properly decided by a judge at an ordinary trial after he had seen the witnesses on each side examined and cross-examined".(98)**

Lord Scarman explained the circumstances in which proceedings for judicial review could be turned into a trial process :

"If issues of fact, or law and fact, are raised which it is neither just nor convenient to decide without the full trial process, the court may dismiss the application or order in effect a trial. In the present case ... there are insuperable objections to granting a declaration in proceedings for judicial review ... A trial is necessary if justice is to be done" (p. 104).

In **R. v. B.B.C. ex p. Lavelle(99)** the court having decided that the declaration and injunction sought under the new order 53 would be inappropriate proceeded to consider the position as if the action were begun by writ under Order 53, rule 9(5). On that basis Mr. Justice Woolf concluded

"I have ... come to the conclusion that ... in the case of employment of the nature being considered, the Court can, if necessary intervene by way of injunction and certainly by way of declaration".**(100)**

This was a welcome development. Although the Law Commission and subsequently Parliament rejected the model of assimilating the procedure of judicial review to that of ordinary actions, and instead chose the model of assimilating the latter to the former, we might have been arriving at the ideal combination of the two. However, s.31 of the Supreme Court

Act 1981 did not incorporate the provisions of Order 53, rule 9(5). Such incorporation could have given a healthy boost to this trend.

Furthermore while proceedings of judicial review could be turned into a trial process the converse is not possible. That is to say an action begun by writ could not be continued as a proceeding for judicial review because that would enable the plaintiff to commence proceedings without having to obtain 'leave' to apply for judicial review.**(101)**

These are the constraints on what otherwise could have been a perfect solution viz. an ideal combination of the two models for the reform considered by the Law Commission.

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(1) Law Com. No. 73, Cmnd. 6407, 1976.

(2) As in **Punton** v. **Ministry of Pensions and National Insurance (No.2)** (1963) I W.L.R. 1176

(3) Law Com. No. 73, Cmnd. 6407, 1976, paras 34 and 58.

(4) The Court of Appeal first expressed this view in the unreported case of **Uppal** v. **Home Office** (1979) cited in **Heywood** v. **Hull Prison Board of Visitors** (1980) 3 All E.R. 594; **De Falco** v. **Cawley B.C.** (1980) 1 All E.R. 913 in which the Court of Appeal expressed a contrary view was overruled by the House of Lords in **Cocks** v. **Thanet D.C.** (1982) 3 All E.R. 1135.

(5) (1982) 3 All E.R. at 692 (C.A.)

(6) (1982) 3 All E.R. at 687-88.

(7) (1953) 2 Q.B. 18

(8) (1969) 2 A.C. 147.

(9) In **O'Reilly** v. **Mackman** (1982) 3 All E.R. 1124 at 1129, 1130.

(10) (1982) 3 All E.R. at 692.

(11) In **O'Reilly** v. **Mackman** (1982) 3 All E.R. 1124; **Cocks** v. **Thanet D.C.** (1982) 3 All E.R. 1135; **Mathew Brown** v. **Hamilton D.C.** (1982).

(12) The Supreme Court Practice speaks of new Ord. 53 as follows "This Order may ... be said to constitute a landmark in the development of administrative law, a new starting point for the growing jurisprudence in this field".(p.865).

(13) (1982) 3 All E.R. at 696 (C.A.)

(14) (1982) 3 All E.R. at 1134.

(15) **O'Reilly** v. **Mackman** (1982) 3 All E.R. at 694.

(16) (1982) A.C. 617 at 653.

(17) (1982) 3 All E.R. at 1130-31. Persuasiveness of this argument is weakened by the fact that in appropriate cases costs are awarded against public authorities. See **Chief Constable** v. **Evans** (1982) 3 All E.R. 141 at 146 (H.L.).

(18) Law Commission's Working Paper No. 40 (1971) para 15.

(19) Law Com. No. 73 (Cmnd. 6407, 1976) para 37.

(20) See the figures in Judicial Statistics, 1976, 1977, 1978, 1979 and 1980.

(21) See R.S.C., Order 18, rule 19.

(22) **Hunter** v. **Chief Constable of West Midlands** (1981) 3 All E.R. 727 at 729 (H.L.).

(23) (1968) 1 W.L.R. 1315.

(24) (1969) 1 Q.B. 577. Also in **Henry Moss of London Ltd.** v. **Customs and Excise Cmmr.** (1981) 2 All E.R. 86.

(25) Source: Judicial Statistics 1980, Tables A7(c) and A6.

(26) Law Commission's Working Paper No. 40 (1971) para 117.

(27) Law Com. No. 73 (Cmnd. 6407, 1976) para 8.

(28) Annual Report of the Council on Tribunals for 1980/81, Appendix D.

(29) (1982) 3 All E.R. 1124 (H.L.).

(30) (1953) 2 Q.B. 18

(31) (1969) 2 A.C. 147.

(32) (1981) 2 All E.R. 93 at 105.

(33) Law Com. No. 73, cmnd. 6407, 1976, ax para 37.

(34) (1982) 3 All E.R. at 1130.

(35) We have already seen that in **Barnard** v. **N.D.L.B.** (1953) 2 Q.B. 18 and in **Anisminic Ltd.** v. **Foreign Compensation Commission** (1969) 2 A.C. 147 The Plaintiff did not know of the facts which rendered the decision void till discovery.

(36) Law Commission's Working Paper No. 40 (1971) para 104.

(37) Law Commission's Working Paper No. 40 (1971) para 105. It is worth mentioning that discovery does not roam unchecked in ordinary actions. There are many cases in which the provision for "automatic" discovery does not apply (see Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice (22nd ed. 1981), 217) e.g. in actions begun by originating summons and in civil proceedings to which the Crown is a party. See R.S.C. Order 77, rule 12(1).

Where a party makes an application for discovery (whether general discovery under Order 24, rule 3 or special discovery under Order 24, rule 7) it will be ordered only if it is necessary "for disposing fairly of the cause or matter or for saving costs": Order 24, rule 8. In personal injury cases s.33(2) of the Supreme Court Act 1981 enables a person, before he brings an action, to apply to the court for discovery of documents. But the application must be made by originating summons supported by an affidavit stating the grounds for discovery and showing, if practicable by reference to any pleading intended to be served in the proceedings that the documents are relevant to an issue arising or likely to arise out of a claim for personal injuries. A court order for discovery of particular documents is subject to similar requirement. See Order 24, rule 7(3)

(38) Law Com. No. 73 : Report on Remedies in Administrative Law (Cmnd. 6407, 1976) para 49.

(39) **O'Reilly v. Mackman** (1982) 3 All E.R. at 1131, 1134.

(40) (1981) 2 All E.R. at 114.

(41) (1953) 2 Q.B. 18.

(42) (1969) 2 A.C. 147.

(43) (1981) 2 All E.R. at 115. "The Federation obtained leave ex parte for judicial review. It then sought an order for discovery of documents from the master, but no order was made pending the hearing inter partes, of a preliminary issue on the locus standi point" (per Lord Scarman at p. 110).

(44) (1981) 2 All E.R. at 114; see also **I.R.C. v. Rossminster** (1980) 1 All E.R. at 494.

(45) (1983) 1 All E.R. 910 (H.L.).

(46) **O'Reilly v. Mackman** (1982) 3 All E.R. at 1131-32.

(47) (1982) 3 All E.R. at 1132.

(48) (1928) W.N. 137.

(49) (1947) 1 All E.R. 612 at 616.

(50) (1956) 1 W.L.R. 254.

(51) (1979) 38 P & CR 609 at 615.

(52) (1983) 1 All E.R. 765 at 792.

(53) The rules of natural justice (which are normally relevant to administrative process and not judicial review) do not include one's right to cross-examine one's opponents: **University of Ceylon v. Fernando** (1960) 1 All E.R. 631; **Bushell v. Secretary of State** (1980) 2 All E.R. 608 (H.L.).

(54) In **Heywood v. Hull Prison Board of Visitors** (1980) 3 All E.R. 594 at 598 Goulding J. said "In the present case counsel for the plaintiff has contemplated the possibility ... of cross-examining members of the board of visitors. In principle that seems to me an undesirable way of dealing with such questions" In **O'Reilly v. Mackman** (1982) 3 All E.R. 680 at 699 Ackner L.J. said "It is clearly most undesirable to place members of a tribunal in a position which is not really compatiable with the free and proper discharge of their functions, and such would be the case if cross-examination were a matter of course".

(55) Per Lord Scarman in **I.R.C. v. Rossminster Ltd.** (1980) 1 All E.R. at 104.

(56) **Chief Constable v. Evans** (1982) 2 All E.R. at 146.

(57) Tyson (Contractors) Ltd. v. Min. of H. & L.G. (1965) 63 L.G.R. 375.

(58) Law Com. No. 73 (Cmnd. 6407, 1976) para 43.

(59) See on this J.M. Evans, "Judicial Review in Ontario recent developments in the remedies some problems of pouring old wine into new bottles" (1977) 55 Can. B.R. 148 ; Mullan, "The Federal Court Act a misguided attempt at Administrative Law Reform" (1973) 23 Tor. L.J. 14.

(60) The Canadian Federal Court Act 1970 specifies grounds of judicial review as well as reforms the remedies. The New Zealand Judicature Amendment Act 1972 is based on the Fourth Report of "the New Zealand Public and Administrative Law Reform Committee (1971) which recommended that there ought to be an additional remedy for the review of administrative action to be called an "application for judicial review" under which all forms of existing relief would be available. But this remedy was to co-exist and not supersede the existing remedies.

(61) As was recommended for Australia by the Elliot Committee on Review of Prerogative Writ Procedures 1973, Commonwealth Paper No. 316 (1973). See now Administrative Decisions (Judicial Review) Act 1977. The commentators' view that the danger under this model is that "the baby of a largely satisfactory and familiar substantive law of judicial review may be thrown out with the bath water of its disfiguring procedural and remedial technicalities and archaisms" (J.M. Evans, (1977) 55 Can. B.R. 148, 149) is not borne out by the Australian case law. See for instance, **Hamblin** v. **Duffy** (1981) 34 A.L.R. 333. Two other Australian legislation designed to introduce reforms in administrative law were the Administrative Appeal Tribunal Act 1975 (providing for appeals on merits of a statutory decision) and the Ombudsman Act 1976.

(62) Law Commission's Working Paper No. 40 of 11 October 1971.

(63) Law Com. No. 73, cmnd. 6407, 1976, paras 5 and 6.

(64) (1964) 1 W.L.R. 226 See also **Healey** v. **Minister of Health** (1955) 1 Q.B. 221.

(65) Law Commission's Working Paper No. 40 (1971) para 139.

(66) Law Commission's Working Paper No. 40 (1971) para 141

(67) (1983) 1 All E.R. 241.

(68) **Cooper** v. **Wilson** (1937) 2 K.B. 309; **Ridge** v. **Baldwin** (1964) A.C. 40; **Barnard** v. **N.D.L.B.** (1953) 2 Q.B. 18; **Vine** v. **N.D.L.B.** (1957) A.C. 488; **Nagle** v. **Feilden** (1966) 2 Q.B. 633.

(69) e.g. **Lee** v. **The Showmen's Guild of Great Britain** (1952) 2 Q.B. 329.

(70) Law Commission's Working Paper No. 40 (1971) paras 85-86.

(71) (1982) 3 All E.R. 855.

(72) As stated in **Kruse** v. **Johnson** (1898) 2 Q.B. 91

(73) (1983) The Times, January 12.

(74) **Cocks** v. **Thanet District Council** (1982) 3 All E.R. 1135 (H.L.); **O'Reilly** v. **Mackman** (1982) 3 All E.R. 1124 (H.L.).

(75) Law Com. No. 73 (cmnd. 6407, 1976) para 43 (emphasis added).

(76) Law Com. No. 73 (cmnd. 6407, 1976) para 45.

(77) (1982) 3 All E.R. at 1134.

(78) See Carol Harlow, '' 'Public' and 'Private' Law: Definition Without Distinction'' (1980) 43 Mod. L. Rev. 241.

(79) (1983) 2 All E.R. 46; (1983) Crim. L. Rev. 398.

(79a) **Maltglade Ltd.** v. **St. Albans R.D.C.** (1972); **Allingham** v. **Minister of Agriculture** (1948) 1 All E.R.; **Commr. of Customs and Excise** v. **Cure & Deeley Ltd.** (1962) 1 Q.B. 340.

(80) (1983) The Times, February 10.

(81) **Gouriet** v. **Union of Post Office Workers** (1978) A.C. 435 (injunctions); **Gregory** v. **Camden L.B.C.** (1966) 1 W.L.R. 899 (declarations).

(82) **Punton** v. **Ministry of Pension and National Insurance (No. 2)** (1963) 1 W.L.R. 1176 (the declaration not being available for error of law apparent on the fact of the record).

(83) **Lee** v. **Showman's Guild of Great Britain** (1952) 2 Q.B. 329.

(84) e.g. in Barnard v. **N.D.L.B.** (1953) 2 Q.B. 18

(85) **Nagle v. Fielden** (1966) 2 Q.B. 633.

(86) **Pyx Granite Co. Ltd. v. Min. of H. & L.G.** (1960) A.C. 260 (privilege to carry out redevelopments on land free from planning restrictions).

(87) **Cooper v. Wilson** (1937) 2 K.B. 309; **Vine v. N.D.L.B.** (1957) A.C. 488; **Ridge v. Baldwin** (1964) A.C. 40.

(88) R.S.C. Order 53, rule 4(1).

(89) **I.R.C. v. Rossminster Ltd.** (1980) 1 All E.R. 80 (H.L.).

(90) **R. v. Secretary of State** ex. p. Powis (1981) 1 All R. 788. The remedy applied for was certiorari rather than declaration. However, the categories of admissible evidence were defined in terms of judicial review rather than certiorari. Consequently the law as stated here would equally apply to the declaration. Admissible fresh evidence is limited to (a) evidence to show what material was before the deciding body, (b) evidence to determine jurisdictional or procedural errors, and (c) evidence of misconduct by a party or the deciding party.

(91) (1983) 1 All E.R. 226 at 240 (H.L.).

(92) (1982) 3 All E.R. 141 (H.L.).

(93) (1964) A.C. 40. See also **Malloch** v. **Aberdeen Corpn.** (1971) 1 W.L.R. 1578 (H.L.).

(94) **R. v. Boundary Commission for England ex p. Foot** (1983) 1 All E.R. 1099. This contradicts the view that a claim for a declaration is in substance a claim for an injunction : International General Electric Co. of New York Ltd v. **Customs and Excise Comm.** (1962) Ch. 784.

(95) Per Lord Diplock in **I.R.C. v. Rossminster Ltd.** (1980) 1 All E.R. at 95-96. S. 31 of the Supreme Court Act 1981 has not introduced this. R.S.C. New Order 53 could not have provided for this without primary legislation amending s.21 of the Crown Proceedings Act 1947.

(96) (1980) 1 All E.R. 80 (H.L.).

(97) Under s.20c of the Taxes Management Act 1970.

(98) Emphasis added.

(99) (1983) 1 All E.R. 241 at 249.

(100) At p. 253, although the court in its discretion declined to grant these remedies on the facts of the case.

(101) Thus Lord Diplock said in **O'Reilly** v. **Mackman** (1982) 3 All E.R. at 1133 "... Ord. 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law, can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged on the hearing of the application, can be granted to him. If what should emerge is that his complaint is not of an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under r 9(5), instead of refusing the application, to order the proceedings to continue as if they had begun by writ. **There is no such converse power under the Rules of the Supreme Court to permit an action begun by writ to continue as if it were an application for judicial review" (emphasis added).**

DISCRETIONARY TRUST & POWER: DISTINCTION WITHOUT A DIFFERENCE?

by Mrs F E Spearing*

A conventional starting point for a course on the law of trusts is to distinguish the trust concept from others such as contract, bailment etc. In this connection, one of the most important distinctions to be made is between trust and power a distinction which is, arguably, central to the understanding of much of the law relating to trusts, and for this reason. While a trust imposes (ie, it is mandatory) certain duties upon a trustee, he also has certain powers which he can exercise if he wishes and which are ancillary to the implementation of the grantor's wishes - eg, the power to insure. The power of appointment over property, on the other hand, gives to the donee of that power (sometimes called the 'primary donee') the right to dispose of property in favour of another. The problem is that this concept is often very difficult to distinguish from the true nature of the obligation of a trustee to distribute trust property in accordance with the terms of the trust instrument, in many cases of discretionary trust.(1)

The object of this article is to consider trusts (primarily discretionary trusts) and mere powers from the point of view both of the trustee/appointor donor of a power and that of the beneficiary/object in order to determine whether there really is a distinction between discretionary trusts and mere powers; and the extent to which the law has proved capable of adapting to the discretionary trust.

Stroud's(2) definition of such power is taken from Farwell

"A power is an authority reserved by, or limited to, a person to dispose, either wholly or partially of real or personal property, either for his own benefit or that of others. The word is used as a technical term and is distinct from the dominion which a man has over his own estate by virtue of ownership."

This definition, of course, describes both general and special powers of appointment. On the other hand the nature of a trust can be explained

by reference to Godefroi's(3) description of a trustee. A trustee is one who holds the

"ownership or dominion over, the subject of the trust, but is bound to allow the beneficial enjoyment or usufruct of that subject to be reaped by another who is called the cesui que trust or beneficiary".

These definitions alone do not, however, clarify the essential legal rights and duties of the trustee or donor of a power and the beneficiary or object of a power. The initial premise is the proposition that a trust is imperative while a power is permissive. To quote from Jowitt,(4)

"... Powers must be distinguished from trusts; powers are never imperative they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative. Powers are, however, sometimes divided into

(1) mere bare or naked powers (or powers in the proper sense of of the word) and

(2) powers coupled with a trust, or powers in the nature of trusts which the donees are bound to exercise; they are therefore trusts and powers only in form"(5)

Thus a person upon whom a trust is imposed is under an obligation to carry it out and if he fails to perform that obligation those who should have benefitted under the trust and who have thereby been prejudiced may complain to the Chancery Division of the High Court and seek redress.(6) On the other hand a person who is a potential appointee under a power of appointment is without any remedy unless there has been an excessive or fraudulent appointment.(7) The former describes an appointment in favour of a person who does not qualify and the latter an appointment which is not made in good faith. It may therefore be crucial to distinguish between these two concepts as the consequences of inaction on the part of the trustee or appointor are so very different.

On considering the position of the beneficiary of a discretionary trust, however, it becomes clear that his position will in many cases be little better than that of an object of a power of appointment. The essence of the discretionary trust is the flexibility which it gives if the settlor is prepared to endow his trustees with a power of disposition over the trust property. Unforeseen circumstances can be dealt with as they arise; and in this respect the most important single issue is that of taxation upon the fund as a whole. A well drawn trust instrument

will combine a discretionary trust with powers of appointment and powers to add beneficiaries or objects in order to derive maximum benefits from the available fund and to distribute in accordance with the intentions of the settlor.(8) A necessary consequence is that no beneficiary can be sure of any entitlement until the trustees have exercised their discretion in his favour.(9) His position, therefore, is quite different from that of a beneficiary under a fixed trust who can sell or assign his interest to a third party. It can at least be said of both fixed and discretionary trusts that if all the beneficiaries are of full age and legal capacity and entitled not only to income but also immediately to capital then they may bring the trust to an end and distribute the property among themselves by agreement. This is unlikely in the case of discretionary trusts as it would be contrary to the whole object of the discretionary trust concept for the whole fund to be immediately distributable among adult beneficiaries.

Discretionary trusts are now generally classified into two types according to the terms of the trust with regard to the distribution of income; exhaustive and non-exhaustive. In the case of the former the trustees are required to distribute the entire income in each year or within a reasonable time from its end. By contrast in the case of the non-exhaustive discretionary trust there is some provision for accumulation or for gifts to charity to utilise income which the trustees choose not to distribute.(10)

In the case of an exhaustive trust the beneficiaries as a whole should at least be entitled to insist that the trustees distribute the income to one or more of their number after a bona fide consideration of their claims,(11) although no particular beneficiary can insist on anything more than a consideration of his case. However, the position of a beneficiary of a non-exhaustive discretionary trust is much more tenuous. The most that he can insist upon is that the trustee give proper consideration to the question whether or not to make a distribution. If the trustee fails to exercise his discretion to distribute the beneficiary can do no more than remind the trustee of his existence and of the merits of his case. His position would seem to be very similar to that of a possible appointee or object under a power of appointment who waits hopefully for an appointment in his favour.(12) It would seem, therefore, that the discretion given to the trustee in respect of this type of discretionary trust gives rise to a power to distribute rather than a duty to do so. His duty is merely to consider whether he should exercise that discretion.

Thus it becomes clear that from the point of view of the beneficiary his rights under a non-exhaustive discretionary trust are apparently indistinguishable from those of the object of a special power of appointment. Nonetheless it has been argued that a trustee is under a fiduciary duty in respect of the powers and duties vested in him and therefore has a greater obligation in respect of them than is the case with the mere donee of a power of appointment. Such a donee might ignore it entirely without being in dereliction of duty while the trustee who failed year by year even to consider the distribution of income would be considered blameworthy.**(13)** Unfortunately this may often now appear to be a distinction of relatively little help or value. After 1925 all powers of appointment must exist behind trusts.**(14)** Thus they will always involve trusteeship and one might imagine, therefore, fiduciary duties. It is necessary, however, to draw a distinction between the power which gives rise to a trust merely by reason of conveyancing machinery and the power which is created as a component part of an expressly created trust. In the latter case the trustee to whom the power of appointment is granted clearly owes a fiduciary duty in respect of its exercise. He should consider whether it should be exercised and make a proper survey of the objects in favour of whom it is exercisable. In the former case the mere "accidental" trusteeship should not of itself impose the fiduciary duty owed by the genuine trustee.

On analysis it is therefore evident that the mere inquiry, "is there a trust or a power", may be of little practical consequence from the point of view of either trustee or beneficiary. The apparent lack of significance in the distinction has been reflected in the terminology applied to discretionary trusts. They have been frequently described as powers in the nature of a trust or trust powers to reflect the fact that there is a trust in existence but that the trustee is empowered rather than obligated in respect of the distribution. Both terms can be regarded as reasonably accurate descriptions of their hybrid nature which savours of both trust and power and as recognition of the fact that there may be little point in attempting the distinction.

Unfortunately these terms have also been regularly used to describe a quite different situation; where an instrument creates what appears to be a power but is interpreted by the court as disclosing an intention that the class of objects should benefit in any event, should the power not be exercised. Clearly this can only occur where there is no provision in default of appointment because the existence of such a default provision would make it evident that nothing more than a mere power had been created. If the court holds that the class was intended to

benefit in any event, it will declare that there is a trust in favour of the class of objects subject to a power of selection in the donee of the power; thus excluding a resulting trust in favour of the grantor.(15) The question then arises of how such a trust is to be implemented in the absence of a selection. The answer appears to be that the court can direct the manner of distribution and that this will normally, but not inevitably, be upon the basis of equality. The cases illustrating this approach involve small classes and were decided before the advent of the modern discretionary trust.(16)

In consequence one is left with the position that the term trust power is used, according to the context, to describe either the situation where it is considered proper for the court to direct a distribution, usually equal, to give effect to the intention of the original grantor, or, alternatively, a situation where a fiduciary duty arises in respect of the power to grant rights in property so that the person with that duty must properly discharge it; that is the modern discretionary trust. How in this case is effect to be given to the intention of the donor, should the trustee not make a distribution? Would he have wished that the court should take over the duty of the carefully selected trustee and itself decide upon the distribution of the property? This would seem to defeat the whole object of the discretionary trust, the essence of which is the reliance of the settlor on the discretion of the chosen trustee. There does not, however, appear to be a reported decision in which this extreme step has become necessary. The usual situation is that the trustees having discovered difficulties of interpretation seek directions from the court by originating summons. Were the trustees to refuse to make a distribution it is suggested that the court would direct the appointment of new trustees or a survey of the various classes of beneficiaries in order to decide upon a scheme of distribution.(17)

If a court chose to treat such a case in a similar fashion to that described above in respect of the trust subject to a power of selection, the court itself would make the distribution and the modern case law would seem to require that any such distribution would be on the basis of equality. Again this is contrary to the central rationale of the discretionary trust which is its flexibility. Thus the application of the term "trust power" to these quite different sets of circumstances appears inaccurate and unjustified.

There is in fact some authority among the earlier case law for the court to order an unequal distribution.(18) This would be more appropriate in the case of the modern discretionary trust. Even this solution involves

the usurpation by the court of the trustee's discretion as to whether a particular beneficiary, if any at all, should receive a payment at any particular time.

The discretionary trust must, therefore, be recognised for what it is a trust which is very close to a power but which is much more sophisticated than any mere power, bare power, or power collateral, terms which are all applied to true powers.

It will be recalled that one object of distinguishing a trust from a power is to clarify the true nature of each of these concepts. Many of the cases which have been the subject of litigation have been at what might be called the margins of trusts or powers. Problems of terminology and classification therefore arise acutely. Terms may be used which are clear enough in the context of the particular case but confusing when analysed in the context of the whole subject area.

One can define a scale wherein the rights of the objects or beneficiaries increase at each stage. The scale commences with the mere power and runs through the non-exhaustive and exhaustive discretionary trust to the fixed trust. The trust power, as described in the older case law, relates to a situation where there is held to be a fixed trust subject to the divesting of some beneficiaries by the exercise of the power of selection. The reverse situation may arise where fixed rights are granted subject to a power of revocation. The possibilities are infinite.

Although it has so far been suggested that the attempted distinction between trusts and powers is a matter of largely academic interest there are clearly differences in their legal consequences which may make the distinction essential for practical reasons. The recent assimilation of the tests for certainty of objects in the case of discretionary trusts and powers has apparently rendered the distinction unnecessary in this particular context.**(19)** At the same time the case law leading to this assimilation with its close scrutiny of the two concepts has given renewed vigour to the time-honoured comparison mentioned at the start of this article.**(20)**

Obviously in respect of both trusts and powers it is necessary that the trustee should be satisfied that he is distributing property in favour of a person who is properly entitled to it. Therefore that person must clearly come within the class identified by the grantor. It has long been recognised as sufficient that in the case of a mere power the particular individual in question is so qualified. It is of no consequence

that the whole class cannot be ascertained, provided it can be said of any given individual, but not of one only, that he qualifies.(21) However, in the context of the trust it has been held that there should be complete ascertainment of all possible beneficiaries.(22) The justification for this distinction is in the mandatory character of the trust which requires that it be capable of implementation by the court should the trustee fail to carry out his duty. The usual method of implementation by the court since about 1800(23) has been equal division and to achieve this a complete list of beneficiaries is needed to fix the size of each share. This approach clearly has some merit in relation to traditional fixed trusts including trust powers in the old sense. One could make little criticism of the notion that "equality is equity" in that context. However, the Court of Appeal decision which asserted the "complete ascertainment" requirement for trusts occurred in a case concerning a large scale discretionary trust for which an equal distribution would have been totally unsatisfactory and quite at odds with the intentions of the grantor.(24)

In reality all that is required in the case of a large scale discretionary trust is that the trustee should make a proper survey of the possible beneficiaries so that he may decide how best to utilise the bounty of the settlor in accordance with his intentions. Obviously, the wider his range of enquiry the better but it would be most unfortunate to forbid a distribution in favour of several hundred beneficiaries because of doubts as to the qualifications of some others.(25) The House of Lords took the opportunity in the case of **McPhail v Doulton** to reject the two distinct tests for powers and discretionary trusts(26) and to adapt for the latter a test similar to that applied to powers.(27) Although the decision is not without its difficulties it does appear to diminish the necessity for making fine and artificial distinctions. The history of the trust in that case is cited as a prime example of possible differences of interpretation of instruments even at the judicial level.(28) At first instance and in the Court of Appeal the instrument was held to create a power. The House of Lords, not being bound by I.R.C. v **Broadway Cottages Trust**, held it to be a trust (in our terms, a non-exhaustive discretionary trust).

The net result seems to be that neither a discretionary trust nor a power will fail because there may be persons of whom it cannot be said with certainty whether they qualify, provided that it can be established by evidence that a particular claimant does qualify. In the sequel to **McPhail v Doulton** the significance of the words is "or is not" a member of the class was exhaustively considered and the notion that

the court must be able to say that any individual either positively did or did not qualify was rejected by the majority.(29) A discretionary trust would not fail because there were certain people whose claim was uncertain. A distinction must still be drawn between evidential uncertainty with regard to certain individuals which will not invalidate either discretionary trust or power and conceptual or semantic uncertainty which will still be fatal to both because qualification is, in such cases, incapable of proof.(30) Whether such uncertainty exists is still a matter of much debate; the expression "dependant" is not regarded as causing any difficulty(31) and re Barlow furnishes a possible definition of friendship,(32) although this must be seen in the context of the decision itself which related to indivIdual gifts rather than division of a trust fund and, justifiably or not, a different line of authority exists for for such cases.(33) Even a gift which appears to involve conceptual uncertainty may succeed if the trustee or a third party is given the power of decision on the qualification.(34)

It appears that a trust will fail if it is administratively unworkable or indicates no logical or sensible intention, an example being a trust for all the residents of Greater London.(35) A power to add as a beneficiary under a trust other than the settlor or his wife has been upheld. The intention behind the provision was entirely logical, to give the the trustees maximum flexibility but to avoid the tax consequences of the settlor or his spouse becoming beneficiaries.(36) It remains to be seen just where the line will be drawn, if at all, in relation to trusts. The argument for judicial control over trusts, however artificial in the case of the discretionary trust, may be held to dictate some limit.

It seems unlikely that the McPhail v Doulton, Baden saga will fade into the legal back-stage before some of the collateral issues arise for decision, for example, just how many claimants must produce positive evidence of entitlement for a power or discretionary trust to be valid.(37) Hence the comparisons and contrasts which have been under discussion are likely to continue the pattern of emphasis on this close analysis of terminology. The compensation for the student is that work done at this stage is repaid with an enhanced understanding of the nature and variety of trusts and of the capacity of the law to develop to accommodate the current and changing needs of practitioners and their clients. In addition it furnishes yet another example of the vital truism that even in the allegedly precise legal world few words can be regarded as having an absolute meaning detached from their contexts.

From the point of view of legal practice there seems to remain a clear doubt as to whether our courts will ultimately find themselves able to tailor the existing rules to the ambivalent status of the discretionary trust without the need for legislation.

On the one hand there are general statements from authors such as the Australian Jacobs, "Equity fashions a trust with flexible adaptation to the call of the occasion", indicating the liberal view point that the law can adapt to accommodate new concepts such as the discretionary trust.(38) The opposing view is exemplified in the minority judgments in **McPhail v Doulton.**(39) Lord Guest stressed that a change in the test for certainty of objects can come only through legislation.(40) Perhaps one could argue that the true worth of equity is in its development of flexible concepts and that analysis by reference to definitions whilst valuable as an academic exercise is in contradiction to and, perhaps even itself endangers, that flexibility. Similar problems and differences of opinion are to be found in other areas of the law of trusts. For example the divergent opinions of Lord Justice Denning and Mr Justice Bagnall in relation to constructive and resulting trusts.(41) These problems seem to be an inevitable result of the doubtful status of equity as an evolutionary force after the Judicature Acts when perhaps its teeth were drawn.

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(1) "To say that there is no obligation to exercise a mere power and that no court will intervene to compel it, whereas a trust is mandatory and its exercise may be compelled may be legally correct enough but the proposition does not contain an exhaustive comparison of the persons who are the trustees in the two cases". Lord Wilberforce, McPhail v Doulton (1970) 2 All E.R." 228 at 240c. He then added quoting Farwell on Powers..."Trusts and powers are often blended, and the mixture may vary in its ingredients".

(2) Stroud's Judicial Dictionary (4th Edn. 1974), at 2073.

(3) Ibid quoting Godefroi (2nd Edn.) at 2838.

(4) Jowitt's Dictionary of English Law (2nd Edn. 1977), at 1397, taken from Brown v Higgs 1799 8 Ves. 570).

(5) The modern distinction between bare powers and trust powers or powers in the nature of a trust where the court may intervene originates from Brown v Higgs supra.

(6) Lord Eldon L.C. in Morice v Bishop of Durham (1805 10 Ves. 522 at 539/540, stresses that a trust must be of such a nature that it can be controlled by the court.

(7) See Lord Guest in McPhail v Doulton supra at 236, d-e and 237, b.

(8) For an example of this flexibility see In re Manisty's Settlement (1974) Ch. 17.

(9) Re Bibby (J) & Sons Trust Deed, Davies v I.R.C. (1952) W.N. 402. Pension payable to the widow of an employee on the latter's death under a purely discretionary trust out of funds provided by the employee's former employer not "property" or a "beneficial interest" within the meaning of S. 2(1) (d) F.A. 1884, (estate duty).

(10) Re Locker's Will Trusts (1978) 1 All E.R. 216, furnishes an example of a discretionary trust which changed from exhaustive to non-exhaustive; it was described as an Obligatory discretionary power. McPhail v Doulton supra, discussed infra, is an example of a non-exhaustive discretionary trust. Lord Hodson described it as a trust for distribution of the whole with power to accumulate, agreeing with Mr Justice Goff at first instance.

(11) The rights of beneficiaries under non-exhaustive and exhaustive discretionary trusts became crucial in a number of estate duty cases. These discuss the issues of individual and group rights. It is suggested that individually, as opposed to collectively, a beneficiary under an exhaustive discretionary trust has no greater rights than under a non-exhaustive trust. However, the House of Lords authority relates only to a non-exhaustive trust. Gartside v I.R.C. (1968) A.C. 553, In re Weir's Settlement Trusts (1971) Ch. 145, Sainsbury v I.R.C. (1970) Ch. 712.

(12) Lord Wilberforce in McPhail v Doulton supra, at 247b-d.

(13) See (7) supra.

(14) Law of Property Act 1925 Sl.(7).

(15) See (7) supra.

(16) Lord Wilberforce in McPhail v Doulton supra, at 242a "Equal division may be sensible and has been decreed, in cases of family trusts for a limited class, here there is life in the maxim "quality is equity" but the cases provide numerous examples where this has not been so and a different type of execution has been ordered appropriate to the circumstances".

(17) But see Lord Wilberforce's reference to Richardson v Chapman (1760) 7 Bro. Parl. Cas. 318, at 242e-243a where he suggests that the court sets aside the wrongful act of the trustee and at the same time directs the trustee to perform the proper act not as a matter of discretion but in accordance with the decree of the court and he takes this as authority to indicate that in a proper case the court can itself execute the discretionary trust and so implement the intention of the settlor.

(18) See (16) and the subsequent discussion in Lord Wilberforce's judgement to 243c where he reviews the case for unequal distribution and comes to the conclusion that it is perfectly permissible where the nature of the trust requires it.

(19) The assimilation was effected in principle by McPhail v Doulton supra by a majority of 3-2. In Re Baden's Will Trusts (No 2), (1973) 3 All E.R. 1304, the Court of Appeal decided by a majority that the test was exactly the same as for powers and not merely similar. This case involved the application of the McPhail principle to the trusts involved in that case.

(20) Re Gulbenkian's Settlement Trusts (1968) 3 All E.R. HL, **McPhail v Doulton** supra, Re Baden's Deed Trusts (No 2) supra.

(21) Re Gulbenkian supra.

(22) I.R.C. v Broadway Cottages Trust (1955) Ch. 20.

(23) See (18).

(24) See (22).

(25) Robert Burgess writing in vol 30 (1979) I.C.L.Q. indicates that it makes logical sense to adopt the individual certainty test propounded in Re Barlow (1978) I All E.R. 296 and by Megaw L.J. in Baden 2 supra as opposed to the intermediate certainty test adopted from Gulbenkian supra or the complete ascertainment test from Broadway Cottages Trust supra. He emphasises that only in this way can the donor's intention be carried into effect. For a more conservative view-point which stresses that the individual certainty test may permit the validity of a trust where the beneficial interests are unclear see Lindsay McKay Vol 44 Conveyancer 1980.

(26) The distinction between the test for certainty of objects in the case of a power and of a trust was established by Mr Justice Harman in Re Gestetner Settlement (1953) Ch. 672. and can be explained as follows: a power collateral or appurtenant or other power which does not import a trust on the conscience of the donee, in which case it is not necessary to know all the objects to appoint to any one of them and a trust imposing a duty to distribute, where there is much to be said for the view that he (the trustee) must be able to review the whole field in order to exercise his discretion properly.

(27) See (19)

(28) Lord Wilberforce in McPhail v Doulton supra at 240a-g.

(29) Re Baden's Deed Trusts (No. 2) supra where the test for powers propounded in Gulbenkian supra was closely analysed.

(30) Note the views of Lord Justice Denning on this distinction forcibly expressed in Re Tuck's Settlement Trusts (1978) 1 Ch.

(31) In Re Baden (No. 2) supra.

(32) Supra.

(33) See Re Allen (1953) Ch. 810.

(34) Lord Denning asserts this in Re Tuck's Settlement Trusts supra. However, the ratio of that case is unclear. It appears that the qualifications were held to be capable of proof without resort to the named outsider.

(35) An example invented by Lord Wilberforce in McPhail, supra.

(36) In Re Manisty's Settlement, supra.

(37) In Re Gulbenkian, supra, the suggestion that in the case of a power a single object would be sufficient was rejected by the House of Lords. In Re Baden (No. 2), supra, the three members of the Court of Appeal adopted very different approaches to this question.

(38) See also Lord Wilberforce in McPhail v Doulton, supra at 242g. "I prefer not to suppose that the great masters of equity, if faced with the modern trust for the benefit of employees would have failed to adapt their creation to its practical and commercial character'.

(39) Lords Hodson and Guests.

(40) Lord Guest at 238c.

(41) See the well-known quote of Bagnall J. in Cowcher v. Cowcher (1972) 1 All E.R. 943 at 948 d-e.

APPEALS FROM ARBITRATION UNDER SECTION ONE OF THE ARBITRATION ACT 1979

by N J Harrison*

The Arbitration Act 1979 came into force on the 4th April of that year. One of its main objects was to replace the case stated method of appeal with an appeal on a point of law to the High Court. The purpose of this article is to consider the state of the relationship between the Courts and arbitrations after four years of the Act. In order to do this it is necessary to explain briefly the reasons for the enactment of the legislation.

The Courts have always been aware that Commercial Law in arbitration might develop into a separate estate if appeal to the courts were permitted to be excluded. For this reason the right of any party to appeal by way of case stated has been sacrosanct.(1) However recently it has been felt that too much was being made of a good thing.

Until 1979 the method of judicial intervention was under s.21 of the 1950 Arbitration Act. This provided "an arbitrator may state any question of law arising in the course of a reference in the form of a special case for the decision of the High Court." The essence of this method is that the initial decision to put the question to the court lies with the arbitrator. In considering whether or not the use of the special case would be justified the courts were mainly concerned with making the distinction between law and fact and not with the actual merit of the decision. However disputes often concern questions of construction which are classified by the courts as questions of law. The willingness of the courts to entertain appeals on such questions irrespective of whether or not the questions could (and should) have been finally settled by the arbitrator is well illustrated by the Court of Appeal's decision in **Halfden Greig** v **Sterling Corporation**(2) where existing controls over the arbitrator's freedom to state a case were further relaxed. The theoretical basis of the case stated method was spelled out by Lord Denning who said:

"When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfills these requisites. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law (see *Re Nuttall and Lynton and Barnstaple Railway Co)* as distinct from a point which is dependent on the special expertise of the arbitrator or umpire (see *Orion Compagnia Espanola de Seguros* v *Belfort Maatschappij voor Algemene Verzekgringeens).* The point of law should be clear cut and capable of being accurately stated as a point of law as distinct from the dressing up of a matter of fact as it if were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case as distinct from a side issue of little importance.

If those three requisites are satisfied, the arbitrator or umpire should state a case. He should not be deterred from doing so by such suggestions as these: it may be suggested that a special case should be reserved for cases which are of general application (such as the construction of a standard form) or which would elucidate or add to the general principles of law (such as the doctrine of frustration or repudiation). I would not so limit the stating of a special case. In most cases the parties themselves are concerned, not with general principles, but with their particular dispute. If the case does involve a point of law which satisfied the requisites which I have mentioned, either of the parties should be enabled to have it decided by a judge of the High Court. When the parties agree to arbitrate, it is, by our law, on the assumption that a point of law can, in a proper case, be referred to the courts.

It may be suggested that if the point of law is only as to the construction of a particular document or the words in it as applied to the proved facts then it should be left to the arbitrator or umpire. I do not agree. Most of the special cases are stated on points of construction. No one hitherto has thought that they should be refused on that ground.

It may be suggested that, if the point of law is only as to the proper inference, or the appropriate implication to be drawn from the proved facts then it should be left to the arbitrator or umpire. Again, I do not agree. Some of the most important awards have been of that kind: see, for instance, *Re Comptoir Commercial Anversois & Power Son & Co''.*

This approach has tended to increase the number of appeals and to reduce the role of the arbitrator in deciding whether an appeal is justified. In that case itself the arbitrators initially refused to state a case.

They said:

"With reference to the (owners') request that we should state our Award in the form of a Special Case we have to advise you that we have decided not to do so for the following reasons:- We do not feel that this is a proper case to be so stated. Whilst it may well be that there is a question of law it is our feeling that, whilst we do not presume to usurp the functions of the Court, it is more suitable for decision by a commercial arbitration tribunal than by the Courts since its interpretation is so closely allied to commercial practice and the interpretation that commercial men would give it. Counsel agreed that the Courts' decision would add nothing to the wealth of law which is already available to us and as there is no further principle of law involved we feel it unnecessary from the point of view of both time and expense to trouble their Lordships further. We have also decided to delay the issue of our Award for fourteen days so that the parties may, if they wish, apply to the Court".

In addition a party faced with the prospect of paying a large sum would have an economic inducement to postpone the date by taking advantage of the availability of the appeal by way of case stated.(3)

Parliament therefore decided to abolish the case stated method and to grant a right of appeal on a point of law.

However unless both parties agree to appeal the court must grant leave. The key provision is s.1(4) which provides

"(4) The High Court shall not grant leave under subsection (3) (b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate".

The important phrase is "substantially affect" and this has recently been a major concern of the Commercial Court.(4)

However the House of Lords in **Pioneer Shipping Ltd** v **BTP Tioxide Ltd(5)** has diminished the weight to be attached to that phrase by emphasising that the Court must consider the policy of the Act and the whole of s.1.

In the **Pioneer case** the courts were faced with an appeal from an arbitrator on the question as to whether a charterparty had been frustrated. The ship was chartered to make six or seven consecutive voyages to convey titanium slag from Canada to England. A strike occurred at the loading

port while the vessel was on the first voyage. The parties added clauses to the contract the effect of which was to release the charterers from the next voyage if the strike was not settled soon and the charterers agreed to carry further cargo in the next season in 1980. The arbitrator held that the 1979 season arrangements had been frustrated since at that date of the hearing the strike was still on. In the Commercial Court the judge held that the contract was an indivisible one for two Seasons and that the whole had been frustrated. Both the Appeal Court and House of Lords held that it was divisible and that the initial arbitration decision was correct.

The other argument before these courts was whether the Commercial Court judge was right in agreeing to give leave to appeal to the court in the first place and they held he was wrong on this too.

The importance of the case lies in the Lords' interpretation of the new Act. In the cases under the Act before the **Pioneer** case the tendency was to give the Act a literal meaning, that is to say, the judge would simply decide whether the determination of the question of law could substantially affect the rights of the parties. For example in **Schiffahrtsagentur Hamburg Middle East Line v Virtue Shipping Corporation(6)** Robert Goff J said that he could find nothing in the Act which suggested that the court should give leave in some cases but not in others. The result of this was to leave the right of appeal largely unfettered and would perhaps permit as many appeals to be made as had previously been made under the case stated method.

The problem with this result is that there is evidence that Parliament's intention in enacting the Statute was to restrict access from arbitrations to the courts. Lord Diplock rightly emphasizes s.4 of the act which gives parties the right to exclude the s.1 right of appeal. This was especially aimed at foreign parties who wished to arbitrate under the English legal system but were put off by the prospect of appeal. However if the agreement is one to which under s.4 an exclusion clause cannot be attached or the parties do not enter an exclusion agreement, being free to do so, why should their right to an appeal on a question of law be any less in arbitration than other spheres of law?

Nevertheless Lord Diplock finds that

> "It would defeat the main purpose of the ... Act if judges when determining whether a case was one in which the new discretion to grant leave to appeal should be exercised in favour of an applicant... did not apply much stricter criteria than those stated in **The Lysland**

which used to be applied ... to require an arbitrator to state a special case."

This means that in the view of the House the criteria for a case stated were too liberal and that if a literal view of the 1979 Act was adopted there would again be too easy an appeal to the courts.

Therefore in order to achieve a restriction of access to appeals the House rejected the literal interpretation of Robert Goff J and stated that whether leave to appeal is to be given depends on the nature of the contract as well. This means that it depends on whether the contract clause is a "one-off" or "standard form".

The term "one off" can apply either to an event or a clause. If the event which brings the arbitration clause into play is limited to the parties themselves and does not have repercussions on anyone else this is a "one off" event. If the clause giving rise to the dispute has been drafted by the parties themselves it is a "one off" clause. Standard form clauses are in the other category and so are "standard form events" which mean events which affect many other commercial contracts, usually the outbreak of wars or closure of ports.

In the one off situations the leave of appeal should not be given

"unless it is apparent to the judge on mere perusal either that the arbitrator misdirected himself or that his decision was such that no reasonable arbitrator could reach".

But in the standard form situations the test is different

"leave should not be given unless the judge considered that a strong prima facie case had been made out that the arbitrator was wrong".

In many cases such as the **Pioneer** case itself it may be quite difficult for one person to be certain that the contract was frustrated or in another situation that particular goods were or were not of "merchantable quality". If an arbitrator understood the legal doctrine in question but thought that it was or was not present on the facts he could well be wrong but it is doubtful whether there would be misdirection. It would not therefore be a ground of appeal. The House of Lords has said in effect that if the arbitrator gets the law right but reaches a questionable decision when applying it, that is insufficient to found an appeal. This approach favours policy rather than the parties' rights in each situation.

These are equally affected whether their contract is "one off" or "standard form". It is such a teleological approach that the literal words have been quite overcome. Its architect is Lord Denning rather than Lord Diplock since the former Master of the Rolls created the classification in the Court of Appeal verdict in **Pioneer.** Lord Denning noted, in respect of what the charterparty stated were to be the rights of the parties, that "on such a question the arbitrator is just as likely to be right as the judge, probably more likely". But the question surely is whether the judge or arbitrator was **actually** right.

Thus the House has stated that the fundamental question is not whether the High Court judge agrees with the arbitrator's decision but whether it appears on perusal of the reasoned award either that the arbitrator misdirected himself in law or his decision was such that no reasonable arbitrator could reach. The term "misdirected himself in law" probably means either that he misunderstood the law or wrongly applied the law. If an arbitrator can be observed from the award itself to start on a wrong footing by miss-tating eg the doctrine of frustration or lay time then clearly there is good ground for an appeal.

The right of appeal given under this Act is expressed in the usual way to be "on a point of law". This has been amplified to attain a classic shade of meaning in the speech of Lord Radcliffe in Edwards v **Bairstow(7)**

> "If the case contains anything ex facie which is bad law and and which bears on the determination it is obviously erroneous in point of law. But without any such misconception appearing ex facie it may be the facts found are such that no person acting judicially ... could have come to the determination under appeal. In those circumstances too the court must intervene".

However the desire to curtail appeals from arbitration may be leading to the loss of any elasticity which the above statement contains. There is a similarity between Lord Diplock's view that the decision whether or not to grant leave should be taken "on a mere perusal of the reasoned award itself without the benefit of adversarial argument" and the doctrine of error on the face of the record used in administrative law. In that subject it is used to resolve the vital distinction between jurisdictional error and error on the record. Lord Parker CJ said in **R.V. Agricultural Land Tribunal ex p. Bracey(7a)**

> "Where it is said that the tribunal have gone wrong in law whilst acting in their jurisdiction this court can only interfere if they can see that error on the face of the record".

The use of error has historically been against inferior tribunals by the Court of Queen's Bench in its supervisory capacity. Lord Denning explained in **R v Northumberland Comp. App. Tribunal ex p. Shaw(8)** that

> "the court of King's Bench has an inherent jurisdiction to control all inferior tribunals not in an appellate capacity but in a supervisory capacity ... the Lord Chief Justice has in the present case restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record; even though they do not go to the jurisdiction".

However the relationship which exists between arbitration and the court is an appellate relationship.

The danger inherent in the **Pioneer** approach is that there may be many cases where there is no real misdirection but there is some feature of importance either to the litigants, the development of the law or the English Legal System which requires judicial as well as arbitral consideration.

If this is so there might be a temptation to High Court judges to maximize any element of doubt they felt about the arbitrator's decision in order to justify giving leave to appeal.

For example in the recent case of **Clea Shipping Ltd v Bulk Oil Ltd(9)** the question was

> "whether, and if so in what circumstances, an innocent party may during the performance of a contract decline to accept a repudiation by the other party to the contract ...? The posing of that question immediately directs the mind to well known cases which include **White and Carter Councils v MacGregor ... The Puerto Buitrago; the Odenfeld.** There is in informed legal circles a continuing discussion and debate as to the precise scope and effect of the split decision of the House of Lords in **White and Carter".**

The judge thought it was possible that the arbitrator had misdirected himself in that

> "there appears to be a real question as to whether the arbitrator has correctly directed himself in distinguishing the present case from **The Odenfeld".**

But, he then added,

"it does seem to me at any rate strongly arguable that this is a case in which a lesser test is applicable for leave of appeal.

The case does I think raise a fundamental question of contract law ... it is a question which has agitated legal writers and practitioners".

He then gave leave to appeal.

Other issues, which are perhaps not so susceptible to solution by considering whether there has been a misdirection, may arise. For example the question of incorporation of terms and clauses such as arose in the case of **The Emmanuel Colochotronis.(10)** Here the agreement provided that the contract should be completed and superseded by Bills of Lading which should contain an arbitration clause. Later the defendants argued there had not been a process of incorporation of the arbitration clause originally stated in the contract into the Bills of Lading. The arbitrators held that there had. In the Commercial Court the judge looked at the **Pioneer** case but adopted Lloyds J's view that there was a spectrum of situations rather than the alternatives posed by Lord Diplock. He also felt that the parties did not intend "to accept for better or worse the decision of the tribunal they had chosen" and gave leave to appeal. It is very difficult to find any misdirection here but it seems a suitable case for appeal.

The Commercial Court may also find itself too confined by the **Pioneer** case. For example what happens if it decides the situation is not "one off" or "standard form"? This difficulty arose in **The Apex.(11)** Can the court modify the **Pioneer** case by adopting other criteria? In **The Apex** the judge looked at the clause he was being asked to consider and said

"is it then a 'one off' clause? It is a typed clause and therefore to that extent it is a clause which the parties have made for their own purposes. On the other hand it is a clause which is strikingly similar to a Shelltime 3 charter".

Leave to appeal was given. The view of the judge was that this clause was not really a "one off" or "standard form" but a hybrid and that counsel had established there was a strong prima facie case that the arbitrator was wrong.

If the reasoning in the **Pioneer** case becomes too dominant then it is submitted this will remove much of the judicial freedom created by

the literal words of the Act and will become one of the unusual situations where the purposive mode becomes restrictive. Cases such as **Marraeleza Compania SA** v **Tradax SA(12)** will recur. Here it was found that there was a question of law which did substantially affect the parties' rights but the judge could not give leave to appeal because

> "at the very highest the case is one which could be described as a 50-50 case (ie a 50/50 chance the arbitrator was right) and that is not enough to persuade me to grant leave." (per Lloyd J)

Under the Act there is another way by which the Courts may be spared the time and the parties the expenses of appealing. It is possible for the parties to arbitration to exclude the right of appeal by means of an exclusion notice. Provided this is entered into after the dispute has commenced it will be affective.**(13)** Thus the policy of the Act is also to give the parties a choice as to whether there should be a possibility of appeal and if they have chosen not to exclude this it is submitted that the Appeal Courts should not fetter their freedom with restrictive statutory interpretation.

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(1) Czarnikow v Roth, Schmidt & Co 1922 2 KB 478.

(2) 1973 2 All ER 1073, (The Lysland)

(3) See Journal of Business Law 1979 p.249 and Report on Arbitration 1978 Cmnd 7284.

(4) See for example International Sea Tankers Inc of Liberia v Hemisphere Shipping Co Ltd 1981 2 Lloyd's Rep 308 and Italmare Shipping Co v Ocean Tanker Co Inc 1981 2 Lloyd's Rep 459.

For a discussion of these earlier cases see Malek New Law Journal December 24 1981 at p. 1302.

(5) 1981 2 All ER 1030.

(6) 1981 2 All ER 887.

(7) 1952 2 All ER 57.

(7A) 1960 1 W.L.R. 911.

(8) 1952 1 All ER 122.

(9) 1983 1 Lloyd's Rep 315.

(10) 1982 1 Lloyd's Rep 297.

(11) 1982 1 Lloyd's Rep 476.

(12) 1982 1 Lloyd's Rep 52.

(13) In a "domestic" arbitration agreement. For a definition of this and the distinction between "domestic" and "non domestic" see Arbitration Act 1979 s.3. In a "non domestic" agreement an exclusion clause may be entered into at the time of contracting.