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EDITORIAL

This issue of the journal, as always, covers a diverse range of topics: human rights, policing, banking and contract. The first article discusses whether human rights legislation may assist in protecting individuals against interference with the use and enjoyment of their home. The second examines the concept of zero tolerance policing in both the USA and the UK, and the third presents an analysis of banking regulation under the Financial Services and Markets Act 2000. The two casenotes have a contractual theme: one is concerned with insurance contracts, the other discusses the issue of damages for mental distress. The journal thus continues to reflect a wide range of interests. We hope that this may continue, and that it will also continue to attract scholarly contributions from academics and practitioners in this country and abroad.

Again, as always, it is my pleasure to thank a number of people who have contributed to this issue of the journal. In addition to those who have contributed articles, casenotes, book reviews and submissions for Nottingham Matters, I would like to thank the casenotes and book reviews editors. It is also my pleasure to thank members of the Editorial and Advisory Boards and those who have acted as referees for this issue. Especially thanks go to Mrs Lesley Comerie, and Ms Jane Ching. Their assistance in producing this issue has been invaluable.

MARY SENEVIRATNE, EDITOR.

ARTICLES

IMPROVING PROTECTION AGAINST INDIRECT INTERFERENCE WITH THE USE AND ENJOYMENT OF HOME: CHALLENGING THE LEGACY OF *HUNTER v. CANARY WHARF* USING THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND HUMAN RIGHTS ACT 1998.

AUSTEN GARWOOD-GOWERS*

INTRODUCTION

In the spirit of give and take one may expect to be tolerant of some interference with the use and enjoyment of one's home by neighbouring occupiers of land. However, it is when that interference is unreasonable and substantial that one might expect to be able to take legal recourse, including civil action. However, which form or forms of civil action might be suitable for the task? Negligence is not suitable if the harm suffered is purely to one's use and enjoyment of the home: such as loss of sleep through noise, or loss of enjoyment as a result of a noxious smell.¹ Intentional torts such as trespass to the person or harassment will obviously only be effective where the interference is direct. One may obtain the protection of an injunction if the Attorney General successfully brings a criminal case in public nuisance. However, this will require that a class of people is affected² and furthermore it is only possible to obtain the tortious protection necessary to claim damages if one has suffered damage greater than ordinary sufferers have.³ This leaves private nuisance.

In *Malone v. Laskey*,⁴ private nuisance was seen as merely protecting rights over land. This view was supported in Professor Newark's seminal article, *The Boundaries of Nuisance*.⁵ However, in *Khorasandijan v. Bush*,⁶ the Court of Appeal by a two to one majority (Dillon and Rose L.J.J.; Peter Gibson J. dissenting) concluded that anyone

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¹ A finding of negligence does not confer a remedy in respect of distress, annoyance, inconvenience and physical symptoms short of personal injury – *Hicks v. Chief Constable of Yorkshire* [1992] 2 All E.R. 65 as applied more recently in the Court of Appeal in *Riley v. Merseyside Regional Health Authority* [1995] 6 Med L.R. 246.

² *A.G. v. PYA Quarries Ltd.* (No. 1) [1957] 2 Q.B. 169, C.A.

³ For this requirement in public nuisance and the fact that outside the commercial context damage would probably have to be physical harm see G. Kodlinsky, "Public Nuisance and Particular Damage in the Modern Law" (1986) 6 L.S. 182.

⁴ [1907] 2 K.B. 141.

⁵ (1949) 65 L.Q.R. 480.

⁶ [1993] Q.B. 727.

who occupied a property as a home could sue in nuisance for loss of use or enjoyment of that home. Dillon L.J. stated that to his mind it was:

ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or leasehold proprietary interest in the premises in which he or she has received the calls.⁷

The issue was raised again in *Hunter v. Canary Wharf* and *Hunter v. Docklands Development Corporation*⁸. A differently constituted Court of Appeal⁹ unanimously favoured *Khorasandijan* over *Malone*. Giving the sole opinion, Pill L.J. stated that:

[a] substantial link between the person enjoying the use and the land on which he or she is enjoying it is essential but, in my judgment, occupation of property, as a home, does confer upon the occupant a capacity to sue in private nuisance.

There has been a trend in the law to give additional protection to occupiers in some circumstances. Given that trend and the basis of the law of nuisance in this context, it is no longer tenable to limit the sufficiency of that link by reference to proprietary or possessory interests in land. I regard satisfying the test of occupation of property as a home provides a sufficient link with the property to enable the occupier to sue in private nuisance. It is an application in present-day conditions of the essential character of the test as contemplated by Lord Wright. It appears to me, as it did to Dillon L.J. to be right in principle and to avoid inconsistencies, for example between members of a family, which in this context cannot now be justified.¹⁰

However, when the case came to the House of Lords, by way of appeal by the plaintiffs with a cross appeal by the defendants, a four to one majority (Lords Goff, Lloyd, Hoffman, Cooke and Hope with Lord Cooke dissenting on this point) favoured the orthodox approach in *Malone*.

There are three important points to make about this approach to nuisance. First, it will probably also apply to the rule in *Rylands v. Fletcher*¹¹ since this rule has been shown by the House of Lords in *Cambridge Water Co v. Eastern Counties Leather Plc.*¹² to be a branch of the law of nuisance dealing with instances of isolated escape.¹³ Second, it means one must have rights over land – such as exclusive possession of the land,¹⁴ ownership without exclusive possession or a reversionary interest – in order to sue. Third, it follows that the objective of the court in providing remedies is purely to protect rights over the land. The only benefit for people who merely occupy the land as a home, whether as a lodger, *au pair*, live in carer or family member is if the person with rights over the land is be successful in obtaining abatement of the nuisance.

Although *Hunter* has been widely criticised, little academic attention has been directed towards challenging its legacy of inadequate legal protection of home life, particularly in the context of those without proprietary interests in land. Human rights law holds the key. “Victims” of the *Hunter* approach could claim before the European Court of Human Rights (ECtHR) that, by failing to provide adequate domestic law, the UK had violated one of their substantive convention rights (the Article 8 right to

⁷ *Ibid.*, at 734.

⁸ [1997] A.C. 655.

⁹ Pill L.J., Waite L.J. and Neill L.J.

¹⁰ *Ibid.*, at 675.

¹¹ [1868] L.R. 3 H.L. 330, H.L.

¹² [1994] 2 A.C. 264.

¹³ *Clerk and Lindsell on Torts* (Sweet & Maxwell, 2000, 18th edition para 20-14) suggest this point is “at least arguable”.

¹⁴ A tolerated trespasser with exclusive possession can sue – see *Pemberton v. Southwark London Borough Council* [2000] 3 All E.R. 924, C.A.

private life being the most obvious) and denied them an effective remedy under Article 13. Success would “force” the UK Parliament to take remedial legislative action. Alternatively, following the coming into force of the Human Rights Act 1998 (HRA) claimants could argue before the domestic courts in a suitable case that domestic law must be expanded in the light of Convention rights.

Of course one would expect the human rights law arguments to involve a different kind of reasoning to that used by the House of Lords in *Hunter*. Nonetheless, it is important to revisit the justifications put forward by the House for adopting the narrower approach in *Malone* since these arguments are likely to be relied on by the defendant to such a human rights law claim.

THE JUSTIFICATIONS PUT FORWARD IN *HUNTER*

The defendants in *Hunter* argued¹⁵ that *Khorasandijan* should be seen as wrongly decided because it was based on the Canadian decision in *Motherwell v. Motherwell*¹⁶ which had in turn wrongly supported the proposition, derived from *Foster v. Warblington Urban Council*,¹⁷ that occupancy of a substantial nature was necessary to establish standing to sue in private nuisance. Alternatively they suggested that *Khorasandijan* should be seen as opening up a new tort of harassment, leaving the *Malone* orthodoxy intact.¹⁸ Lord Goff,¹⁹ supported by Lords Lloyd,²⁰ Hoffman²¹ and Hope²² all accepted the first of these arguments as a ground to deny the existence of a right of action. They took the view that the plaintiff in *Foster* had succeeded because he had exclusive possession and that the court had not established that occupant-licensees without exclusive possession could sue. Lord Goff added that he thought that what the Court of Appeal in *Khorasandijan* had been doing was to attempt to exploit the law of private nuisance in order to create a separate tort of harassment “that was artificially limited to harassment” which took place in the plaintiff’s home.²³ He noted that he did not personally think:

that this is a satisfactory manner in which to develop the law, especially when, as in the case in question, the step so taken was inconsistent with another decision in the Court of Appeal, viz., *Malone v. Laskey* [1907] 2 K.B. 141 by which the court was bound. In any event, a tort of harassment has now received statutory recognition . . . We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy. For these reasons, I do not consider that any assistance can be derived from *Khorasandijan v. Bush* by the plaintiff in the present appeals.²⁴

The statutory recognition of harassment may remove the problem of seeking to develop the common law to provide a remedy for harassment in the home context. However, the comment by Dillon L. J. in *Khorasandijan* that it would be “ridiculous”

¹⁵ [1997] A.C. 655 at 677.

¹⁶ (1976) 73 D.L.R. (3d) 62.

¹⁷ [1906] 1 K.B. 648.

¹⁸ [1997] A.C. 655 at 678.

¹⁹ *Ibid.* at 691. The plaintiff had exclusive possession of the foreshore (owned by a third party) which the defendant council had polluted causing damage to the plaintiff’s oyster business.

²⁰ *Ibid.* at 697.

²¹ *Ibid.* at 702–3.

²² *Ibid.* at 724.

²³ *Ibid.* at 692.

²⁴ *Ibid.* For positive reception of the idea of a tort of harassment stemming from *Khorasandijan* see Conaghan, “Harassment and the Law of Torts” (1993) 1 Feminist Legal Studies 189.

if today's law would only protect freeholders and leaseholders from deliberate harassment at home²⁵ when it could equally apply to many non-harassing interferences bears further consideration. Hence, even putting human rights law aside, there is a need to consider whether the majority had adequate justification to take the approach they did.

Lord Goff found two substantive arguments in favour of retaining the rights over land approach. The first was that it enabled, where appropriate, those creating a nuisance to make an informal arrangement with the "rightholder(s)":

either that it may continue for a certain period of time, possibly on the payment of a sum of money, or that it shall cease, again perhaps on certain terms including the time within which the cessation shall take place. The former may well occur when an agreement is reached between neighbours about the circumstances in which one of them may carry out major repairs to his house which may affect the other's enjoyment of his property...²⁶

His Lordship suggested that:

... the efficacy of arrangements such as these depends on the existence of an identifiable person with whom the creator of the nuisance can deal for this purpose. If anybody who lived in the relevant property as a home had the right to sue, sensible arrangements such as these might in some cases no longer be practicable.²⁷

It is suggested that this problem is unlikely to be serious as households of any size could always nominate one or more of their number to negotiate an arrangement on their behalf.

The second basis on which Lord Goff supported the orthodox position was that the alternative:

faces the problem of defining the category of persons who have the right to sue. The Court of Appeal adopted the not easily identifiable category of those who have a "substantial link" with the land, regarding a person who occupied the premises "as a home" as having a sufficient link for this purpose. But who is to be included in this category? It was plainly intended to include husbands and wives, or partners, and their children, and even other relatives living with them. But is the category also to include the lodger upstairs, or the *au pair* girl or resident nurse caring for an invalid who makes her home in the house while she works there? If the latter, it seems strange that the category should not extend to include places where people work as well as well as places where they live, where nuisances such as noise can be just as unpleasant or distracting. In any event, the extension of the tort in this way would transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land. This is, in my opinion, not an acceptable way in which to develop the law.²⁸

With respect to Lord Goff, changing the law to allow residents in general a right of action would not have a significant impact on certainty. This class of persons is fairly clear. It would include not just family members but also lodgers and those who work and live in the home (such as the *au pair* and live-in carer) but exclude people who are temporary visitors, such as hotel guests or visiting friends and relatives. His Lordship's concern about where it would all end if we went down this route was, it is submitted,

²⁵ [1993] Q.B. 727 at 734.

²⁶ [1997] A.C. 655-727 at 692.

²⁷ *Ibid.*

²⁸ *Ibid.*

a rather crude attempt to justify the orthodox position by reference to worries about a slippery slope when that slippery slope does not exist. In academic commentary, Wightman has perhaps gone the furthest by suggesting that rights of action should extend to protecting those who have an important “activity connection” with the land without having rights over it: such as people engaged in recreational activities or enjoying a right of way.²⁹ However, it would be equally be logical to stop short of this and simply protect occupation of the home, an approach that Lord Cooke in his dissenting speech thought was, “. . . an acceptable criterion, consistent with the traditional concern for the sanctity of family life and the Englishman’s home.”³⁰ Even one of the majority, Lord Lloyd, had some sympathy with this view³¹ though he rejected the suggested change on the basis that it would fundamentally change the scope of private nuisance as a cause of action:

Like, I imagine, all your Lordships, I would be in favour of modernising the law wherever this can be done. But it is one thing to modernise the law by ridding it of unnecessary technicalities; it is another thing to bring about a fundamental change in the nature and scope of a cause of action.³²

Both Lord Lloyd and Lord Hoffman took the view that the three kinds of private nuisance (nuisance by encroachment on a neighbour’s land; nuisance by direct physical injury to a neighbour’s land; and nuisance by interference with a neighbour’s quiet enjoyment of his or her land) should be subject to an award of damages in the same measure, that is, diminution in the value of the land. As Lord Lloyd put it:

there is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts.³³

The significance of using this approach is that adding family members would make no difference to the value of the claim. As Lord Lloyd again put it, “[i]f that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor.”³⁴

In effect one is compensated not for the number of people affected or the degree to which they are affected but the degree to which the value of the land or one’s ability to use the land is reduced. As Lord Hoffman states, inconvenience, annoyance and illness could not be compensated as consequential losses in a private nuisance claim: “[i]t is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness.”³⁵ It follows therefore, in the words of Lord Lloyd, “that the only persons entitled to sue for loss in amenity value of the land are the owner or the occupier with the right of exclusive possession”.³⁶

One may concede this point. However, Lord Hoffman states that having done so “there seems no logic in compromise limitations, such as that proposed by the Court

²⁹ J. Wightman, “Nuisance – the Environmental Tort? *Hunter v. Canary Wharf* in the House of Lords” (1998) 61 M.L.R. 871–885 at 881.

³⁰ [1997] A.C. 665–727 at 718.

³¹ *Ibid.*, at 695.

³² *Ibid.*, at 696.

³³ *Ibid.*, at 696.

³⁴ *Ibid.*

³⁵ *Ibid.*, at 706.

³⁶ *Ibid.*, at 696.

of Appeal in this case, requiring the plaintiff to have been residing on land as his or her home.”³⁷ The problem with this view is that:

[t]he traditional division of the law into ‘torts’ is, at most, of expository value. To allow the preservation of the supposed conceptual integrity of this structure to influence the law’s approach to social problems is to allow the tail to wag the dog.³⁸

The change that Lord Hoffman found illogical had in fact the logic of doing justice; a logic that the House of Lords had readily used in the past as a basis for abandoning established rules and principles.³⁹ What is more, their Lordships could have satisfied both forms of logic by creating a new tort. Counsel⁴⁰ for the defendants had unwittingly hinted at this by suggesting that the plaintiff in *Khorasandijan* “would have been provided with a suitable remedy if English law recognised a tort of invasion of privacy”.⁴¹ So, too, had Lord Lloyd in suggesting that *Motherwell* could be supported on the ground that in Canadian law there was already a recognised cause of action for invasion of privacy.⁴²

INTRODUCING A HUMAN RIGHTS LAW ANALYSIS

Lord Cooke’s dissenting speech drew persuasive support from human rights arguments. These included the rights of the child, under Article 16 of the Convention on the Rights of the Child, to protection from interference in his or her home life and also the right, under Article 12 of the Universal Declaration of Human Rights and Article 8 of the European Convention on Human Rights (ECHR), of protection of the home life of people in general. The latter is of particular importance because the claimants in *Hunter* could have gone on to rely on it, along with Articles 13 and 14, had they applied to the ECtHR.

Article 8

Article 8(1) states

everyone has the right to respect for his private and family life, his home and his correspondence.

Article 8(2) defines the limits of protection of this right, stating

there shall be no interference by a public authority with this right except such as in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of crime and disorder, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Showing a violation of Article 8 is a two-part process. First, the claimant must show that the Article 8(1) right has been interfered with. Second, the claimant must

³⁷ *Ibid*, at 707.

³⁸ P. Cane, “What a Nuisance!” (1997) 113 L.Q.R. 515, at p. 520.

³⁹ For example, in *Miliangos v. George Frank (Textiles) Ltd* (No. 1) [1976] A.C. 443, [1975] 3 All E.R. H.L. it removed the rule that a plaintiff was not in law entitled to judgment for a sum of money expressed in a foreign currency. In *R v. R (Rape: Marital Exemption)* [1991] 4 All E.R. 481, H.L. it even allowed retrospective criminalisation by abandoning the principle that a husband could not be guilty of the offence of rape against his wife.

⁴⁰ Counsel included Lord Irvine of Lairg Q.C. (now L.C.).

⁴¹ [1997] A.C. 655–727 at 678.

⁴² *Ibid*, at 697–698.

show that the restriction on him or her caused by the interference cannot be justified as necessary in a democratic society to protect one of the interests laid down in Article 8(2).

The scope of the term “home”

The private and family life, home and correspondence aspects of Article 8(1) are often interwoven but have independent meanings and give rise to different lines of case law. The notion of “home” under Article 8 does not provide a constraint on the overall scope of the Article. In other words, though an interference may not take place in the home context it may nonetheless raise issues of private life. The point is made particularly effectively in *Niemietz v. Germany (A/215B)*⁴³ where the ECtHR held that a lawyer’s private life had been interfered with when his office was searched by police.⁴⁴ However, by the same token, there are cases where the state’s conduct only constitutes an interference with private life because it related to events that took place within the home rather than outside it.⁴⁵

To attract protection, one’s home life does not need to revolve around a conventional house. One could, for example, dwell in a caravan, as did the applicants in *Buckley v. United Kingdom*⁴⁶. However, this does not go as far as saying one would succeed in arguing that the whole of a vast area of land on which one lived a nomadic lifestyle would necessarily be a home for Article 8(1) purposes.⁴⁷ Nor, rather restrictively, would a structure the claimant was building but had not yet lived in be classified as his or her home. Hence in *Loizidou v. Turkey*,⁴⁸ where the applicant had begun building a block of flats on her plot of land in Northern Cyprus, one of which was intended to be a home for her and her family, but was prevented from completing by the invasion of Turkish forces, the ECtHR held that there was no interference with Article 8(1) because:

... the applicant did not have her home on the land in question. In [the court’s] opinion it would strain the meaning of the notion “home” in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives.⁴⁹

All of the cases in which applicants have been successful have involved their living for some time in the home concerned. However, this does not necessarily mean that one has to be living in it at the time of the application. In *Gillow v. UK*,⁵⁰ the applicant had a house but had not lived in it for many years at the time of the application,

⁴³ (1993) 16 E.H.R.R. 97, ECtHR.

⁴⁴ The word “home” itself is given a broad meaning in some jurisdictions as paragraph 30 of the judgment itself emphasises: “[a]s regards the word ‘home,’ appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany . . . , it has been accepted as extending to business premises. Such an interpretation is, moreover, fully consonant with the French text, since the word ‘domicile’ has a broader connotation that the word ‘home’ and may extend, for example, to a professional person’s office.”

⁴⁵ This is particularly the case where the events are of a sexual nature – see, for example, *ADT v. UK* [2000] 2 F.L.R. 697, (2001) 32 E.H.R.R. 33 and contrast it with *Laskey, Jaggard and Brown v. UK* (1997) 24 E.H.R.R. 39.

⁴⁶ (1997) 23 E.H.R.R. 101, ECtHR

⁴⁷ The Commission in *G and E v. Norway*, unreported, Nos. 9278/81 and 9415/81. 35 D and R 30 (October 1983) found that there was no interference with home life when a Lapp population was displaced from its indigenous lands (which were then submerged for the building of a hydro-electric plant). The plant went ahead despite extensive protests, which were encapsulated within Norway’s widely aired 1983 *Eurovision Song Contest* entry.

⁴⁸ (1996) 23 E.H.R.R. 513

⁴⁹ Para 66. Fortunately the applicant’s claim under Article 1 of Protocol 1 succeeded.

⁵⁰ (1986) 11 E.H.R.R. 335.

having let it. However, the ECtHR found a violation of Article 8(1) with emphasis being placed on the fact that the applicant had maintained strong links with the house, had always intended to return to it and had left furnishings in it.

As *Loizidou* shows, having legal rights over the land is no guarantee of success. However, equally, there are a number of reasons why one would expect to succeed in some cases without having such rights. First, the ECtHR has not made a point of stressing that rights over land are necessary. On occasion, judgments in favour of applicants do not even make it clear whether all the applicants have had rights over land.⁵¹ Second, when the applicant has rights over land the ECtHR does not restrict itself to awarding compensation for infringement of these rights.⁵² Third, it would be inconsistent with the common sense meaning of a “human right” to “home life” to say that a place is only a person’s home if he or she has legal rights over it.

Does the applicant have to suffer a certain level of adverse impact in order to establish an interference with Article 8(1)?

Establishing an interference with Article 8(1) appears only to require that the complaint is sufficiently connected with the rights to home, privacy, family or correspondence and that *an* adverse impact on one of these rights has been experienced. There is no suggestion that it requires the applicant to show a *particular degree* of adverse effect. The ECtHR would be unlikely to impose such a requirement, as to do so would result in the approach to Article 8 failing to be consistent with that taken to the similarly structured Article 10.⁵³

However, there is a possibility that some claims involving very limited adverse impact may not reach the court in the first place. More than half of the applications to the ECtHR are declared inadmissible. Most of them are rejected under Article 35(3) as manifestly ill-founded. A declaration of inadmissibility on this ground would be made if the complaint disclosed gave no grounds to suggest that a violation were possible.⁵⁴ This would be the case, for example, where it was inconsistent with a constant line of reasoning in the case law. In our scenario (that of a potential claimant with limited or no proprietary rights in the land relied on as his or her “home”) an application involving an interference with Article 8(1) might be dismissed if, given a consistent line of reasoning in the case law, it was clear that the state involved could provide a justification under Article 8(2). All other things being equal, this is more likely to be so where the applicant had suffered only a minor adverse impact.

⁵¹ See, for example, *Hatton and Others v. United Kingdom* (2002) 34 E.H.R.R. 1 and also *Guerra v. Italy* (1998) 26 E.H.R.R. 357 where it is merely stated that the applicants lived in the area affected.

⁵² For example, the applicant in *Lopez Ostra v. Spain* (1994) 20 E.H.R.R. 277 was compensated not just for the harm fumes and smells from a factory had caused to the market and amenity value of her land but also for the anxiety she had suffered as a result of her daughter’s being caused a serious illness by the interference (para 298). Although the ECtHR deemed the grand total of her claim to be excessive it did not question any of the heads of her claim (para 299–300).

⁵³ Under Article 10(1) there is no requirement of a level of adverse effect on freedom of expression for an interference to be founded. The rationale for this is that control on the type of applications that are successful can be exercised under Article 10(2) where the right of expression can be subject to such “formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society” to protect one (or more) of the interests laid down in Article 10(2). Article 8(2) fulfils the same function of control in relation to Article 8(1) (*per* T. Lewis, Department of Academic Legal Studies, Nottingham Law School, Nottingham Trent University, 18 April 2002, e-mail communication).

⁵⁴ *De Becker v. Belgium*, Yearbook II (1958–9) p.214 (254). Since Article 35(3) is often the make or break issue in determining whether a case comes before the ECtHR the scope it is given is crucial yet the case law relating to it does not reveal an entirely consistent approach (see further P. van Dijk, and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (Kluwer 1990), p104–107).

How far does the state have a duty to take positive measures to protect people from interferences by other people?

The Article 8(1) right has a negative aspect in as much as it is designed to protect individuals from invasion of their rights by the state itself. It also has a positive aspect whereby the state is required to take appropriate positive measures to protect people from interference by other people. As the ECtHR put it in *Powell and Rayner v. UK*:⁵⁵

Article 8(1) cannot be interpreted so as to apply only with regard to direct measures taken by the authorities against the privacy and/or home of an individual. It may also cover indirect intrusions which are unavoidable consequences of measures not at all directed against private individuals. In this context it has to be noted that a State has not only to respect but also to protect the rights guaranteed by Article 8(1).

The state may be held responsible for interferences it does not actively perpetrate where the interference was facilitated by failure of the state authorities to provide adequate assistance or protection. More relevantly, in the context of the scenario outlined above, it may be held responsible for an interference that stems from a failure to have adequate law. Hence, in *Marckx v. Belgium*⁵⁶ and *Johnston v. Ireland*,⁵⁷ the ECtHR held that the state was in violation of Article 8 by failing to provide a law allowing for inheritance by children born outside marriage. Cases where inadequacies in law resulted in the state failing to meet a positive obligation to avoid indirect interference with the use and enjoyment of the home include the factory pollution case of *Lopez Ostra v. Spain*⁵⁸ and the Heathrow airport flight noise cases of *Powell and Rayner v. UK*⁵⁹ and *Hatton and Others v. United Kingdom*.⁶⁰

Is the UK satisfying its positive obligation under Article 8(1) in this context?

It was stressed in *Stubbings and Others v. United Kingdom*⁶¹ that

Article 8 does not necessarily require that States fulfil their positive obligations to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation.⁶²

However, this judgment was given in the context of UK law *providing* a civil remedy but subjecting it to a time bar⁶³ whereas in the scenario outlined above those without rights over land *do not have* a civil remedy that adequately protects their use and enjoyment of home life from indirect interference in the first place. This would almost certainly to be considered a failure by the UK to satisfy its positive obligation to secure respect for Article 8.

The nature of Article 8(2)

A violation of Article 8 is avoided if under Article 8(2) the restriction on the applicant's Article 8(1) rights can, in the circumstances, be justified as necessary in a democratic society. To satisfy this requirement the interference must be in accordance with law;

⁵⁵ (1989) 9 E.H.R.R. 375 at 376.

⁵⁶ (1979–1980) 2 E.H.R.R. 330.

⁵⁷ (1986) 9 E.H.R.R. 203.

⁵⁸ (1995) 20 E.H.R.R. 277.

⁵⁹ *Op. cit.*

⁶⁰ (2002) 34 E.H.R.R. 1.

⁶¹ (1996) 23 E.H.R.R. 213.

⁶² *Ibid*, at para 64.

⁶³ Alleged sexual abusers could not be sued where the claim was brought more than six years after the 18th birthdays of the claimants.

pursue one of the legitimate aims laid down in Article 8(2) and meet a “pressing social need”.⁶⁴ Furthermore its restrictive effects must be proportionate to the objective(s) that it seeks to achieve.⁶⁵

The state successfully justified indirect interference with the use and enjoyment of the home in the Heathrow Airport noise interference case of *Powell and Rayner v. UK*.⁶⁶ Here, the ECtHR afforded the UK a wide margin of appreciation to decide how best to address the problems of aircraft noise, holding that the taking of noise limitation measures and the public utility of the airport meant that the interference was justified under Article 8(2).⁶⁷ However, in *Hatton and Others v. United Kingdom*⁶⁸ a five to two majority of the ECtHR found the UK to have violated Article 8 in the context of sleep disturbance arising from Heathrow Airport night flights. The UK could show night flights pursued a legitimate economic objective but could not discharge its burden to show proportionality between its legitimate economic objective and the effect pursuit of this objective had on the Article 8(1) right and hence could not show that the restrictions were necessary in a democratic society. The reason for this was that it could not quantify either the economic benefit of the night flights or the adverse effect such flights had by preventing some of the population from getting a full night of sleep.⁶⁹ *Hatton* may not contradict the reasoning used in *Powell* but certainly represents an evolution in Article 8 protection through placement of “the onus on the State to justify a situation where certain individuals are bearing a heavy burden on behalf of the rest of the community”.⁷⁰

Is the interference in this context justifiable as necessary under Article 8(2)?

In the scenario outlined above, interference with Article 8(1) would, it is suggested, be in accordance with the law. However, would such interference amount to the pursuit of a legitimate aim or the meeting of a pressing social need? Further, would the interference satisfy the requirement of proportionality? The answer can be found by analysing the justifications used by the court to support its position in *Hunter*. These can be summarised as follows:

- (1) the need to follow precedent;
- (2) the linked need for private nuisance not to be distorted so as to become a remedy it was not originally designed to be;
- (3) the benefits of simplifying (and consequently encouraging) informal arrangements between neighbours by limiting title to sue (combined with the argument that this often suffices to provide a solution to the situation for everyone in the home);
- (4) the problem that the category of persons occupying land as their home is uncertain in scope;
- (5) the “where will it all end” argument.

⁶⁴ *Handyside v. UK*, (1979–1980) 1 E.H.R.R. 737, 753–754.

⁶⁵ J. Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester: John Wiley, 1999), at p. 288.

⁶⁶ *Op. cit.*

⁶⁷ *Op. cit.* at paras. 40–5.

⁶⁸ (2002) 34 E.H.R.R. 1.

⁶⁹ See also *Lopez Ostra v. Spain* (1994) 20 E.H.R.R. 277 where the ECtHR concluded that certain interference with the home life of the applicant could not be justified under Article 8(2) because a fair balance had not been struck between the interest in the town’s economic well-being and the effective enjoyment of the Article 8 right.

⁷⁰ K. Cook, “Environmental Rights as Human Rights” [2002] E.H.R.L.R. 196–215 at 204. *Hatton* has been referred to a Grand Chamber.

The first two justifications can be quickly rejected: the ECHR is designed to give practical protection of rights. It would fail in this if it allowed precedent or an historic definition of a tort to intrude. In any event there is nothing to prevent the creation of a new tort. Finally neither justification involves pursuit of a legitimate aim.

The third argument does have a legitimate aim (of protecting economic well being) given that economic benefit can flow from keeping the law as it is because it assists the making of informal arrangements. However, it hardly seems that it meets a pressing social need or is proportionate, if the law were changed arrangements would probably be made almost as often and could be further encouraged by the court imposing cost sanctions for unreasonable failure properly to attempt to make such an agreement before resorting to legal action.⁷¹

The fourth justification, that a change in the law would create conceptual uncertainty is also, it is suggested, without foundation, given that the category of “persons who occupy land as their (rightful) home” is not particularly uncertain and could soon be demarcated by case law. In any case, a degree of uncertainty of scope is inherent in the human rights field and is hardly a justification for not protecting such individuals either in general or in the context of Article 8(2).

The fifth justification, concerning the dangers of expanding the law too far is also, it is suggested, without foundation. Home life has a special significance under Article 8 and there is nothing in Article 8 that would require private nuisance to expand to interests outside the home: even those of a special kind of which John Wightman has written.⁷²

Article 14 (In Conjunction With Article 8).

If the ECtHR were to hold that Article 8 had been violated, it would not proceed to consider Article 14. Nonetheless Article 14 is worth considering, by way of subsidiary argument and as an issue of some academic interest.

Article 14 prohibits discrimination, stating:

[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In the context of Article 8, this means that “once a state has taken a positive step to promote or protect private or family life, it must, in principle extend the benefits to all without discrimination.”⁷³ Although Article 14 does mention discrimination on any ground it must be admitted that the only direct discrimination likely to arise in the scenario under discussion would be on the basis of whether or not one has rights over land. However, discrimination on this basis in turn indirectly disadvantages certain groups of people, particularly children (who cannot acquire rights over land) and women (who may be less likely to have them).

The question of violation of Article 14 was considered in *Spadea and Scalabrino v. Italy* where it was stated:

Article 14 will be breached where, without objective and reasonable justification persons in “relevantly” similar situations are treated differently. For a claim of violation of this

⁷¹ To some extent the court already has such powers, see CPR r. 44-5(3): “the court must . . . have regard to . . . the efforts made, if any, before and during the proceedings in order to try to resolve the dispute”.

⁷² J. Wightman, “Nuisance – the Environmental Tort? *Hunter v. Canary Wharf* in the House of Lords” *op. cit.* Article 10 might protect the freedom to carry out recreational activities and the like without unjustifiable interference.

⁷³ J. Coppell, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester: John Wiley, 1999), at p. 288.

Article to succeed, it has therefore to be established, *inter alia*, that the situation of the alleged victim can be considered similar to that of persons who have been better treated.⁷⁴

For the purposes of compensation for diminution of market value the person who lives in a home with rights over the land is not in a “relevantly” similar position to the person who lives in a home without such rights. However, he or she is in a relevantly similar position for the purposes of enjoying his or her home life in other respects. As such the discriminatory state of English law will breach Article 14 unless an objective and reasonable justification can be found for it.

As set out above, a justification would be objective and reasonable if it involved the pursuit of a legitimate aim with the value of achieving this aim being in proportion to the restriction on the rights in question. On a few occasions a state has been able to find a sufficient justification for discrimination. For example, in *Petrovic v. Austria*⁷⁵ the complaint was that paternity leave payments were not provided when maternity leave payments were. However, it is difficult to see any of the five justifications put forward in *Hunter* constituting an objective and reasonable justification for the purposes of Article 14. Even where they pursue a legitimate aim that aim is not sufficiently important to be proportionate to the restriction on rights that they involve. Indeed, one might almost go as far as Professor Fleming who describes the discrimination at the heart of the orthodox position as “senseless.”⁷⁶

Article 1 Of Protocol 1

Article 1 of Protocol 1, which guarantees the right to peaceful enjoyment of possessions, is not relevant here as “it is mainly concerned with the arbitrary confiscation of property and does not, in principle, guarantee a right to peaceful enjoyment of possessions in a pleasant environment.”⁷⁷

Article 6

In spite of *Osman v. UK*,⁷⁸ it seems unlikely after the ECtHR decision in *Z and Others v. UK*⁷⁹ that striking out an action because it does not amount to an established cause of action will be treated as denying the right to a fair trial.⁸⁰

Article 13 In Conjunction With Article 8 (Or 14).

Article 13 reads

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In *Hatton and Others v. UK*, it was stated that Article 13 had been consistently interpreted by the ECtHR as requiring a remedy in domestic law only in respect of grievances which could be regarded as “arguable” in terms of the Convention. In the case itself since a violation of Article 8 was found, Article 13 had to be considered.⁸¹

⁷⁴ Judgment of 28 September 1995, A.315-B, p. 28.

⁷⁵ [1998] E.H.R.L.R. 487.

⁷⁶ Fleming, *The Law of Torts* 8th edition (Law Book Company Limited, 1992). For a review of the various opinions see Lunney and Oliphant, *Tort Law: Text and Materials* (Oxford, 2000), at p. 553.

⁷⁷ *Powell and Rayner v. UK* (1986) 9 E.H.R.R. 375 at 378.

⁷⁸ [1999] 1 F.L.R. 193, ECtHR.

⁷⁹ *The Times*, 31 May 2001.

⁸⁰ For an analysis of the two decisions in this context see R. Bagshaw, “Human rights – no duty of care” (2001) 34 *Student Law Review* 62.

⁸¹ (2002) 34 E.H.R.R. 1, para 113.

The applicant had not been able to take a private nuisance action under domestic law because this had been barred by the Civil Aviation Act 1982, section 76(1) which provides, so far as is relevant, that:

No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flight, so long as the provisions of any Air Navigation Order . . . have been duly complied with. . . .

The only means of legal challenge that remained to the applicants was judicial review of the government's 1993 scheme for restrictions on noise from night flights. However, the ECtHR stated that it was clear that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness. This did not allow consideration whether the increase in night flights under the 1993 scheme represented a justifiable limitation on the right to respect for the private and family life and home of those living in the vicinity of Heathrow airport.⁸² As a consequence the scope of action available to the applicants was not enough to enable the UK state to comply with Article 13.

It is worth noting that *Hatton* was heard in the ECtHR after the introduction of the HRA – illustrating that its implementation was no guarantee against continued violations of Article 13.

Violations of Article 13 after the coming into force of the HRA

The first basis on which the ECtHR might still find a violation of Article 13 is that a domestic court or tribunal might, in a particular case, have failed to provide a remedy simply because it had wrongly concluded that there was no violation of a substantive ECHR right. This is bound to happen on occasion despite the fact that under the HRA, section 2, the judiciary “must” take into account Strasbourg jurisprudence in “determining a question which has arisen in connection with a Convention right.”⁸³

The second basis on which it is still possible for a violation of Article 13 to be found is that, where legislation is at issue, the domestic courts and tribunals are not always empowered to take any action in respect of the violation of an applicant's ECHR right except to notify Parliament of the violation, *i.e.* issue a declaration of incompatibility.⁸⁴ This is of some relevance to the scenario under discussion because, as *Hatton* illustrates, the availability of a private nuisance action is not always governed purely by the common law.

The circumstances in which the domestic courts and tribunals can *only* issue a declaration of incompatibility are governed by the scope of the HRA, section 3. Section 3(1) contains the “interpretative obligation” that in “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” This applies to all legislation passed

⁸² *Ibid* at para. 115.

⁸³ According to Lord Hope of Craighead in the House of Lords in *R v. DPP ex p. Kebeline and Others* [1999] 3 W.L.R. 972 at 993–4 the margin of appreciation “is not available to the national courts when they are considering Convention issues arising within their own countries.” This enables them to take a more radical approach than the ECtHR would in their place (except in areas like national security, public order and economic well-being where there is a domestic equivalent of the margin of appreciation whereby the judiciary will afford an area of discretionary judgment on democratic grounds).

⁸⁴ The circumstances in which such declarations “may” be made are considered in section 4. The first is where the court is satisfied that a provision of primary legislation is incompatible with a Convention right (Sections 4(1) and 4(2)). The second is where subordinate legislation, made in the exercise of a power conferred by primary legislation, is incompatible with a Convention right and (disregarding any possibility of revocation) the primary legislation concerned prevents the removal of the incompatibility (Sections 4(3) and 4(4)).

before or after the HRA came into force. Most incompatible legislative provisions will remain because section 3(1) clearly does not allow judges to challenge incompatible legislation unless the legislation is subordinate and then only if primary legislation does not prevent removal of the incompatibility.⁸⁵ Nonetheless, in the recent House of Lords decision *R v. A (Complainant's Sexual History)*⁸⁶ Lord Steyn, using the White Paper that had introduced the Human Rights Bill as support,⁸⁷ suggested that section 3 even applied if there were no ambiguity in the language of a legislative provision in the sense of its being capable of two different meanings.⁸⁸ In explaining exactly how far the courts should go his Lordship indicated:

In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise: *R v. Secretary of State for the Home Department, Ex p Simms* [2000] 2 A.C. 115, 132A-B *per* Lord Hoffmann.⁸⁹

The other judge to comment on the scope of section 3 in *R v. A (Complainant's Sexual History)* was Lord Hope who also saw it as giving judges the selective power to modify, alter or supplement legislative provisions. However, whilst Lord Steyn felt that this power merely did not extend to interpreting legislative provisions in a manner that conflicted with the *express* will of Parliament, Lord Hope felt that it also did not extend to interpreting legislative provisions in a manner that conflicted with the *implied* will of Parliament.⁹⁰ Lord Hope's view may be preferable but until the difference of opinion is settled by a future House of Lords' decision, we are in something of a "constitutional void".⁹¹ The relevance of the problem to the context of our scenario can be gauged by imagining *Hatton* had been heard by a domestic court. The court would only have been able to circumvent the fact that Civil Aviation Act 1982, section 76(1) expressly denied the applicants the opportunity to gain redress for noise

⁸⁵ Sections 3(2)b and 3(2)c.

⁸⁶ [2001] U.K.H.L. 25; [2002] 1 A.C. 45 (Lord Slynn of Hadley; Lord Steyn; Lord Hope of Craighead; Lord Clyde and Lord Hutton).

⁸⁷ "Rights Brought Home: The Human Rights Bill" (1997)(Cm 3782), para 2-7.

⁸⁸ *R v. A (Complainant's Sexual History)*, *op. cit.*, at para 44. He noted that [u]nder ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord Chancellor observed that 'in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility' and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention': Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). *Ibid.*

⁸⁹ *Ibid* at para 46.

⁹⁰ *Ibid* at 108. He stated that the rule of interpretation in section 3 is "only a rule" that ... does not entitle the judges to act as legislators. As Lord Woolf C.J. said in *Poplar Housing and Regeneration Community Association Ltd v. Donogue* [2001] E.W.C.A. Civ 595, section 3 does not entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament: see Lord Hoffmann's observations in *R v. Secretary of State for the Home Department, Ex p Simms* [2000] 2 A.C. 115, 131F-G. *ibid.* *Poplar Housing and Regeneration Community Association Ltd v. Donogue* is reported at [2002] Q.B. 48.

⁹¹ J. Grant, Department of Academic Legal Studies, Nottingham Law School, NTU, e-mail communication, 15th April 2002.

disturbance in a nuisance action by creating a new tort. However, doing so would have subverted the implied purpose of the section, which was to provide a level of immunity for airports from civil action for noise disturbance.

Another point to make about section 3 is that by virtue of section 6(2) it will act as a qualification on the section 6(1) legal duty on public authorities not “to act in a way which is incompatible with a Convention right.” Accordingly a public authority will only be acting unlawfully if it does not act in a manner which is compatible with Convention rights *when it was possible for it to do so*. When legislation, even when filtered through section 3, prevents a public authority from acting compatibly with a Convention right, the only domestic recourse a claimant would have would be to seek a declaration of incompatibility. Again, an effective remedy for Article 13 purposes would have been denied.

The third basis on which the domestic courts and tribunals may not provide an effective remedy for breach of a ECHR right is that the HRA confers on domestic courts a power, but not an obligation, to provide a remedy, let alone to provide an effective one for Article 13 purposes.⁹²

USING THE HRA: AN ILLUSTRATION

Obviously if the defendant is *not* a public authority the claimant must make his or her case on the basis of pre-existing law. However, if the defendant is a public authority the claimant has standing under the HRA, section 7 to argue his or her case on the basis of section 6. *Peter Marcic v. Thames Water Utilities Limited*⁹³ is a highly relevant illustration. Mr Marcic had, on several occasions over a number of years, suffered the discharge into his front garden (and from there into his back garden) of surface and foul water discharged from sewers operated by Thames Water. He had taken successful steps to prevent its getting into his home but it had damaged the fabric of his house. Judge Havery Q.C. in the Technology and Construction Court dismissed the claims founded on *Rylands v. Fletcher*; nuisance; negligence and breach of statutory duty. However, the judge allowed the claim of Mr Marcic under the HRA, section 7 that he had been the victim of an unlawful act by a public authority. Specifically, his claim was that Thames Water had acted unlawfully under section 6 of the HRA as a public authority which had acted in a manner incompatible with Mr Marcic’s right to respect for his home under Article 8 of the ECHR and of his entitlement to peaceful enjoyment of his possessions under Article 1 of the First Protocol, by failing to carry out works to bring the repeated flooding of Mr Marcic’s property to an end. Using *Guerra v. Italy*⁹⁴ as authority, it was emphasised that although the interference under Article 8(1) resulted not from active interference but from a failure to act, Thames Water could nonetheless be liable in principle, and was ultimately so in fact because it could not

⁹² Obviously if the claimant is arguing a breach of an existing area of law, seen in the light of a Convention right, the provision of a remedy will be governed by the pre-existing rules as to the granting of remedies in that area of law. The scope of these rules may not be such as to ensure the claimant gets what the ECtHR would view as an effective remedy. When the claimant is using section 7 of the HRA, i.e. where the defendant is a public authority, there is still no guarantee of an effective remedy being provided because Article 13 was omitted from the HRA in favour of a more limited approach to the provision for remedies: namely section 8. Section 8(1) states that “(i)n relation to any act (or proposed act) of a public authority which the Court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.” There is no guarantee that a court will grant a remedy under this section and if it does there is no guarantee that what it considers a “just and appropriate” remedy will be consistent with what the ECtHR would view as an effective remedy.

⁹³ [2002] EWCA Civ 64, [2002] 2 W.L.R. 932, C.A.

⁹⁴ (1998) 26 E.H.R.R. 357 (at p. 382–3).

justify its interference under Article 8(2).⁹⁵ Damages were awarded under the power in section 8. Both parties appealed. Thames Water challenged the finding under section 7. Mr Marcic challenged the remainder of the decision. He was not satisfied by merely having succeeded under the ECHR as this left him without damages for that portion of the harm he had suffered prior to the implementation of the HRA. The Court of Appeal agreed with the decision of the Technology and Construction Court that Thames Water had acted in a manner incompatible with Mr Marcic's ECHR rights. However, in the view of the Court of Appeal, reliance on section 7 and the HRA as a whole was superfluous in Mr Marcic's case in as much as he could clearly bring his case within the pre-existing scope of private nuisance. This in turn enabled him to obtain damages for all the harm he had suffered, not just that suffered after the HRA came into force.

METHODS FOR EXPANDING DOMESTIC PROTECTION OF HOME LIFE

Assuming that in our scenario, where the applicant does not have proprietary rights in land, judges would have to expand domestic law to make it compatible with Article 8 and possibly with Article 14 (in conjunction with Article 8) what approach should they take? In *Douglas v. Hello Ltd.*, Keene L.J. said that

since the coming into force of the Human Rights Act 1998, the courts as a public authority cannot act in a way which is incompatible with a Convention right: section 6(1). That arguably includes their activity in interpreting and developing the common law, even where no public authority is a party to the litigation. Whether this extends to creating a new cause of action between private persons and bodies is more controversial, since to do so would circumvent the restrictions contained on proceedings contained in section 7(1) of the Act and on remedies in section 8(1).⁹⁶

This quotation provides a summary of the debate concerning any direct horizontal effects of the HRA *i.e.* whether it provides new causes of action between private parties. This was an issue that Keene L.J. said was unnecessary to determine in the proceedings with which he was faced since reliance was being placed on "breach of confidence, an established cause of action, the scope of which may now need to be approached in the light of an obligation on this court under section 6(1) of the Act."⁹⁷

Since *Douglas*, the courts have continued to see the breach of confidence action as a suitable method of ensuring that legal protection from disclosure of private matters is compatible with Article 8 in cases like *Theakston v. MGN Limited*⁹⁸ and most recently *A v. B & Anor, sub nom Garry Flitcroft v. Mirror Group Newspapers Ltd.*⁹⁹ Rightly or wrongly, the judges have viewed the development of the tort of breach of confidence as merely an evolution. How they would address those areas where the only way an existing cause of action can be rendered compatible with an ECHR right is if its fundamental nature is changed remains moot. In the home life context, this dilemma may affect trespass to land as well as private nuisance (and probably by extension, the

⁹⁵ As the Court of Appeal itself puts it "on the facts of the present case, it was necessary to decide whether Thames' scheme of priorities had struck a fair balance between the competing interests of Mr Marcic and of their other customers. It was common ground that the onus was on Thames to establish this. Thames had failed to do so. It followed that Mr Marcic's claim under the Human Rights Act succeeded." *op. cit.*, para 108).

⁹⁶ [2001] Q.B. 967 at para 166.

⁹⁷ *Ibid.*

⁹⁸ [2002] EWHC 137, [2002] E.M.L.R. 22, Q.B.D.

⁹⁹ [2002] EWCA Civ 337, [2002] 2 All E.R. 545, C.A

rule in *Rylands v. Fletcher*). Currently trespass to land protects *possession* of land from physical invasion.¹⁰⁰ However, it could be extended by the courts in the light of Article 8 additionally to protect the private physical space of legitimate *users of land who do not have possession* such as the lodger or hotel guest.¹⁰¹

In essence the question is whether a property-based claim should become something more. This recently arose as a matter for consideration in the High Court in *Nora McKenna and Others v. British Aluminium Limited*.¹⁰² This case involved the defendant bringing an action to strike out claims in private nuisance and strict liability as having no prospect of success under the Civil Procedure Rules 1998.¹⁰³ The defendant was relying on the House of Lords' decision in *Hunter* in support of an argument that the claims of those claimants who had no rights over the land "affected" should be struck out. Giving judgment, Neuberger J. stated that these claims could not be struck out because it was at least questionable whether the *Hunter* approach was compatible with Article 8. If, or when, the case goes to trial we will be enlightened by a definitive answer to this question. However, in the meantime it is worth pointing out that Neuberger J. clearly saw the question of appropriate action to be taken should the approach in *Hunter* be incompatible with Article 8 as less than straightforward. The defendant had argued that the section 6 duty owed by courts and tribunals should not extend to changing the common law in such a fashion that a property-based claim was altered into something else.¹⁰⁴ Neuberger J. did not need to decide whether this argument was correct but admitted it was a "powerful" one that "may very well turn out to be right."¹⁰⁵

However, the problem is that if this argument does turn out to be correct then, unless the defendant is a public authority, the courts and tribunals will arguably be "forced" to find another way of complying with their section 6 duty. This will necessitate evolving a new cause of action out of existing law; something they will have to do in any event *in situations* where there is a breach of a claimant's ECHR right(s) but no relevant existing cause of action. On the question of creating a new cause of action the Lord Chancellor stated in the House of Lords debates on the Human Rights Bill that in his opinion:

... the court is not obliged to remedy the failure by legislating via the common law either where a convention right is infringed by incompatible legislation or where, because of the absence of legislation – say, privacy legislation – a convention right is unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights *unless the common law itself enables them to develop new rights or remedies*.¹⁰⁶ [italics added]

The italicized sections of this statement indicate that the Lord Chancellor clearly thought that the evolution of new causes of action was a normal part of the function of the common law. This would suggest that in the scenario under discussion the courts could quite easily develop a new tort. The statement of case in *Nora McKenna and*

¹⁰⁰ See *White v. Bayley* (1861) 10 C.B. (NS) 227.

¹⁰¹ As examples of interest that trespass to land does not protect these are courtesy of Lunney and Oliphant, *Tort Law: Text and Materials* (Oxford, 2000), at p. 663. Of course if the person legitimately using the land were to be protected there would then need to be further change so as to balance their rights with those of others such as the rights of entry of the hotel owner and staff in the case of the hotel guest.

¹⁰² *The Times*, 25 April 2002, Ch. D.

¹⁰³ S.I. 1998/3132.

¹⁰⁴ (2002) (Case No: BMO9697, 16th January) at page 16, para. d.

¹⁰⁵ *Ibid* at para e.

¹⁰⁶ H.L. Deb, 24 November 1997, col. 785.

Others suggested “a common law tort analogous to nuisance”¹⁰⁷ which might be taken as a rather vague plea for a tort protecting the use and enjoyment of home life from indirect interference. The alternative would be to evolve an all-embracing tort of privacy. On the question of the latter choice the Lord Chancellor rather equivocally commented:

I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right of privacy.¹⁰⁸ [italics added]

Did he mean that a right of privacy would in effect exist because a patchwork of expanded existing causes of action would cover the whole area of privacy? Or did he mean that the courts would soon put these separate causes of action under an umbrella cause of action called privacy? It seems that he thought the latter was at least possible. Indeed, in an earlier statement he went as far as suggesting that irrespective of whether the Human Rights Bill was passed the judiciary were “pen poised” to “develop a right of privacy”.¹⁰⁹ This comment of His Lordship is particularly surprising as for a over a century and a half the legal world has been waiting for an action in privacy to arise from the foundations built in cases such as *Prince Albert v. Strange*.¹¹⁰ In the meantime we have witnessed the failure of cases such as *Kaye v. Robertson*¹¹¹ (which involved the *Allo! Allo!* star Gorden Kaye), because of the inadequate coverage of piecemeal causes of action.¹¹² We have also experienced the irony of English authorities being instrumental in development in the US courts of a right of privacy.¹¹³ The intellectual pioneers of the US approach, Warren and Brandeis, commented:

[t]he principle which protects personal writings and any other productions of the intellect or of the emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts and to personal relations, domestic or otherwise.¹¹⁴

Of course a problem with an all-embracing tort of privacy is that it would be like a vast ocean with uncertain boundaries. One can understand this having been a disincentive to its creation in English law. However, following implementation of the HRA it is difficult to see the force of this argument: the ability to argue “the right to privacy” has created uncertainty as to the nature and scope of the law in certain areas in any event. Furthermore, turning this “right” into a tort in the common law sense of the word would be the best way of diminishing any such uncertainty because instead of simply making decisions on the privacy issue at hand judges would be making broader pronouncements on the scope of a privacy law as a whole. It would also make drafting particulars of claim much easier: avoiding the danger of claims failing because lawyers have not identified the right cause of action from the existing piecemeal

¹⁰⁷ *Op. cit.*, at page 17, para. a-b.

¹⁰⁸ *Op. cit.*

¹⁰⁹ *Ibid.*

¹¹⁰ (1849) 1 McN & G 23.

¹¹¹ [1991] F.S.R. 62.

¹¹² Kaye's representatives sought to get an interlocutory injunction preventing publication of an article in the *Sunday Sport* that claimed he had agreed to give the paper an exclusive interview. In fact he had been in his private hospital room recovering from extensive injuries to his head and brain and there were notices saying the media should not be there. In spite of this a newspaper reporter and photographer had invaded his private hospital room, trying to get an interview with him when he was in no fit condition and had taken a photograph of him. His representatives argued libel, malicious falsehood, trespass to the person and passing off before the Court of Appeal (Glidewell, Bingham and Leggat LJJ.) but only malicious falsehood succeeded and this was only to the limited extent that it prevented publication of the falsehood that he had agreed to give an exclusive interview.

¹¹³ See Lunney and Oliphant, *Tort Law: Text and Materials* (Oxford, 2000) 664.

¹¹⁴ “The Right to Privacy” (1890) 4 *Harvard Law Review* 193.

multitude.¹¹⁵ Doubtless there would be teething problems but this could be to the benefit of all in identifying the precise nature of applicants' rights and obligations in the privacy context. Of course it must be admitted that it is more likely that domestic judges will continue with a piecemeal approach of expanding existing causes of action wherever required and creating new piecemeal causes of action wherever unavoidably necessary. However, after a period of such development we would probably have what was the equivalent of a tort of privacy in any case, at which point the judges might be prepared to concede that there was indeed a tort of privacy, both to avoid a charade and to make it easier to set out one's particulars of claim.

¹¹⁵ This could have been the problem in *Kaye* in as much as the actor's representatives might well have had better luck if they had argued breach of confidence. If the situation arose today and the tort of privacy could not be argued they might make the argument identified earlier that their "space privacy" and legitimate users of private space should be protected by trespass to land as seen in the light of Article 8 or alternatively a new tort analogous to trespass to land.

ZERO TOLERANCE POLICING: NEW AUTHORITARIANISM OR NEW LIBERALISM?

ROGER HOPKINS BURKE*

INTRODUCTION

The notion of “zero tolerance” policing has been widely discussed in the media in recent years and has received considerable support from politicians right across the political spectrum both in the USA and the UK. Proponents of this apparently “get-tough” crime control style of policing have used widespread public enthusiasm for such initiatives to justify their implementation.¹ Opponents observe this policing style to be invariably targeted at poor and excluded members of society and part of a growing tendency towards authoritarianism in social policy.²

This paper proposes that simply dismissing public support for zero tolerance style policing strategies as being part of a reactionary backlash against social reformist developments in policing – and wider society in general – fails to address some very legitimate public concerns about law and order. Indeed, it is the central proposition that such policing initiatives should be seen in the context of an emerging new conceptualisation of liberalism that promotes the notion of citizen responsibility in equal measure to the traditional demand for rights. The paper examines the socio-political circumstances in which different variants of zero tolerance style policing have been introduced in the USA and the UK and the very different attempts to sustain that approach in both constituencies.

The structure of this paper is as follows. First, zero tolerance style policing strategies are explained and located in a theoretical context. Second, contemporary social formations in which these policing initiatives have been introduced are discussed. Third, the introduction – and attempts to sustain – zero tolerance style policing in New York City are examined. Fourth, the introduction – and attempts to sustain – such policing initiatives in various constituencies in Britain are examined. Fifth, it is concluded that “proactive, confident, assertive” policing initiatives can be successful but that they need to be driven by the concerns, and retain the legitimacy, of the community in which they are introduced. We start with an examination of exactly what zero tolerance style policing is.

ZERO TOLERANCE STYLE POLICING STRATEGIES AND THEORETICAL CONTEXT

The notion of “zero tolerance policing” has been largely associated with the “broken windows thesis” discussed below. Its origins nonetheless lie very much in the “just say

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¹ W. J. Bratton, “Crime is Down in New York City: Blame the Police” in N. Dennis (ed.) *Zero Tolerance: Policing a Free Society* (Institute for Economic Affairs, 1997); W.J. Bratton, *Turnaround* (Random House, 1997); N. Dennis and R. Mallon, “Confident Policing in Hartlepool” in Dennis (ed.) *op. cit.*; T. Romeanes, “A Question of Confidence: Zero Tolerance and Problem Oriented Policing” in R. Hopkins Burke (ed.) *Zero Tolerance Policing* (Perpetuity Press, 1998); Silverman, E. B. (1998) “Below Zero Tolerance: The New York Experience” in Hopkins Burke *op. cit.*

² E. Currie, “The Scalpel Not the Chainsaw: The US Experience with Public Order”, *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* (Vol. 1 No. 8) pp. 132–7; R. Morgan, “Swept Along by Zero Option”, *The Guardian* (January 22, 1997); I. Taylor, “New York/Manchester: Zero Tolerance or Reclaim the Streets”, *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* (Vol. 1 No. 8) pp. 139–48); C. Crowther, “Policing the Excluded Society” in Hopkins Burke *op. cit.*; J. Wadham, “Zero Tolerance Policing: Striking the Balance” in *ibid.*

no to drugs” policies of the Reagan administration in the USA during the early 1980s. The notion of “zero tolerance” was later applied in other areas of public policy. In the USA, the concept became associated with targeting drink driving amongst teenagers and violence and guns in schools³ and later with campaigns against domestic violence, sexual assault and child abuse in various constituencies including the USA, UK, Canada and Australia.

In the area of policing, “zero tolerance” is a generic expression that has been used to describe a wide variety of what this author has termed “proactive, confident, assertive policing strategies”.⁴ The actual content of the various initiatives has varied with location but all have been fundamentally underpinned by the theoretical proposition that a strong law enforcement approach to minor crime – in particular to public order offences – will help prevent the incidence of more serious offences and ultimately lead to falling crime rates. Central to this proposition is the “broken windows” thesis developed in the USA in the early 1980s by James Q. Wilson and George Kelling, two criminologists usually associated with the political right.⁵ The thesis suggests that the very existence of unchecked and uncontrolled minor incivilities in a neighbourhood – for example, begging or panhandling, public drunkenness, vandalism and graffiti – increasingly discourages legitimate business and respectable residents while providing a welcoming atmosphere to criminals.

The influence of the “broken windows” thesis has been readily acknowledged by the early pioneers of zero tolerance style policing, William J. Bratton, the then Commissioner of Police with the New York Police Department (NYPD),⁶ and Superintendent Ray Mallon of the Cleveland Constabulary in the UK.⁷ In support of their argument that a positive proactive presence targeting petty offenders on the street can lead to substantial reductions in crime, they refer us to the statistics for their localities. These show that during the period 1994 to 1996 the official crime rate in New York City decreased by 37 per cent – the homicide rate alone by 50 per cent⁸ – and in Hartlepool, Cleveland, UK, by 27 per cent.⁹

We should note that George Kelling has distanced himself on numerous occasions from the term “zero tolerance”. Nonetheless, his seminal text “Mending Broken Windows” – with Catherine Coles – clearly indicates him to be in favour of the notion that the police should “take care of the little things and the big things will take care of themselves” (a popular car bumper sticker seen widely on police cars in some parts of the USA).¹⁰ Moreover, it is a text that unambiguously opposes the handing over of US cities to squatter camps of supposedly “homeless” people involved in activities on the streets and subways that most of us would define as extortion. Furthermore, it provides a meticulous and scholarly assault on the civil liberties “industry” that has sought to support those groups.

While at first sight this stance might appear to be unashamedly right-wing and illiberal, it is nonetheless a viewpoint very much in harmony with what can be identified as an emerging new configuration of liberalism both in the UK and the USA.

³ M. Neimeier, “Zip, Zero, Zilch: The New Alcohol Tolerance Law for Underage Drivers in Michigan”, *University of Detroit Mercy Law Review* (Vol. 73, No 1, Fall 1995) pp. 45–71.

⁴ R. Hopkins Burke, “A Contextualisation of Zero Tolerance Policing Strategies” in Hopkins Burke, *op. cit.*

⁵ J. Q. Wilson and G. L. Kelling, “Broken Windows”, *Atlantic Monthly* (March 1982) pp. 29–38.

⁶ Bratton, *op. cit.*, (1997), *op. cit.* (1998).

⁷ Dennis and Mallon *op. cit.*; Romeanes *op. cit.*

⁸ Bratton *op. cit.* (1997).

⁹ Dennis and Mallon *op. cit.*

¹⁰ G. L. Kelling and C. M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (The Free Press, 1998).

The individual citizen is considered to have both responsibilities towards the general-well-being of society and the traditionally acknowledged entitlement to rights. It is a notion with significant criminological foundations in the increasingly influential idea that the rights of victims should be prioritised over those of the perpetrator.¹¹ In short, from this perspective it is acknowledged that both individuals and the collectivities – or communities – in which they live have rights. Consider the following quotation from Professor Eli Silverman, at John Jay College of Criminal Justice, New York City, as an example of that thinking located in the US context:

It is important to note that the community also has rights. Successful zero tolerance policing is more in harmony with community wishes than is the abandonment of public spaces to those who violate other people's rights, privacy and passage.¹²

There are however considerable legitimate grounds for concern about the nature of zero tolerance style policing strategies. Academic opponents have noted a lack of convincing evidence to support a direct causal link between such initiatives and the apparent fall in the crime figures. Perhaps more disturbingly, they have raised the spectre of a return to the failed "military-style" proactive "swamp" policing tactics previously pursued in inner-city neighbourhoods in both the USA and the UK and in which perceived police partiality and brutality culminated in major public disorders epitomised by Brixton, UK, in 1981 and Los Angeles, USA, in 1992.

It is highly significant that respected criminologists with links to both ends of the political spectrum from both sides of the Atlantic have agreed in their criticisms of military-style policing. From the USA, James Q. Wilson – co-author of the "broken windows" thesis¹³ and strongly associated with the political "new right" – has argued that increased police activity targeted at "crime areas" can *appear* racist because black people make up a large proportion of the inhabitants of such neighbourhoods. Moreover, *actual* racism leads to mistrust of the service by those it claims to serve. Consequently, the flow of information on which the police heavily depend in order to function successfully as a crime-fighting entity ceases and the police subsequently come to feel that the local population holds them in contempt. The British criminologists John Lea and Jock Young – strongly identified with the new political left – have taken the argument a step further and propose that reductions in crime that apparently occur as a result of military-style policing may actually be the outcome of an unwillingness to report offences on the part of an alienated public.¹⁴

Thus, it has been widely acknowledged that military-style policing amounts to the brutalisation of communities that in turn leads to more, not less, crime by the inhabitants. Moreover, illegal actions – whether perceived or actual – committed by over-enthusiastic police officers provokes younger inhabitants by bringing home to them their own powerlessness. This perceived unfair treatment and racism further reduces the flow of information from the public, and this in turn compels the police to become still more oppressive in order to obtain results. With the loss of support from the local community officers come to rely heavily on stereotypes. This accentuates the impression of unfair treatment among the residents and the vicious circle is complete. The police become the perceived enemy of the community and offenders are secretly or even overtly admired and given sanctuary.

¹¹ L. Zedner, "Victims" in M. Maguire, R. Morgan and R. Reiner (eds.) *The Oxford Handbook of Criminology – 2nd Edition* (Clarendon Press, 1997).

¹² Silverman, *op. cit.*, at p. 58.

¹³ Wilson and Kelling *op. cit.*

¹⁴ J. Lea and J. Young, *What is to be Done about Law and Order?* (Penguin, 1984).

Therefore, the argument against military-style policing extends beyond normative allegations of alleged racism and unfair treatment. Such strategies are identified as simply counter-productive: they reduce the quality and quantity of information flow to the police that is vital to the detection of serious offenders. At the same time, there is an extension of the labelling process: entire communities are labelled “criminal” with the police themselves attracting the label “enemy”. Not only do they receive less information about criminals and their activities than they otherwise would, they also tend to provoke resentment and public unrest.

The Scarman Report¹⁵ into the Brixton disorders stressed that all aspects of police work should be premised upon the *active consent, trust and participation* of the community. The British public police service thus subsequently sought to undergo a transition towards community policing where “the intention was to break the cycle of antagonism and alienation that had hitherto existed between the police and some – invariably ethnic-minority – communities”.¹⁶

With the crime figures apparently forever increasing, community-policing strategies nonetheless, starved of resources and commitment from senior management, appeared not to work or satisfy public demand.¹⁷ The solution, for supporters of the community-policing model, is adequate implementation. By inference, it is preferable that the police have a tolerant attitude to minor criminal activity in certain communities than risk further alienation and potential serious social unrest. However, it is a viewpoint not widely shared by the public. Crime surveys conducted in the UK have repeatedly shown that the public want a visible police presence on their streets.¹⁸ Senior police officers and their academic supporters argue however that there are insufficient resources available to implement such a strategy. Those police professionals who promise the public otherwise are accused of “dishonest policing”.¹⁹ It is possible to observe an extremely convenient convergence between two discourses. On one hand, there is a traditional liberal/libertarian criminal justice perspective that proposes that the police should withdraw from whole areas of the social world so that they do not further criminalise groups of dispossessed unfortunates. On the other hand, there are the material concerns of senior police management with limited resources. There is a most convenient justification for doing little.²⁰

For some years this considered withdrawal from the streets appears to have been *de facto* policing policy in large – predominantly urban – geographical areas of both the USA²¹ and Britain.²² In general, it was an unspoken orthodoxy unchallenged until the introduction in the USA of zero tolerance style policing strategies.²³ However, the latter style of policing does not have to be incompatible with the community-policing ideal.

The US policing academic Friedmann²⁴ provides a basis for theorising a more assertive form of community policing that takes account of both the rights of the community *and* of the individual:

¹⁵ Lord Scarman, *The Brixton Disorders 10–12 April 1981: Report of an Inquiry by the Rt. Hon. the Lord Scarman, OBE* (HMSO, 1981).

¹⁶ E. McLaughlin, “Police, Policing and Policework” in E. McLaughlin and J. Muncie (eds) *Controlling Crime* (Sage in Association with the Open University, 1996).

¹⁷ D. Smith, “The Police and Community”, in P. Wilmott (ed.) *Policing the Community* (Policy Studies Institute, 1987).

¹⁸ R. Morgan and T. Newburn, *The Future of Policing* (Clarendon Press, 1997).

¹⁹ D. Bayley, *Police for the Future* (Oxford University Press, 1994).

²⁰ R. Hopkins Burke, “The Socio-Political Context of Zero Tolerance Policing Strategies”, *Policing: An International Journal of Police Strategies & Management* (Vol. 21[4]) pp. 666–82.

²¹ Kelling and Coles *op. cit.*; Bratton, *op. cit.* (1997).

²² Dennis and Mallon *op. cit.*

²³ Hopkins Burke, *op. cit.* (1998).

²⁴ R.R. Friedmann, *Community Policing: Comparative Perspectives and Prospects* (Harvester Wheatsheaf, 1992).

Community policing is a policy and a strategy aimed at achieving more effective and efficient crime control, reduced fear of crime, improved quality of life, improved police services and police legitimacy, through a pro-active reliance on community resources that seeks to change crime causing conditions. It assumes a need for greater accountability of police, greater public share in decision-making and greater concerns for civil rights and liberties.²⁵

This author has proposed elsewhere that those zero tolerance style policing strategies that aspire to *widespread legitimacy* and successes are those compatible with this definition. The police service takes a proactive, confident and assertive central role in seeking to confront and control crime but at the same time is highly dependent upon the support and legitimacy of the community it purports to serve.²⁶

In 1993, Mayor Rudolph Giuliani and NYPD Police Commissioner Bill Bratton first introduced a form of zero tolerance style policing to New York City.²⁷ Giuliani had, that year, been elected the first Republican mayor in the city for over 60 years after a campaign strongly focused on the issue of crime and disorder. He appointed Bratton to develop policing strategies to deal with these problems, and personally co-ordinated the activities of other essential city agencies.²⁸

Giuliani appears at first sight – and has been widely perceived to be – a fundamentalist right-wing Republican with a Reagan/Thatcherite agenda based on a marriage of authoritarian social policies and free market economics. Bratton firmly locates the policing initiative they introduced in terms of an opposition to the post-Vietnam liberal/libertarian discourse that he considered had come to dominate US public life.²⁹ Giuliani has been himself previously closely linked with the neo-conservative think-tank the Manhattan Institute founded in 1984 by Anthony Fischer (mentor to Margaret Thatcher) and William Casey (Ronald Reagan's director of the CIA). Closer examination reveals a more complex situation.

New York City is essentially an intensely populated metropolis of fragmented and diverse communities that could best be described as – to use the language of contemporary social science – postmodern in nature. Mayor Giuliani could be considered a new style politician who was at least partly alert to some of the implications – and indeed electoral necessities – of trying first to get elected and then second to govern such a society, albeit with undoubtedly strong political foundations in the “new” political right. Before examining that notion more closely, it is appropriate at this point to examine the concept of postmodernity – and the modernity it aspires to succeed – more closely.

MODERN AND POSTMODERN SOCIAL FORMATIONS

Modern societies are fundamentally mass societies involving mass production and consumption, corporate capital and organised labour. They are economically organising interventionist states that aspire to full employment, demand management and public investment in health education and welfare.³⁰ They are essentially social formations characterised by moral certainty and confidence in the explanatory power

²⁵ *Ibid.* at p.26.

²⁶ Hopkins Burke, *op. cit.* (1999).

²⁷ Kelling and Coles, *op. cit.*; W. J. Bratton, “How We Cleared Up New York” in *The Sunday Times* (24 November, 1996).

²⁸ Bratton, *op. cit.* (1997).

²⁹ *Ibid.*; Bratton, *op. cit.* (1998).

³⁰ D. Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Basil Blackwell, 1989).

of grand social and political theories to solve the problems of humanity.³¹ There are competing ways of seeing and dealing with the world – for example, conservatism, liberalism and socialism – but the adherents to these different perspectives believe in the capacity of *their* particular doctrine to solve all problems in society.

These grand theories or meta-narratives³² are invariably presented as signifying the perceived material interests of mass groups or social classes. Modern societies are therefore characterised by different political parties of the left and right with each purporting to have *the* solution to *all* societal problems. They thus seek to initiate programmes that satisfy the different class interests of the mass of society, and this has been achieved, in the main, through the creation of conditions to enhance economic development while at the same time providing widespread welfare provision for the workers.

During the last quarter of the twentieth century, there were, however, increasing doubts about the survival of the modernist project in an increasingly fragmented and diverse social world. Politically, the traditional parties of the “left” and “right” appeared incapable of representing multiple interest groups as disparate as major industrialists and financiers, small business proprietors, the unemployed and dispossessed, wide ranging gender and sexual preference interests, environmentalists, the homeless and the socially excluded.³³ Postmodern politics are thus complex and characterised by moral ambiguity. There is recognition that there are different discourses that can be legitimate and hence right for different people, at different times, in different contexts.³⁴ Postmodernism is a perspective with its foundations firmly located in cultural relativism where the objective truth – or more accurately the competing objective realities – of modernity are replaced by multiple realities or moral ambiguities.

The postmodern condition raises all kinds of issues for politicians and the parties they represent because few of these varied views and discourses can be located easily and exclusively within the traditional boundaries of modernist political thinking. The successful politician has to balance the various ambiguities in order to gain a coalition of support across a range of issues. The practical implications of these observations for New York City will now be considered.

POLICING THE POSTMODERN METROPOLIS: THE CASE OF NEW YORK CITY

New York City is very much a postmodern metropolis characterised by a mixture of diverse and fragmented communities with a wide range of interests and concerns. Virtually every ethnic group and cuisine available on the planet can be found in its streets. The aspiring successful politician has to be aware of the necessity of building coalitions between these diverse groups and the need to identify crucial issues that unite the widest possible range of interests. The issue identified by Mayor Giuliani was that of crime. At the time New York City was widely recognised as the crime capital of the

³¹ R. Hopkins Burke, *An Introduction to Criminological Theory* (Willan Press, 2001).

³² J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester University Press, 1984).

³³ A. Giddens, *Beyond Left and Right* (Polity, 1994); A. Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, 1998).

³⁴ Hopkins Burke, *op. cit.* (1998).

world. Many of its citizens were scared and they wanted something doing about the problem.³⁵

It was in this context that Giuliani appointed Bratton as Police Commissioner with a mandate to target crime. The latter enacted this authorisation by introducing a computerised managerial or geographical system known as CompStat into the NYPD. This has been most noticeably used to target “quality of life” crimes – the later termed “zero tolerance” policing strategy – as a means of recovering the streets of New York City for the law-abiding citizen.³⁶

Throughout this paper, the term “zero tolerance *style* policing” has been used. This has been done for the simple reason that a zero tolerance-*in totality* approach is impossible to implement. In New York City, an extra 7,000 police officers were employed, and sophisticated computer crime mapping techniques were used to rationalise the police response: to *target* specific areas for a limited time. A more accurate description of the New York initiative – and certainly of all zero tolerance style experiments in Britain, where it should be noted extra resources have not been made available – would be *selective intolerance* of a targeted crime problem.

Liberal academics argue that these zero tolerance style policing strategies have been used selectively to target the poor and excluded sections of society in the interests of the middle classes.³⁷ However, while this is a perfectly legitimate observation, it is important to note that the targeting of “quality of life” crimes was – at least at its instigation – extremely popular with a large cross-cultural section of the population of New York City.³⁸

The crime statistics suggest a substantial reduction in the number of offences committed and the police received popular credit for this decline. There have been other widely touted explanations for that reduction: fewer young males in the population, the end of the crack-cocaine epidemic and a simultaneous desire among young black males raised in the ghetto to live longer and therefore to stop shooting each other.³⁹ Logic suggests that these factors must have been influential and this author has argued elsewhere that it is extremely likely that they provided the sociological preconditions for the initial widespread public support.⁴⁰ Silverman is convinced the Giuliani/Bratton policing initiative precipitated the reduction in crime.⁴¹

Further logic suggests that the extra 7,000 officers on the streets must have had some influence on events, a supposition supported by a 23 per cent increase in arrests during the initial period of zero tolerance policing between 1993 and 1996. Moreover, the category of arrest reflected the strategy of targeting low level, public order and minor drug offences. Arrests for misdemeanours rose by 40 per cent; arrests for misdemeanour drug offences by 97 per cent. However, arrests for more serious offences (felonies) only rose by 5 per cent, although there was a 44 per cent decrease in reported serious offences (a 60 per cent decrease in murders, a 12 per cent decrease in rapes, a 48 per cent decrease in robberies and a 46 per cent decrease in burglaries).⁴² It was this large reduction in the crime figures that was – at least initially – widely popular with the population across class and ethnic boundaries.

³⁵ Bratton, *op. cit.* (1997).

³⁶ Kelling and Coles, *op. cit.*; Bratton, *op. cit.* (1996), (1997); Silverman, *op. cit.* (1998).

³⁷ Crowther, *op. cit.*; Wadham *op. cit.*

³⁸ Silverman, *op. cit.*

³⁹ Currie, *op. cit.*

⁴⁰ Hopkins Burke, *op. cit.* (1999).

⁴¹ Silverman, *op. cit.*

⁴² J. Greene, “Zero Tolerance: A Case Study of Police Policies and Practices in New York City” (Unpublished paper, 1998).

Silverman pertinently observes that the black communities of New York City had come to demand the same levels of policing traditionally enjoyed by the white middle-class suburbs.⁴³ Now, at a theoretical level, this should not come as a surprise to observers and commentators in the UK. For some years, the findings of self-report crime surveys have informed us that it is the poorest sections of our societies – in particular, members of ethnic minority groups – who have experienced the highest level of crime victimisation.⁴⁴ It would thus seem reasonable to assume that the very same people would have a large demand for policing. However, this clearly has not been the case. Many other surveys have shown that these very same ethnic groups are vehemently anti-police.⁴⁵ This is because there has been a widespread perception among black people – acknowledged above in the discussion of the views of left and right realist criminologists – that the police have been racist. Understandably, they do not want police officers whom they consider to be external to their communities targeting people simply because they are black.

A group of people substantially over-represented among victims of crime – a group with a legitimate demand for quality policing: black people – has been the regular recipient of unprofessional treatment and this has been received as harassment and persecution. Law abiding black people at a high risk of crime victimisation have been discouraged from seeking help from a perceived racist police force and have developed common cause with a delinquent minority in their midst because of a shared status of being black and the victims of racism. In short, there is a widespread demand for policing among black people but they want professional behaviour on the part of the police. It appears that they were promised more professional treatment from the NYPD following the Giuliani/Bratton policing initiative than they had previously enjoyed.

Life is undoubtedly hard for many people in New York City. There are a great many poor people and a great percentage of these are black.⁴⁶ There is a lot of violence, people carry guns, many are killed; even larger numbers of black people are processed annually by the criminal justice system and a good proportion of these are incarcerated.⁴⁷ There is a long established history of police brutality involving black people in New York City.⁴⁸ Yet there is evidence that the black communities welcomed the Giuliani/Bratton police intervention in a more positive fashion than others previously.⁴⁹ The police were seen to use “assertive” practices, but these were being used against people because they were criminal and not simply because they were members of a particular ethnic group. The police were gaining the respect – and this may have been a very grudging respect in black communities experiencing great poverty and deprivation – of the majority of law abiding black citizens. The crucial label was “criminal” rather than “black”.

⁴³ Silverman, *op. cit.*

⁴⁴ See: J. Young, “Incessant Chatter: Recent Paradigms in Criminology” in M. Maguire, R. Morgan and R. Reiner (eds) *The Oxford Handbook of Criminology*, (Clarendon Press, 1994).

⁴⁵ C. Norris, N. Fielding, C. Kemp, and J. Fielding, “Black and Blue: An Analysis of the Influence of Race on Being Stopped by the Police”, *British Journal of Sociology* (Vol. 43(2)) pp. 207–24; T. Bucke, *Policing and the Public: Findings from the 1994 British Crime Survey*, Home Office Research and Statistics Department, Research Findings No. 28 (Home Office, 1992).

⁴⁶ Fiscal Policy Institute cited by NY1 Television News Channel Internet Service (18 December, 1997) Time Warner Cable, <http://www.ny1.com>.

⁴⁷ J. Miller, cited in V. Chaudhary and M. Walker, “The Petty Crime War”, *The Guardian* (21 November, 1996).

⁴⁸ Amnesty International, *United States of America: Police Brutality and Excessive Force in the New York City Police Department* (Amnesty International Report, AMR 51/36/96, 1996).

⁴⁹ See Silverman, *op. cit.*

It was a central part of the Giuliani/Bratton policing initiative both to tackle police corruption and, most importantly, to be seen by the public to be doing something about the problem. Bratton sent an unambiguous message to New Yorkers that he was going to do something significant about unprofessional behaviour within their police service.⁵⁰ Problematically, the promise was not to be honoured in the long term and with it increasingly went support for zero tolerance style policing in New York City.

Amnesty International noted that police brutality remained a serious problem in the NYPD with the large majority of victims being from ethnic minorities. African-Americans made 50 per cent of complaints against the police lodged during 1995 with 26 per cent by Latin Americans.⁵¹ Nearly all of the victims in the cases of deaths in custody were found to be members of ethnic minorities. During the period between 1993 and 1996 when Bratton was Police Commissioner, complaints concerning police conduct rose by 65 per cent. In the four years up to 1998, the filing of civil rights claims against the police for abusive conduct had increased by 75 per cent.⁵² Initially, however, the electoral coalition in support of zero tolerance style policing held firm.

Rudolph Giuliani was re-elected in November 1997 with a greatly increased majority and electoral analysis suggests his tough stance on crime was responsible for his success.⁵³ Significantly, there was a "Democrats for Giuliani" group committed to securing his re-election: this at a time when that party was winning other elected posts in the city by large margins. Being seen to fight crime successfully appeared to be an excellent means of building electoral support between the very diverse ethnic and other interest groups in New York. It was a situation that was not to last.

In August 1997, two police officers were charged with assaulting a Haitian immigrant, Abner Louima, in a police station toilet. He had a broken broom handle forced into his rectum and was subsequently admitted to hospital for two-and-a-half months. One officer was sentenced to 30 years in prison after admitting the assault while another, who was convicted of holding Mr Louima down, was jailed for 15 years and eight months. This author has previously observed that it was significant that the NYPD responded swiftly in speedily charging the two officers with assault and taking action against other implicated personnel at all levels in the organisation.⁵⁴ Mayor Giuliani repeatedly expressed his dismay over the incident and professed his sympathy for the victim. He visited Mr Louima in hospital and appeared on television in an attempt to soothe tempers among the Haitian population. So while there was undoubtedly continuing racism and other forms of unprofessional behaviour in the NYPD, at the same time there appeared to be a high profile response on the part of the authorities both to do something and to be seen doing something about the problem. Police violence against ethnic minorities was nevertheless to continue and the public were increasingly to seek redress.

In February 2000, thousands demonstrated in New York City calling for social justice and law enforcement reforms after the acquittal of four white policemen on charges of murdering an unarmed West African man. Amadou Diallo had been hit by 19 out of 41 shots fired as he stood at the entrance of his Bronx apartment.⁵⁵ The following April, protestors clashed with NYPD officers during a funeral procession for another unarmed black man killed by officers. There were 23 police officers and four

⁵⁰ Hopkins Burke, *op. cit.*

⁵¹ Amnesty International, *op. cit.*

⁵² Greene, *op. cit.*

⁵³ NY1 Television News Channel Internet Service (4 November, 1997) Time Warner Cable, <http://www.ny1.com>.

⁵⁴ Hopkins Burke, *op. cit.* (1998).

⁵⁵ BBC News Online, 'Brutality' Cases Sour Community Relations (13th July, 2000), BBC, http://news.bbc.co.uk/hi/english/world/americas/newsid_831000/831740.stm.

civilians injured in the clashes, and 27 people were arrested on charges that included disorderly conduct and inciting a riot.⁵⁶ NYPD Commissioner Howard Safir, questioned about these three cases, showed a distinct lack of sensitivity in a troubled situation:

Those are tragic incidents but you have to put them in context. We have six million contacts with the public a year. We arrest almost 400, 000 people a year. And you're talking about three incidents.⁵⁷

His predecessor, Bill Bratton, did not share this view. He proposed that the police should avoid alienating ethnic minorities and – tacitly acknowledging the views of both the right and left realists discussed above – proposed that police effectiveness would be improved by working with communities:

If the police in 1997 had been pulled back from the assertive policing, the community-based policing could have reduced crime and disorder and improved race relations. Instead, we have the situations we find ourselves in now.⁵⁸

Mayor Giuliani and Howard Safir stood by their “get-tough” approach, warning that anything less would bring back rampant crime and referred to a record of crime reduction “envied by the rest of the world”.⁵⁹ It was however a record becoming increasingly untenable for a much wider audience than the black and Hispanic ethnic minorities.

In September 1999, the police were accused of using excessive force when officers shot dead a Jewish man, Gary Busch, wielding a hammer. Hundreds of Hassidic Jews took to the streets of an Orthodox Jewish area in Brooklyn to protest at the shooting chanting, “Jewish blood is not cheap!” The incident put renewed pressure on Mayor Giuliani again to defend his police force. He said that he believed the officers involved had kept to procedures but Jewish community leaders accused the police of using unnecessary force.⁶⁰

At lunchtime on 20th June 1998, police descended on Washington Square Park in Greenwich Village seeking to serve warrants on small-scale marijuana dealers who hawk their product from park benches. The park's exits were sealed, trapping hundreds of law-abiding citizens inside. A Rutgers University professor was detained in handcuffs when he tried to leave to attend an appointment. “There were a lot of mothers with baby carriages and children”, one witness told the *New York Times*.⁶¹

A significant part of the New York City zero tolerance style policing initiative involved attempts at regulating various aspects of public expression, including refusals to permit processions, marches and rallies. There was a number of Federal Court cases challenging violations of the First Amendment (the right to free speech). These included successful challenges to allow a protest procession by taxi drivers in May 1998; to defeat an attempt to prevent food vendors from marching against a curtailment of their stands and to overturn a declaration that no more than 30 people could assemble at any one time on the steps of City Hall. In October 1998 the October 22 Coalition, which was planning a protest against police brutality, was refused a permit to march. The decision was overturned by a Federal Court judge who ruled that

⁵⁶ BBC News Online, *Clashes Erupt at NY Funeral* (8th April, 2000), BBC, http://news.bbc.co.uk/hi/english/world/americas/newsid_690000/690741.stm.

⁵⁷ CNN.Com US News (30th April, 2000).

⁵⁸ *Ibid* at page 3.

⁵⁹ *Ibid*.

⁶⁰ BBC News Online *Outrage at NYPD Shooting* (1st September, 1999), BBC, http://news.bbc.co.uk/hi/english/world/americas/newsid_435000/435529.stm.

⁶¹ B. Shapiro, “Zero Tolerance Gospel”, *Index Online* (Issue No. 4, 1998).

the refusal of the permit had more to do with the protestors' message than any likely traffic congestion. The City appealed against the decision. Three Federal Court judges however upheld the right to hold the march. In August 1998, a permit to hold the Million Youth March in Harlem was refused. A Federal Court judge ruled that the refusal was unconstitutional and that the rules in relation to granting permits were "breathhtaking in their lack of standards". A later Federal Court appeal upheld the right to allow the rally to take place.

The policing of demonstrations and marches in the city had been the subject of complaints about police concerning violence, provocation, the refusal to negotiate with organisers and widespread arrests. Immediately prior to the Million Youth March in Harlem, the Police Commissioner announced plans to "saturate the site" with police and to clear the streets promptly at 4 pm. The rally ended in violence when a police helicopter swooped low over the crowd and police in riot gear stormed the stage to shut down the meeting three minutes after the allotted time for the event had expired. The event had attracted 6,000 attendees and 3,000 police.

Mayor Giuliani might claim that his zero tolerance policy had brought the crime rate down in New York City to near record lows but by early 2000, the early widespread coalition of support for the "zero tolerance" policing initiative in New York City had been substantially reduced. In April the NYPD was forced severely to reduce the scale of Operation Condor, a typical zero tolerance style initiative where waves of uniformed and undercover officers had been sent on to the streets to stop and search anyone they believed was acting suspiciously. The operation had been a statistical success with extremely high arrest rates for minor drugs offences, but it has been a public relations disaster. The New York media had been running daily stories of outrage from citizens who claimed that, based on ill-founded suspicion, the police had subjected them to public humiliation. In the aftermath of the police killing of an unarmed security guard, Patrick Dorismond, the NYPD announced that it had cut funding for Operation Condor by a third and redirected the funds to more traditional policing methods such as street patrols. Public opinion polls showed that the once apparently politically invincible Mayor Giuliani was running a very poor second in the race with the Democratic candidate Hillary Clinton to become senator for New York State in September.⁶²

It was noted above that the successful politician in the postmodern metropolis has to balance the various interests of diverse and fragmented communities in order to gain and sustain an electoral coalition. New York City is undoubtedly such a metropolis and Rudolph Giuliani had in 1993 successfully identified crime control as a unifying concern among all communities. Blacks, Hispanics, Jewish, the white middle class, women, and mothers with young children all had an interest in serious crime control. The evidence suggests at the outset a broad coalition of support for the Giuliani/Bratton zero tolerance style policing initiative in New York. Crime levels were high and it would seem that near-desperate measures were being quite widely called for. However, as we have seen in the above discussion, by 2000 each of these groups had good reason to doubt that the ends justified the "get tough" means that were being employed by the NYPD. Consequently, the foundations of Mayor Giuliani's electoral coalition were falling apart. Zero tolerance style policing strategies were no longer popular in New York City.⁶³ Before reflecting further on why that should be the case, we will consider the implementation of such measures in Britain.

⁶² M. Riley, "Police Tactics Exceed New Yorkers' Tolerance", *The Age* (11th April, 2000).

⁶³ Rudolph Giuliani later withdrew from the electoral race for the Senate when he was diagnosed with cancer. Hillary Clinton subsequently won the Senate seat for New York State. According to opinion polls, Giuliani remained extremely

ZERO TOLERANCE STYLE POLICING IN BRITAIN

British zero tolerance style policing experiments have been introduced in very different, but usually metropolitan, high crime locations. Hartlepool and Middlesborough, in Cleveland, are two of the few places – outside London – where a police force has explicitly used zero tolerance style policing in Britain.⁶⁴ Following the high profile and much publicised adoption of the strategy in Hartlepool in 1994, the number of recorded offences was halved, while in Middlesborough reported crime was reduced by 20 per cent within six weeks.⁶⁵ Superintendent Ray Mallon – widely associated with the introduction of the strategy in both areas – was in late 1997 suspended from duty and accused of various counts of improper behaviour.⁶⁶ Zero tolerance style initiatives have nonetheless continued to be used but in a much lower profile fashion by the Cleveland Constabulary to target particular crime problems in the area on a short-term basis.⁶⁷ This more surreptitious approach to the implementation of zero tolerance style policing was to become increasingly characteristic of all British initiatives while at the same time they sought to gain and maintain the support of the local community in which they were introduced.

In October 1996, the Strathclyde Constabulary introduced the Spotlight Initiative in Glasgow.⁶⁸ Concerned at the outset about obtaining support and legitimacy, it held widespread consultations with the public. It was found that people were substantially more anxious about the security of their property and their personal safety in public places than they were about the possibility of becoming victims of serious crimes such as murder and rape. Altogether, 20,000 stop and searches were made in the first month with an overall reduction of nine per cent in recorded offences.⁶⁹

Spotlight has remained a long-term initiative that takes a targeted approach to those areas of crime identified by the public as being of the greatest concern to them. A flexible and responsive policing style involves using intelligence sources and technology to target problems and their sources. A high profile uniformed presence offers reassurances to the public. Partnerships are formed with other agencies.⁷⁰

In November 1996, the Metropolitan Police implemented a high profile – and again highly publicised – experiment known as “Operation Zero Tolerance” (in collaboration with the City of London Police and the British Transport Police) in the King’s Cross area of London. It lasted six weeks. The intention was “to target and prevent crimes which are a particular local problem, including drug-related criminality”⁷¹ and included elements of the New York approach of targeting minor crimes (such as dropping litter, graffiti, aggressive begging, and low-level disorder) adapted to deal with specific problems found in some locales in London. Police sources suggested a substantial reduction in the number of drug dealers operating in the area while independent

unpopular and although excluded by electoral law from seeking a third term of office the Republican candidate trailed a bad second. All of this was reversed following the terrorist attack on the World Trade Center on 11 September 2001 when the mayor became famous worldwide for his charismatic and dignified response to the disaster.

⁶⁴ *The Times*, “Zero Tolerance: There Should be No Blind Eye to Crime”, *Leading Article* (19 November, 1996).

⁶⁵ R. Chesshyre, “Enough is Enough”, *Telegraph Magazine* (1 March, 1997) pp. 20–6.

⁶⁶ At the time of writing in early 2002, Mallon is still awaiting a disciplinary hearing but remains extremely popular in the locality. In fact, the local Labour Party wish to adopt him as their candidate for the first elected Mayor of Cleveland.

⁶⁷ Cleveland Constabulary, *Policing Plan 2001–2* (Cleveland Constabulary, 2002).

⁶⁸ J. Orr, “Strathclyde’s Spotlight Initiative”, in Dennis (ed.), *op. cit.*

⁶⁹ W. Ellis, “Justice of the First Resort”, *The Sunday Times* (24 November, 1996).

⁷⁰ Strathclyde Police, “Introduction to Spotlight”, *Office of Chief Constable* (Strathclyde Constabulary, 2002).

⁷¹ Metropolitan Police, *Policing Plan 1995/96* (Metropolitan Police, 1995).

evaluations showed that 81 per cent of residents in the King's Cross area felt safer because of the operation.⁷²

The initiative was preceded and succeeded in the area by Operation Welwyn, established to tackle the problems of drug-related crime and street prostitution in partnership with the London Boroughs of Camden and Islington, the respective Health Authorities and local Community Action Groups. The expressed intention of the Operation Welwyn unit is to improve the quality of life for the residents, commuters and people who work in or pass through the area by reducing crime and the fear of crime. In order to target the specific issues raised by the public, the unit selects officers from Islington Police Station, the City of London Police and other specialist groups for short-term crackdowns. There are 34 officers currently working within Operation Welwyn. Two offences that particularly concern both the local population and those passing through are street drug dealing and prostitution. Long-term initiatives have therefore been introduced to tackle these problems. Plain-clothed officers specifically tackle the former with the assistance of video and photographic surveillance. Between 1992 and 1998, the unit made 598 drug-related arrests. Uniformed officers tackle the problem of prostitution 24 hours a day. Kerb-crawlers are stopped and have court summonses sent to their home address.⁷³

The Metropolitan Police have also introduced other longer-term initiatives and short-term crackdowns against particular offences in specific areas where there is widespread public support for these strategies. Launched in 1993, Operation Bumblebee is a now force-wide initiative introduced to tackle burglary. Three million explanatory leaflets and stickers have been distributed to homes throughout London and raids have targeted burglars and those who receive and sell stolen property right across London. The public is shown the results of police investigations through the media. Between November 1996 and October 1997, for example, 145,900 residential burglaries in the capital were cleared up and offences fell by 11.5 per cent.⁷⁴

Launched in May 1996, Operation Crack Down aims to arrest and prosecute drug dealers while diverting users into appropriate treatment. High visibility policing and long-term intelligence gathering are used to target prominent criminals. Between July 19th and August 24th of that year, there were 837 arrests for supply and possession of drugs and other criminal offences. In terms of partnership, drug misuse is widely recognised as a problem for the whole community and working in conjunction with other agencies the police seek to tackle local problems through local crime reduction strategies introduced by the Crime and Disorder Act 1998, a highly significant piece of legislation to which we will return below.

Although these British zero tolerance style policing initiatives have been far from homogeneous in approach there are identifiable common themes compatible with Friedmann's conception of community policing. First, they have all relied heavily on a visible presence of police officers interacting with the public on the street. Second, there has been a central focus on the police consulting public, private and voluntary agencies. Third, all of the schemes have been demand led introduced in response to public anxiety about high levels of crime and disorder and more general concerns about community safety.

This public anxiety has been very understandable in the context of an increasing trend for an over-stretched, resource-strapped, British police service ostensibly to

⁷² BBC News Online, *Ray Mallon and 'Zero Tolerance'*, (1 December, 2001), BBC, http://news6.thdo.bbc.co.uk/hi/english/uk/newsid_36000/36107.stm.

⁷³ Metropolitan Police, *Metropolitan Police Fact Sheets: Operation Welwyn* (Metropolitan Police, 2002).

⁷⁴ Metropolitan Police, *Metropolitan Police Fact Sheets: Operation Bumblebee* (Metropolitan Police, 2002).

withdraw from whole areas of traditional police work by proactively selecting, with crime management desks, those incidents to which they will respond. The respected British criminologists Rod Morgan and Tim Newburn observe:

At least one chief constable, for a force which sees itself as a front-runner in the pursuit of the new [crime management approach], has privately said to us that the concept of the community constable is no longer feasible, if was ever sensible, and that he could envisage a time when up to three quarters of all calls from the public to his force would no longer result in attendance by an officer. To the extent that this is so, the public may be educated to the view that this shift in prioritising the allocation of police resources is sensible and acceptable. But there is substantial room for doubt whether the public will be satisfied by any significant diminution in the visible presence of uniformed officers in their communities.⁷⁵

There is no doubt that the British “New” Labour Government elected in 1997 identified the legitimate widespread concern about supposedly minor crime, incivilities and public order offences that plague our communities as a major issue that cuts across the liberal/conservative political divide. The Prime Minister, Tony Blair, and his Home Secretary, Jack Straw, both, prior to gaining office, made highly publicised statements supportive of “zero tolerance” policing.⁷⁶ Subsequently, their flagship criminal justice legislation, the Crime and Disorder Act 1998 placed a statutory responsibility on local authorities to work with the police to tackle crime and disorder and to set local targets for reducing the scale and prevalence of these social problems. At the time of its implementation, the then Home Office Minister Alun Michael said:

What we will do is place a new joint responsibility on the police services and local authorities to develop statutory partnerships to prevent crime and enhance community safety by means of Community Safety Orders. We recognise how plagued many neighbourhoods are by continual anti-social behaviour by individuals or groups of individuals.⁷⁷

REFLECTIONS AND CONCLUSION

This paper has critically examined the introduction of zero tolerance style policing strategies in the USA and UK and advanced the proposition that this approach should be considered in the context of a contemporary conceptualisation of liberalism that promotes equally citizen responsibility and rights. We have seen that these strategies take different forms in different locations but fundamentally, all are founded on the idea that a rigorous intervention against minor offences helps remove the preconditions that encourage more serious crime. It is proposed in this paper that “proactive, confident, assertive”⁷⁸ zero tolerance style policing strategies *can* be very much in accordance with this revised notion of liberalism. They are forms of community policing that take account of both the rights of the community *and* the individual, but which are highly dependent upon the continuing support of the former to enable them to be – and remain – successful.

It was observed that the socio-political conditions in New York City were very much hospitable to a zero tolerance style of policing when initiated by Mayor Giuliani and

⁷⁵ Morgan and Newburn, *op. cit.*, at p. 212.

⁷⁶ T. Blair, “Interview with Tony Blair”, *The Big Issue* (8 January, 1997); A. Travis, “Atlantic Cuffings”, *The Guardian* (21 November, 1996).

⁷⁷ A. Michael, “First Steps in Consultation on Crime and Disorder”, *Home Office News Release*, 149/97 (12 June, 1997).

⁷⁸ Hopkins Burke, *op. cit.*, (1998).

Commissioner Bratton in 1993. The former clearly came from an unambiguous right-wing political background but was very aware of the necessity of building a very broad electoral coalition that inevitably included both white liberals and sizeable numbers of those from the ethnic minorities. It was a coalition highly receptive to the targeting of “quality of life” crimes in order to restore law and order to the streets. Moreover, it appeared to work. The crime statistics pointed to substantial reductions in crime.

Initially, the police were to receive widespread popular credit and support for the decline in the crime rate. Furthermore, the black communities initially welcomed the Giuliani/Bratton police intervention as it promised targeting the criminals in their midst to the advantage of the law-abiding majority.⁷⁹ With the passage of time, the level of support went into steep decline and the dominant electoral coalition was to fragment. Police brutality remained a serious problem in the NYPD and the evidence suggests that the large majority of the victims of such abuses were members of ethnic minorities.⁸⁰ Bratton himself – now the former Police Commissioner – argued that the police should avoid alienating ethnic minorities in order to boost police effectiveness but his successor and Giuliani remained committed to their “get-tough” approach.

As we have seen, blacks, Hispanics, Jews, the white middle class, women and mothers with young children all had a material interest in crime control. However, eventually members of each of these groups were to experience dubious NYPD tactics and incidents of unprofessional behaviour. There is a suggestion here that “get-tough” policing measures might be useful – and widely perceived to be legitimate – in the short-term. Communities seem prepared to tolerate such assertive approaches when the extent of a crime problem is clearly intolerable. When the problem is alleviated, people rediscover their critical faculties. Moreover, it may be harder to restrain overzealous police officers from breaches of professional behaviour in the long-term. These lessons seem to be very much heeded in the rather different British context – and implementation – of zero tolerance style policing.

British zero tolerance style initiatives have been introduced in very different high crime locations and although not homogenous, all have common features. First, they have all been dependent on a highly visible police presence on the street interacting with the public. Second, there has been a central focus on the police consulting public, private and voluntary agencies in order to gain widespread legitimacy for their initiatives. Three, short-term focused “crackdowns” have been implemented to target particular offences without an overbearing long-term presence that comes to alienate the particular community. Fourth, and perhaps most significantly, in view of the experience of New York City all schemes have not just been introduced in response to widespread public anxiety about high levels of crime and disorder, but have remained sensitive to the demands of the community.

Thus, we might observe that successful proactive, confident, assertive policing initiatives need to be driven by the concerns of the particular community. Police activity that is not community driven is not community policing and will not be considered legitimate by the community. The police service cannot be used as a blunt instrument to help restore some partially and inaccurately remembered monocultural moral certainty of modernity. Such an approach can only lead to dissent and, probably, to serious social disorder, and indeed would be an essential defining

⁷⁹ Silverman, *op. cit.*

⁸⁰ Amnesty International, *op. cit.*

characteristic of a new authoritarianism. A “new liberalism” – as we observed at the outset of this paper – promotes both the responsibilities and the *rights* of *all* its citizens in equal measure.

A RELATIONAL AND ECONOMIC ANALYSIS OF BANKING REGULATION UNDER THE FINANCIAL SERVICES AND MARKETS ACT 2000

*DAVID McILROY**

INTRODUCTION

The Bank of England Act 1998 and the Financial Services and Markets Act 2000 ("FISMA") together effected a major shift of policy with regard to banking regulation in the U.K. The sheer scale of FISMA, with 433 sections, 22 Schedules and 92 statutory instruments¹ enacted under its aegis makes commenting on it a daunting task. But behind the detail, a new regulatory approach underlies FISMA, which the Financial Services Authority ("F.S.A.")² is now seeking to implement.

FISMA adopts a radical approach, and has subsumed regulation of traditional banking activities within a broader regulatory framework for financial services ranging from shares and derivatives to insurance and mortgages. Nonetheless, although the distinctive nature of banking regulation is now obscured by its incorporation within the general legislative framework for financial services to be found in FISMA, in its international sources,³ the law relating to the authorisation, supervision and regulation of banks and banking activities remains a clearly identifiable corpus of rules.⁴

This article attempts a preliminary evaluation of the new FISMA regime, by comparison with the previous supervisory approach of the Bank of England (with regard to its style) and the historic approach to banking regulation in the U.S.A. (with regard to its policy goals). These three approaches are considered in the light of two schools of legal analysis which have broken the traditional mould by explicitly including policy considerations in the work of the legal academic.

THE ECONOMIC ANALYSIS OF LAW

The first and most widely known is the school of the Economic Analysis of Law, whose central thesis is that the law is in fact (and should be) contoured so as to promote the goal of economic efficiency. The value of economic efficiency is that it maximises welfare/ utility across society as a whole. That assertion is premised upon rational choice theory, which depends upon the assumption that people are rational maximizers

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¹ At the last count on 8th March 2002.

² Not to be confused with the Financial Services Act 1986, the predecessor to FISMA for non-banking activities, which was also habitually abbreviated to F.S.A.

³ Principally E.U. legislation, now mostly consolidated in the Banking Consolidation Directive 2000, and in the work of the Basle Committee on Banking Supervision.

⁴ Whose focus is on banks' activities as deposit-takers.

of their satisfactions,⁵ and upon the deeper assumption that the pursuit of such individual maxima of satisfactions will in fact achieve the greatest happiness of the greatest number. Rational choice theory can therefore be seen as the explanatory counterpart to the normative theory of preference utilitarianism.⁶

Despite Richard Posner's protestations to the contrary,⁷ the reality is that rational choice theory and the Economic Analysis of Law tend to be primarily about money.⁸ The reason for this is that money and the cost of choices in monetary terms are capable of straightforward calculation in a way that evaluating the emotional, social, and psychological impact of particular decisions is not.

According to the most aggressive partisans of the Economic Analysis of Law, values such as honesty, the keeping of promises *etc.* are desirable not for their moral value *in se* but because of their contribution to economic efficiency.⁹ Put bluntly, honesty is worthwhile because honesty tends to reduce transaction costs.

Others are more measured, and put forward economic efficiency as a tool with a powerful ability to explain the shape of many existing rules (*positive* Economic Analysis of Law) as well as being one of several policy goals which the law ought to be pursuing (*normative* Economic Analysis of Law).

RELATIONAL ANALYSIS

The second approach is that of Relationism. Relationism's proponents argue that because human beings are social beings, human wellbeing is, in the final analysis, promoted more by healthy relationships than by a healthy bank balance.¹⁰ The proper goal of the law is to do what it can to contribute to meaningful relationships within society. Relationism suggests that good relationships tend to exhibit relational

⁵ B. Cheffins *Company Law, Theory, Structure and Operation* 4.

⁶ As it is by John Braithwaite and Philip Pettit in "Republicanism and Restorative Justice: An Explanatory and Normative Connection" in H. Strang and J. Braithwaite ed. *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000) 147.

⁷ R. A. Posner *The Economic Analysis of Law* 4th edn. (Boston: Little Brown & Company, 1992) "... one of the most tenacious fallacies about economics [is] that it is about money. On the contrary, it is about resource use, money being merely a claim on resources."

⁸ One of the criticisms feminism makes of the current dominance of economics as an approach to public policy is that it systematically overvalues the importance of men, who tend to be in the higher paid jobs in the workplace, and undervalues the importance of women, who tend to be in lower paid jobs and contributing through caring and domestic activities in ways that are not directly remunerated in cash terms: C. Mackinnon *Feminism Unmodified* (Cambridge, MA: Harvard University Press, 1987) 33–37; S. Okin "Women and the Making of the Sentimental Family" *Philosophy and Public Affairs* 11/1 (1981) 85; *Justice, Gender and the Family* (New York: Basic Books, 1989) 128–30; Z. Eisenstein *The Radical Future of Liberal Feminism* (New York: Longman, 1981) 66; J. Elshtain *Public Man, Private Women: Women in Social and Political Thought* (Princeton, NJ: Princeton University Press, 1981) 176.

⁹ See A.T. Kronman and R.A. Posner *The Economics of Contract Law* (Boston: Little Brown & Company, 1979) 1–3; and "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication" (1980) 8 *Hofstra Law Review* 487. At times Posner's own position appears nuanced: "... the term efficiency, when used as in this book to denote that allocation of resources in which value is maximized, has limitations as an ethical criterion of social decisionmaking. Utility in the utilitarian sense also has grave limitations, and not only because it is difficult to measure when willingness to pay is jettisoned as a metric. . . . Other familiar ethical criteria have their own serious problems. *Although no attempt will be made in this book to defend efficiency as the only worthwhile criterion of social choice, the book does assume, and most people would probably agree, that it is an important criterion*". *The Economic Analysis of Law* (4th edn, 1992) 13, emphasis mine. Elsewhere, as, for example, in *Sex and Reason* (Cambridge, MA, 1992), when he reduces marriage to an implicit contract for the exchange of sexual and other services, he reveals himself to be both rigorous and ruthless in his application of economic analysis.

¹⁰ Although they would recognise the significant contribution of financial difficulties to marital breakdown: Keith Tondeur of Credit Action argues in *Say Goodbye to Debt* (Marshall Pickering, 1994) 35, that money worries are named as the number one cause of marriage break-up in 70 per cent of cases.

proximity, and that relational proximity is indicated by the presence of a combination of five factors: directness,¹¹ continuity,¹² multiplexity,¹³ parity¹⁴ and commonality.¹⁵

Relationism comes in two versions. “Weak” relational analysis provides a critique of existing law in so far as it does not promote relational proximity. Close relationships are better than less close equivalent relationships, and insofar as the law either penalises relational proximity or fails to take positive steps to promote it, the law is deficient. “Strong” Relationism recognises that while greater relational proximity may be highly desirable in order to achieve good relationships within society, close relationships may not necessarily be good relationships.¹⁶ “Strong” Relationism suggests that relational integrity is another proper goal of the law.¹⁷ Relational integrity is made up of honesty, transparency, consistency, fidelity and positivity (the opposite of negativity.)¹⁸ When compared with Weak Relationism, Strong Relationism has both the merits and the defects of having a richer moral content upon which to draw.

The questions this paper seeks to address are whether in its regulatory style and its regulatory goals, the FISMA regime for banking regulation is theoretically sound in terms of Relational Analysis and or the Economic Analysis of Law.

THE STYLE OF BANKING REGULATION

In broad terms, the history of banking supervision in the U.K. over the last fifty years can be seen as an accelerating move away from a primarily relational style of banking supervision towards a more economically calculated approach.

The Bank of England's relational approach to banking supervision

The Banking Act 1979 gave the Bank of England the responsibility for licensing all institutions taking deposits (*i.e.* all “banks”). Prior to the Banking Act 1987, the Bank

¹¹ Directness refers to the quality of communication, and is defined by Schluter and Lee in *The R Factor* (London: Hodder & Stoughton, 1993) 274 as “that condition in a relationship involving a lack of mediation in contact and, at its most intense, involving face-to-face meeting”.

¹² Continuity refers to the frequency, regularity and amount of contact, and the length of the relationship, and is defined by Schluter and Lee, *op. cit.*, 274 as “that condition in a relationship involving frequency, regularity and sustaining of contact”.

¹³ Multiplexity refers to the variety of contexts in which the parties meet, and is defined by Schluter and Lee, *op. cit.*, 275 as “that condition in a relationship involving contact in more than one context or role”.

¹⁴ Parity is a slightly maladroit term which refers to the mutual respect and fairness evident in the parties’ relationship, and is defined by Schluter and Lee, *op. cit.*, 275 as “that condition in a relationship involving an approximate balance of power or influence, whether or not operating from an institutional base”. M. Clark “Relational Impact Statements: Measuring the effect of public policy on personal relationships” in N. Baker (ed.) *Building a Relational Society: New Priorities for Public Policy* (Aldershot: Ashgate, 1996) 256 has suggested that parity can be measured by “[t]he extent to which people meet as equals, not necessarily in terms of their role or status but in terms of their perceived personal worth”.

¹⁵ Commonality refers to shared goals, values and experience, and is defined by Schluter and Lee, *op. cit.*, 273 as “that condition in a relationship involving common purpose”.

¹⁶ One only has to look at the statistics on domestic violence to realise that to be the case. Strictly speaking, in terms of relational proximity, such a domestic arrangement is likely to be severely deficient in parity and commonality.

¹⁷ In fact, “weak” and “strong” Relationism do not exist in hermetically (or hermeneutically) sealed boxes, as Schluter and Lee recognise in the final chapter of *The R Factor*. In that chapter, they identify some of the ideological underpinnings of Relationism, and in particular the notion that “a good relationship is to be understood primarily as a morally good relationship”: *op. cit.*, 267.

¹⁸ As defined by Stephen Copp in “Developing a Relationally Based Law of Contract” in *Christian Perspectives on Law and Relationism* (Carlisle: Paternoster, 2000) 64; see also Timothy M. Green “Banking and Finance: the importance of relationships” in Nicola Baker (ed.) *Building a Relational Society* 202, Richard Higginson *Transforming Leadership, A Christian Approach to Management* (London: SPCK, 1996) chapter 3, and “The Cadbury Committee report” (*The Report of the Committee on the Financial Aspects of Corporate Governance*, London: Gee & Co, 1992) which proposed a Code of Best Practice based around the principles of “openness, integrity and accountability”, with integrity expressly defined by the Committee as “both straightforward dealing and completeness. What is required of financial reporting is that it should be honest and that it should present a balanced picture of the state of a company’s affairs.”

of England was under no statutory duty to supervise banks. It had no statutory powers to assist it in doing so. However, as a matter of practice, it did so as part of its “responsibility as guardian of the good order of the financial system as a whole”.¹⁹

The way in which the Bank of England approached its supervisory function was to focus it around the “interview . . . the aim [of which] is to build up within the Bank an intimate picture of the institution, its business and objectives, and to assess the capabilities of its management to control the business and fulfil the objectives”. Because of the highly concentrated nature of the centre of British finance, it was possible to have regular direct meetings between senior officials at the Bank of England and the banks in the City.²⁰ In relational terms, the Bank of England’s approach scored highly in terms of directness and continuity.

The Bank of England believed that its approach was successful in fostering trust and confidence, in other words that parity and reciprocal relational integrity with the banks were good. When intervention by the Bank of England on the markets was required, it sought to do so with the co-operation and assistance of the major banks, thus further fostering parity and commonality. No doubt, given the tendency of the City before the “Big Bang” to operate as a club, multiplexity was also a feature of the Bank of England’s regulation, as its officials met with senior members of the banks socially. Control over the activities of errant banks was achieved by the proverbial “raising of the Governor’s eyebrow”.

The result was that the Bank of England believed that it had the trust of and the support of both the banking community as a whole and of individual banks within that community. When crises in the banking sector in the late 1970s and early 1990s necessitated action to restructure the sector, it was able to call on the major banks for assistance in order to alleviate the situation.

And yet, for all of that, it has been in England that the scandals of the collapse of Johnson Matthey Bankers and BCCI have occurred.²¹ That is not to say that BCCI was not an international scandal,²² nor to ignore the crises and collapses such as *Crédit Lyonnais* and *Banco Ambrosiano* that have occurred on the Continent.

The high degree of trust between the Bank of England and the banks it was supervising was thought to lead to a free flow of information so that the Bank of England was ideally placed to monitor events within the banks under its supervision. The reality was, however, that the close relationship led to the Bank of England being overly accepting of what it was told by the banks, and reluctant to probe and investigate behind what was being presented to it in order to discover the truth. Furthermore, the proximity of the Bank of England to the banks it was regulating led to it regarding itself as guardian of the banking community rather than as protector of the interests of the bank’s customers, investors and so on.

The collapse of Johnson Matthey Bankers is a case in point. Johnson Matthey Bankers had been one of the banks that the Bank of England had thought it could trust, and therefore monitor only loosely. It demonstrated the wisdom in the words of Bingham L.J., as he then was, in the report into BCCI: “The Bank of England’s traditional techniques of supervision, based as they are on trust, frankness and a

¹⁹ Page and Ferguson, *Investor Protection* (London, 1992) 85.

²⁰ Ken McGuire, “Emergent Trends in Bank Supervision in the United Kingdom” (1993) 56 M.L.R. 669 at 676.

²¹ The collapse of Barings in the 1990s falls into a different category altogether because, although a U.K.-based bank, it was brought down by the activities of a single rogue trader in Singapore, whose activities went unnoticed because there was inadequate supervision *within* the bank itself.

²² The supervisor with formal responsibility for supervising BCCI S.A. was the Luxembourgish supervisory authority, initially the Commissariat au Contrôle des Banques and latterly the Institut Monétaire Luxembourgish.

willingness to co-operate, seem to me on the whole to have served the banking community well". However, he continued: "[o]ne of the virtues claimed for the Bank's supervision is its flexibility. This should mean that a quite different supervisory approach is adopted where trust and frankness are lacking."

Within a decade of Bingham L.J.'s observation, the U.K. government had chosen to put in place a radically different approach to the supervision of banks.

The F.S.A.'s economically calculated approach to banking supervision

The apparent susceptibility of the English banking system to spectacular collapses has led to responsibility for banking supervision being removed from the Bank of England and given to the Financial Services Authority ("F.S.A.")²³ and to the replacement of the Bank's informal approach to supervision with far more rules-based techniques of regulation.²⁴

The reasons for the change are numerous and probably cumulative. The foundation of the Bank of England's informal approach to supervision was its supposed prestige and reputation. Post-BCCI, it is only a slight exaggeration to describe the Bank of England as "reputationally bankrupt" so far as its ability to supervise was concerned. While that made a new start for banking regulation inevitable, the F.S.A. has no historical capital on which to draw, and has to build a reputation from the ground up.

Equally, if not more important, has been the change in the nature of the marketplace over the last twenty years. The German model of universal banking has become the norm. Banks now routinely have securities divisions and insurance subsidiaries. This new multifunctionality on the part of the firms being regulated was a major reason for giving the F.S.A. responsibility for supervision of securities activities,²⁵ as well as traditional banking activities. This decision immediately raised an issue about the future regulatory culture that the F.S.A. would adopt, as the securities regulators that it replaced had traditionally exercised their powers in a far more arms-length way than the way in which the Bank of England used its authority.²⁶ Instead of "quiet words" and informal sanctions, there was a preference for disciplinary action and public sanctions.

A further factor, which militates against the use by the F.S.A. of a relational approach to banking supervision, is the issue of scale. Banking groups are now much larger organisations than before and the F.S.A. is a much larger regulatory authority, with much broader responsibilities than anything seen previously in the U.K.

Finally, the impetus for the change has come partly from the European Union. Building the single market depends on the adoption of common standards or on the mutual recognition of national approaches to banking regulation. It is far easier to check whether rules are being adhered to than whether informal techniques of supervision are proving effective, and therefore the European Union has issued a series of Directives, which have formalised regulatory criteria and methods.

Under the FISMA regime, the F.S.A. has announced that its preferred regulatory style places a new emphasis on thematic and industry wide work. The aim is to

²³ By the Bank of England Act 1998.

²⁴ McGuire, "Emergent Trends in Bank Supervision in the U.K." (1993) 56 M.L.R. 669; Jonathan Scott, "Banking and Securities Regulation: When Two Worlds Collide" (1998) 13 Butterworth's Journal of International Banking and Finance Law 171.

²⁵ Under the Financial Services and Markets Act 2000.

²⁶ Jonathan Scott, *op.cit.*

implement “risk-based regulation” with firms supervised more or less closely depending on the degree of risk that the F.S.A. believes they pose to its achieving its statutory objectives.²⁷

Therefore, the F.S.A. has indicated that for certain categories of businesses it will make far fewer routine visits than were its predecessors’ habits.²⁸ At the F.S.A. 2000 conference, Michael Foot, Managing Director and Head of Financial Supervision for the F.S.A. said that “institutions which represent a low risk to our objectives . . . will not have the close continuous interaction with F.S.A. staff that they have had at present, because their risk assessment does not justify it”. Viewed in relational terms, this is a pronouncement that for those firms their future relationship with the F.S.A. will be less direct and less continuous. There have, therefore, to be concerns about whether such a change in approach will be effective.

The reason for the change is an economic calculation. Put bluntly, often the costs of direct contact outweigh the potential for damage *to the system* if the institution in question fails. The F.S.A. itself is quite sanguine about the possible consequences. To quote Michael Foot again “. . . to stress one common theme in all we have been saying, we are not targeting for a zero failure regime, and we will not be seeking to prevent failure of any institution at any price”.

The difficulty for the F.S.A. is judging accurately the potential for systemic harm. Banking is an industry that depends upon consumer confidence, and that confidence is a volatile substance, which may evaporate at any moment.²⁹ An apparently minor bank failure *could* cause a disproportionately large reaction on the part of bank customers, with social and systemic costs far in excess of those the F.S.A. had calculated for.

Conclusion: relationally proximate supervision or economically calculated supervision?

There is no doubt that the Bank of England’s informal regulatory regime scored highly in terms of relational proximity. Its apparent failure could therefore be regarded as fatal to the contentions of Relationism in this field. However, this failure, at the very least in relation to the BCCI affair, may be understood as an example of excessive relational proximity without sufficient reciprocal relational integrity. While the F.S.A.’s more rules- and risk-based strategy has undoubted potential for reducing the costs of regulation, it remains to be seen whether the loss of a degree of relational proximity will also carry with it a loss of regulatory effectiveness. Although the spectacular collapses of the Bank of England’s reign are well-publicised, its largely successful rescues of banks during the secondary lending crisis of the 1970s and the property crisis of the early 1990s have received less attention. It is doubtful whether the F.S.A., with its more hands-off approach, will receive similar assistance from the major banks in such endeavours in the future.³⁰

²⁷ That risk is assessed “according to the impact that they would have on our objectives if the risk materialised, [and] the probability of them occurring at all”: F.S.A. 2000 conference paper by Michael Foot, Managing Director and Head of Financial Supervision, F.S.A. *Our New Approach to Risk-Based Regulation – What Will Be Different for Firms*.

²⁸ Michael Foot said that in relation to low risk institutions we would expect our routine oversight to be based predominantly on remote monitoring, and supported by sampling of particular lines of business . . . and by our thematic work . . . institutions which represent a low risk to our objectives, may in the past have been subject to regular routine monitoring. Such visits will effectively cease and be replaced by what we hope is a much more cost effective and focussed combination of sample visits to monitor general compliance standards in a sector, and desk-based work to monitor performance.

²⁹ Witness the present hysteria over the MMR vaccine.

³⁰ Although even under the FISMA regime, it is the Bank of England rather than the F.S.A., which remains the Lender of Last Resort for U.K. banks.

In economic terms, the (non-)supervision of BCCI may yet prove to be a very expensive mistake for the Bank of England.³¹ It does not make an attractive advertisement for the supervisory regime which it operated at the time. Ultimately, a judgement will have to be made about the relative cost and effectiveness of the new regime. At present, it is too early to tell.

THE GOALS OF BANKING REGULATION

For most of the history of banking, there has been little or no formal supervision of banking business. That is in sharp contrast to the modern financial services sector, which is now heavily regulated. There is no doubt that the requirements of banking supervision add significantly to transaction costs. The key gain flowing from banking supervision is that its requirements tend to keep banks from becoming insolvent, and “manage” the consequences of banks becoming insolvent, so that their failure does not corrode the financial system as a whole.

Is banking regulation economically justified?

It is no accident that FISMA is called the Financial Services and *Markets* Act. The F.S.A.’s role is to regulate the financial services marketplace. All markets need some form of regulation, if only in the form of contract law to ensure that bargains are kept, and elementary trading standards law to ensure that honest weights and measures are used.

In the context of financial services, David Llewellyn has convincingly argued that in the absence of regulation, bad behaviour can lead to gridlock, as good firms, which take prudent decisions, are driven out of business as customers are attracted to firms which promise greater rewards, but have to take unwarranted risks in order to attempt to achieve them.³² Regulation, therefore, “can have a positive and beneficial effect of breaking a *grid lock* by offering a guarantee that all participants will behave within certain standards”.³³

But bank regulation is far more intrusive than trading standards laws or the requirement that all gas fitters must be CORGI registered. Leaving aside the arguments that there are no market failures in the financial services markets and that if they do exist they are not sufficiently serious to warrant regulation (assumptions which are perilous in the light of the BCCI, Equitable Life, pensions mis-selling and other recent scandals),³⁴ the case for the present level of banking regulation still needs to be made out.

The argument that banks are special and therefore need careful supervision is broadly this. Banks operate by recycling money. They collect it from their depositors and then lend it out again, thereby promoting allocative efficiency within the economy as a whole. Typically the terms on which they operate are that they borrow short and lend long. In other words, at any given moment, although the totality of the banks’ assets may be sufficient to cover their liabilities, it is highly likely that if all those who were entitled to withdraw their money chose to do so simultaneously the bank would

³¹ The House of Lords has refused to dismiss the litigation brought by Three Rivers District Council and countless other claimants at the interim stage: *Three Rivers D.C. v. Bank of England (No.3)* [2001] UKHL 16, [2001] 2 All E.R. 513; [2001] Lloyd’s Rep Bank 125. The trial of the action is expected to take a year.

³² Llewellyn, *op. cit.*, 27.

³³ *Ibid.*, 28.

³⁴ Llewellyn, *ibid.*, observes “In recent years, bank failures around the world have been common, large and expensive”, 7.

be insolvent. The continuing solvency of an individual bank therefore depends on its customers retaining their confidence that their money is safe while it is in the bank's hands.

However, because of the nature of banks and the products that they offer, customer confidence can easily be misplaced. One of the major reasons for regulating financial services markets is that they are the most likely to demonstrate information asymmetry.³⁵ It is therefore necessary to have common rules so that the financial status of banks and the attractiveness of their products can be readily compared, and supervision to ensure that banks are not disguising unduly large burdens of bad debt. Because of the long-term nature of customer's relationships with their banks, it is necessary for a regulator to be constantly maintaining vigilance over the banks' solvency.

The majority of commentators would accept this analysis, including the doyen of the Economic Analysis of Law, Richard Posner, who argues that concealing vital financial information from creditors, which, if known, would impair a person's reputation, is equivalent to the fraud of a producer concealing defects in its products.³⁶ Benston is something of a lone voice in over-optimistically arguing that the market would lead to voluntary disclosure in any event.³⁷ One of the major advantages of mandatory disclosure rules is that, because all companies in the market are required to provide the same information in the same terms, it eases comparison between alternative products.³⁸

Furthermore, because banks are so linked to one another in the marketplace, they are liable to systemic risk; either because when one bank fails, there is a run on all the other banks as their customers lose confidence, or because when one bank fails owing money to other banks, they are dragged down with it.

Systemic risk is the ultimate nightmare for governments. Systemic risk is the most extreme form of market failure, in which the collapse of one or more troubled financial institutions triggers a contagious collapse of otherwise healthy firms.³⁹ Some forms of regulation can be understood as insurance by and for depositors against that low-probability but high-impact event from which no-one in the banking system can be protected, no matter how well their particular bank is run.⁴⁰

In evaluating the economic efficiency of banking supervision the question is whether the increased transaction costs associated with regulation are outweighed by other economic gains.⁴¹ The problem with determining whether regulation is more cost-effective than

³⁵ Dale and Wolfe, "The structure of financial regulation" (1998) 6 *Journal of Financial Regulation and Compliance* 327; see also the observations of Andrew Whittaker, General Counsel to the Financial Services Authority, in "The Role of Competition in Financial Services Regulation", a presentation to the Regulatory Policy Institute on 27th April 2001, paras. 26–7.

³⁶ R. Posner, "The Right of Privacy" (1978) 12 *Georgia Law Review* 393; "Privacy, Secrecy and Reputation" (1979) 28 *Buffalo Law Review* 1.

³⁷ Benston's argument is that efficient and competitive companies have an interest in disclosing relevant information to consumers in an open manner, whereas government-imposed disclosure requirements are never universally useful and may even "keep financial product providers from communicating effectively with consumers": G. J. Benston *Regulating Financial Markets: A Critique and Some Proposals*, Hobart Paper No. 135, (London: Institute of Economic Affairs, 1998). Llewellyn strongly disagrees: *The Economic Rationale for Financial Regulation* (FSA Occasional Paper Series 1, 1999) 32–3.

³⁸ Llewellyn, *ibid.*, 33.

³⁹ Dale and Wolfe, "The structure of financial regulation" (1998) 6 *Journal of Financial Regulation and Compliance* 326.

⁴⁰ Llewellyn, *op. cit.*, "regulation to prevent systemic problems may be viewed as an insurance premium against 'low-probability-high-seriousness' risks", 16.

⁴¹ Andrew Whittaker, General Counsel to the Financial Services Authority, observed in "The Role of Competition in Financial Services Regulation", a presentation to the Regulatory Policy Institute on 27th April 2001

"... competition and regulation are not always and inevitably in conflict. It is true that compared with that idea, the perfect market place, regulation can create barriers to entry and potentially reduce competition. But we do not enjoy a perfect market place" (para. 20).

allowing market failure is that it is rather like quantifying the value of policing in terms of its effectiveness in preventing major rioting. It is almost impossible to assess its cost accurately as against the impact of that which has not occurred because of its existence.

There are, however, further economic arguments available to support the need for regulation, which turn on rational choice theory. Consumers display a rational preference for banking regulation. Why? There are two main reasons: (1) a significant proportion of their wealth and above all their liquid assets are looked after by the banks. Therefore bank failure is viewed as serious by them.⁴² (2) They lack the necessary information, time and skills to be able to check the soundness of the banks themselves, and therefore it is rational for them to “delegate” that responsibility to government.⁴³ This is particularly true given the long-term nature of financial services products, and the fact that “no amount of information at the time contracts are signed and purchases made protects against *subsequent* behaviour of the [bank]”.⁴⁴

As Llewellyn concedes, if the public want something it has potential value within welfare economics on the basis that “[t]here is an evident consumer demand for regulation and hence, irrespective of theoretical reasoning, there is a welfare gain to be secured if, within reason, this demand is satisfied”.⁴⁵ This is a perfectly sensible recognition of the fact that there is more to human well-being than simply the amount of money in one’s pocket at any given time. Knowing that it will still be there tomorrow enables one to sleep more easily, and having slightly less money but being sure of its continued existence will be chosen by most risk-averse consumers ahead of having a slightly greater sum but with far greater uncertainty. In economic terms, “[t]he ultimate rationale for regulation designed to protect the consumer is to correct for market imperfections or market failures which would compromise *consumer welfare* in a regulation-free environment”.⁴⁶

“The costs of regulation should not be compared with a zero cost base but with the costs imposed on the consumer by any alternative to regulation, *e.g.* monitoring and verification costs.”⁴⁷ Despite the critiques, ultimately Llewellyn is right to conclude that “in some circumstances [and markets] (including finance), enforceable and monitored regulation (which has a cost attached) can be justified as an alternative to high transaction costs for consumers”. More positively, he argues that “[t]o the extent that regulation enhances competition and overall efficiency in the industry, it creates a set of markets which overall work more efficiently and through which everyone can gain”.⁴⁸ Unfortunately, that latter formulation begs the very question at issue.

The problem is that so long as consumers perceive regulation as a free good, there will be a tendency for them to demand more regulation and for governments to over-regulate, *i.e.* to supply more regulation than is economically efficient.⁴⁹ From a governmental perspective, the political dangers attendant upon systemic risk are too horrible to contemplate, and so they too have an incentive in over-regulating, quite

⁴² Llewellyn, *op. cit.*, 31.

⁴³ Llewellyn, *op. cit.*, 10, 21–4, 35–9.

⁴⁴ Llewellyn, *op. cit.*, 10.

⁴⁵ Llewellyn, *op. cit.*, 30.

⁴⁶ Llewellyn, *op. cit.*, 21, emphasis mine. See also 23 where he says

“The purpose of regulation is not to replace competition but to enhance it and make it effective in the marketplace by offsetting market imperfections which potentially compromise consumer welfare. . . . Information, and therefore disclosure requirements, are an important part of this process”.

⁴⁷ Llewellyn, *op. cit.*, 39.

⁴⁸ Llewellyn, *op. cit.*, 45.

⁴⁹ Llewellyn *The Economic Rationale for Financial Regulation* (FSA Occasional Paper Series 1, April 1999) 6

apart from the short-term response to consumer pressure.⁵⁰ So, with incentives on both consumers and governments to over-regulate, that is what is likely to occur. Even if banking regulation is theoretically justifiable, the economic critique of the FISMA regime is that, in its design, the U.K. government has succumbed to the temptation to over-legislate.

Is banking regulation justifiable in relational terms?

Information asymmetry is among the principal reasons identified by Economic Analysis of Law as a possible justification for banking regulation. In Relational terms, one of the major causes of information asymmetry in the marketplace as it currently stands, is the lack of directness and parity between customers and financial institutions. Even a customer's contact with his or her local branch is limited, and he or she has little way of finding out about the financial soundness of the banking group as a whole, with its worldwide and multifunctional nature. The activities of a single rogue trader in Singapore⁵¹ or the U.S.A.⁵² may have a profound effect on the solvency of the bank in which he or she has invested, without there being any idea or opportunity to find out about the consequences before it is too late. Equally, he or she has no control over the companies in which his or her bank invests his or her money.

In a market configured in such a way, it is legitimate and necessary, Relational theory would argue for the customer to ask someone, the regulator, to stand in his or her place and to seek to exercise control, restraint and oversight of the bank's activities on his or her behalf, on a basis of directness and parity. The regulator expresses commonality with the customer by agreeing to act in the customer's interests. Regulators also have some degree of commonality with the banks they supervise, in that both sides have a common interest in seeing the banks operate successfully. Relationally proximate regulation is, therefore, theoretically justifiable from a Relational perspective.

However, analysing the arena in which regulators now operate, Schluter and Lee conclude that "[i]t is an unenviable job being a regulator – employed by one giant to rap another giant over the knuckles."⁵³ With the creation of the F.S.A. banking regulation has become about one giant creating another giant to rap lots of other giants on the knuckles. There was some speculation during the passage of FISMA 2000 through Parliament about whether the F.S.A. was about to become the most powerful public body in the country outside of Parliament itself.⁵⁴ Alastair Alcock comments that "[t]he initial impetus to create a "Super Regulator" was probably brought about by the need to avoid a different type of monster, namely an independent central bank that remained responsible for supervising the banking system".⁵⁵

In general, given the present structure of the market, Relational theory has far less angst about the desirability of regulation than does economic analysis. Having said that, Relational theory would suggest a very different market structure as a goal for banking regulation.

⁵⁰ Llewellyn, *ibid.*, 13–4.

⁵¹ To take the case of Barings Bank, an English bank.

⁵² In the case of Allied Irish Bank.

⁵³ Michael Schluter and David Lee, *The R Factor* (London: Hodder & Stoughton, 1993) 106 see also 105.

⁵⁴ An Opposition spokesman, Andrew Tyrie MP, said during the course of the Parliamentary debates, "We need to be clear that we are creating a leviathan – an institution of unprecedented power and authority . . . We are creating the most powerful body in this country after the Government"; Hansard Vol 343 HC, 27 January 2000, c608.

⁵⁵ Alistair Alcock *The Financial Services and Markets Act 2000* (Bristol: Jordans, 2000) 9. As a matter of historical fact, the F.S.A. was given its supervisory responsibilities over banks by the Bank of England Act 1998 which gave the Bank of England its independence.

IS THE FISMA REGIME THEORETICALLY JUSTIFIED?

Relational and Economic Analysis of Law each prescribe a distinct structure for the market for banking services. The ideal market in economic terms is one in which perfect competition ensures economic efficiency. The role of the banking regulator within such a market is to prevent market failure and to encourage greater competition. The ideal market in relational terms is one in which bank and customer are relationally proximate to one another, and in which banks act towards their customers with relational integrity. To what extent does the FISMA 2000 regime resemble those ideal markets?

Banking regulation as the promoter of relational proximity in the banking marketplace

Historically, the U.S.A. has had a strong tradition of laws that promoted relational proximity within banking law. In 1927, the McFadden Act was passed at a federal level with the aim of preventing banks from operating branches in more than one state. This legislative aim remained until 1994, when the Riegle-Neal Interstate Banking and Branching Efficiency Act was passed, enabling bank holding companies to acquire control of banks in any state and permitting banks in different states to merge with one another, but always subject to limits and controls.

Following the Wall Street Crash of 1929, the rapid collapse of a large number of banks (9,000 banks were forced to suspend operations) was believed at the time to have been the result of reckless involvement by banks on the stock market⁵⁶ (which the Glass-Steagall Act 1933 was introduced to counter) and due to the fact that banks did not have sufficient information about the companies to which they were lending. Subsequently, most states operated the unit banking scheme which prevented a bank from operating from more than one office. The downside was that this prevented banks from spreading risk by having different branches in different areas. As a result, American banks have often been vulnerable to localised conditions. A collapse in the local economy because of, say, a failure in the harvest, or the closure of a factory, would not only devastate the local community but also force the local bank into insolvency.

From a liberal economic standpoint, Benston is fiercely critical of the sort of rules which have historically governed the U.S. banking sector, such as restrictions on entry, controls over products, restrictions on the allowable business of financial firms (including the separation of commercial and investment banking), restraints on prices and interest rates, portfolio restrictions on financial institutions and restrictions on geographical diversification and branching.

However, Timothy Green puts forward an economic justification for adopting a relational approach to banking. He argues that

... the rigid lending criteria and centralised decision-making rules that are beginning to creep into banking conspire, to some extent, to starve new entrepreneurship of funds. . . . [E]ntrepreneurship is not necessarily confined to those people whom banks would traditionally consider to be safe lending options. Imaginative business can require imaginative finance, which must rely upon relationship and the character assessment which relationship facilitates.

⁵⁶ Richard Posner's view is that this belief is erroneous, and that the precipitous decline in stock prices was much more likely to have been *the result* of the expectation of a decline in economic activity rather than the cause of the decline, although he concedes that the stock market crash may have contributed to the severity of the depression: *The Economic Analysis of Law* (4th edn.) 444.

The argument in favour of relational proximity in banking can be explicitly dressed up in economic terms. If the Economic Analysis of Law is modelled upon the perfectly competitive market, in which there is no information asymmetry, and if the rational decision-maker needs the best possible information at his or her disposal in order to be able to choose efficiently, then promoting localised banking, in which banks are more likely to know their customers may well be expected to tend to promote efficient lending decisions.⁵⁷ A major part of the justification for the U.S. rules following the Great Depression was the perception that the banks had been lending indiscriminately without understanding sufficiently about whether the companies to whom they were lending were good or bad risks.

In its own terms, Relational theory would suggest that displays of relational proximity in banks' relationships with their customers are, to some extent, dependent on the size of the bank (or at least on the extent to which discretion and power are decentralised).⁵⁸ Small banks are therefore more likely to lend appropriately, in relational terms, to their customers, and to treat their customers sensitively when difficulties arise, with consequent social benefits.

There can be no doubt that the U.S. approach to banking regulation has resulted in the industry having a dramatically different structure from that in the U.K. In the U.K. there are approximately 500 banks and 80 building societies. In the U.S.A., which has five times the U.K.'s population, there are 27,000 deposit-taking institutions.

Smaller American banks in general have consistently achieved higher returns on assets than larger banks.⁵⁹ The other side of the coin is that, without the ability to spread risk widely, small banks are vulnerable to collapse. The U.S.A. has had to manage the reality of a high level of bank failure sustained over long periods of time. Between 1980 and 1993 approximately 2,800 banks failed in the U.S.A.; *i.e.* 10 per cent! Bank failures are a common occurrence in the U.S.A., even when economic conditions are relatively stable.⁶⁰ Although generous deposit protection means that few lose out financially; bank failures do inevitably lead to a loss of relational continuity.

In the U.K., investment banking and high-street banking were largely separate for historical, rather than legislative reasons. However, in the 1980s the situation radically changed and universal banking became the norm. The process of consolidation among the high street banks had, however, been in progress for most of the twentieth century.⁶¹ While some commentators have sought to argue for a thoroughgoing return to regional banking, of the style which existed with the nineteenth century joint stock banks,⁶² Timothy M. Green, whose family has been involved in banking throughout its twentieth century transformation,⁶³ argues that such a return is not only unfeasible, but also unnecessary provided the national (or even international) banks have effectively devolved lending decisions to a local or regional level.⁶⁴ There is a clear analogy to be drawn between such ideas and the much-vaunted (and yet overlooked) public law

⁵⁷ An argument Timothy Green puts forward in the U.K. banking context: "Banking and Finance: The Importance of Relationships" in N. Baker ed. *Building a Relational Society* 212–3.

⁵⁸ A point Timothy Green makes in "Banking and Finance: The Importance of Relationship" *ibid.*, 213–5.

⁵⁹ Schluter and Lee, *op. cit.*, *The R Factor*, 201.

⁶⁰ Campbell and Cartwright "Banks and Consumer Protection: the Deposit Protection Scheme in the United Kingdom" (1998) *Lloyd's Maritime and Commercial Law Quarterly* 128 at 134. The statistics are taken from S. Hefernan, *Modern Banking in Theory and Practice* (Chichester, 1996) 276–9.

⁶¹ Timothy M. Green "Banking and finance: the importance of relationships" in Nicola Baker (ed.) *Building a Relational Society: New Priorities for Public Policy*, *op. cit.* 203.

⁶² Alan Duncan, *An End to Illusions*, Demos report (1993) 36.

⁶³ Timothy M. Green "Banking and finance: the importance of relationships" in Nicola Baker (ed.) *Building a Relational Society: New Priorities for Public Policy*, *op. cit.*, 201.

⁶⁴ *Ibid.*, 213–4.

principle of subsidiarity.⁶⁵ With its tradition of strong autonomy in the hands of bank branches, the banking sector would historically have been a good example of how such a principle could be made to work successfully.

The picture in the U.S.A. has been transformed by the Gramm-Leach-Bliley Act (The Financial Services Act) 1999 which abolishes the barriers prohibiting affiliations between commercial banks, securities firms and insurance companies so that American financial institutions can now offer a full range of services, from traditional loans to investment banking services. It repeals part of the Glass-Steagall Act 1933 and amends the Bank Holding Company Act 1956 so as to allow “financial holding companies” to offer banking, insurance, securities and other financial products to consumers. In relational terms, the problem is not the increased range of services that American banks will henceforth be able to offer their customers, but rather that such a reform will tend to hasten the development of giantism among American banks. Such giantism may be unwarranted if, as some studies suggest, there are no economies of scale in bank operations once a level of approximately \$25 million in deposits has been reached.⁶⁶ Small banks may be vulnerable to failure; but the protection which vastness offers against such a risk may turn out to be illusory.

In contrast to the historic U.S. approach, the FISMA 2000 regime attempts only limited control of the structure of providers of banking services.⁶⁷ By and large, the multifunctional nature of the modern bank is assumed. Indeed, such multifunctionality forms part of the very *raison d'être* of FISMA's regulatory design. The multinational nature of many banks is promoted by E.U. law as a positive good. What restrictions there are in E.U. law on banks concern principally the ownership and control by banks of companies carrying out activities unrelated to financial services, and are borne out of a concern to avoid “crony capitalism”.⁶⁸

Banking regulation as the promoter of economic efficiency in the banking marketplace

The Bank of England's regulatory goals were never explicitly stated. However, from its general approach and in particular its hardnosed behaviour with regard to bank rescues, it can be surmised that the Bank of England's ultimate concern was for London's reputation as a major financial centre and therefore for the overall stability of the banking system.

Under FISMA, the F.S.A. is given four regulatory objectives by section 2. Those objectives are market confidence, public awareness, the protection of consumers and the reduction of financial crime. Those objectives are spelt out in sections 3 to 6. The market confidence objective is that of maintaining confidence in the financial system.⁶⁹

⁶⁵ Article 5 Treaty of the European Community.

⁶⁶ Schluter and Lee, *op. cit.*, *The R Factor* 202, quoting G. Benson et al. “Scale Economies in Banking: A Restructuring and Reassessment” *Journal of Money, Credit and Banking* no. 14 (1982) 4 and T. Gilligan et al. “Scale and Scope Economies in the Multi-Product Banking Firm” (1984) 13 *Journal of Monetary Economics* 393–405.

⁶⁷ Among the threshold conditions for authorisation to be found in Schedule 6 to FISMA are: the requirement that an organisation accepting deposits, i.e. a bank, must be either a company or a partnership (clause 1(2)), and must have transparent close links with its parent and subsidiary companies (clause 3(2)). Section 111 FISMA 2000 gives to the courts control over transfers of banking business, which will only be authorised if “in all the circumstances of the case, [the court considers that] it is appropriate to sanction the scheme”.

⁶⁸ Article 51 Banking Consolidation Directive 2000 (Directive 2000/12/EC) provides that (1) no credit institution may have a qualifying holding the amount of which exceeds 15 *per cent* of its own funds in an undertaking which is neither a credit institution, nor a financial institution, nor an undertaking carrying on an activity referred to in the second subparagraph of Article 43(2)(f) of Directive 86/635/EEC, and that (2) the total amount of a credit institution's qualifying holdings in undertakings other than credit institutions, financial institutions or undertakings carrying on activities referred to in the second subparagraph of Article 43(2)(f) of Directive 86/635/EEC may not exceed 60 *per cent* of its own funds. Article 51(6) is, however, a significant concession and allows Member States to permit derogations from the above limits “if they provide that 100 *per cent* of the amounts by which a credit institution's qualifying holdings exceed those limits [are] covered by own funds and the latter [are] not included in the calculation of the solvency ratio”.

⁶⁹ Section 3(1) FISMA.

The public awareness objective is that of promoting public understanding of the financial system,⁷⁰ and includes ensuring the provision of appropriate information and advice.⁷¹ The consumer protection objective is that of securing the appropriate degree of protection for consumers,⁷² having regard to, *inter alia*, the needs that consumers have for advice and accurate information,⁷³ and the general principle that consumers should take responsibility for their decisions.⁷⁴ The reduction of financial crime objective is that of reducing the extent to which it is possible to use a regulated business for a purpose connected with financial crime,⁷⁵ and in particular, fraud.⁷⁶

What is significant by its absence from the F.S.A.'s list of regulatory objectives is reference to the promotion of competition in the banking sector. Indeed, during the passage of FISMA through Parliament, the major critique of the proposed regime was that it failed to promote competition sufficiently. There are three distinct strands to this argument:

(1) Regulation tends to be anti-competitive, raising high entry barriers to new operators and products that customers might want.

(2) Regulation creates distortions of competition because of “moral hazard”, where customers, sure of generous compensation in the event of the collapse of financial institutions, flock to those suppliers promising the greatest returns, even if to achieve such returns will require them to take extraordinary risks.⁷⁷

(3) Regulation is ineffective because it merely drives operations overseas to less heavily regulated jurisdictions (the phenomenon of “regulatory arbitrage” or the so-called “Delaware effect”).

(1) Regulation is anti-competitive

During the debates on the Financial Services and Markets Act 2000, the Economic Secretary observed:

To take an extreme example, it could be argued that the entire system of authorisation is a barrier to competition, in that it prevents firms that might otherwise do so from entering the financial services industry. However, no one would seriously argue that authorisation should be abandoned for that reason.⁷⁸

Nonetheless, Howard Flight M.P. noted that “[t]he large players welcome regulation. It raises the threshold of entry enormously. The innate tendency of regulation is towards consolidation and cartels”⁷⁹.

Benston argues strongly that one of the major costs of regulation to the consumer and benefits to regulated institutions is that it reduces competition.⁸⁰ Although

⁷⁰ Section 4(1) FISMA.

⁷¹ Section 4(2)(b) FISMA.

⁷² Section 5(1) FISMA.

⁷³ Section 5(2)(c) FISMA.

⁷⁴ Section 5(2)(d) FISMA.

⁷⁵ Section 6(1) FISMA.

⁷⁶ Section 6(3)(a) FISMA.

⁷⁷ Llewellyn, *op. cit.*, 7, 17–8, 28–30.

⁷⁸ Standing Committee A, 9 November 1999, c.812.

⁷⁹ Vol. 343 HC, 27 January 2000, c.652.

⁸⁰ Benston *Regulating Financial Markets: A Critique and Some Proposals* (1998). This argument is considered and challenged by Llewellyn, *op. cit.* at 46–8. In a similar vein to Benston, Posner writes

“[w]e . . . suspect that the real purpose of the Glass-Steagall Act is not to protect the federal deposit insurance function but to protect securities underwriters from bank competition. Suspicion is likewise strong that the reason for the limitations on branch banking and interstate banking is not to protect banks from risks of competition that might ultimately be borne by the federal deposit insurance agency but to protect banks from competition, period”

The Economic Analysis of Law (4th edn.) 449.

supportive of the need for appropriately designed regulation, Llewellyn is wise enough to acknowledge that “however well-intentioned, regulation has the potential to compromise competition and to condone, if not in some cases endorse, unwarranted entry barriers, restrictive practices, and other anti-competitive mechanisms.”⁸¹

In his report on competition and regulation in the banking sector, Don Cruickshank regarded banking regulation as having a high potential for affecting competition between suppliers. It directly affects the cost base of individual suppliers, for example via capital adequacy ratios feeding into the price of loans; it indirectly controls the number of suppliers, it indirectly inhibits changes in products, and it operates at a detailed behavioural level on suppliers.⁸² It could potentially score poorly in terms of price efficiency, productive efficiency and allocative efficiency. He therefore argued that the promotion of competition should be included as one of the FSA’s statutory objectives.⁸³

Cruickshank’s call ultimately fell on deaf ears. However, the need for the provision of accurate information was made a significant feature of the F.S.A.’s statutory objectives.⁸⁴ Banks, in particular, are not only required to give their customers detailed information about the financial products which they are offering, but are also obliged to provide to the markets and to the regulators significant amounts of information about the nature and state of their business.⁸⁵

Such disclosure requirements are good from a relational point of view as they promote parity. They are also highly important from the point of view of the Economic Analysis of Law as fundamental to such an approach to law is the assumption that the rational decision-maker will be able to choose efficiently in order to maximise his or her welfare/utility. This can only be done if the rational decision-maker is in possession of sufficient information to be able to make choices on such a basis.

However, one of Cruickshank’s most telling insights comes in paragraph 2.11 of his report. He identifies a paradox inherent in traditional methods of banking regulation:

regulators acknowledge information asymmetry as the main rationale for regulation, yet are themselves generally very reluctant to disclose the information on risk exposures which would help to reduce the need for intrusive prudential regulation.

Although Don Cruickshank’s recommendation that competition be one of the F.S.A.’s primary statutory objectives was rejected, the F.S.A. is, however, subject to some degree of oversight by the U.K. competition authorities and the F.S.A.’s rules and practices are kept under review by the Director General of Fair Trading for any “*significantly* adverse effect on competition”.⁸⁶ He or she reports to the Competition Commission which then has to form a view about the practices or rules in question. But even where such an effect is found to exist, the F.S.A.’s approach will be upheld if, in the view of the Competition Commission, it can be justified in terms of the F.S.A.’s statutory functions and obligations.⁸⁷

⁸¹ Llewellyn, *op. cit.*, 46, 52–3.

⁸² Cruickshank *Competition and Regulation in Financial Services: Striking the Right Balance* (Norwich, July 1999) para. 41.

⁸³ The call was made by Don Cruickshank in his interim report on reform of the banking sector, *Competition and Regulation in Financial Services: Striking the Right Balance*, p.13 and Annex 3. Hugh Pigott analyses the reasons for the rejection of that call in a short article entitled “Competition in U.K. Banking” (1999) 14 *Butterworth’s Journal of International Banking and Finance Law* 323. See also John Plender “Too close for comfort” (2000) 15 *Butterworth’s Journal of International Banking and Finance Law* 107.

⁸⁴ Under s.4(2)(b) with regard to the public awareness objective, and under s.5(2)(c) with regard to the consumer protection objective.

⁸⁵ Through the requirements with regard to auditors, large exposure limits, and capital adequacy rules, among others.

⁸⁶ s.160 FISMA 2000.

⁸⁷ s.162(5)-(7) FISMA 2000.

At the European level, despite the European Commission repeatedly indicating in its annual reports that E.C. competition law applied to the financial sector,⁸⁸ the banks did not agree with this,⁸⁹ and they were not finally convinced of their error until the European Court of Justice gave judgment in the case of *Züchner*.⁹⁰ However, in spite of being prepared to address the practices of the banks, the Commission and the E.C.J. have taken the view that national legislation and administrative practices, even if they produce the same effect as a prohibited cartel, cannot infringe Arts. 81, 3 g or 10 “in the absence of any link with [anti-competitive] conduct on the part of undertakings”.⁹¹

Partisans of the Economic Analysis of Law will derive some cold comfort about the soundness of their thesis in the light of Lord McIntosh’s observations during the passage of FISMA through Parliament:

... we do not want the external competition scrutiny [of the F.S.A.’s activities] to turn on legal issues. ... The key question that we want the competition regulators to address is whether the F.S.A., in discharging its general duties, has struck the right balance between competition and regulation. The answer to that should turn more on economic than legal arguments.⁹²

(2) Regulation distorts competition by creating economic moral hazard

Just as regulation is criticised on economic grounds for hindering entrance to the marketplace, so it can also be attacked if it impedes exit from the marketplace. From an economic standpoint, provision of lender-of-last-resort facilities by central banks is objectionable in so far as it allows poorly managed banks to avoid the ordinary consequences of competitive failure, *i.e.* liquidation.

In order to reduce the problem of “moral hazard”, the F.S.A. has emphasised that it is not aiming to maintain a “zero failure” regime as regards failure, or lapses in conduct, by firms. The reason for this policy choice by the F.S.A. is that “[t]o do so would be uneconomic from a cost/benefit point of view, would hinder competition and innovation and would create an unacceptable level of moral hazard both on firms and consumers”.⁹³ This will, no doubt, be welcome news to, among others, the Bank of England, which, despite losing its supervisory responsibilities, remains the lender-of-last-resort for U.K. banks.

The traditional alternative to lender-of-last-resort facilities in banking law is the provision of deposit insurance. Compared with lender-of-last-resort facilities, deposit insurance has the merit of allowing the poorly managed bank to fail, whilst protecting the interests of consumers.

In the U.S., where regular bank failure is a fact of life, the Federal Deposit Insurance Corporation (F.D.I.C.) provides 100 *per cent* compensation to the most vulnerable savers.⁹⁴ A major critique of such a scheme of deposit insurance is that 100 *per cent* deposit protection gives rise to serious problems of moral hazard. The U.S. approach of giving generous and complete deposit protection up to \$100,000 is therefore criticised for leaving consumers without any incentive to monitor their bank’s financial

⁸⁸ II. Report on Competition Policy 1973: paras. 51–3; VII. Report on Competition Policy 1979: paras. 32–7.

⁸⁹ Dassesse, Isaacs, Penn, *EC Banking Law*, 2nd edn. (London, 1994) para. 24.1.

⁹⁰ *Züchner v. Bayerische Vereinsbank A.G.* Case 172/80, [1981] E.C.R. 2021.

⁹¹ *Criminal Proceedings against Meng*, Case C-2/91, [1993] E.C.R. I-5773, para. 22.

⁹² vol. 611 H.L., 27 March 2000, c.572.

⁹³ F.S.A. Consultation Paper 38, F.S.A., January 2000, Annex A.

⁹⁴ The specified limit is currently \$100,000 per depositor per institution. The astute investor can fully protect his deposits simply by ensuring that no more than \$100,000 is placed with any one institution. For further discussion on this point see Campbell and Cartwright “Banks and Consumer Protection: the Deposit Protection Scheme in the United Kingdom” (1998) *Lloyd’s Maritime and Commercial Law Quarterly* 135.

solvency for themselves. In this respect, the European approach where there is an element of co-insurance and depositors do not recover the full amount of their losses is to be preferred from an economic standpoint.⁹⁵

Under the present U.S. system, the F.D.I.C. does have the power to take alternative action other than simply allowing the bank to fail and paying out under the deposit insurance scheme, but only if such “open bank assistance” or “purchase and assumption” imposes less cost on the deposit insurance fund.⁹⁶ In consequence, the F.D.I.C. may be obliged to ignore the greater economic and relational costs in allowing a bank which might be sound in the long-term to go to the wall. Again, the flexibility of the U.K. approach is preferable in economic terms.

Notwithstanding the moral hazard problems associated with deposit insurance, in the U.K., Llewellyn takes deposit protection as a given in his analysis of the economic rationale for financial regulation.⁹⁷ In short, the public like it and no politician would dare to remove it.

Although generally critical of the operation of bank supervision in the U.K., Don Cruickshank accepted the principle that regulatory intervention is appropriate to protect retail depositors’ funds in the event of a bank failure and to ensure that solvent banks are not put at risk from the unexpected failure of another bank.⁹⁸ Within an Economic Analysis of Law, therefore, deposit insurance can be justified on the basis of consumer preferences and/or as a necessary measure to prevent systemic risk.

Furthermore, deposit protection can be defended from a Rawlsian perspective as a form of “maximin” measure, whereby rational consumers/citizens, who are unaware of whether their deposits at the bank will be profitable or not, choose to maximise the position should it turn out that they have chosen a bank which does not perform well in the markets and ultimately becomes insolvent. From the perspective of rational choice theory, of course, Rawlsian justice is only appropriate in a state of serious uncertainty, such as precisely that which Rawls posits for his actors behind the “veil of ignorance” in his “original position.”⁹⁹

(3) Regulation is ineffective as it only leads to regulatory arbitrage

Regulatory arbitrage, sometimes referred to as “the Delaware effect”, is only possible among states that have access to the same market. The Delaware effect depends on the fact that Delaware as a state of the U.S.A. has access to the enormous free trade area that is America. The solution to the problem of regulatory arbitrage is to deny companies who are nationals of a state which does not adhere to acceptable minimum standards access to the regulated market, or to allow them access on terms where they are regulated by the host state. These are the solutions adopted by the Basle Committee’s rules¹⁰⁰ and under the Post-BCCI Directive.¹⁰¹ Theoretically, the problem

⁹⁵ Llewellyn, *op. cit.*, 18. It is debatable to what extent the problem of moral hazard remains despite the element of co-insurance present in the European Deposit Guarantee Schemes. K. Dowd “The Case for Financial *Laissez-Faire*” (1996) 106(436) *Economic Journal* May 679–87 identifies no less than four potential moral hazards associated with deposit insurance, limited or full.

⁹⁶ Unless the bank failure in question poses a systemic risk which severe and widespread, in which case the F.D.I.C. has the power to depart from the least cost provisions, but only with the authorisation of the Secretary of the Treasury, after consultation with the President and notice to Congress.

⁹⁷ Llewellyn, *op. cit.*, 29.

⁹⁸ Cruickshank *Competition in U.K. Banking: A Report to the Chancellor of the Exchequer* (Norwich, March 2000) paras. 2-8-9.

⁹⁹ John Rawls, *A Theory of Justice* (OUP, 1972) 136–42.

¹⁰⁰ The 1992 Minimum Standards for the Supervision of International Banking Groups and their Cross-Border Establishments and the 1997 Core Principles for Effective Banking Supervision.

¹⁰¹ Prudential Supervision Directive – Directive 1995/26/EC.

of regulatory arbitrage is, therefore, by no means insurmountable. The difficulty is in enforcing the standards in practice.

Conclusion on the validity of the economic critiques

With regard to the effect of banking regulation on competition, the best David Llewellyn can do is to argue that “[a]lthough historically regulation in finance has often been anti-competitive in nature, this is not an inherent property of regulation”.¹⁰² The one area where it can be clearly seen that regulation promotes economic efficiency and competition rather than the contrary is where regulation forces companies to make disclosure of their assets and liabilities, their product charges and their pricing structures.¹⁰³ What is striking is that these rules could be just as easily defended from the standpoint of Relationism, as promoting parity between banks and their customers.

Howard Davies makes a slightly different argument that

Without regulation to give consumers some independent assurance about the terms on which contracts are offered, the safety of assets which underpin them, and the quality of advice received, saving and investment may be discouraged, . . . with damaging economic consequences,¹⁰⁴

an argument which even Benston is forced partially to accept. To the extent that banking regulation creates greater public confidence in the banking sector it encourages more saving and that promotes economic efficiency as banks are in a better position to loan surplus funds than are others.¹⁰⁵

Llewellyn concludes

In the final analysis, effective competition is the major component of consumer protection and the assurance of good products at competitive prices. The purpose of regulation is, therefore, not to displace competitive pressures or market mechanisms, but to correct for market imperfections and failures which produce sub-optimum outcomes and distort consumer choice. . . . Provided regulation is properly constructed, it reinforces the efficiency of, rather than detracts from, market mechanisms.¹⁰⁶

He identifies six positive gains from efficiently framed regulation: (1) reduced transaction costs for consumers, (2) efficiency gains through ameliorating market breakdown or grid lock, (3) enhanced consumer confidence, (4) the possible generation of positive externalities, (5) efficient authorisation procedures which remove hazardous (i.e. potentially insolvent or mismanaged) firms from the market, and (6) improved ability on the part of consumers to make informed judgements as a result of enforced disclosure requirements.¹⁰⁷ This is, therefore, the aim of well-designed regulation and supervision from the point of view of an Economic Analysis of Law.

Given the rejection of competition as a primary statutory objective, the F.S.A.’s primary contributions to the U.K.’s economy are based on the four statutory objectives that were adopted: promotion of market confidence, public awareness of financial services, consumer protection and the reduction of financial crime.¹⁰⁸ In effect, stability is given priority over efficiency. This translates as a favouring of the interests of depositors (whose deposits are better protected) over those of borrowers (who would

¹⁰² Llewellyn *op. cit.*, 46.

¹⁰³ Llewellyn *op. cit.*, 23, 32–3, 47.

¹⁰⁴ H. Davies “Financial Regulation: Why Bother?” Society of Business Economists Lecture (January 1999).

¹⁰⁵ Llewellyn *op. cit.*, 25.

¹⁰⁶ Llewellyn *op. cit.*, 48.

¹⁰⁷ Llewellyn *op. cit.*, 50.

¹⁰⁸ s.2(2) FISMA 2000.

be able to obtain loans more cheaply were there more competition in the banking sector).¹⁰⁹

But it all seems to be played out against a background identified by John Plender, who wrote:

Ageing stalwarts in the City of London will recall that the last wave of enthusiasm for increased competition in U.K. banking, reflected in the competition and credit policy of the early 1970s, was a preliminary to Britain's biggest post-war financial crisis.¹¹⁰

When push comes to shove, decreased competition is a price currently identified by politicians as being one worth paying for stability.

CONCLUSIONS

In terms of the style of banking supervision, criticisms can be made of a one-dimensional relational approach to supervision. It has been argued with some force that too much relational proximity between the regulator and the banks it is supervising is a positive evil. A more nuanced critique would be that of Bingham L.J., who identified the problem not just as one of too much relational proximity, but of the existence of such a cosy relationship in the absence of truly reciprocal relational integrity. It remains to be seen whether a more formalistic approach, where information gathering is more standardised and distanced will prove to be more effective in the long run. Can banking supervision overcome its economic costs? Does aiming for low-cost regulation not risk unacceptably high overall social costs?

So far as the need for banking regulation is concerned, despite the academic debate about the economic efficiency of banking regulation, there appear to be, on balance, good grounds for regarding it as, at least potentially, an appropriate response to consumers' desires for security and the problems of systemic risk. In relational terms, given the present structure of the market for financial services, a regulator is necessary to achieve the parity and directness with the banks which individual consumers lack.

So far as the goals of regulation are concerned, Relationism would favour a regime similar to that in the U.S.A. from the enactment of the Glass-Steagall Act until its repeal,¹¹¹ with rules against banks having branches in more than one state, *etc.* While this approach tends to promote relational proximity, it does involve some economic costs. Whether they are excessive is something that can only be measured over time as the USA experiences life under a more liberalised approach to banking. The multi-functional bank is still a relatively new phenomenon in the U.K., and whether greater relational proximity between banks and their customers is a desirable or achievable regulatory goal in the U.K. is a matter that it may still be too early to determine.

With regard to Economic Analysis, it is clear that under FISMA 2000, economic efficiency is not the primary objective of U.K. banking regulation but is, instead, a restraining principle. Under the FISMA regime, stability is given a higher priority than efficiency. This may, however, be justifiable on the basis of welfare maximisation. Consumers prefer protection if they lose in the financial services marketplace rather than potentially greater gains if they win. Whether the constraints imposed under FISMA 2000 are necessary or sufficient in order to achieve a proper balance between competition and regulation is again something that will be played out over time.

¹⁰⁹ Hugh Pigott "Competition in U.K. Banking" (1999) 14 *Butterworth's Journal of International Banking and Finance Law* 323.

¹¹⁰ John Plender "Too Close for Comfort" *Financial Times* 31st March 2000, (2000) 15 *Butterworth's Journal of International Banking and Finance Law* 107.

¹¹¹ By the Riegle-Neal Interstate Banking and Branching Efficiency Act 1994 and the Gramm-Leach-Bliley Act 1999.

CASE NOTES

The address for the submission of case notes is given at the beginning of this issue

DRAFTING PROBLEMS AND LEGAL DIFFICULTIES IN REINSURANCE CONTRACTS

HIH Casualty & General Insurance Ltd v. New Hampshire Insurance Co. and Ors

[2001] EWCA Civ 735, [2001] 2 All E.R. (Comm) 39 (C.A.) (Peter Gibson, Mummery and Rix L.J.J.)

INTRODUCTION

The economic and practical significance of reinsurance have increased dramatically in the last few decades. Almost all underwriters reinsure the whole or a part of the risk they have undertaken with other underwriters. This is done for a variety of reasons: either because the underwriter deems the risk undesirable or, as is more frequently the case, because the underwriter has accepted a greater pecuniary responsibility in respect of a particular risk, or of an accumulation of risk in one asset or location than he thinks it prudent to retain. In practice, in order to ensure that the claims are made and settled on both policies in exactly similar terms, a reinsurance policy is effected on the same conditions as the original policy. This would mean that construction difficulties in relation to the original policy is inevitably going to have an impact on the relationship between reinsured and reinsurer. Furthermore, when determining the rights and obligations of parties under the reinsurance contract, documents not only relating to the reinsurance contract but also the ones in regard to the original contract might need to be taken into account. Determining the inter-relation between these documents could in some cases be quite problematic. These issues, namely difficulties in construction and the existence of various documents relating to the reinsurance transaction, were the main reasons for litigation in *HIH Casualty & General Insurance Ltd. v. New Hampshire Insurance Co. and Ors*. The object of this paper is to analyse the judgment delivered by the Court of Appeal in this case. Reference will be made to the first instance judgment¹ particularly in cases where discrepancies arise.

FACTS OF THE CASE

HIH Casualty and General Insurance Ltd. (HIH) had undertaken a policy of pecuniary loss indemnity insurance, which provided collateral for the financing of six films. The

¹ [2001] Lloyd's Rep. I.R. 224.

peril insured was the risk that revenues from the “six revenue generating projects” concerned would fail to reach the sum insured within a certain period.² The sum insured was premised on the costs of production, and the insurance was designed to enable the investors whose finance supported the production of the films to recoup their investment. Initially, the slip for the insurance was subscribed to by HIH in the form of slip policy. After a short period, HIH agreed and signed the Pecuniary Loss Indemnity policy wording. Clause 8 of this policy, which was headed “Disclosure and/or Waiver of Rights”, provided that:

To the fullest extent permissible by applicable law, the Insurer hereby agrees that it will not seek to or be entitled to avoid or rescind this Policy or reject any claim hereunder or be entitled to avoid or rescind this Policy or reject any claim hereunder or be entitled to seek any remedy or redress on the grounds of . . . non-disclosure or misrepresentation by any person or any other similar grounds. The Insurer irrevocably agrees not to assert and waives any and all defences and rights of set-off and/or counterclaim (including without limitation any such rights acquired by assignment or otherwise) which it may have against the Assured or which may be available so as to deny payment of any amount due hereunder in accordance with the express terms hereof.

HIH obtained reinsurance for 80 per cent of the liability undertaken by them from three separate insurers, namely Axa, Independent and New Hampshire. The reinsurance slip policy, so far as material, provided as follows:

This Reinsurance is subject to all terms, clauses and conditions as original and to follow that placement in all respects . . . The Reinsured hereon agrees to consult and obtain Reinsurers’ agreement to all amendments and alterations to the terms, clauses and conditions of the Original Policy. The Reinsured also agrees to obtain Reinsurers’ (agreement) to the appointment of any advisor and/or lawyer in the event of a claim being made under the Original Policy and/or a dispute under the Original Policy. The Reinsured further agrees to obtain Reinsurers’ agreement to the appointment of accountants and/or auditors as deemed necessary under the Original Policy. In consideration of the above, Reinsurers hereon agree that in the event of claim and/or professional advisors fees and expenses being incurred under the Original Policy, this Reinsurance will pay at the same time . . . Cancellation Clause as Original Policy.

At the end of the policy period, the revenue collected for the films was significantly less than the amount insured. The claims of the producers totalling over US\$ 31 million were each paid by HIH, which sought to recover in the three actions contributions towards some 80 per cent of that sum under the reinsurance agreement. The reinsurers refused to indemnify HIH on the grounds that HIH should not have met the producer’s claims or, alternatively, that, whatever the position was under the insurance contract, they were not obliged to pay under the reinsurance contract for various reasons including breach of warranty and breaches of the duty of good faith. At the first instance, David Steel J. decided on various preliminary issues arising in these actions. The claimant appealed against the judge’s findings on the preliminary issues and the defendants cross-appealed.

THE JUDGMENT AND ITS EVALUATION

Rix L.J., who delivered the judgment of the Court of Appeal, stated the questions which arose on appeal and cross-appeal in a systematic manner. Accordingly, the first

² The slip policy stated that the producer would produce and make six made-for-TV films, whereas the policy wording provided that the producer had invested or was in the process of investing in six revenue generating entertainment projects.

issue was whether the requirement to make six films was a term of the insurance and reinsurance contracts. If it were, identifying the legal character of such term would be the next task of the court. Finally, the effect of clause 8 in the insurance contracts and reinsurance contracts, if incorporated, had to be determined. These three issues will be evaluated in turn.

Determining terms of the insurance and reinsurance contracts and the relationship between the slip and policy

Like the first instance judge, David Steel J., Rix L.J. had no doubts that the requirement to make six films was a term of the insurance contract. This obligation was expressly stated in the original slip policy. Whether such a term was also contained within the policy wording was more finely balanced simply because this requirement was worded in a different manner in this document. However, the words “six revenue generating entertainment projects” appearing in the policy wording, were, according to Rix L.J., another way of saying six films. The relationship between the process of revenue-generating and the risk insured against, namely the failure of the projects to generate a balance, was so close that a term requiring the production of six films was held to be implied. Since the terms of the insurance contract had been incorporated into the re-insurance contract, it was clear that this term formed part of the reinsurance contract as well.

While making their case, the reinsured contended that the policy wording superseded the original slip policy and since the term regarding the making of six films did not appear in the former, such an obligation was not a term of the contract. The contrary judgment of Rix L.J. to the effect that the policy wording also contained a term requiring the making of six films, made this contention redundant. However, Rix, L.J., *obiter*, considered it appropriate to clarify the longevity speculation about the relationship between the slip and policy in insurance contracts. This issue was discussed in detail by the Court of Appeal in *Youell v. Bland Welch & Co. Ltd.*,³ particularly in the judgment of Beldam L.J.⁴ That case concerned a contract of reinsurance at Lloyd's. Although it was common ground that the slip was superseded by a formal policy, the reinsurers submitted that the slip could be looked at as an aid to the construction of the policy.

This submission was rejected mainly on two grounds. First, attention was drawn to an older case, *Ionides v. Pacific Fire & Marine Insurance Co.*,⁵ said to determine the rule on this point. In that case a problem arose because the policy named the vessel in which the insured cargo was to be carried as the “Socrates”, whereas the vessel in which the cargo had actually been shipped and lost, was the “Socrate”. The question was whether the slip could be used to assist in finding the parties’ true intention. In the light of the prevailing stamp duty expressed in a duly stamped policy,⁶ Kelly C.B. observed that the slip was not admissible to prove a legally binding contract of marine insurance or to affect in any way the construction of such a contract. Beldam L.J. viewed the admissibility of the slip to be governed by the Marine Insurance Act 1906,

³ [1992] 2 Lloyd's Rep. 127.

⁴ *Ibid.* at 140–1.

⁵ (1871) L.R. 6 Q.B. 674 affirmed (1873) L.R. 7 Q.B. 517.

⁶ At one time, a slip could not be given in evidence for any purpose whatsoever. However, that had been changed by the Customs and Inland Revenue Act 1867. Sections 7 and 9 of that Act provided that no contract of marine insurance could be valid unless expressed in a policy, and that no policy could be given in evidence unless duly stamped. The rule, which in marine insurance required a “policy” in due course, became embodied in s. 22 of the Marine Insurance Act 1906. It was only under the Finance Act 1959 that such a policy became valid even though not stamped.

section 89.⁷ The use of the words “as heretofore” in that section indicated to Beldam L.J. that the admissibility of a slip was governed by the state of law as it stood at the date of codification. As far as his Lordship was concerned, the state of law was expressed in *Ionides v. Pacific Fire & Marine Insurance Co.* The other reason why the slip could not be used in construing the policy, according to Beldam L.J., was the possible infringement of the parol evidence rule⁸ by virtue of which “parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract”.⁹ In fact, Beldam L.J. stated his preference for a rule of law on this point founded in the parol evidence rule.¹⁰

Those remarks made in *Youell v. Bland Welch & Co. Ltd.* do not form binding precedent that where a prior contract is followed by a further contract, or where in an insurance context a slip has been followed by the policy, there is a rule of law which makes it inadmissible to consider the terms of the prior contract, or that the parol evidence rule has the same effect. The reason for this is that in *Youell*'s case it was common ground that the policy in question was intended to supersede the slip so accordingly all these statements were *obiter*. Rix L.J. considered it dangerous to build on the single case of *Ionides* (as Beldam L.J. had done in his *dicta* in *Youell*'s case) to conclude that a slip could never be used to assist in the construction of a policy. His Lordship regarded *Ionides*' case as “unique” bearing in mind the fact that at the time it was decided there were numerous statutory restrictions and controversy surrounding use of the slip for any purpose. He was of the opinion that due to these factors the court was anxious to show that the use for which the slip was admitted into evidence was limited.

In my opinion, it may be also doubted whether the Marine Insurance Act 1906, section 89 attracts the restrictive interpretation adopted by Beldam L.J. The intention of this section seems to confirm that reference to the slip may be made as established before the passing of the Act. Accordingly, construing this provision in the way Beldam L.J. did would inevitably reduce the significance of the slip, which is an outcome contradicting the general idea behind this section.

Furthermore, it seems somehow dated to approach this issue armed with the parol evidence rule. The modern approach of the House of Lords is that, on the positive side, evidence should be admitted of the background, surrounding circumstances, factual matrix and genesis to the contract.¹¹ It could also be argued that there is a binding contract in the slip.¹² That a loss may occur in some cases before even a policy is issued supports this argument. Of course, most of the time the parties make variations to the contract when agreeing on the terms of the policy. Also in some cases they disregard

⁷ This section provides “Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceedings”.

⁸ It should be noted that the first instance judge, Phillips J., had a similar approach [1990] 2 Lloyd's Rep. 423 on this point. Also, in *St Paul Fire & Marine Insurance Co. (UK) Ltd. v. McConnell Dowell Constructors Ltd.* [1993] 2 Lloyd's Rep. 503 Potter J. applied the parol evidence rule again in refusing to look outside the policy for the terms of the risk insured.

⁹ *Bank of Australasia v. Palmer* [1897] A.C. 540, per Morris L.J., at 545.

¹⁰ Similarly Hobhouse J. (as he then was) in *Punjab National Bank v. de Boinville* [1992] 1 Lloyd's Rep. 7, at 12, could be read as stating that there is a rule of law that “once a policy has been issued, that is the document that contains the terms of the contract”.

¹¹ *Investors Compensation Scheme v. West Bromwich Building Society (No. 1)* [1998] 1 All E.R. 98.

¹² In *Ionides v. Pacific Fire & Marine Insurance Co.* (1871) L.R. 6 Q.B. 674 at 684–5, Blackburn, J. said “The slip is, in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business.” See also *Linshman v. Northern Maritime Insurance Co.* (1875) L.R. 10 C.P. 179; *Thompson v. Adams* (1889) 23 Q.B.D. 361; *General Accident Fire & Life Assurance Corp. & Ors v. Peter William Tanter & Ors (The Zephyr)* [1984] 1 Lloyd's Rep. 58 and *Sirius International Insurance Corp. v. Oriental Assurance Corp.* [1999] Lloyd's Rep I.R. 343.

the initial contract expressly or impliedly while finalising the policy. However, even in such a case there should not be anything preventing one from looking at the terms of the initial contract in order to construe the true intentions of the parties. At the end of the day, the initial contract forms the background of the final agreement.

Therefore, instead of developing a conclusive rule of law on this point, each case must be considered separately, bearing in mind the surrounding circumstances. Without a doubt, in cases where the slip has been superseded by the policy the value of the slip will be diminished.¹³ Rix L.J. indicated that in the insurance market it may well be possible to speak of a general presumption that a policy is intended to supersede a slip: however he was reluctant to adopt a presumption of fact to this end. If, as a result of the construction, it is established that the slip is not intended to be superseded by the policy, the relationship between these contracts should be decided by considering both of them. The parties' intention could be that the policy operates alongside the slip, to the extent that that is possible, but where that is not possible, it may well be proper to regard the policy as superseding the slip simply because it is made later in time.

Rix L.J. was convinced that this was the case in this appeal and both documents were intended to live together. On reaching this conclusion, the fact that the policy wording was incomplete played a crucial role. Since certain essential aspects of the insurance cover, e.g. the maximum cover for each film and the amount of premium, were not referred to in the policy wording, the insurance cover would have made sense only if the slip was taken as the basis of the agreement. Also, the fact that the slip was referred to as the "slip policy" was held to be an indication that the parties had no intention of superseding this document. Accordingly, his Lordship drew the inference that the term requiring the production of six films could have been regarded as a term of the insurance contract by virtue of the slip, even though it had not appeared in the policy wording.¹⁴

Rix L.J.'s judgment on this point is, in the writer's opinion, a giant step towards the right direction. The role that the slip will play should be decided taking the surrounding circumstances and intention of the parties into account. It would be an uncommercial conclusion to state that there is a rule of law that the slip will not be considered in any way while trying to construe the contract in question. Besides, there is no legal principle supporting such a conclusion. To the contrary, the true spirit of both precedent and legislation is, it is suggested to the effect that the slip should have a wider potential relevance as a source of evidence. It must, however, be borne in mind that Rix L.J.'s judgment on this point does not, unfortunately, form a binding precedent and further clarification might be required in this area.

The legal character of the "six film term" in insurance and reinsurance contracts

Once it had been established that the term requiring the production of six films was a term of the insurance and reinsurance contracts, the next task was to determine its legal character. David Steel J., at first instance, held that this term was a warranty, breach of which in the insurance context entitled the insurer to be discharged from further

¹³ Rix L.J. illustrates this point in the following way: "Where the latter contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the latter contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provide no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle."

¹⁴ Of course, this was not the case in the current litigation.

liability automatically.¹⁵ He reached this conclusion on the basis that the clause had a material bearing on the risk.¹⁶ Rix L.J., agreeing with him, laid down the tests that needed to be applied when deciding whether a term was a warranty or not in the insurance context. Accordingly, one test was whether it was a term which went to the root of the transaction; a second, whether it was descriptive of or bore materially on the risk of loss; a third, whether damages would be an unsatisfactory or inadequate remedy.

In the present case, the six film term seemed to answer all three tests. It was a fundamental term, for even if only one film were omitted, the revenues were likely to be immediately reduced. If the revenues fell below the sum insured, the loss of a single film might be the critical difference between loss or no loss, and in any event likely to increase the loss. For the same reason, the term bore materially on the risk. Furthermore, a cross-claim would be an unsatisfactory and inadequate remedy because it would never be possible to know how much the lost film would have contributed to revenues. It seems to the author that the nature of insurance was also a factor which played a significant role in classifying the six film term as a warranty. Such insurance may be said to play a useful role in facilitating film finance and thus in the creativity and productivity of the film industry. But the danger for insurers is that they, albeit relative outsiders to the industry, are undertaking the fundamental risk of the cost of production. Therefore, it should be questioned what warranties they require for undertaking such risk. Perhaps this question was in the minds of both David Steel J. and Rix L.J. when they were evaluating the legal character of the six film term.

Rix L.J.'s judgment on this point is significant in two respects. First, it laid down a series of tests which, without a doubt, will be very useful in future in determining whether a term is a warranty or not in the insurance context. The hesitancy of English courts during recent years in affording warranty status to a disputed term in an insurance contract¹⁷ increases the significance of these guidelines. It also made clear that the words "warranty" or "warranted" are not essential in order to create a warranty in this context.¹⁸

The effect of clause 8 in the insurance and reinsurance contracts

Clause 8 is a waiver agreement whereby the insurer agrees in advance not to rely on certain defences, which would otherwise be available. In recent years, disputes caused by poor drafting of such clauses have been a prime cause of litigation in this field and the position is no different in this case.¹⁹ Rix, L.J., first of all, clarified the scope of this clause in the context of the original insurance contract. His Lordship, affirming David Steel J.'s judgment, held that this clause was not sufficient to waive a breach of warranty defence. The subject matter of the first sentence is "non-disclosure or misrepresentation". In other words, the type of defence intended to be excluded by this clause was extra contractual. On the other hand, breaches of warranty were breaches

¹⁵ Section 33(3) of the Marine Insurance Act 1906, which also applies to non-marine insurance, reads: "A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

¹⁶ *Barnard v. Faber* [1893] 1 Q.B. 340.

¹⁷ See *Kler Knitwear Ltd. v. Lombard General Insurance Co. Ltd.* [2000] Lloyd's Rep. I.R. 47.

¹⁸ See also *Aktielskabet Greenland v. Janson* (1918) 35 T.L.R. 135 where a clause worded: "no mining timber carried", was held to be a warranty. Similarly, in *J Kirkaldy & Sons Ltd. v. Walker* [1999] Lloyd's Rep. I.R. 410 Longmore J. did not hesitate to afford warranty status to a clause which, without using the word "warranted", required the insured vessel to be surveyed for towage purposes and then to be condition-surveyed.

¹⁹ See *Toomey v. Eagle Star Insurance Co. Ltd. (No. 2)* [1995] 2 Lloyd's Rep. 88; *Kumar v. AGF Insurance Ltd.* [1999] Lloyd's Rep. I.R. 147 and *HIH Casualty v. Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 191.

of the contract itself. Accordingly, they could not be regarded as constituting “similar grounds”. As for the second sentence, HIH contended that the word “defences” should be read separately from the rest of the text and accordingly included “breach of warranty defences”. Rix, L.J. rejected this argument too as follows:²⁰

In my judgment, however, it is much more natural to read the word [defences] as part of the overall phrase “defences and rights of set-off and/or counterclaim”. It is natural to think of a set-off as a defence (even if it can also be thought of as a right), and a counterclaim as a right (even if it may also give rise to a defence). In my view the word “defences” is primarily connected with “set-off” and the word “rights” is primarily connected with “counterclaim”. In any event, it is plain that a set-off may give a defence, and that is sufficient to explain the language of the sentence. Moreover, that explanation would be consistent with the closing language of the sentence – “so as to deny payment of any amount due hereunder in accordance with the express terms hereof”. If there was prima facie a good claim (“amount due hereunder” etc), a defence of set-off or a right of counterclaim might result in a valid denial of payment of a sum otherwise due. Where, however, a breach of warranty occurs before a loss within the cover, it is difficult to say that that breach provides a defence against an amount “due hereunder in accordance with the express terms hereof”. It would be more natural to say that by reason of the breach of warranty there was nothing due, and that that was so precisely because of the contract’s “express terms”.

Furthermore, Rix L.J. rejected the reinsurers’ submission that the clause excluded negligent misrepresentation and non-disclosure. Relying on the well-known principles of construction set out in *Canada Steamship Lines Ltd. v. R.*,²¹ the reinsurers alleged that there was no sufficiently clearly expressed intention in clause 8 to exclude the consequences of negligence in misrepresentation or non-disclosure. However, this submission seems to be open to a fatal objection. The clause in question, as it is worded, is very general and seems to include all types of non-disclosure and misrepresentation. It could, therefore, be argued that if the parties had intended to make a distinction between different types of non-disclosure and misrepresentation, this should have been achieved by express wording.²²

Finally, the effect of this clause in reinsurance contracts had to be determined. However, there was also a dispute whether this clause had, in fact, been incorporated into the reinsurance contracts.²³ David Steel J. held that clause 8 was specifically incorporated into the reinsurance contract by virtue of the provision which provided that the cancellation clause in the reinsurance contract would be as the original policy. By relying on the evidence provided by the reinsurer’s expert and disregarding the contrary evidence given by the insured’s expert, David Steel J. held that clause 8 was known in the market as a “non-cancellation” clause so the reference to the cancellation clause in the reinsurance policy was in fact a reference to clause 8. Rix L.J. quite rightly reversed this finding and viewed the point as a pure matter of construction. On that basis, since the term in question referred to the clause as “Cancellation Clause”, the reference should probably be to a clause whose title was or contained the word “Cancellation”. Neither was the case as far as clause 8 was concerned.

²⁰ [2001] All E.R. (Comm) 39 at 71.

²¹ [1952] A.C. 192.

²² Rix L.J., also held that the wording of cl. 8 was sufficient to cover any claim for damages which would be brought under the Misrepresentation Act 1967, section 2(1).

²³ Unfortunately, as indicated by Lord Griffiths in *Forsikringsaktieselskapet Vesta v. Butcher (No. 1)* [1989] 1 All E.R. 402 at 406, little thought is given to the difference between an original insurance contract and a reinsurance contract at the time the reinsurance is placed with Lloyd’s and this leads to a number of disputes during the execution of the reinsurance contract.

However, there was still room for clause 8 to be incorporated into the reinsurance contract by reason of the general words found in the reinsurance slip.²⁴ The tests used in determining whether a term is incorporated into a contract or not,²⁵ had been formulated by David Steel J.:

- (i) Is the clause in question germane to the reinsurance, or merely collateral?
- (ii) Does it make sense without undue manipulation?
- (iii) Is it consistent with the express terms of the reinsurance?
- (iv) Is it apposite for inclusion in the reinsurance?

Rix L.J. found it appropriate to adopt this formulation. Accordingly, he had no doubt that clause 8 was incorporated into the reinsurance contract. This clause was, in fact, germane to the reinsurance because, despite not being part of the central definition of the risk, it was material to the nature and scope of the risk in the same way that an exception clause is germane to the shipment, carriage and discharge of goods under a bill of lading.²⁶ It would make sense without undue manipulation²⁷ and also be consistent with the other terms of the reinsurance contract and the common law duties of good faith that would otherwise exist in relation to the reinsurance contracts. The reasoning of Rix L.J. seems to be in line with the previous authorities. Surely, it is submitted, the formulation initially adopted by David Steel J. would create a landmark in cases where incorporation of a term in reinsurance and carriage of goods by sea contracts became an issue.

In an attempt to demonstrate that clause 8 was not incorporated into the reinsurance contract, the reinsurers alleged that clause 8 was an unusual term and for that reason incorporation of such a term was “unfair”. His Lordship was prepared to say that the clause was unusual, but he found no authority preventing the incorporation of an unusual term into a reinsurance contract. The cases cited by the reinsurers in their submissions, *Marten v. Nippon Sea and Land Insurance Co.*²⁸ and *Charlesworth v. Faber*,²⁹ were authority for the proposition that reinsurers were bound by usual terms, even to the extent of overriding an inconsistency. However, both of these cases were silent on the issue whether general words of incorporation could import an unusual or uncommon term. According to Rix L.J. the key issue was to determine whether the clause in question was fairly presented to the other party. Therefore, provided that sufficient notice was given, an unusual term could be incorporated into the contract. In other words, in his Lordship’s analysis, when determining whether a clause is incorporated into the contract or not, the crux of the matter is whether sufficient notice is given to the other party. In determining whether sufficient notice was given or not,

²⁴ The relevant provision was worded as “This reinsurance is subject to all terms, clauses and conditions as original and to follow that placement in all respects”.

²⁵ This issue becomes a significant one in carriage of goods by sea particularly in cases where bills of lading incorporate charterparty terms. See, for example, *Kish v. Taylor* [1912] A.C. 604; *Fidelitas Shipping Co. v. V/O Exportchleb* [1963] 2 Lloyd’s Rep. 113 and *Astro Valiente SA v. The Government of Pakistan (The Emmanuel Colocotronis)* (No 2) [1982] 1 Lloyd’s Rep. 286.

²⁶ See *TW Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd.* [1912] A.C. 1.

²⁷ Here there was a disparity between the judgments of Rix L.J. and David Steel J. The latter was prepared to manipulate cl. 8 so that the term “the insurer” was understood in the reinsurance contract to be referring to the “reinsurer”. Such a manipulation would not only affect the effect of this clause in reinsurance contracts, which will be evaluated below, but also would be inaccurate from a linguistic point of view as the clause goes on to speak of “its arrangements with [the producer]”, where “its” must, in the manipulated version, refer to the reinsurer, but cannot properly do so, since it is only the reinsured who has arrangements with the producer.

²⁸ (1893) 3 Com. Cas. 164.

²⁹ (1900) 5 Com. Cas. 408.

the way the clause in question was presented must be evaluated.³⁰ The marriage of these two concepts would mean that in cases where a clause is not fairly presented, not only does that clause not become part of the contract but also, in this context, this situation might amount to a breach of the duty of utmost good faith which is an overriding principle as far as insurance contracts are concerned.³¹

What might be the effect of clause 8 in reinsurance contracts? The reinsurers pleaded that the effect of incorporating clause 8 into the reinsurance contracts was merely to bind the reinsurers to a payment made by the reinsured where the reinsured might otherwise have had a straightforward defence based on non-disclosure or misrepresentation. Alternatively, clause 8 could be interpreted as operating independently at the reinsurance level thus preventing the reinsurers from complaining about non-disclosure or misrepresentation (or any other ground of defence which might be excluded by clause 8 on its true construction) as between the reinsured and themselves.

Rix L.J., disagreeing with David Steel J., preferred the former interpretation. In doing so, his Lordship considered the intention of the parties as to the interrelation between insurance and reinsurance contracts. There were numerous indications³² that the insurance and reinsurance contracts were intended to be back to back. However the contracts would not operate in a back to back manner if the effect of clause 8's incorporation was that the self-same non-disclosure or misrepresentation operated differently at the two levels. In such a case, the reinsured would be bound to pay while the reinsurers were entitled to avoid. The interpretation of clause 8 adopted by the Court of Appeal left the door open for one of the reinsurers, namely Independent, to allege breach of the duty of good faith since the notification to them, including considerations of notice of the clause, was unfair.

CONCLUSIONS

One of the main contributions of the case to the development of insurance law is the clarification of the relationship between the slip and policy. Unlike the restrictive approach adopted in *Youell v. Bland Welch & Co. Ltd.*, a significant role was granted to the slip during the process of construction of the insurance contract. Furthermore, some guidelines have been provided which could be used in determining whether a term is a warranty or not in the context of insurance contracts. The case also illustrates the problems which can be encountered in the drafting of waiver agreements. The remarkable increase in the amount of disputes caused by vague drafting of waiver agreements is perhaps a signal to the market to be more precise in the drafting of such clauses.

The question of the relationship between original insurance contracts and reinsurance contracts is one of the central issues in the law of reinsurance. The *HIH* case is a good example illustrating the problems that can arise when the parties intend to incorporate terms of the original insurance policy into the reinsurance contract. The tests that need to be taken into account when deciding whether a clause has been

³⁰ It should be stressed that the court, as a matter of fact, determined that one of the reinsurers, namely Independent, had not been endorsed with a copy of the policy wording, therefore was unaware of the existence of cl. 8.

³¹ This issue was, in fact, discussed in *Property Insurance Co. Ltd. v. National Protector Insurance Co. Ltd.* (1913) 108 L.T. 104. It is astonishing that no reference was made to this case in Rix L.J.'s judgment.

³² These indications were: the fact that "Type" and "Interest" in the reinsurance policy were stated to be "As Original Policy"; the fact that the premium was the same in both contracts; the fact that the amendment clause was intended to bind the reinsurers, subject to consultation and their agreement being obtained, to "all amendments and alterations to the terms, clauses and conditions of the Original Policy"; and the fact that the reinsurers promised to pay any claim and professional advisors' fees and expenses "incurred under the Original Policy... at the same time".

incorporated into the reinsurance contract have been explored and clarified by the court. Furthermore, it has been indicated that it is not the nature of the term, (*i.e.* whether it is common or unusual) but the degree of notice and fairness of its notification, which plays a role in its incorporation. It is clear that lack of fair notification on the part of the reinsured could cost him or her dearly since the reinsurer could rely on the defence of a breach of the duty of utmost good faith in such cases. Furthermore, in cases where there are incompatible clauses, this case leaves no doubt that the court would make pragmatic sense of the muddle in a pragmatic way by giving effect to the commercial purpose of reinsurance. This was the dominant view when interpreting clause 8 within the reinsurance context.

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CONTRACTUAL DAMAGES FOR MENTAL DISTRESS

Farley v. Skinner (No. 2)

[2001] U.K.H.L. 49, [2001] 3 W.L.R. 899 (H.L.) (Lords Steyn, Browne-Wilkinson, Clyde, Hutton, Scott of Foscote)

INTRODUCTION

*Farley v. Skinner*¹ involved a short question of whether and when contractual damages for mental distress are available. The facts were simple, yet the hearing took up an “exorbitant amount of time” because of the division of opinion that it generated.

Mr Farley was a successful businessman who wished to acquire a country residence for his retirement. He was drawn to the peace and tranquillity of Riverside House, a beautiful property in the village of Blackboys in Sussex. It looked ideal for him but for its location some 15 miles from Gatwick International Airport which, inevitably, raised the question of aircraft noise. Mr Farley gave Mr Skinner, his surveyor, specific instructions to investigate, *inter alia*, whether the property would be seriously affected by aircraft noise and said that he did not want a property on a flight path. To these instructions, Mr Skinner responded as follows: “. . . we were not conscious of this [aircraft noise] during the time of our inspection, and think it unlikely that the property will suffer greatly from such noise . . .” Reassured by this report, Mr Farley bought the property for £420,000 and had it modernised and refurbished at an additional cost of £125,000.

Shortly after moving in, his worst fears were realized. Riverside House was not far away from a navigation beacon and at certain busy times, aircraft would be stacked up around the beacon until they were cleared for landing at Gatwick. It was common ground that the plaintiff’s enjoyment of the property was diminished by aircraft noise: it “interfered with his enjoyment of a quiet, reflective breakfast, a morning stroll in his garden or pre-dinner drinks”. Notwithstanding these disturbances, the plaintiff decided to stay on. He, however, felt that he deserved to be compensated for the defendant’s breach in giving him an inadequate contractual response to the important issue of aircraft noise.

He commenced an action for damages on two grounds: (a) that the real value of the property, affected by the aircraft noise, was substantially less than what he had paid for it and (b) that his use and enjoyment of the property had been impaired by the aircraft noise. With respect to (a), the trial judge concluded that the aircraft noise, which had upset Mr Farley, did not result in any diminution in the value of the property. The purchase price that Mr Farley had paid coincided with the open market value of the property after taking into consideration the aircraft noise.² Mr Farley, however, succeeded in his claim with respect to (b) and was awarded £10,000 in accordance with the principles stated in *Watts v. Morrow*.³

The defendant did not challenge the decision with respect to (a) but appealed on the issue whether in law, the plaintiff was entitled to damages in respect of (b). The matter came before a two-member Court of Appeal. Judge L.J. agreed with the trial judge while Hale L.J. differed on the ground that the surveyor had not guaranteed a result

¹ [2001] U.K.H.L. 49, [2001] 3 W.L.R. 899.

² Had there been an appreciable reduction in the value of the property as a result of the aircraft noise, the plaintiff could not have claimed both that difference in value and damages for discomfort. To allow both would amount to double recovery, per Lord Scott *ibid.* at para 109.

³ [1991] 1 W.L.R. 1421.

but had only undertaken a duty to exercise reasonable care. In the result the matter had to be re-argued before a differently constituted Court of Appeal. The majority of the Court of Appeal⁴ held that Mr Farley was not entitled to damages for mental distress. Taking the two Court of Appeal decisions together: two members of the Court of Appeal held in Mr Farley's favour while three held against him. When the appeal reached the House of Lords, the Law Lords, applying the then recent guidance provided by *Watts v. Morrow*⁵ and *Ruxley Electronics and Construction Ltd v. Forsyth*,⁶ unanimously restored the trial judge's award of £10,000.

THE HOUSE OF LORDS DECISION

In *Watts v. Morrow*, Bingham L.J. had stated that a plaintiff is not in general entitled to damages for the inconvenience or mental distress that is caused *merely* by a breach of contract.⁷ Many breaches of contract cause anxiety and disappointment to the innocent party, for example when goods fail to be delivered or services are not performed as promised. Even though these reactions are undoubtedly foreseeable, damages for such injured feelings are ruled out on the ground of public policy.⁸ The rule against the recovery of non-pecuniary damages is not absolute and there are limited exceptions: a well settled one being that damages for pain, suffering and loss of amenity caused to an individual by a breach of contract are recoverable.⁹ This exception is not material in the present appeal. The other exceptions stated by Bingham L.J. are pertinent and their precise scope is in issue here. Where the *very object* of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be recoverable if the plaintiff is deprived of the benefit of such a contract.¹⁰ The law would be defective if it did not provide for this exceptional category of case. In other cases (including a contract to survey a house for a prospective buyer as in *Watts v. Morrow*), damages are recoverable for consequential physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.¹¹

Bingham L.J.'s observations were adopted by the House of Lords in *Farley*, with Lord Scott viewing the *dicta* as being wholly consistent with the established principles for the recovery of contractual damages¹² and Lord Steyn reiterating that entitlement to damages for mental distress caused by a breach of contract was not established by mere foreseeability alone. The right to recovery is dependent on the case falling fairly within the principles governing the special exceptions;¹³ in other words, a correct

⁴ [2000] Lloyd's Rep PN 516, Stuart-Smith and Mummery L.J.J. with Clarke L.J. dissenting in a detailed and powerful judgment.

⁵ *Op. cit.*

⁶ [1996] A.C. 344.

⁷ See Pollock C.J. in *Hamlin v. Great Northern Railway Co* (1856) 1 H & N 408 at 411; *Addis v. Gramophone Co Ltd* [1909] A.C. 488 H.L.; *Cook v. S.* [1967] 1 All E.R. 299. The general principle was recently approved by the House of Lords in *Johnson v. Gore Wood & Co* [2001] 2 W.L.R. 72.

⁸ *Supra*, n. 3 at 1445, *per* Lord Bingham. It may be deduced that contract breaking is an incident which is expected to be met with mental fortitude. Hence mere annoyance or disappointment at the failure to perform the contract should not, as a matter of policy, sound in damages.

⁹ *McGregor on Damages*, (1997, 16th ed., Sweet & Maxwell), para 96, pp 56–57

¹⁰ *Diesen v. Samson* 1971 S.L.T. (Sh Ct) 49; *Jarvis v. Swans Tours Ltd* [1973] Q.B. 233; *Jackson v. Horizon Holidays Ltd* [1975] 1 W.L.R. 1468; *Heywood v. Wellers* [1976] Q.B. 446; *Jackson v. Chrysler Acceptances Ltd* [1978] R.T.R. 474.

¹¹ The phrase "physical inconvenience" may be traced to the judgment in *Hobbs v. London & South Western Railway Co* (1875) L.R. 10 Q.B. 111, 122; *Bailey v. Bullock* [1950] 2 All E.R. 1167; *Wapshott v. Davis Donovan & Co* [1996] P.N.L.R. 361.

¹² *Supra*, n. 1, at para 82.

¹³ *Supra*, n. 1, at para 16.

categorisation of the claim is required. Useful as Bingham L.J.'s *dicta* are as a starting point, they are broad principles, not a precise test or verbal formula "written in stone".¹⁴ It is for the courts to apply the principles to the differing circumstances of individual cases.

In applying these principles to *Farley*, the House of Lords provided some important clarifications of their precise scope. Lord Steyn noted¹⁵ that the words "the very object of the contract" should not be given a narrow reading. The contractual obligation that had been breached need not be the sole or principal object of the contract. In this connection, Lord Hutton's proposal of a general test is to be welcomed. It is a test that the courts could apply in practice in order to preserve the fundamental principle that general damages are not recoverable for mere disappointment caused by a breach of contract and "to prevent the exception expanding to swallow up, or to diminish unjustifiably, the principle itself". He stated¹⁶ that a plaintiff should not be denied damages for non-pecuniary loss if (1) the matter in respect of which he or she seeks damages is of importance to him or her, (2) he or she has made clear to the other party that the matter is of importance to him or her and (3) the action to be taken in relation to the matter is made a specific term of the contract.

If the above conditions were satisfied (as in *Farley*), Lord Hutton saw no reason why the claim should be rejected on the ground that the specific obligation was not the principal object of the contract or on the ground that the other party did not receive special and specific remuneration in respect of that obligation.

Accordingly, *Farley* is distinguishable from the case of an ordinary survey contract (such as that in *Watts v. Morrow*) because of the specific undertaking to investigate a matter important for Mr Farley's peace of mind, even though that undertaking could not be said to be the principal object of the property survey contract. It is sufficient that the main or important object of the contract was the provision of pleasure, relaxation or peace of mind. Accordingly, the House of Lords overruled *Knott v. Bolton*¹⁷ which decided that an architect, engaged to design a wide staircase for a gallery and impressive entrance hall, was not liable for the disappointment and distress caused by the lack of an impressive staircase on the ground that the central object of the contract was to design a house, not to provide pleasure to the occupiers of the house. A general test comprising "simple and practical rules" which shifts the focus from the very object of the contract to the importance of the term breached will widen significantly the scope of liability within the special exceptions and lead to more "coherent and just solutions" in future cases.

Certain other useful points emerge from *Farley*. The failure to move out did not divest the plaintiff of a claim for damages for non-pecuniary loss. In other words, the plaintiff is not disqualified from claiming damages if he or she cannot mitigate by making good the defects. Mr Farley could not have abated the nuisance (aircraft noise) which was beyond his control and he had acted reasonably in making the best of a bad job by staying on. If he had moved out, he would no doubt have recovered the substantial costs of removal or resale. Furthermore, like any contractual claim for damages, the principles of remoteness must be satisfied. Since the object of the request to investigate the issue of aircraft noise was to enable Mr Farley to enjoy the property,

¹⁴ *Supra*, n. 1, *per* Lord Clyde, at para 35.

¹⁵ *Supra*, n. 1, at para 23.

¹⁶ *supra*, n. 1, at para 54.

¹⁷ (1995) 11 *Const. L.J.* 375.

it was within the contemplation of the parties that if the property were affected by aircraft noise, he would either not buy the property or live there deprived of his expectation of peace and quiet.

The House of Lords also made helpful observations in connection with Mr Farley's alternative ground of appeal in which he sought damages for his mental distress as consequential loss within the second exceptional category noted in *Watts v. Morrow*. This was on the basis that the aircraft noise constituted physical inconvenience and discomfort which Mr Farley suffered as a consequence of the defendant's breach. In this connection, Lord Scott made two observations: first, it was subject to the remoteness hurdle that consequential damage must, at the time of the contract, be reasonably foreseeable as liable to result from the breach. In *Johnson v. Gore Wood & Co*,¹⁸ the plaintiff's claim failed in respect of damages for mental distress caused by solicitors' negligence in failing to advise about various financial matters. The mental distress suffered was not within the contemplation of the parties as liable to result from the breach. Second, the adjective *physical* in the phrase "physical inconvenience and discomfort" required some clarification. The distinction should be made not between physical and non-physical inconvenience, for that would be very difficult to distinguish, but based on the cause of the inconvenience or discomfort. If the cause were no more than disappointment that the contract had been broken, damages were not recoverable, even if the disappointment had led to a complete mental breakdown. But if the cause of the inconvenience or discomfort was a sensory experience (sight, touch, hearing, smell *etc.*), damages could, subject to the remoteness rules, be recovered.¹⁹

Lord Hutton's approach appears to have been whether or not the breach of contract had a physical effect on the plaintiff. The aircraft noise did indeed affect Mr Farley through his hearing and could be regarded as having a physical effect upon him. Accordingly, it was open to the trial judge to find that the plaintiff had indeed suffered physical inconvenience and discomfort. It is submitted, with respect, that too much should not be made of the adjective "physical". In claims for mental distress comprising vexation or frustration, for example, it is unnecessary to show a physical impact. Similarly, there is no reason why it must be shown that the inconvenience or discomfort is physical in order to qualify for damages, provided it is not mere disappointment at the defendant's failure to perform.

In determining contractual liability for mental distress, the dicta in *Watts v. Morrow* should be applied together with the principles laid down in *Ruxley* as to the proper measure of damages in such cases. It will be recalled that the swimming pool in *Ruxley* was built to the standard six feet at the deep end instead of the seven feet six inches specified under the contract. An award that was based on the cost of curing the defect (£21,560) would have been wholly disproportionate to the loss suffered and economically wasteful. Instead the House of Lords awarded the plaintiff the moderate sum of £2500 for his disappointment in not receiving the swimming pool he desired. *Ruxley* establishes the entitlement of the injured party to damages where he or she is deprived of a contractual benefit which is apparently of value to him or her but the ordinary means of measuring the recoverable damages are inapplicable as where, for example, he or she is not entitled to the cost of reinstatement or where the breach has not caused diminution in the market value of the property. In such cases, "where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure",²⁰ justice required that reasonable damages (a modest sum not

¹⁸ [2001] 2 W.L.R. 72.

¹⁹ *Supra*, n. 1, at para 84, 85.

²⁰ *Supra*, n. 4, *per* Lord Mustill and Lord Lloyd of Berwick at 360–361, 374.

based on difference in value) should be awarded solely to compensate the plaintiff for his or her disappointed expectations. Quantification of that value will, in many cases, be difficult and may often seem arbitrary.²¹ But the amount to be awarded is to be a modest sum.²² Although the *Ruxley* principle was enunciated in the context of a construction contract, the relevant principle could be of more general application.²³ More specifically, for present purposes, it should also restrict compensation for mental distress as a consequential loss to a modest sum.²⁴

Applying the *Ruxley* principle to *Farley*, Lord Hutton²⁵ and Lord Steyn felt that the award of £10,000 to the plaintiff was high but they were not prepared to interfere with it as the plaintiff was stuck with a situation where the inconvenience and discomfort caused to him would continue. At the same time, Lord Steyn cautioned that awards in this area should be “restrained and modest” and it was “important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation”.²⁶

Farley clarifies and re-affirms the approach to the simple but important issue of contractual damages for mental distress, a question that has caused such division of opinion. The House of Lords’ clear guidance has pre-empted the need in the future for relatively simple claims (such as Mr Farley’s) to travel to appellate courts for a ruling.²⁷

TER KAH LENG*

²¹ *Supra*, n. 1, *per* Lord Scott, at para 79.

²² See *e.g.* *Jarvis v. Swan Tours*, *op cit.*; *Jackson v. Horizon Holidays*, *op. cit.*

²³ *Supra*, n. 1, *per* Lord Hutton, at para 50.

²⁴ *Supra*, n. 1, see Lord Scott, at para 110.

²⁵ *Supra*, n. 1, at para 61.

²⁶ *Supra*, n. 1, at para 28.

²⁷ *Supra*, n. 1, *per* Lord Scott, at para 74.

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BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

EVOLUTION OR REVOLUTION? RIGHTS AND LIBERTIES AFTER THE HUMAN RIGHTS ACT 1998

Civil Liberties Law: The Human Rights Act Era

by N. WHITTY, T. MURPHY and S. LIVINGSTONE

London, Butterworths, 2001, xxxii and 499 pp.

Paperback, £26.95, ISBN 0-406-55511-7

Students of constitutional law will no doubt be struck by the title of this book, as, on the face of it, it appears inherently contradictory. The concept of right is not one that can always be comfortably reconciled with that of liberty.¹ The two are often perceived as being polar, opposite ends of the legal spectrum, the former positive and empowering, the latter oft criticised as being negative, the residue left over after the State has sated its appetite. However, it becomes immediately apparent that this title is no mistake. In their engaging first chapter the authors go to great lengths to explain to the reader their reasoning for the selection of such a title. As might have been expected with legislation of this type, reactions to the introduction of the Human Rights Act 1998 have been diffuse, ranging from prophecies of impending doom and anarchy on the streets at one extreme to criticisms that the Act is too limited on the other.² Both these positions, whether radical or conservative, have tended towards the extreme. Whitty *et al* have sought to move away from any kind of dogmatic approach as to the likely impact of the Act. Instead they have sought to reconcile the various positions and to postulate on the likely outcome of the interface between these uneasy bedfellows. The result is a nicely balanced one that does not lean too greatly towards one position or another, but instead undertakes careful analysis of the likely interface between the two noting:

the Diceyan civil liberties tradition, which promoted the common law's central role in protecting 'liberties', has not necessarily been abolished by the enactment of the HRA; indeed, at present, it seems more likely that both will co-exist in a complex relationship with one another and a range of other 'high' and 'low' constitutional forces.³

¹ See for example C. R. Munro, *Studies in Constitutional Law*, 2nd ed. (Butterworths: London, 1999) Chapter 10 "From Civil Liberty to Civil Rights".

² "Human rights 'free for all' feared" *The Daily Telegraph*, 7 August 2000; "Judges strike the rights balance" *The Daily Telegraph*, 19 December 2000; J. Wadham (1999) "Legal overview of the Human Rights Act", Liberty: <http://www.liberty-human-rights.org.uk/mhrp6.g.html>

³ p. 5.

The impact of the Act it seems may come to be seen as neither bang nor whimper⁴ but, as Whitty *et al* point out, a further turn of the British constitution's perpetually moving evolutionary wheel.

As with any work of this nature, coming so soon after the enactment of the legislation that it seeks to assess, *Civil Liberties Law: The Human Rights Act Era* suffers from the pace with which the area has developed. The period following the coming into force of the Act in October 2000 has been one of great excitement for constitutional lawyers as each new case further evidences the developing judicial approach to it. Nevertheless the balanced, well-reasoned approach adopted by the authors serves to provide the reader with a startlingly prescient prediction of the development of the Act. Consideration of the cautious but evolutionary developments in the field of privacy gives adequate support to the position adopted.⁵ Indeed the book is well worth reading for the first chapter alone. The beauty of the chapter is that it does not seek to engage in speculation as to the precise impact of the Act in specific areas, but instead seeks to illustrate the countervailing forces that will shape the United Kingdom's constitution in the post-Human Rights Act 1998 era. Rather than perceiving the Act as an all-pervading unwieldy bludgeon the approach is to consider the impact upon the power dynamic within the constitution.

The book, however, does serve a greater purpose – the first chapter though meritorious on its own also provides the foundations for a more detailed assessment of the likely impact of the Human Rights Act 1998. Working from the basis of their initial analysis the authors go on to identify what they consider to be key areas within which the Act is likely to be significant. Their choices are unlikely to be controversial, they cover areas traditionally considered key by civil libertarians as well as subject matter of a highly topical nature. Public order, terrorism, fair trials, prisoners' rights, privacy, secrecy and freedom of expression and equality are all given substantial consideration. The second of these, terrorism, seems a remarkably prescient choice in light of the fact of the book's publication prior to the attacks on New York and Washington. However, each of the areas is treated with the same careful, considered scrutiny as in the first chapter.

Thankfully the authors avoid developing a "Human Rights Act 1998 and . . ." type approach to these topics. Instead they continue their initial broad-brush approach. The introduction of the Human Rights Act is used as a watershed, which divides the 'old' civil liberties approach from the "new" post-Human Rights Act 1998 developments. The opportunity is taken to reflect upon and contextualise the traditional position in English law and to highlight sub-areas within the topics selected where the Human Rights Act 1998 may be of use in stimulating or aiding change. This said the book carefully avoids being prescriptive in its approach. In keeping with the early themes the authors are keen to emphasise the opportunities for constitutional and legal development brought about by the introduction of the Act rather than demanding that it be utilised in order to achieve particular political ends. However, at no point do they shy away from acknowledging the Act's attendant problems. The approach is reflective and considered and manages to avoid becoming bogged down in minute detail whilst managing to set this broader vision in solid foundations.

Civil Liberties Law: The Human Rights Act Era should be warmly welcomed as a much needed addition to the now vast range of literature on the impact of the

⁴ G. Phillipson "The Human Rights Act, 'horizontal effect' and the common law: a bang or a whimper?" (1999) 62 M.L.R. 824.

⁵ See, amongst others: *Theakston v. MGN Ltd* [2002] EWHC 137 [2002] E.M.L.R. 22; *Venables v. News Group Newspapers Ltd* [2001] 2 W.L.R. 1038; *Campbell v. Mirror Group Newspapers Ltd* [2002] EWHC 499, *The Times* 29 March 2002; *Douglas v. Hello! Ltd* [2001] Q.B. 967.

introduction of the Human Rights Act 1998. It should also be lauded for taking the opportunity to take a step back from the minutiae and adopt a more holistic approach to analysis of the impact of the Human Rights Act 1998 against the background of the United Kingdom's civil liberties oriented historical background. The authors clearly have a positive approach to the Act, taking the view that it presents opportunities that should undoubtedly be taken up. The text is accessible and well written and will make valuable reading for a wide-ranging audience from undergraduate students to practitioners. Equally, the book can be digested as a whole, but individual chapters will make useful reading for those operating in specific fields of interest. The book tends more towards the political scientist than the black-letter lawyer, but in this much it may be of use to both, particularly the latter – enabling a distinction to be drawn between the contextual wood and the sub-disciplinary trees.

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EU LAW

EC Membership and the Judicialization of British Politics

by DANNY NICOL

Oxford, Oxford University Press, 2001, 287pp.

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This book is part of the series Oxford Studies in European Law, edited by Paul Craig and Grainne de Búrca. Its objective is to consider the impact of British membership of the European Community on the relationship between Parliament and the courts in the United Kingdom. It discusses in detail the British attempts to join the EEC, the passage of the European Communities Bill, and the comparative experience in Ireland. In somewhat less detail, it considers the British experience of membership, in particular the Treaty on European Union 1992 (TEU) and the judgments of the House of Lords in *R v. Secretary of State for Transport, ex parte Factortame Ltd and others*¹ that an Act of Parliament must be suspended pending determination of its compatibility with Community law, and in *R v. Secretary of State for Employment, ex parte Equal Opportunities Commission*² declaring that certain provisions of an Act of Parliament were contrary to Community law. It also considers, by way of comparison, the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) through the Human Rights Act 1998 (HRA).

It should be said at the outset that this book is clearly written and makes a number of very interesting arguments. As a stimulus to debate, it would be a useful addition to the reading list of students studying domestic or EU constitutional law, although it is unfortunate that there is some inconsistency of citation between the footnotes and the Table of Cases and indeed the citations for some cases (including the judgment of the Court of Justice on interim remedies in *Factortame*) are not given.

However, the book should not be viewed as providing a dispassionate and entirely balanced account of the different arguments. Instead, the author pursues a definite thesis throughout the book, namely that the legal implications of accession to the EU were not foreseen or intended by politicians, and that a new basis of the supremacy of Community law must therefore be found. Although some convincing arguments are made in support of the first limb of this argument, it is disappointing that the contrary arguments are on occasion rejected without proper consideration or, indeed, are not considered at all. The relationship between this debate and the supremacy of Community law is somewhat tenuous and in places stronger arguments are required to support the connection. The more important argument that the supremacy of Community law has in turn given unprecedented power to the national courts, which can now apply law not made by the British Parliament in preference to law so made is, in general, not followed through. Instead, the author tends to concentrate on the relationship between the British Parliament and Community law as adopted by the Community legislature and applied in the Community courts.

Nicol argues in the Introduction that the United Kingdom was traditionally regarded as having a political constitution in which the courts adopted a subordinate role to that of Parliament. Although judicial activism began to make inroads into the sovereignty of Parliament at least a decade before the accession of the United Kingdom to the Community, it was that accession and the subsequent recognition of the direct effect of Community law in the national legal system which changed the constitution to one

¹ [1991] A.C. 603.

² [1995] 1 A.C. 1.

based on law. After a brief description of the cumulative effect of *Van Gend en Loos v. Nederlandse Administratie der Betsatingen*,³ *Costa v. ENEL*⁴ and *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*,⁵ Nicol then argues at some length for the uncontroversial proposition that the checks and balances necessary to a democratic system are only effective in controlling the executive if the legislature fully understands the legal implications of measures taken. He also argues that the British courts' assumption that the Community law is supreme has been based on the argument (set out, for example, by Lord Bridge in *Factortame* at 658) that Parliament intended this to be the case, and that if Parliament did not understand that this would be the result of its actions, and therefore could not have intended it to be the result, this basis is flawed and some other must be sought.

Nicol gives an absorbing account of British attempts to join the Community, although this appears to provide considerable evidence against his contention that the Parliament did not fully understand the sovereignty implications of accession. For example, he cites the concentration in the House of Lords on the impact of Community legislation rather than case law in support of the argument that the role of the Court of Justice was underestimated and therefore the implications for sovereignty misunderstood. However, no discussion of the relationship between the Court of Justice and the other institutions is provided, and therefore the argument that the Court only interprets the law, and the legislature is free to pass legislation to counteract any judgments which it regards as erroneous, is not addressed. Similarly, Nicol argues that the fact that three of the Member States who made submissions in the *Van Gend en Loos* case opposed the establishment of the doctrine of direct effect indicates that it was not the intent of the Member States who drew up the EC Treaty, but he fails to address the possibility that they did not consider this issue in 1957, had changed their mind in the interim, or would in fact have been prepared to reach agreement on it subject to concessions on other issues.

While the question of whether the legislature and executive truly understood the full legal (or, for that matter, political and economic) implications of accession to the Community is undoubtedly open, it is submitted that the significance of the answer is now minimal except as a matter of historical interest. Indeed, the degree of accuracy with which an answer can be given must be doubted. The events with which the book is primarily concerned took place over thirty years ago. The contemporaneous documentary evidence is not compelling, and evidence given much later by those involved is inevitably tainted by lapse of time, hindsight and the current political agenda as to the United Kingdom's relationship with the EU.

Even if it could be proved that the British government and Parliament failed fully to understand the implications of accession, this would add little of substance to the current legal debate. It could also be argued that the true consequences of particular action can never fully be foreseen, not just because they may be difficult to predict, but also because those acting do not have limitless time to consider all possible repercussions. In some ways the book adopts too uncritically the argument, potentially convenient for those that wish to justify their change of stance over time, that British politicians were duped. Some allowance is made for the possibility that they might have understood more than they admitted publicly, but were deterred from sharing this understanding with the public for fear that the electorate might consider the truth unpalatable. However, no allowance is made for the possibility that in 1972, as in 1957

³ Case 26/62 [1963] E.C.R. 1.

⁴ Case 6/64 [1964] E.C.R. 585.

⁵ Case 106/77 [1987] E.C.R. 629.

and still today, there are a number of rival agendas for the future of the European project and that the consequences of accession depended in large part on future acts, including those of the United Kingdom itself. It could be argued that the United Kingdom and its politicians have, in the main, been unprepared to exercise the degree of compromise and commitment required to exert influence, and as a result the progress of the Community since 1972 may not have been what British politicians of the time anticipated. It is therefore a pity that the book does not consider the possibility that the gap which it suggests exists between the claims made for accession and the experience of membership is due not to mistaken claims in 1972 but a failure to act so as to make them a reality in subsequent years.

Even if it were to be accepted that the government and Parliament failed to foresee the legal consequences of their actions in 1972, Nicol's argument that this undermines the basis of the supremacy of Community law in the United Kingdom is surely flawed. The recognition of the supremacy by British courts is based not on their assumption that this was Parliament's fully comprehending intention, but on the Treaties themselves and the jurisprudence of the Court of Justice. It is therefore unnecessary to find a more compelling basis such as the respective roles of politicians and courts as Nicol contends. This is perhaps a relatively minor criticism, since a discussion of the relationship between these roles is useful to the wider debate, stimulated in particular by the enactment of the HRA, on the relationship between the courts and the legislature in the United Kingdom. However, the thesis would have been more convincing had potential defects in governmental and Parliamentary understanding been linked, for example, to their ability to assess further moves towards European integration, such as British membership of EMU.

The discussion in the chapters on "The Vote on Entry" and "Passage of the European Communities Bill" of the failure of the British Parliament to anticipate and examine the effect of accession on the power of national courts is excellent. It provides a detailed account and critique of the judgments of the Court of Justice and national courts, and academic literature available at the time and is, to say the least, thought-provoking. Nicol argues that although members of Parliament considered the impact of decisions made outside the United Kingdom (by the legislative or judicial institutions of the Community), they failed to consider the potential increase in judicial power at national level which would result from making law not made by the national Parliament supreme in national courts. Unfortunately, in the wealth of evidence and argument provided, it is unclear whether the author concludes that this omission was excusable or not. Strict adherence to the chronological order of events, which is generally very helpful in this book, is regrettable here because specific examples of judgments illustrative of this increased judicial power since 1972 are not provided during this discussion.

The comparison drawn with Ireland is interesting, but as Nicol acknowledges, the Irish constitution was law-based rather than political prior to accession, and therefore although its experience may provide an interesting contrast, it is difficult to make valid comparisons. Again, he fails to consider whether the post-1972 relationship with Europe has affected the extent to which expectations in 1972 have been realised, and the view now taken of what those expectations are or should have been. The political climate in Ireland has tended to be considerably more pro-Europe than that of its nearest neighbour, and this may also reduce the possibility for drawing comparisons.

The key theme of the chapter on "*Factortame*, EOC and Maastricht" (which also considers the effect of the Court of Justice judgment in *United Kingdom v. Council*

(*Working Time Directive*)⁶ is that the British courts have failed to explain why the European Communities Act prevents the application of the doctrine of implied repeal to Community law. There is some justification for this as an argument, but the tone of the chapter is that this is a conclusion, and thus counter arguments – for example that the terms of the Act prohibit implied repeal – are not addressed. The possibility of express repeal is also not examined. Again, adherence to the chronological order of events is unfortunate here because no mention is made of the HRA until the following chapter. Given that Nicol himself draws parallels between the impact of the HRA and the European Communities Act in the subsequent chapter, it would surely have been appropriate to bring the former into the discussion on the entrenchment of Community law and its implications for the power of national courts. That said, the chapter on “The Human Rights Comparison” is comprehensive in its coverage of the debate concerning the enactment of the HRA, with particular reference to the impact of the experience of Community law. Unfortunately, the key difference – that the structure of the Community gave the United Kingdom no choice but to incorporate Community law fully into domestic law, whereas the ECHR system permitted it to limit the impact of the ECHR to actions in the Court of Human Rights and, when it chose to extend jurisdiction to the national courts, to do so on its own terms – is analysed in a single paragraph. No significance is attached to it, yet there is surely at least an arguable case that this is the reason that the HRA does not make the ECHR supreme over English law. The lack of consideration of any such argument undermines the conclusion that by 1998 parliamentarians were more sophisticated and better able to protect political sovereignty from the judges. Indeed this is only put forward as a possibility and it is therefore disappointing that alternative arguments were not considered more thoroughly.

In his conclusion, Nicol suggests that there was “wilful blindness” at a political level as to the consequences of accession to the Community. Disappointingly, he does not suggest precisely where that wilfulness existed; whether it was the Cabinet, the Commons or the whole of Parliament which chose to turn a blind eye. Nor does he examine with any rigour the argument that this was in order to avoid frightening the public out of voting in favour of accession. Finally, he suggests that debates over the impact of later Community measures, including the TEU, were much more sophisticated and indicated a greater level of understanding. While there is some evidence to support this, his review of the actions of politicians involved in the negotiation and ratification of the TEU seems more lenient than that of the actions of those involved in accession. The United Kingdom had been a member of the Community for twenty years by the time of the TEU, and should therefore have been in a stronger position to mould its development according to its own expectations and wishes. British politicians certainly had greater access to information and evidence about the potential effects of proposed developments. In addition, commentators now have thirty years of experience to assess the effects of accession, but only ten years in which to judge the effects of the TEU. It is therefore essential to acknowledge that the full consequences of the TEU may not yet be fully appreciated.

In conclusion this is a well researched and written book, with much to stimulate argument. However, arguments which run contrary to those of the author are not given sufficient weight, and ultimately this detracts from the weight of his arguments.

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⁶ C-84/94, [1996] E.C.R. I-5755.

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LITERATURE, PHILOSOPHY AND LAW

Empty Justice, One Hundred Years of Law, Literature and Philosophy

by MELANIE WILLIAMS

London, Cavendish Publishing, 2002, xxxviii + 238pp.

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This is a self-advertisedly ambitious book, and one which, on the whole, succeeds in its ambitions of interdisciplinarity, bringing together law, literature and philosophy, or rather aspects of them. However, it is neither a light nor an easy read. It is unequivocally challenging, and this, despite the hope expressed by the author that readers will not be put off by its density, may well mean that it receives a smaller readership than it actually deserves. While it is a substantial text, with a considerable amount of exploration of theoretical concepts, it is not impenetrable, merely complex (necessarily so given the interdisciplinary brief the author has set herself). For those who do respond to its challenges, though, it will provoke a useful reassessment of a number of certainties about law and the ways in which it affects, and has been influenced by, reactions to it expressed through literature and philosophical reflection. This extensive book is not afraid to posit some very “big” questions, and the author justifies her own conclusions by a wealth of assured reference to an impressive array of subject disciplines and wide-ranging types of conduct and their relation to criminality and its implications for the philosophy of jurisprudence. The reader is forced to think, and use his or her capacity to analyse and consider how a socio-legal context has influenced, over time, understandings and perceptions of the law and its practical applications. At a time of considerable pressure for legal reforms to provide remedies for the “ills” of society and perceived “failures” of the legal process, the implications of this work have valuable lessons for the present.

Certainly this is not a book to sit down with and tackle in one gulp: the most rewarding approach may well mean taking it chapter by chapter (even section by section) and not necessarily in the contents order. This is not a problem, in that each chapter is self-standing to a considerable extent. But the lengthy introduction is both necessary and interesting in its diversity and is an essential starting place for any reader taking up Williams’ challenge to rethink links between “the moral life” and the formation of identity and how law, literature and philosophy cast light on these. Readers are thus provided with plenty of explanatory commentary that directs them through the rest of the text. The issues examined are often controversial and topical, including prostitution and pornography, questions of moral and physical decay, the doctrine of free will, and the concept of the reasonable man – in other words, topics that have long challenged the legal mind. Legal scholars are thus invited to re-evaluate the legitimacy and impact of long-established legal principles, while scholars in other disciplines can learn about legal issues in ways which underline their broader socio-cultural relevance.

Empty Justice thus uses an impressive range of knowledge and understanding of different disciplines to move beyond the limitations of such boundaries. In raising such issues, Williams also tackles the tricky problem of interdisciplinarity, readily accepting that a work which claims to be such should be subjected to a healthy scepticism and that it needs, very carefully, to define its terms. However, Williams does explain her claim to interdisciplinarity well, and in ways that should provide a model for others seeking to produce work with a similar label. The result is not an easy blandness, but a stimulating discussion of the ways in which these disciplines coincide in their

priorities – and where they diverge. Readers may not always agree with Williams’ definitions and perspectives, but they are likely to benefit from being forced to reassess their own stance and it is a good way of learning (or updating) understandings of key theories, past and present, in these three fields. One problem here, though, is that a better sense of the chronological dimension, giving the broader cultural and political contexts, might have helped readers unfamiliar with some of the concepts and theories, as well as some of the works of literature and philosophy she discusses, navigate their way through the debates. Williams’ erudition can seem daunting. But she so carefully maps out her analysis, with regular cross references within the text, that this is a fairly minor criticism.

It is likely that different chapters will hold the interest of different readers, according to the ways in which they chime with existing knowledge and priorities. The huge sweep makes that inevitable. But there are themes that run throughout, and it is worthwhile for the reader to seek to follow these throughout the book. The issues raised by sexual equality and its presentation in law and literature, and the philosophical justifications therefore, provide one example here. From Hardy’s *Tess of the D’Urbervilles* to Ballard’s *Super-Cannes*, via Coetzee’s *Foe*, Williams uses literature to provide a context for debating the ways in which authority has pronounced on a range of cases, from recent high-profile cases such as *R. v. Ahluwalia*¹ to ones which are now less familiar, such as the Viscountess Rhondda case. (The Viscountess Rhondda claimed, as her father’s heir, the right to sit in the House of Lords in 1922 – but despite the recent enactment of the Sex Disqualification (Removal) Act 1919, the Lords rejected her claim.) In so doing, Williams provides a deeply provocative reassessment of the coincidences between cultural attitudes (underpinned by philosophy) and actual legal experience, underlining her claim that “the ability of fictional texts to confront and critique the dark underside of Western liberal values is truly potent”.² This is linked to discussion of the extent to which a legal system can be viewed separately from its essentially moral purpose – pointing up the importance of including both philosophical and literary perspectives in lawyers’ own assessments of their role in society and the usefulness of the legal system (as well as, implicitly, the factors which should drive forward considerations of reform of the process). Thus Williams also discusses, for instance, the challenges thrown out by the *Pinochet*³ hearing to the complacency of many practitioners that the legal system is inherently impartial, arguing (successfully to our mind) that the weight of evidence in both literature and philosophy indicates that a judge “cannot entirely divest himself of his identity at the court door”,⁴ justifying Lord Hoffman’s removal from that hearing.

As this brief survey of the discussions included in the book indicates, this is a work of enormous range, but it is far from superficial in what it covers. It sustains its claims to depth of debate admirably. It is a well-produced book, clearly referenced and with admirably clear contents pages. It is a pity that the index is not more exhaustive – given the complexity of the book, a denser index would be an asset, given that most readers are likely to dip into this book rather than read it at a single sitting, and, subsequently, are likely to wish to refer back to it for particular points. The complexity of the analytical structure means that points which remain in the mind are not easily re-discovered via the contents page, and thus a more detailed index would have been a further asset to this otherwise generally admirable and thought-provoking book.

¹ [1992] 4 All E.R. 889, C.A.

² At page 4.

³ *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119, H.L.

⁴ At page 73.

Read it – and advise others to do so. If you are at times roused to disagree quite powerfully with some of its conclusions, you will not be bored by it and you will enhance your individual understanding of a range of highly topical concerns.

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NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

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*FIONA CUNNINGHAM**

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Further details of the course can be obtained from our website at nls.ntu.ac.uk or by contacting the course administrator, Beverley Roberts at Beverley.Roberts@ntu.ac.uk

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RESPONSE TO THE SECOND CONSULTATION ON THE CONSUMER GUARANTEES DIRECTIVE (99/44/EC)

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This is a response to the Second Consultation (“the Consultation”) on the Consumer Guarantees Directive (“the Directive”). There are three parts: the first part sets out the criteria relevant to assessing whether the Directive would be implemented correctly by the proposals in this Consultation. The second part focuses on the specific questions raised in the Consultation. The third part offers further comments on the proposals.

PART ONE – RELEVANT CRITERIA

There are two considerations in assessing whether the proposals put forward in the Consultation would adequately implement the Directive: first, there is compliance with EC jurisprudence on the implementation of directives. Recent judgments by the European Court of Justice (ECJ) set down important principles that need to be taken into account in implementing directives which give protection to consumers. Second, it needs to be considered whether the implementing legislation successfully implements the requirements of the Directive without creating uncertainties in other aspects of the law.

ECJ jurisprudence

It is first of all necessary to draw the DTI’s attention to two recent judgments by the ECJ. In *C-144/99 Commission of the European Communities v. Kingdom of the Netherlands* (judgment of 10 May 2001),¹ it was held that the Netherlands had failed to implement fully Directive 93/13/EEC on Unfair Terms in Consumer Contracts. In particular, the Commission argued that the Netherlands had not implemented fully Article 4(2) (on “core terms”) and Article 5 (on plain and intelligible language) of the Directive. The Netherlands argued that it was not necessarily expressly to implement particular articles in a directive if existing national rules already fulfilled the requirements of the directive. Moreover, the courts would ensure that existing legislation is implemented in accordance with the directive.

The ECJ made a number of important observations: first, the legal position under national law must be sufficiently precise and clear that individuals are made fully aware of their rights (paragraph 17). Second, there was no consistent application of Dutch legislation in line with the Directive (paragraph 20). Finally, even where settled case-law of a Member State interprets provisions of national law in line with the requirements of a directive, it does not meet the clarity and precision necessary to meet the requirement of legal certainty, which is particularly relevant in the context of consumer protection (paragraph 21). *Therefore, it seems that relying on established case-law may not be enough to comply with the requirements of a directive.* It will be explained below that the DTI’s position with regard to inadequate installation instructions and Article 4 of the Directive would not be enough to comply with the Directive.

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¹ *Commission v. Kingdom of the Netherlands*, Case C-144/99, [2002] E.C.R., E.C.J.

More recently, the Unfair Contract Terms Directive was once again at the centre of a non-implementation case in *C-372/99 Commission of the European Communities v. Italian Republic* (judgment of 24 January 2002).² Here, the Commission claimed that Italy had failed to ensure that terms recommended by trade associations in standard contracts could be challenged when the term had not actually been used in a consumer contract (as per Article 7(3) of the Directive). Here, the ECJ observed that it was not enough to have the possibility of ensuring compliance with a directive through case-law, even where there is case-law in line with the directive, where the legislation is insufficiently clear, or even contradictory. This would not be in accordance with the principle of legal certainty.

This position was most recently supported by Advocate-General Tizzano in his opinion in *C-473/00 Codifis v. Fredout* (18 April 2002),³ a further case involving the Unfair Contract Terms Directive.

It will be explained below that these important recent developments are not reflected in the proposals put forward by the DTI in the Consultation.

Implementation without creating uncertainty

The DTI plans to amend relevant primary legislation in this field. Whilst this is, in principle, desirable (and would be in accordance with the requirements under EC law, as set out in the previous section), there are difficulties with this approach. Existing legislation is, of course, based on English (or Scottish) concepts, whereas the Directive represents an amalgam of concepts from the different jurisdictions of the Member States. Such conceptual differences may require amendments to provisions other than those directly affected by the Directive in order to ensure that the Directive is fully implemented without causing knock-on problems in related fields.

PART TWO – RESPONSE TO SPECIFIC QUESTIONS

The Consultation raises seven specific questions. This part offers my response to these questions.

Q1 – Views are welcomed on our proposed changes to s.14 and the method employed to extend the remedies to consumer sales.

(a) Definition of “consumer” – it is to be welcomed that the DTI intends to adopt a single definition of “consumer”. However, it is of concern that the Draft Regulations would not create one such definition, but at least three different definitions of consumer for different parts of the Sale of Goods Act 1979 (“SoGA”). Some tidying-up is urgently required in this respect.

(b) Paragraph 7: It does seem to be a fairly minor change. It also needs to be borne in mind that the list in section 14(2B) is merely an indicative list, rather than a set of absolute requirements, and a particular product would not have to meet all of the elements to be regarded as satisfactory.

Nevertheless, there is a qualitative difference between “normal use” and “common supply”. It is this author’s understanding that some business sectors are concerned that the addition of “or normally used” would amount to gold-plating, on the basis that the

² *Commission v. Italian Republic*, Case C-372/99, [2002] E.C.R., E.C.J.

³ *Codifis S. A. v. Fredout*, Case C-473/00, [2001] E.C.R., E.C.J.

satisfactory quality test can be relied upon for the full limitation period (provided that the defect was present at the time of delivery/passing of risk).⁴ This is misunderstanding the nature of the satisfactory quality test. “Normal use” is probably already a factor which may be taken into account as a “relevant circumstance”. The inclusion of these words is useful for the avoidance of doubt. More importantly, it also ensures that the wording from the Directive is repeated in the implementing legislation, which would meet the standard for the implementation of consumer protection directives set out in Part One.

(c) Paragraph 8: Although this is probably an accurate statement of the position in English law, it seems that recent ECJ jurisprudence would require the express inclusion of this aspect of conformity to ensure compliance with the principle of legal certainty (see above). In order to avoid non-implementation proceedings, the DTI is urged to include an express reference to “performance” in the Act.

(d) Paragraph 9: As with “performance”, it seems that inadequate instructions are probably covered as an aspect of quality under section 14(2) already (see *Wormell v. RHM Agriculture (East)*,⁵ and more recently, *Albright & Wilson UK v. Biachem* (2000)⁶).

However, once again it must be stressed that recent non-implementation proceedings clearly demonstrate that reliance on case-law is not enough because it does not allow consumers to ascertain their rights directly from the text of the legislation. Therefore, the DTI is urged to include an express reference to inadequate installation instructions in section 14(2B) and equivalent provisions.

(e) Paragraphs 10/11: Agreed. When the European Parliament debated the express inclusion of these factors, it was felt that the general conformity requirement already covered such aspects. The retention of this list would therefore not conflict with the Directive.

(f) Paragraph 12: There is no immediate problem with this approach. However, express terms are often used to specify consumer requirements (e.g., with custom-made motor cars). Admittedly, this is going to be rare, but it may happen. In most cases, such requirements are likely to be treated as part of the “description” of the goods, and would therefore be covered by section 13.

Q2 – Do you agree that the proposed change of the 1982 Act deals adequately with the provisions in Article 2(5) concerning installation by the seller?

No – this would not correctly implement the Directive. Section 13 of the Sale of Goods and Services Act 1982 (“SGSA”) introduces a negligence-based standard – installation would only have to be carried out with reasonable care and skill. This is not enough to comply with the requirements of the Directive. For example, an installer may use reasonable care and skill in installing the appliances in a consumer’s new kitchen, and yet there may be problems. If the appliances are not faulty, then inadequate installation is to blame. However, if the installer has acted with reasonable care and skill, the consumer will not have a remedy. This is not what the Directive intended. It requires a contractual *and* a strict liability standard in this context.

⁴ See below on the difference between these two concepts.

⁵ [1987] 3 All E.R. 75.

⁶ *Albright & Wilson UK v. Biachem* [2001] EWCA Civ 301, [2001] All E.R. (Comm) 537, C.A.

It must be remembered that the Directive equates inadequate installation with a lack of conformity. If an appliance has not been installed properly, this is tantamount to saying that it is not fit for its common purposes, or is not free from minor defects.

There needs to be a new provision (whether in the SoGA, the SGSA or both) that inadequate installation will be treated as a breach of the term implied by section 14(2).

Q3 – Does this offer a fair solution to the issue of swapping between new and existing remedies?

First, it needs to be remembered that asking for a replacement is to reject the goods originally delivered. Under the current SoGA, a consumer (or, indeed any buyer) has the right to reject non-conforming goods and to terminate the contract (and thereby obtain a full refund). However, these are separate rights and a consumer is able to reject goods without having to terminate the contract at the same time. A consumer could, instead, ask for a replacement, which the seller would be obliged to provide (leaving aside the distinction between specific goods and unascertained goods allocated to the particular contract).

A consumer who asks for replacement has therefore rejected the goods. It would therefore be conceptual nonsense to amend section 35(6)(a) by adding “or replacement”, because by asking for a replacement, the consumer has already exercised his or her right of rejection.

Second, the basic proposition in section 48D(1) would be a reasonable compromise between seller and consumer interests. However, there is a danger that this may give rise to additional scope for disagreements between sellers and consumers as to what constitutes a “reasonable opportunity”. For example, a consumer who is told he or she needs to wait for a few days to have his or her washing machine repaired and is then kept waiting for a fortnight may wish to reject instead, but the seller may claim that he or she has been busy and then had to wait for a spare part to come in that he or she has not yet had a reasonable opportunity to effect a repair. There is, of course, the converse situation where the seller arranges for repair within a reasonable time and then the consumer tries to reject.

This author is unable to provide concrete evidence of the extent of such problems, although anecdotal evidence (see *Which?* Briefcases, Watchdog or The Guardian’s consumer section, for example) suggests that these are not uncommon.

It seems that the potential problems to which this provision may give rise suggest that the DTI’s policy of maintaining existing rights whilst giving full effect to the new rights runs into difficulties when it comes to dealing with the relationship between the old and new remedies.

Q4 – Could consultees please give their views on the dual liability period issue, supported by hard evidence.

This author is unable to provide specific evidence, but can offer some observations on the legal position in this respect.

The Consultation correctly notes that after the two-year period, there would still be a right to claim damages, which would cover at least the cost of repair or replacement.⁷

⁷ There is also the possibility that the consumer may still be able to exercise his “short-term” right of rejection after the two year period has expired. Under SoGA, a consumer is entitled to reject once he is deemed to have accepted the goods. One factor is the passage of a reasonable period of time (and this is often referred to, perhaps misleadingly, as the “short term right of rejection”). What is “reasonable” depends on the nature of the product. Although it is, admittedly, unlikely that two years would be a reasonable period, it is most certainly not impossible, nor improbable.

More importantly, because the measure of damages is contractual, the damages award may be *higher* than the cost of repair or replacement (it covers consequential losses, such as the cost of hiring a replacement car, and may also cover the additional losses if the consumer has made a special purpose for which the goods were required known to the seller and the goods are not available for this).

Far from imposing additional costs on business, extending the remedies to the full six-year period (or whichever period the Law Commission deems desirable) may limit their costs to the provision of the remedy.

The new draft section 48D(2) correctly retains a consumer's right to claim for damages for consequential and incidental losses, such as hiring replacement goods or loss of enjoyment (see *e.g.*, *Bernstein v. Pamson Motors (1987)*⁸ where a consumer was awarded compensation for a "thoroughly spoiled day").

Q5 – The Draft Regulations ally the reversed burden of proof to the four remedies of the Directive but keep them separate from the existing 1979 Act's rights. We welcome views on this and request, as ever, strong evidence to back up arguments, including costings, and we welcome comparisons with our existing rights.

This is a very difficult question to deal with, and the arguments for and against are finely balanced. The difficulty that many consumers face is that they will frequently not be able to produce unequivocal evidence that a product was defective at the time of purchase. In most cases, this will be inferred from the nature of the defect and the circumstances, *e.g.*, a washing machine that breaks down after being used only a few times will very probably not have been of satisfactory quality at the time of sale.

A point made earlier is that the right of rejection has two elements – the actual right to return the goods and the right to terminate the contract (and claim a full refund). However, a consumer is not required to terminate (and accept a refund) when rejecting goods and can instead require the seller to perform his or her obligations under the contract by tendering replacement goods. Thus, the remedy of replacement is akin to the right of rejection, with the exception that the consumer does not terminate the contract. In effect, therefore, the "reversed burden" would only then not apply if the consumer wished to terminate (in practice, by asking for a full refund). Therefore, the real impact of applying the reversed burden to the "initial right of rejection" would be on the consumer's right to terminate the contract. The DTI is urged to consider evidence (if available) on the number of claims for a full refund (*i.e.*, termination) contrasted with the number of claims for replacement products. In both circumstances, the consumer has "rejected" the goods.

This is slightly different in the case of a claim for damages, which may cover a greater amount than the actual cost of repair/replacement. If the consumer actually claims damages, he or she will need to explain the extent of his losses. The burden of proof will therefore be on him or her anyway.

A compromise solution would therefore be to apply the reversed burden of proving that there was a defect at the time of delivery to all the remedies other than termination during the first six months of purchase. However, a consumer who claims damages which exceed the cost of repair or replacement will have to prove his or her loss (*i.e.*, the burden of proving the additional loss would be on the consumer).

⁸ *Bernstein v. Pamson Motors (Golders Green) Ltd.* [1987] 2 All E.R. 220, Q.B.D.

Q6 – Are you content with the guarantees section of the Draft Regulations?

These adequately reflect the provisions in the Directive. Admittedly, the Draft Regulations would only allow the original consumer to enforce the guarantee against the guarantor, and it is not difficult to make out a case for transferability of the benefit of a guarantee to subsequent owners of the relevant product. In fact, if the guarantee document expressly provides for such transferability, then the Contracts (Rights of Third Parties) Act 1999 will enable subsequent owners to enforce a guarantee against a guarantor. The DTI may wish to consider whether a general rule should be introduced that a guarantee can be transferred to any owner of the corresponding product during the guarantee period.

Of course, there may be good reasons for limiting guarantees to the original consumer, particularly where there is a likelihood that defects may be caused by the manner or intensity of use of the product, or where specific maintenance instructions need to be followed. A subsequent owner may be unaware of the care a previous owner has taken with the product.

A final comment on this point – there have been at least two instances under the Unfair Terms in Consumer Contracts Regulations 1999 where the OFT has taken the view that a restriction of a guarantee to the original consumer was unfair. However, the products in question were double-glazing and a replacement car engine, and the case for transferability with such products may be stronger than with other consumer products.

With reference to Regulation 7(6)/7(7) (Enforcement powers) – the inclusion of specific enforcement powers for guarantees is a little surprising, particularly because the Stop-Now Orders Regulations⁹ (“SNORs”) should apply to these already. Admittedly, as currently drafted, the SNORs fail to cover guarantees on consumer *products* (they only seem to cover guarantees on *services*). However, Part 8 of the Enterprise Bill will introduce a reformed enforcement mechanism which will undoubtedly extend to guarantees.

It is also interesting to note that the Regulation 7 powers are not subject to a “harm to the collective interests of consumers” test, unlike the SNORs/Part 8 of the Enterprise Bill. It is not clear if this is deliberate or not. However, it does seem unlikely that an enforcement authority would take action unless there was a danger of more general harm. If so, the Regulation 7 powers would duplicate Part 8 powers and should be removed.

A further point to note is that Regulation 7 would be the only operative provision in the 2002 Regulations, the remainder being provisions amending primary legislation. With a view to the position adopted by the ECJ and its emphasis on legal certainty and accessibility of rights, it would seem advisable to insert a section into the SoGA and related legislation, rather than maintain the free-standing provision in Regulation 7.

In view of the fact that the Enterprise Bill will repeal most of the Fair Trading Act 1973, would this not be a good opportunity to repeal the Consumer Transactions (Restrictions on Statements) Order 1976 and instead include a provision in Regulation 7 which mirrors the 1976 Order and includes the enforcement mechanism from Part II of the Fair Trading Act 1973? This would ensure that all the provisions on guarantees are to be found in the same legislative provision.

Finally, although Regulation 7 adequately transposes the requirements of the Directive, the DTI may wish to consider whether to provide more detail on the pre-sale

⁹ Stop-Now Orders (EC Directive) Regulations 2001 S.I. 2001/1422

availability requirement. Discussions with business representatives suggest that there is some concern about the exact scope of this provision. However, it is not recommended that as detailed a set of rules as adopted in the United States under the Magnuson-Moss Warranty Act 1975 should be introduced in the UK. Rather, the provision of more detailed guidance on the extent of the obligations of guarantor and seller in this respect is encouraged.

Q7 – Are you content with our action to maintain consistency where it currently exists (in the implied terms) but not to extend it to areas where it currently is not present (in the remedies)?

First, there is an incorrect statement of the law in paragraph 37: under a conditional sale, property in the goods is not transferred until that condition is met. This applies to most contracts where payment is by instalments, for example (*cf.* retention of title clauses).

Second, as the implied terms are already intended to be identical, it makes sense to amend other relevant statutes as well to ensure consistency. In respect of the remedial position, it would be a significant task to extend the remedial regime introduced by the Directive to other transactions. However, it is hoped that this area will be revisited at a later date to consider how greater uniformity may be achieved between the various types of consumer transactions.

PART THREE – OTHER COMMENTS

The DTI also invites comments in addition to the specific questions dealt with in Part Two.

Issues Arising From The Consultation Text

Paragraph 12: regarding the final sentence of paragraph 12 (that a separate consumer sales code is inappropriate), with respect, the Draft Implementing Regulations are perhaps the strongest argument yet why a separate consumer code *is* desirable. The text of the amended SoGA would be so complex that I have serious concerns that the ECJ could decide that the UK has not adequately implemented the Directive. It will be almost impossible for a consumer to ascertain their rights from the text of the amended Act, and it may be feared that many legal advisers will have similar difficulties. One thing that has become apparent during the UK's implementation process is that it is all but impossible to transform a piece of legislation that has its origins in mercantile law into a statute that can provide consumer protection whilst still providing a simple framework for commerce.

Paragraph 18: non-implementation of Article 4. Whilst it may be correct that English law already complies, there may be difficulties with this approach in light of the decisions by the ECJ set out in Part one, above. The ECJ now takes the view that exclusive reliance on case-law is not enough to implement adequately the provisions of a directive. There needs to be, at least, a legislative restatement of the case-law position to comply with the principle of legal certainty.

It would therefore seem necessary to add a provision to the SoGA which confirms that a seller has a right of recourse, and that any exclusion or limitation clauses are subject to the requirement of reasonableness under sections 6 and 7 of the Unfair

Contract Terms Act 1977. This would be a correct statement of the current position in English law. This would meet the ECJ's concerns regarding legal certainty (*Commission v. Italy*¹⁰ involved a provision that benefited consumer associations, rather than individual consumers!).

Even then, reliance on the "reasonableness" test for exclusion/limitation clauses may mean that the principle of legal certainty is not complied with. However, the DTI's interpretation of Recital 9 seems correct, which would mean that the "reasonableness" test under The Unfair Contract Terms Act 1979 ("UCTA") would not be against the principle of legal certainty.

Crucially, under the proposed changes, a seller would have no right of recourse if he or she had to provide a remedy because a product did not meet the consumer's expectations based on "public statements". The Draft Implementing Regulations (correctly?) make public statements an aspect of satisfactory quality for consumer transactions only. Consequently, these are not relevant in the supply contracts between seller and distributor/manufacturer. A retailer could therefore not "pass back" liability at all in these circumstances. The proposed new subsection (2 G) would not seem sufficient to bring public statements within the scope of "relevant circumstances" generally.

It seems advisable to re-consider the decision not to implement Article 4 at all because (a) total omission would now be treated as non-implementation; (b) the seller would not be able to pass-back liability for all aspects in any event.

Paragraph 25: the two-month period is entirely optional and there is no need to implement. Germany, for example, also did not implement this provision.

Paragraph 34: the position with regard to second-hand goods seems sensible.

Omission: The DTI has, so far, not picked up on an important difference between the Directive and the SoGA. The Directive assesses conformity at the time the goods are delivered to the consumer (without further defining "delivery"). Under the SoGA, compliance with the implied terms is to be assessed when risk (and therefore property) in the goods passes to the consumer. If the goods are specific, this will be at the time of sale; if they are unascertained, it will be once goods have been allocated to the contract.

If the consumer buys goods in the high street, delivery and the passing of risk will coincide and the will not be a problem. However, in the case of mail-order or electronic commerce purchases, risk may pass before actual delivery. The Directive, however, requires that goods are in conformity at the time of delivery. It is therefore suggested that a subsection (4) is added to section 20 of the SoGA to state that in the case of a sale of goods to a consumer, risk does not pass until the goods have been delivered to the consumer. Furthermore, a subsection (4) should be added to SoGA, section 32 to specify that by way of derogation from the previous sections, where there is a contract of sale with a consumer and the goods are to be sent to the consumer, delivery of the goods to the carrier will *not* be deemed to be delivery of the goods to the consumer.

Issues Arising From The Text Of The Draft Regulations

Regulation 2 – presumably, all these definitions relate only to Regulation 7 on consumer guarantees – all other provisions amend primary legislation and the definitions in Regulation 2 cannot extend to these.

¹⁰ *Op. cit.*

Regulation 3(1) –3(7) – an unmitigated disaster! Is there any point to Regulation 3(1)?

In the new subsection (2D) – “dealing as a consumer” is defined with reference to the Unfair Contract Terms Act 1977 in section 61(5A). The amendments to UCTA are noted.

Regulation 3(10) will introduce a definition of “consumer” into the SoGA, but there is already a definition of “*dealing as a consumer*” – which produces two different definitions of consumer. This is made worse by the adoption of a different test for “dealing as a consumer” for the purposes of section 14.

This form of implementation of the Directive produces anything but legal certainty. For example, the new subsection (2D) uses the phrase “dealing as a consumer”. Subsection 9 will provide a different definition of “dealing as a consumer” for the purposes of this section. This is completely unnecessary. There is no need to use the phrase “dealing as a consumer” in this subsection – why not say “where the buyer is a consumer”, or even better, “where a consumer . . .”? This would be (a) easier to follow and (b) avoid unnecessary confusion.

Moreover, new subsection (9) mentions that “dealing as a consumer” requires the seller to “enter the contract for the purposes of a business” – but sections 14(2) and 14(3) *already require the seller to be “selling goods in the course of a business”* – as interpreted in *Stevenson v. Rogers* (1999),¹¹ this includes *all* sales made by a business. Paragraph (b) in subsection (9) therefore repeats something that is already there, or, worryingly, seeks to limit the significance of “public statements” and “fitness for purpose” to a limited range of transactions (“for the purposes of a business” could be read in a narrower way than “selling in the course of a business” under *Stevenson v. Rogers*).¹²

In short, these proposed amendments are so confusing and full of uncertainty that they (a) are likely to be treated as an incorrect implementation of the Directive; and (b) would make this section almost impossible to apply. Consumers would be unable to identify their rights, and many consumer advisers may similarly struggle to make sense of the new provisions. All the guidance in the world could not help with this.

By way of example, it is suggested that the first part of (2D) should be rephrased as follows: “Where goods (other than second-hand goods which are sold at a public auction which consumers are able to attend) are sold to a consumer, the relevant circumstances . . .”. This would ensure compliance with the Directive, and also obviate the need for the rather clumsy subsection (2E).

Recommended Changes:

- (a) abandon phrase “dealing as a consumer” in new subsections (2D), (2E), (3A) and (3B) and replace with “consumer” (as defined in section 61);
- (b) delete specific definition of “dealing as a consumer” in subsection 9;
- (c) delete subsection 10 – producer is defined in the same way in section 61 by virtue of Regulation 3(11).

Regulation 3(7)

New section 48A(1): subsection (a) is unnecessary – see recommended changes above. Replace with

¹¹ [1998] Q.B. 1028, C.A.

¹² *Ibid.*

(a) this section (Part?) applies only where goods (other than second-hand goods which are sold at a public auction which consumers are able to attend) are sold to a consumer and the goods do not conform to the contract of sale. (b) For the purposes of this part, goods do not conform to the contract of sale if there is a breach of the term implied by section 14(2) or 14(3), or a breach of the term implied by section 13 where the seller was selling goods in the course of a business within the meaning of section 14(2).

This is still far from perfect, but would simplify the text of this provision significantly, and ensure consistency between the various sections of the SoGA.

There is also no need for section 48A(2) – this is repeated in section 48B and 48C. Suggest deleting section 48A(2).

Subsections 48A(5) and (6) could be combined into one section – there is no need to have two separate sections on this point.

Section 48B(1)/48C(1) – first part – unnecessary repetition. Make section 48A cover the entirety of Part 5A and the text becomes more readable.

Section 48B(2) – unnecessary reference to section (1)

Section 48B(6) – this is repeated in Regulation 3(12), which introduces a definition of repair into section 61.

It is generally desirable to review the drafting of section 48A, section 48B and section 48C to simplify these.

Section 48D(2) – this section could be phrased better to make it clear that a consumer who has asked for a remedy under Part 5A can also bring an action for damages for breach of warranty.

The points made in respect of the SoGA apply to the corresponding amendments in other legislation, as well.

Regulation 7: untidy drafting of Regulations 7(3) and (4) – both could be combined into one section.

CONCLUDING COMMENT

The Directive itself may have some serious flaws but the proposed implementation is worse. The drafting of the implementing Regulations leaves a lot to be desired. If implemented as currently drafted, they would produce a very complex web of provisions. However, this is largely unnecessary, and the text could be simplified significantly – see the suggestions made above. It is likely that the UK would be found guilty in non-infringement proceedings if the Draft Regulations were adopted as they are, because they would not meet the standard of legal certainty required of consumer protection measures, as recently laid down by the European Court of Justice in C-144/99 and C-372/99.

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It is a particular pleasure to have been asked to write the editorial for this edition of the *Journal*. This is because, this being the last edition to be produced under Mary Seneviratne's successful editorship, it gives me an opportunity on behalf of the Law School as a whole to thank her for all her work and for her commitment to maintaining the *Journal* as a lively, high quality general law review. The amount of work involved in editing a Law School journal such as ours can hardly be over estimated. From the initial reading of manuscripts, to oversight of the printing and production process, and management of proof reading, the editorial tasks involved are both demanding and extensive. With the able assistance of Jane Ching, and with the support of the Editorial Committee, Mary has excelled in carrying out all of these tasks in her usual professional, efficient and unflappable way. After three years at the helm, however, she is now more than entitled to pass on the baton. It is our great good fortune that she can do so to such an able successor as Adrian Walters. It is a great sign of the health of the School that it can sustain its own journal, and more particularly, that it can call upon so much discretionary effort from colleagues such as Mary Seneviratne, Jane Ching, Adrian Walters and the Members of the Editorial Board. Thank you Mary, and welcome Adrian!

PROFESSOR PETER KUNZLIK

ARTICLES

ANTI-SOCIAL BEHAVIOUR ORDERS: AN INFRINGEMENT OF THE HUMAN RIGHTS ACT 1998?

ROGER HOPKINS BURKE* and RUTH MORRILL**

INTRODUCTION

Anti-social behaviour orders . . . will assist considerably in tackling disorder and anti-social behaviour. . . . Much more can and will be achieved, thus producing a better quality of life for our communities.¹

There have been growing concerns in recent years about anti-social behaviour, disorder and its damaging effects on communities: in the period 1995/6 to 1997/8, for example, calls to the police for such offences increased by 19 per cent.² It has become a commonplace problem with a devastating impact on the lives of a large number of ordinary, law-abiding people; a reality that was to become increasingly recognised by the “New” Labour Party while in opposition and latterly in government. The Labour government’s legislative response, the Crime and Disorder Act 1998 (hereinafter, CDA 1998) introduced a number of measures to protect the most vulnerable people from the intimidating behaviour of the few in their midst.³ Section 1 makes provision for Anti-social Behaviour Orders (hereinafter, ASBOs), a community based civil response to any individuals over the age of ten who act in any way that causes “harassment, alarm or distress”. Prohibitions considered necessary to protect the community from further behaviour of the same kind are contained in the orders. Activities that can lead to the obtaining and enforcement of an ASBO may not necessarily amount to “criminal” behaviour but significantly it is a criminal offence to breach the order and this can result in a maximum jail term of five years.

It is now widely acknowledged as part of the influential communitarian socio-political agenda that emerged in the 1980s in the USA that while individuals have rights in the traditional liberal sense they also have social responsibilities to the whole

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¹ HMIC, *Keeping the Peace: Policing Disorder* (HMSO, 1999).

² Home Office, *Report of Policy Action Team 8: Anti-Social Behaviour* (Social Exclusion Unit: National Strategy For Neighbourhood Renewal, 2000a), para 1-23.

³ Crime Prevention News, *Flagship Bill Unveiled* (Jan-Mar, 1998)

community for which they can be legitimately held accountable.⁴ ASBOs were introduced by a “New” Labour government strongly influenced by the communitarian agenda⁵ and its dominant theme that autonomous selves do not live in isolation but are shaped by the values and culture of communities. From this perspective it has become necessary to take measures to protect and enhance the community against the interests of normless, self-centred, atomistic, invariably actively anti-social, individuals. The question this paper considers is whether that communitarian protectionism has been sought at the expense of individual rights. The paper has the following structure. First, there is an examination of the issue of anti-social behaviour and the case for a legitimate legislative response. Second, the nature of that legislative response is introduced and discussed. Third, a case study of how that legislation has been interpreted and implemented by one local authority is presented. Fourth, there is a discussion of the implementation of that legislative response in the context of debates about the protection of individual human rights.

ANTI-SOCIAL BEHAVIOUR

Disorderly, anti-social behaviour causes alarm and distress, heightens fear of crime and if unchecked can lead to escalating criminal behaviour.⁶

Anti-social behaviour is difficult to define. Behaviour that one person finds anti-social may to another appear commonplace and tolerable. Moreover, the types of behaviour that the public cite worthy of intervention range from the criminal (*e.g.* prostitution or damage to property) to sub-criminal (*e.g.* verbal abuse or noise).⁷ Research has found that police forces do not have a formal definition of anti-social behaviour, but at a local level, it was described as, “whatever ‘minor’ problems intrude on the daily life of the communities and leads to calls for police service”.⁸ The CDA 1998 defines anti-social behaviour as acting “in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as” the defendant.⁹

The Policy Action Team (hereinafter, PAT 8) of the Social Exclusion Unit at the Home Office conducted an extensive study of anti-social behaviour throughout the UK and reached the following conclusions. First, the problem is more prevalent in deprived neighbourhoods. Second, if left unchecked such activities can lead to neighbourhood decline. Third, increases in neighbourhood decline greatly heighten the fear of crime. Fourth, these problems are invariably exacerbated by issues of social exclusion and deprivation.¹⁰ There is a clear theoretical link here with the influential “broken windows theory” developed by the US criminologists Wilson and Kelling who have influentially observed that “at the community level, disorder and crime are usually inextricably linked. . . . If a window is broken and is left unrepaired, all of the rest of

⁴ See A. Etzioni, *The Spirit of Community: The Reinvention of American Society*, Touchstone, 1993); A Etzioni (ed.) *The New Communitarian Thinking: Persons, Virtues, Institutions and Communities*, University of Virginia Press, 1995; R. Hopkins Burke, “Begging, Vagrancy and Disorder”, in R. Hopkins Burke, *Zero Tolerance Policing* (Perpetuity Press, 1998).

⁵ See: A. Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, 1998); A Giddens, *The Third Way and Its Critics*, (Polity Press, 2001).

⁶ Home Office, *Anti-Social Behaviour and Disorder* (Annual Report, 1998C).

⁷ Home Office, *Anti-Social Behaviour* (Crime Prevention Toolkits, 2000a).

⁸ N. Bland and T. Read, “Policing Anti-social Behaviour”, *Policing and Reducing Crime Unit Paper 123* (Home Office, 2000) p.5.

⁹ Crime and Disorder Act 1998, section 1(1)(a).

¹⁰ Home Office, *op. cit.* (2000b).

the windows will soon be broken”.¹¹ Such untended damage signals that no one cares. There is a breakdown of community controls and an increase in the level of disorder. This becomes perceived as a rise in crime, and there is thus a threat to “social order by creating fear of criminogenic conditions”.¹² In order to arrest and reverse such a “spiral of decline” it is proposed that the police should pursue a “problem-oriented” approach; identify local public problems; decide on an appropriate level of order and then provide informal rules to maintain what contentiously is considered to be an acceptable level in terms of the “community’s own moral order”.

The research evidence, which seeks to establish a causal link between disorder and serious crime, is ambiguous. The 1998 British Crime Survey (BCS) established a correlation between areas of high physical disorder and crime victimisation. For example, burglary victimisation was much higher in areas of high disorder than areas of low disorder.¹³ Evidence given to PAT 8 suggests a link between anti-social behaviour, neighbourhood decline, disorder and the creation of an environment in which serious crime could thrive.¹⁴ In an extensive survey conducted in 40 urban residential neighbourhoods in the USA, Skogan found that regardless of ethnicity, class or other variables, residents within the same neighbourhood were in general agreement as to what constitutes disorder and the extent of the problem in their locality. That disorder was, moreover, perceived as having played a central role in neighbourhood decline with there being a direct link between disorder and crime. Thus, the fear of disorder was considered rational because it did seem to precede or accompany serious crime and urban decay.¹⁵ Kelling and Coles found that when graffiti and the “homeless” were challenged on the New York subway system, there were dramatic reductions in murder in both the subway and the street.¹⁶ Other researchers have found strong links between anti-social behaviour in childhood and involvement in future criminal behaviour.¹⁷

Clear links have been found between disorder, anti-social behaviour and the fear of crime. The 1994 BCS indicated that respondent perceptions of disorder – for example, noisy neighbours, alcohol and drug misuse – were predictive of concerns about more serious crimes such as mugging and burglary and this fear was independent of the actual level of crime.¹⁸ The Audit Commission also ascertained that fear of crime is greatest in areas of high physical disorder.¹⁹ Kelling and Coles found that police foot patrols can have an effect on disorder and anti-social behaviour and that this can reduce the fear of crime.²⁰

The “broken windows” philosophy has been closely linked with “zero tolerance” policing strategies first introduced in New York City in 1993 and in various localities in the UK in subsequent years. These have targeted “quality of life” problems such as

¹¹ J. Q. Wilson and G. L. Kelling, “Broken Windows”, *Atlantic Monthly*, March, 1982, p.31.

¹² G.L. Kelling and C. M. Coles, *Fixing Broken Windows* (Free Press, 1996), p.17.

¹³ C. Mirlees-Black, P. Mayhew and A. Percy, A. *The 1998 British Crime Survey* (Research and Statistics Directorate, 1998).

¹⁴ Home Office (*op. cit.*, 2000a).

¹⁵ W. Skogan, *Disorder and Decline: Crime and the Spiral Decay in American Neighbourhoods* (The Free Press, 1990).

¹⁶ Kelling and Coles, *op. cit.*, p. 20.

¹⁷ D. P. Farrington, *Human Development and Criminal Careers*, in M. Maguire, R. Morgan and R. Reiner (eds) *Oxford Handbook of Criminology* (2nd edn), (Clarendon Press, 1997) pp. 361–408. J. Elander, M. Rutter, E. Sminoff, and A. Pickles “Explanations for Apparent Late Onset Criminality in a High-Risk sample of Children Followed Up in Adult Life”, (2000) 40(3) *British Journal of Criminology*, 497–509.

¹⁸ M. Hough, *Anxiety About Crime: Findings from the 1994 British Crime Survey*, Home Office Research Study No 147, (HMSO, 1995).

¹⁹ Audit Commission, *Life’s Work, A: Local Authorities, Economic Development and Regeneration* (Audit Commission, 1999).

²⁰ Kelling and Coles *op. cit.*

graffiti and low level disorder.²¹ They have been widely criticised, however, for being “discriminatory initiatives, which target and criminalise economically excluded groups living on the streets”.²² However, in Leicester, in the UK, for example, the local constabulary eschewed zero tolerance-style strategies in the policing of begging and vagrancy in favour of a “problem-oriented” approach that sought a balance between maintaining order and providing protection for beggars.²³

Some have argued that order-maintenance and zero tolerance policing strategies are compatible, that in order to establish the foundations of a successful problem oriented initiative it is first necessary to target anti-social elements.²⁴ Others consider the styles very different. The Chief Constable of Thames Valley, Charles Pollard, argues that order maintenance is essentially about “identifying and describing a complex problem – with some broad ideas about how to solve that problem”. Zero tolerance is simply concerned with solutions, that is, to tackle low-level crime and disorder “through aggressive, uncompromising law enforcement”.²⁵ Order maintenance policing suggests a wider range of tactics incorporating various local agencies, the community and solutions to the underlying causes of problems rather than merely the symptoms. Moreover, zero tolerance initiatives are invariably selective in “targeting and criminalising the deprived and disadvantaged, the sad and mad, in order to protect business and commercial interests. It is simply *unfair*”.²⁶ ASBOs appear to focus on the same target with similar implications, a drift towards further intolerance of a marginal group with harsh crime control methods.

Anti-social behaviour and disorder may be a problem at a local level but in order for us to explain these issues adequately, it is necessary to situate them within the context of recent socio-economic change. The majority of the population now participates in unprecedented levels of *consumption*, the “driving force of action” that has replaced industrial discipline as a motivational force.²⁷ At the other end of the scale, there is a substantial and growing rump – or underclass – that are permanently excluded, a whole class of people “with quasi-criminal, anti-social, anti-work cultures of welfare dependency, who now threaten the happy security and ordered stability of wider society”.²⁸ For some, the underclass is simply synonymous with a dangerous population of socially excluded young people invariably concentrated in particular local authority housing estates characterised by high crime rates and lawlessness.²⁹ This came to be recognised by the Labour Party in political opposition and they subsequently published two documents proposing a new-style response to anti-social behaviour – the introduction of a “Community Safety Order” (CSO) – with a strong emphasis on mediation between miscreant and community.³⁰ These documents received widespread support from the public, police and local authorities for such an initiative, for it was now widely acknowledged that such behaviour: “causes distress and misery

²¹ See R. D. Hopkins Burke, “The Contextualisation of Zero Tolerance Policing Strategies”, in Hopkins Burke *op. cit.*, 1998, pp. 11–38.

²² R. D. Hopkins Burke, “The Regulation of Begging and Vagrancy: A Critical Discussion”, (2000) 2(2) *Crime Prevention and Community Safety: An International Journal*

²³ R. D. Hopkins Burke, ‘Begging, Vagrancy and Disorder’, in R. D. Hopkins Burke *op. cit.*, 1998.

²⁴ N. Dennis and R. Mallon, “Confident Policing in Hartlepool” in N. Dennis (ed.) *Zero Tolerance: Policing a Free Society*, (Institute for Economic Affairs; 1997). T. Romeanes, “A Question of Confidence: Zero Tolerance and Problem Oriented Policing” in R. Hopkins Burke, *op. cit.*, 1998.

²⁵ Pollard, C. (1998) “Zero-Tolerance: Short-term Fix, Long-term Liability?” in N. Dennis (ed.), *op. cit.*

²⁶ Hopkins Burke, *op. cit.*, 2000, p. 50.

²⁷ R. Reiner, “Policing and the Police”, in M. Maguire *et al.*, *op. cit.*, 1997 pp. 1051–1093.

²⁸ R. MacDonald, *Youth, the ‘Underclass’ and Social Exclusion*, (Routledge, 1997), p. 2.

²⁹ Home Office, *Community Safety Order: A Consultation Paper* (HMSO, 1997); A. Bottoms and P. Wiles “Environmental Criminology”, in M. Maguire *et al.*, *op. cit.*, pp. 305–59; Bland and Read, *op. cit.*; Home Office, *op. cit.*, 2000b.

³⁰ Labour Party, *A Quiet Life: Tough Action on Criminal Neighbours* (Labour Party, 1995); Home Office, *op. cit.*, 1997.

to innocent, law-abiding people . . . has reached unacceptable levels, and revealed a serious gap in the ability of the authorities to tackle this social menace”.³¹ The legislative response contained in the CDA 1998 indicated a much tougher stance with no mention of mediation.

THE ETHOS OF THE CRIME AND DISORDER ACT 1998

The Crime and Disorder Act provides the framework for a radical new empowerment of local people in the fight against crime and disorder. It gives local authorities, the police and a variety of their key partners specific new responsibilities for the prevention of crime and disorder.³²

In response to a perceived public demand throughout the first half of the 1990s for tough action against crime, “New” Labour felt they needed to steal the mantle of “law and order” from the Conservatives. The run-up to the General Election of 1997 witnessed the two parties outbidding each other in making commitments to crackdown on crime and social disorder. The Labour Manifesto criticised the Conservative Government for forgetting the “order” in “law and order” and promised to “tackle the unacceptable level of anti-social behaviour and crime on our streets” by being “tough on crime, tough on the causes of crime”.³³

Aims and Objectives of New Labour Criminal Justice Policy

New Labour criminal justice policy has been fundamentally influenced by left realist criminology. This claims to take crime seriously – particularly, predatory street crime – and prioritises crime committed by working class people against other working class people.³⁴ It is recognised that crime is a reality that makes the lives of many people a misery and that this is particularly true of local authority housing developments and the inner cities, the neighbourhoods that many of the solutions included in the CDA 1998 were expected to target.

Left realists also argue for reduced central state intervention and its replacement by localised multi-agency based forms of crime prevention and control. Thus, in this context the CDA 1998 gives local authorities and the police a statutory duty to work together in partnership to produce a “community safety strategy”.³⁵ They were provided with tools to tackle behaviour previously not deemed criminal and not covered by existing legislation but which posed a threat to the stability and order of communities. ASBOs were such a tool.

New Labour’s criminal justice policy has been termed “managerialist penology” whereby a “permanently dangerous segment of the population (the underclass of permanently excluded, irredeemably dysfunctional deviants) are *managed*”.³⁶ It can be considered in terms of the concept of “actuarial justice” that removes notions of individual need, diagnosis and rehabilitation from the analytical equation and replaces them with “actuarial techniques” of classification, risk assessment and resource

³¹ Home Office, *op. cit.*, 2000b, para.1:26.

³² HMIC, *op. cit.*, p. 8.

³³ Labour Party, *Labour Party Manifesto* (Labour Party, 1997).

³⁴ R. D. Hopkins Burke, *An Introduction to Criminological Theory* (Willan, 2001), pp. 217–30.

³⁵ A. Crawford, *Crime Prevention and Community Safety: Politics, Policies and Practices* (Longmans, 1998), p. 62.

³⁶ I. Brownlee, “New Labour – New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy” (1998) 25(3) *Journal of Law and Society*, 324.

management.³⁷ The “underclass” – and in particular the young underclass – are groups identified in this model as being high risk. The Audit Commission report on youth offending was framed in this language and ignored the traditional criminological agenda of locating the causes of offending by seeking to identify risk conditions, for example, lack of parental supervision or truancy.³⁸ These factors have all been incorporated into the provisions contained in the CDA 1998.

Provisions of the Crime and Disorder Act 1998

The CDA 1998 demonstrated New Labour commitment to tackle crime and disorder. Young people were identified as being central to the problem and the thrust of reform was earlier intervention in their lives. A host of non-criminal orders that proactively seek to prevent offending but which could be enforced by criminal sanction were introduced. It was proposed that “taken together these measures will provide the victims of serious disorder with new, effective weapons to deter those who seem to take delight in making the lives of others a misery”.³⁹ They certainly seemed to uphold Labour’s promise to put the “order” back in “law and order”.

Fionda nonetheless argues that the legislation and the discussions preceding it reflect a mixture of conflicting aims and ideologies: punishment, welfare, restorative justice, managerialist issues and a “responsibilisation strategy” (where central control is rigidly maintained while active responsibility is delegated to the local level). This she argues has resulted in legislation “that is ambiguous in terms of what it is trying to achieve and which sends out no clear message about New Labour’s commitment to any political ideology on the subject”.⁴⁰ Brownlee criticises the ethos of the legislation for blaming the problem of “crime and disorder” on a particular group in society and hoping to reduce that threat merely through management while ignoring the wider social origins of anti-social and criminal behaviour.⁴¹ Its critics thus propose that New Labour has selectively borrowed from left realism to justify a tough approach to crime without effective action to rectify the causes of that crime.

The Theoretical Context of Anti-Social Behaviour Orders

The ASBO was just one of a plethora of powers introduced by the CDA 1998 to help communities blighted by anti-social behaviour. Existing legislation had been seen to be inadequate to the task: the police were hampered by the rules of criminal evidence whilst the civil courts provided only lengthy and costly procedures for local authorities and housing associations to pursue. ASBOs would provide a solution. They are a civil remedy available to both police and local authorities requiring only the civil burden of proof “on a balance of probabilities”.⁴² Essentially, they are an attempt to control the threatening and disruptive anti-social behaviour that plagues many neighbourhoods and which puts them at risk of a decline into more serious criminal activity. The emphasis is therefore – in accordance with the concept of actuarialism – on the reduction of risk and hence the prevention of crime.

The primary rationale for the ASBO is the protection of the public. Thus, the duration of an order is not reflective of the offence committed (proportionality) but a

³⁷ M. Feeley and J. Simon, “Actuarial Justice: The Emerging New Criminal Law”, in D. Nelken (ed.) *The Futures of Criminology* (Sage, 1994).

³⁸ Audit Commission, *Misspent Youth: Young People and Crime* (Audit Commission, 1996).

³⁹ Home Office, *Crime and Disorder Act 1998* (Home Office, 1998b).

⁴⁰ J. Fionda, “New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998”, (1999) Jan. *Criminal Law Review* 37.

⁴¹ Brownlee, *op. cit.*, p. 328.

⁴² Home Office, *The Crime and Disorder Act 1998* (Home Office, 1998d), para. 48.

period deemed necessary to protect the community (with a two year minimum period available). This is again consistent with the actuarial model where the length of sentence given is not dependent on the crime committed but on the extent of the risk posed by the offender and is therefore contrary to the “just deserts” principle of proportionality.⁴³

ANTI-SOCIAL BEHAVIOUR ORDERS: A CASE STUDY

They've given [us] an extra weapon in [our] armoury and they've given [us] an effective tool for solving ongoing problems . . . in conjunction with the local authorities. The police and the local authority are working well together.⁴⁴

In this section, we discuss how ASBOs are supposed to work in theory and then consider how these had been used in practice in one urban location in the middle of England where the local authority had adopted a robust anti-social behaviour strategy and had actively promoted the use of ASBOs.

How Anti-Social Behaviour Orders Work: The Theory

ASBOs are applied for by way of complaint to the Magistrates Court, either by the local authority or the police but only after consultation with each other.⁴⁵ They are available against any individual over the age of ten who has acted in a anti-social manner, that is, caused, or was likely to cause harassment, alarm or distress to one or more persons not of the household.⁴⁶ Magistrates act in their civil capacity and civil rules of evidence apply: thus, the behaviour need only be proved on a balance of probabilities and hearsay evidence is admissible. Where witnesses feel too intimidated to give evidence in court, Home Office guidance allows for the use of professional witnesses.⁴⁷ If the application is successful, the court can make an order prohibiting the defendant from behaving in a way that had led to the application being sought.⁴⁸ Requirements in the order must be *negative* and must last for a minimum of two years.

Breach of the order is an arrestable offence.⁴⁹ The Crown Prosecution Service (CPS) will conduct the prosecution in a criminal court and evidence of the breach must be of the criminal standard, that is, beyond a reasonable doubt. Cases are triable either way. If heard on indictment in the Crown Court the maximum penalty available at the discretion of the judge is imprisonment for five years, or a fine, or both.⁵⁰ The defendant may use the defence of “reasonable excuse”, thus putting the burden of proof on the prosecution.

How Anti-Social Behaviour Orders Work: The Practice

At the time this research was conducted in September 2000, there were 140 ASBOs in force across the country. The Home Office database was aware of 19 breaches of those orders (between 1 April 1999 and 30 June 2000), though the length of sentences is not known.

⁴³ A. von Hirsch, *Doing Justice: The Choice of Punishments. Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976).

⁴⁴ Police officer attached to Midlands ASBO Team

⁴⁵ Crime and Disorder Act 1988, section 1(2).

⁴⁶ *Ibid.*, section 1(1)9a).

⁴⁷ Home Office, *op. cit.*, 1998d, para 4-9.

⁴⁸ *Ibid.*, para 6-10.

⁴⁹ Home Office, *op. cit.*, 1998b, section 1 (10).

⁵⁰ *Ibid.*, section 1 (10)(b).

While the government had stressed that juveniles are not the main targets of the ASBO⁵¹ it is readily acknowledged that “in the case of 12–17 year olds . . . applications may be made more routinely”.⁵² In practice, it would seem that the orders have been mainly used against this group. Three out of the orders granted to the Midlands ASBO Team were for juveniles and this appears to be the case nationally.⁵³ ASBOs have, therefore, been used essentially as a means of bringing misbehaving youngsters before the courts, where previously their conduct would have gone undeterred.⁵⁴

The Midlands ASBO Team suggested that orders were more usefully sought for juveniles not previously drawn into the criminal justice system because it was their intention to sound a warning without criminalising the individual, to deter both future anti-social behaviour and prevent an escalation of current behaviour. It was readily acknowledged, however, that some young people are already well immersed in the criminal justice system before they reach 17 years of age. The Team cited one of their most high profile cases, Darren Roberts (not his real name) as an example. By the age of 14, he had been arrested in excess of 100 times and received over 60 convictions for offences such as burglary, robbery, harassment, assault and car theft. He was labelled a “one-boy crime wave” in the local newspaper. The team considered the ASBO had come too late for Darren. Almost immediately, he breached the order and he was given a nine-month secure training unit order. They had learned a lesson from this initial interpretation of the ASBO:

We took somebody that was well into the criminal system, the criminal system wasn't working, and the ASBO was not going to deter him. . . . By the time Darren was 13 there had been 13 years of damage and a little court order isn't going to help him.

ASBOs are useful when targeted at juveniles because they widen the powers of the police and the local authorities to deal with a category of person previously outside the parameters of available powers. Injunctions are only available against persons of 18 years of age and over. The Protection Against Harassment Act 1997 is designed to deal with situations where harassment is directed against an individual or family but not against a community or where the behaviour is less than harassment but anti-social. This had been the case with Darren Roberts:

He was the only member of the family causing a nuisance, so it was unfair to go for possession [eviction from the local authority home]. He was under eighteen, so we couldn't go for an injunction.

The Team admitted that it is much quicker and easier to get an injunction or use other legislation once a young person reaches the age of 18. There are however significant limitations to such a strategy. First, breach of an injunction is not a criminal offence and therefore there is no power of enforcement in the criminal courts. Second, they are only available against the actual tenant of local authority accommodation who breaches their contract. ASBOs overcome these problems but take longer to implement because of the need to gather evidence from witnesses and information from other agencies. Third, the police have powers under the Criminal Justice and Public Order Act 1994 and the Protection Against Harassment Act 1997. Nevertheless, this criminal

⁵¹ N, Padfield, *A Guide to the Crime and Disorder Act 1998* (Butterworths, 1998), p. 15.

⁵² Home Office, *op. cit.*, 1998d, para. 5-9.

⁵³ Between April 1999 and September 2001 466 ASBOs were granted nationally, 74 per cent were in respect of those 21 years of age and under. Source: S. Campbell, “A Review of Anti-social Behaviour Orders”, *Home Office Research Study 236* (Home Office, 2002).

⁵⁴ M. Rowan, “Anti-social Behaviour Orders – Further Comment”, (1999) 163(40) *Justice of the Peace* 794.

legislation invariably offers only short-term solutions and requires a higher standard of proof. ASBOs were seen to offer a long-term solution to problems that fell outside the remit of the criminal law:

If one 14/15 year old was there every time it happened, that is no evidence of crime whatsoever. But in terms of nuisance and disorderly behaviour, if you can say, this person was making a lot of noise and obviously revelling in it . . . they're part of a mob . . . a part of the anti-social behaviour.

ASBOs had also been found to provide a potential long-term solution to on-street prostitution in residential areas. The Team were currently considering applying for orders in respect of ten persistent offenders soliciting on the street in the local vice area. Hitherto, prostitution had been an issue solely appropriate to the criminal courts. However, while the police are able to gather sufficient evidence to arrest the women, the criminal penalty is, problematically, just a fine:

Every week the women go down to the court and dutifully pay their fines, they regard it as a tax on their activities, it does not keep them off the streets.

If the Team were successful in getting an ASBO granted against a prostitute she could be prohibited from working in the whole local authority area and receive a prison sentence if she breached the order. The Criminal Justice Act 1982, section 71, had of course removed the power of the courts to hand down a custodial sentence for prostitution.

The ASBO is just one of a number of measures available to the police in the case of prostitution. It is possible to pursue a criminal line of enquiry and to liaise with the CPS while an order is being sought, and even after it has been imposed. The CPS would be made aware that an ASBO had been made and if breached there would be the possibility of a custodial sentence:

So, the CPS is probably going to say it is not in the public's interest to prosecute. It is not worth the public money because they are going to be dealt with more firmly by the ASBO route. . . . It depends on how serious the criminal offence is as to whether they do it solely as criminal, solely as a breach [as in the case of prostitution], or they might think . . . it's worth going down both routes.

The Midland Team were aware of human rights legislation issues but did not foresee any substantial difficulties arising:

The alternative is to make them criminal in the first place, . . . either we tolerate anti-social behaviour to some degree or we make that behaviour a crime, which ratchets it up a notch and virtually says that any young person in high spirits is committing a crime.

A necessary balancing act between individual and community rights was readily acknowledged when considering an application but the Team considered themselves successful in achieving this:

The Human Rights Act is not a problem because the terms of the order have to relate to previous behaviour that's going to be proportional. We always push the point that ASBOs are community-based orders and members of the community have human rights as well.

But in particular, with regard to concerns about the infringement of the rights of the particular individual:

I don't think they've got anything to worry about. If they don't persist with that behaviour then they don't need to worry do they?

The orders were not considered a punishment, simply an attempt to improve the situation in a given geographical area while seeking to constrain the behaviour of an individual. ASBOs had been introduced with the intention of protecting the rights of communities and the Team asserted that this is exactly what they seek to do, irrespective of the rights of the individual. In fact, this issue of this balance of rights is one of the most intensely debated criticisms of ASBOs.

A BALANCE OF HUMAN RIGHTS?

The excess in severity may be useful for society, but that alone should not justify the added intrusion into the rights of the person punished.⁵⁵

Getting the balance right

ASBOs were introduced by a government with a strong commitment to communitarian values and the intention of protecting the rights of communities susceptible to unacceptable behaviour of individuals or groups in their midst. Nonetheless, the interests of the community should reasonably be balanced with those of the individual: “people have a right to be protected against aggression, intimidation and incivilities. At the same time, it is necessary to heed the rights and liberties of disadvantaged citizens”.⁵⁶

Seeking a balance between the rights of the individual and those of the community was a challenge faced in many US cities during the 1980s and 1990s, as communitarianism became an increasingly influential doctrine to the detriment of the more traditional individualism.⁵⁷ Seattle, for example, had long tolerated a population of street people. During the 1980s, however, they came increasingly to be associated by commercial enterprise with falling revenues. Citizens refused to shop in areas in which they felt intimidated and compelled to walk in the road to avoid people begging, insulting them and openly urinating. City Attorney Sidran responded by issuing a set of acceptable behaviour guidelines to the street people. For example, sitting or lying on public sidewalks between the hours of 7 a.m. and 9 p.m. was prohibited. Opposition came from libertarians who categorised the legislation as “anti-homeless”. Sidran explained:

What you get into is some sort of balancing in the hearts and minds of the court about whose sidewalk this is. . . . If street people congregate on sidewalks what about those trying to cross the street? Deliver products? Furthermore, if citizens . . . withdrew from the streets the homeless would then become victims of predators in their midst.⁵⁸

The Seattle courts decided that this example of order maintenance *did* strike a balance between the rights of the individual (the homeless) and the community (the citizens of Seattle). Had they retained the liberal *status quo* this would have entailed a violation of the rights of the community, and *vice versa*, had the police chosen to take a “zero tolerance” approach and excluded the homeless altogether.

Whether such a balance has been achieved in the British context with the introduction of ASBOs has been a matter for extensive discussion, in particular, since the incorporation of the European Convention on Human Rights (hereinafter, ECHR)

⁵⁵ A. Von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976), p. 70.

⁵⁶ Hopkins Burke, *op. cit.*, 2000, p. 43

⁵⁷ See Kelling and Coles, *op. cit.*.

⁵⁸ Cited in *ibid.*, p. 218.

into UK domestic law under the Human Rights Act (hereinafter, HRA) 1998. All domestic law would now have to be compatible with the convention. Critics say that the CDA 1998 is not.

The ECHR provides private individuals with no obligation to protect the human rights of another individual but “the European Court and Commission have chosen to impose the obligation on state authorities to protect individuals from the actions of other individuals”.⁵⁹ Under Article 8 of the Convention – the right to respect for private and family life – individuals are guaranteed a right to peaceful enjoyment of their homes. Primarily this implies a negative obligation on the state to refrain from arbitrary interference of this right. The European Court has, however, extrapolated from this a *positive obligation* to take action to ensure that Article 8 rights are effectively protected when the threat is from private individuals. This suggests compatibility with ASBOs, which give local authorities the capacity to protect the rights of communities from the activities of specific individuals. Interpreted in this way, orders positively protect human rights.

Others argue, however, that this protection has been achieved at the expense of the protections afforded the “offender”. Lord Goodhart summarises this argument thus:

Human rights are not just the right to behave well. . . . People have a right to be bloody-minded; they have a right within reason to make a bit of a nuisance of themselves. . . . We want to live in a law-abiding society with a low level of crime . . . and a low level of vandalism and disorder of all kinds . . . but, at the same time, we do not want to live in an authoritarian state.⁶⁰

Von Hirsch *et al* argue that ASBOs abandon basic legal protections for defendants and thus breach their civil rights.⁶¹ This human rights critique is founded on three fundamental issues. First, ASBOs require only a civil standard of proof potentially to enforce criminal measures. Indeed, Home Office guidance states that the orders are intended to deal with criminal or sub-criminal activity, which, for one reason or another, cannot be proven to the criminal standard, or where criminal proceedings are not appropriate.⁶² Cracknell argues that this clearly indicates the use of civil law for crime control. The order may have a civil rhetoric but the outcome of the procedure, if violated, can be severe criminal penalties.⁶³ Von Hirsch *et al* thus observe that the crime control nature of civil procedures contradicts fundamental due-process protections.⁶⁴ Packer had argued that a legitimate criminal justice system should incorporate elements of both “due-process” and “crime control” models,⁶⁵ a notion of “balancing” conflicting aims and interests. Ashworth develops this, observing that they “should not be driven by consequentialist calculations of which set of arrangements would produce the most overall benefits to society. Rather, individual rights must be assigned some special weight in the balancing process”.⁶⁶

It is arguable whether the rights of the individual receive sufficient consideration by those applying for an ASBO. While opponents argue that the threshold for proof is too low, in practice, this might not be the case. The Crown Court has suggested that the

⁵⁹ K. Starmer, *European Human Rights Law* (Legal Action Group, 2000), p. 194.

⁶⁰ HL Report (HMSO, 3 February 1998), Col. 534

⁶¹ A. Von Hirsch, A. Ashworth, M. Wasik, A. T. H. Smith, R. Morgan and J. Gardner, “Overtaking on the Right”, (1995) 145 *New Law Journal* 1501.

⁶² Home Office, *op. cit.*, 1998d, para. 2-6.

⁶³ S. Cracknell, “Anti-Social Behaviour Orders”, (2000) 22(1) *Journal of Social Welfare and Family Law*, 108–15.

⁶⁴ Von Hirsch *et al.*, *op. cit.*

⁶⁵ H. Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

⁶⁶ A. Ashworth, *Sentencing and Criminal Justice* (Weidenfeld and Nicolson, 1992).

civil standard of proof is flexible.⁶⁷ Moreover, the rules of evidence state that, “if an issue in a civil case involves an allegation that a criminal . . . act has been committed, the standard of proof on that issue must be commensurate with the occasion and proportionate to the subject matter”.⁶⁸ In practice, the acceptable lower standard of proof available was not taken literally by the Midlands ASBO Team:

It’s hard to say how much [evidence] to need but we tend to go over the top because the cases we take to court we like to be strong.

Moreover, on the issue of the use of witnesses and hearsay evidence (civil procedure):

If we haven’t witnessed [the behaviour] we can serve . . . a hearsay notice on the defendant but the defence can challenge that and if the witness is not there to be cross-examined the judge won’t give that evidence as much weight.

There is a potential argument that the civil rhetoric of ASBOs violates Article 6 of the ECHR– the right to a fair trial – by not affording suspects the criminal safeguards to which they are entitled. Thus, any proceedings established as “criminal” under Article 6(1) would require further safeguards afforded them by articles 6(2) and 6(3). The case of *Engel v. Netherlands*⁶⁹ established the meaning of “criminal” and this is dependent on three criteria. The first is whether an offence is classified as a criminal offence under domestic law. If this is not the case then the other two criteria become applicable. The second is the nature of the offence and the third, the degree of severity of the penalty.

Once established as criminal under Article 6(1), it is then necessary to turn to Articles 6(2) and 6(3). The former concerns the standard of proof, and the ECHR insists that guilt should be proved beyond reasonable doubt (this is not the case with the ASBO).⁷⁰ In respect of the latter, those subject to applications for ASBOs are never formally arrested or advised of their rights, they are not required to be in court for the hearing and they are only entitled to legal aid and witness examination on a civil standard.

However, the Court of Appeal (Civil) has held that ASBOs cannot be deduced as “criminal” under Article 6(1) because the application procedure is separate from the subsequent criminal proceedings that result from a breach and whose criminal safeguards are provided.⁷¹ Plowden contests the legitimacy of this finding observing the original order to be merely a “preliminary warning stage in a single process” in which “further warnings are inappropriate, illustrated by the lack of conditional discharges as a penalty upon breach”.⁷²

The second fundamental issue raised by critics of ASBOs is the nature of the restrictions on behaviour that can be included in an order. A wide variety of conduct, for example playing music or walking in a city centre (behaviour that is neither a criminal violation nor a civil wrong in itself), can be proscribed. This is done to protect the public from future risk of harassment. However, these actuarialist principles are in direct confrontation to the values of commensurate deserts principles: thus, an order *must* last a minimum of two years, in the hope of reducing risk, regardless of the offence. In Manchester, a 15-year-old schoolboy who “terrorised a community with threats of murder and fire-bombings” was banned from entering a designated square

⁶⁷ P. Tain, “Anti-social Behaviour Orders”, (2001) 145(2) *Sol. J.* 36.

⁶⁸ R. Bagshaw (ed.), *Cross & Wilkins, Outline of the Law of Evidence* (7th edn), (Butterworths, 1996).

⁶⁹ (A22) (1979–80) 1 E.H.R.R. 706, ECtHR.

⁷⁰ *Barbera, Messegue and Jubardo v. Spain* (1989) 11 E.H.R.R. 360, ECtHR.

⁷¹ *R. v. Manchester Crown Court, ex parte McCann*, [2001] EWCA Civ 218, [2001] 1 W.L.R. 184, C.A.

⁷² P. Plowden, “Love Thy Neighbour”, (1999) 149 *New Law Journal* 520.

mile of the city for a period of ten years.⁷³ His behaviour as leader of a gang is certainly worthy of concern and a punitive response would seem in order to protect the community. Nonetheless, a ten-year-long ban on a 15 year old entering a particular area does appear disproportionate.

Thus, the third fundamental issue raised by critics of ASBOs is the excessive and disproportionate penalties available on breach. The maximum penalty for *intentional* harassment under the Criminal Justice and Public Order Act 1994 is just six months imprisonment and that requires criminal proof. In the committee stage of discussion of the CDA 1998, Lord Thomas observed that “prison will not make the offender truly and earnestly repent and be in love and charity with his neighbour”.⁷⁴ If the “offender” behaves in the proscribed way, not only do they potentially face severe penalties but also they carry the stigma “even if he is a person who has otherwise been of completely good character”.⁷⁵

These issues principally contradict the “balance of proportionality” inherent in human rights legislation. Any restriction on the rights of an individual should, according to the ECHR, be proportionate to the legitimate aim it pursues.⁷⁶ It seems that the combination of civil and criminal law available is confusing and inconsistent and defendants are potentially at risk of losing liberties disproportionate to the aim of defending the rights of the community.

Widening the net and stigmatisation

A more general criticism of the CDA 1998 has been the potential for drawing into the criminal justice system a group of people who previously would have “avoided” it. This has been noted as particularly true in respect of juveniles:

[The legislation extends] the concept of “delinquency” to behaviour that falls short of actual criminal offending. Criminal justice authorities are empowered to intervene in these cases of “delinquency”, thus widening the youth justice net.⁷⁷

Moreover, because of the flexible interpretation of “anti-social behaviour” in the legislation, “eventually any conduct that displeases neighbours could be deemed ‘anti-social conduct’. . . . The result is to embrace not merely repetitively criminal actors, but also those with unconventional lifestyles”.⁷⁸

The crucial significance is that an ASBO can be obtained without a criminal offence having been committed. The behaviour has to be subjectively deemed disruptive and the offender considered *at risk* of their activities developing into something more serious. The outcome is that the range of actions over which local authorities can claim authority is widening and individual freedom – particularly in the case of juveniles – is being reduced.

These observations are resonant with Stanley Cohen’s “discipline thesis” regarding the development of the decarceration movement during the 1980s and the transition to community sanctions where he argues that an apparently liberal process actually leads to “net extension and strengthening. . . . Intervention comes earlier, it sweeps in more deviants, is extended to those not yet formally adjudicated and becomes more intensive”.⁷⁹ ASBOs can certainly be considered in this way.

⁷³ *The Times*, “Boy, 15 is Exiled After Reign of Terror”, *The Times*, 24 April 2001, p. 5.

⁷⁴ HL Debate (HMSO, 3 February 1998), Col 600.

⁷⁵ *Ibid*, Col 599.

⁷⁶ Starmer, *op. cit.*, p. 170.

⁷⁷ Fionda, *op. cit.*, p. 45.

⁷⁸ Von Hirsch *et al.*, *op. cit.*, p. 1501.

⁷⁹ S. Cohen, *Visions of Social Control*, (Polity Press, 1985), pp. 126–7.

Cohen considers the role of labelling and stigmatisation in the net-widening process and this is again an important issue with ASBOs. Subject to an order, the individual may well be labelled, drug addict, prostitute or juvenile delinquent, a label that predominates when describing the individual or the group. It is a process of “disintegrative shaming”⁸⁰ with the outcome being a community divided into the law-abiding and a group of outcasts stimulated by their alienation into the formation of deviant subcultures. ASBOs can exacerbate the problem because they offer no potential to de-label and reintegrate the individual but, on the contrary, the stigmatising process will push him or her further and further into a criminal self-concept. In short, targeting these groups in an adversarial way will result in certain sections of the community becoming resentful for being blamed for the “ills of society”, interpret this as dismissal from the mainstream and withdraw from the law completely.⁸¹ Thus, while ASBOs are merely a civil mechanism, their potential to “brand” people as anti-social is a major flaw.⁸²

CONCLUSION

The “post-modern condition” is a term used to describe the increasingly fragmented and diverse social world in advanced industrial societies in recent years.⁸³ In modern societies there are different and competing viewpoints or grand explanatory theories that explain the world – for example, conservatism, liberalism and socialism – but the proponents of each perspective had the moral confidence in their particular doctrine to solve all problems in society. In the post-modern condition, politics becomes more complex as it becomes necessary to square the diametrically opposite perspectives of multiple interest groups with a range of different and legitimate discourses. Moreover, “a post-modern politician who aspires to electoral success needs to identify crucial political issues that concern the widest possible range of interest groups in order to build successful electoral conditions”.⁸⁴

“New” Labour is a political party clearly aware of the need to steer a middle path – or “third way” – between competing interest groups in contemporary societies. The guru of this British version of communitarianism – but with substantial international influence – is the Director of the London School of Economics, Anthony Giddens.⁸⁵ The intention is to balance the undoubted energy of capitalism with the need to foster social solidarity and civic values: “the third way suggests that it is possible to combine social solidarity with a dynamic economy, and this is a goal contemporary social democrats should strive for”.⁸⁶ A crucial identified concern that unites many varied and competing interest groups in communal social solidarity is that of crime and disorder. Thus, it was in this context that the CDA 1998 was introduced to tackle the “root cause of crime” and disorder within local communities. ASBOs are intended to protect the rights of citizens whose lives are blighted by others who behave in a way previously beyond the reach of the criminal law but which nonetheless intrudes on the daily life of communities.

⁸⁰ J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

⁸¹ J. Muncie, “Institutionalised Intolerance: Youth Justice and the 1998 Crime and Disorder Act”, (1998) 19(2) *Critical Social Policy*, 60.

⁸² Tain, *op. cit.*

⁸³ Hopkins Burke, *op. cit.*, 2001, pp. 231–45.

⁸⁴ Hopkins Burke, *op. cit.*, 2000, p. 46.

⁸⁵ Giddens, *op. cit.*, 1998, 2001.

⁸⁶ Giddens *op. cit.*, 2001, p. 5.

Kelling and Coles describe how authorities in various constituencies in the USA have introduced strategies to deal with “quality of life” issues while invariably being challenged in the courts, usually by the American Civil Liberties Union (ACLU) and other libertarian groups.⁸⁷ Debates surrounding the introduction and implementation of ASBOs can be seen as a British example of this conflict between civil rights/human rights pressure groups and the “back to justice lobby” on the one hand and communitarians on the other hand. There have emerged two sets of discourse, each worthy of consideration as both individuals and communities have undoubtedly legitimate rights.

The CDA 1998 communitarian discourse recognises a problem of anti-social behaviour in our communities. Indeed, people have a right to be protected against harassment, alarm, distress and incivilities and it is fair that the police and local authorities should target this behaviour to ensure protection. From that perspective, the ASBO is a reasonable measure that has filled a prominent gap in the law. ASBOs are not a punishment but a deterrent and act to stem behaviour before it reaches a criminal level. They are, however, fraught with problems regarding the civil liberties of individuals. Both the procedures and orders themselves have been attacked because they infringe the fundamental rights of the perpetrator. Local authorities are able to inflict prohibitory conditions without recourse to a criminal court of law and are consequently in conflict with fundamental due process protections.

This paper has suggested that the balance may have shifted too much in favour of “communities” at the expense of individual liberty. Moreover, due-process values have been sacrificed in the increased pursuit of crime control outcomes with a worrying potential to absorb further into a widening net a whole group of relatively non problematic young people who left pretty much alone would grow out of their anti-social activities and become respectable members of society.

So, what does the future hold for ASBOs? One possibility is to hear applications in a criminal court so that orders continue in their present form but individuals are afforded better safeguards. There are, however, two potential problems with this proposal. First, this would amplify the problem of “net-widening” by “criminalizing” an excluded group who might not be involved in criminal behaviour. Second, there would be considerable resource implications. ASBOs were introduced in their present civil form so that the police do not have to spend considerable time gathering criminal evidence. A “quick fix” was seen to be needed to quell anti-social behaviour before it develops into something more serious. If the evidence requirements were increased to the criminal standard then local authorities might just as well wait for the behaviour to escalate and use the criminal law against the offender. Nothing would be really gained.

There is nonetheless a case for revision. Speaking to the Midlands ASBO Team, two issues became apparent. First, ASBOs are most useful when used against those at an early stage in their anti-social/criminal career; and second, they are best targeted at those who already have behaved in some way that has been proved to a criminal standard, for example, in the case of those convicted of soliciting in a public place. In most of these cases the individuals have received criminal penalties but with little deterrent effect. The ASBO reinforces the element of deterrence and prohibits the individual only from breaking the law. It is not drawing people into the net who are “otherwise law-abiding” for they are proven lawbreakers. Perhaps, therefore, specific conditions should apply before an order can be sought. For example, a perpetrator

⁸⁷ Kelling and Coles, *op. cit.*

should have a significant but not substantial criminal record – because ASBOs have been shown not to work for people with a long history of offending – and they thus should be imposed at an early stage. The standard of proof required should be of a “higher civil standard”.

ASBOs have a legitimate and appropriate future in a communitarian criminal justice policy. It would be a mistake to abandon or seriously curtail their use because measures are needed to tackle a grievous social threat to many communities. It is however appropriate to consider and reconsider the issue of civil liberties and human rights in terms of their long-term implementation.

THE FINANCIAL SERVICES AUTHORITY AND CREDIT UNIONS: THE FINAL PIECE OF THE JIGSAW?

NICHOLAS RYDER*

INTRODUCTION

The aim of this paper is to assess the impact of the Financial Services Authority (FSA) upon the development of the credit union movement in Great Britain. The paper provides an overview of the growth of credit unions and briefly assesses the impact of the Credit Unions Act 1979 upon their development. This paper concludes that the FSA will have a beneficial effect upon the development of the movement within Great Britain.

WHAT IS A CREDIT UNION?

A credit union is a distinctive financial institution that is democratically controlled by its members for their benefit and the wider community. The World Council of Credit Unions (WOCCU) defines a credit union as:

... a unique member-driven, self-help financial institution. It is organised by and comprised of members of a particular group or organisation, who agree to save their money together and to make loans to each other at reasonable rates of interest ... a co-operative financial organisation owned and operated by and for its members, according to democratic principles, for the purpose of encouraging savings, using pooled funds to make loans to members at reasonable rates of interest, and providing related financial services to enable members to improve their economic and social condition.¹

Berthoud and Hinton define a credit union as a co-operative society offering its members loans out of the pool of savings built up by the members themselves.² Donnelly and Haggett took the view that a credit union is a financial co-operative that encourages its members to save regularly and which facilitates the borrowing of money at lower interest rates than those normally charged by other financial institutions.³ A credit union is therefore a financial institution that offers its members the ability to save money and obtain loans at a reasonable rate of interest.⁴

THE GROWTH OF CREDIT UNIONS

The earliest form of credit union can be traced to Rochdale, England in the 19th century, from where it spread to Germany, Italy, Austria, France, Canada and the

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¹ For more detailed discussion see <http://www.woccu.org/>. The World Council of Credit Unions, Inc. (WOCCU) is a world-wide representative organisation. WOCCU is the world's leading advocate, platform for innovation and development agency for credit unions.

² Berthoud and Hinton, *Credit Unions in the United Kingdom* (Policy Studies Institute, 1997).

³ Donnelly and Haggett, *Credit Unions in Britain - A Decade of Growth* (Plunkett Foundation, 1998).

⁴ The rate of interest that credit unions are permitted to charge their members is fixed at 12.68 per cent APR by the Credit Unions Act 1979, section 11(5).

United States of America.⁵ In these countries credit unions have developed into mainstream financial service providers and have been permitted to increase the services they can offer to their members and are consequently in direct competition with the traditional suppliers of financial services. On a global level the credit union movement has continued to grow at a significant rate and to have become very successful. Figures for the year 2001 illustrate their rapid expansion: there are over thirty thousand credit unions; with membership of over one hundred million; a global market penetration of over eight per cent; savings amounting to over four hundred million US dollars; loans totalling five hundred million US dollars and reserves amounting to over six hundred million US dollars.⁶ At present the movement in Great Britain numbers nearly seven hundred, but their market share remains at less than one per cent.⁷ The credit union movement has failed to develop within Great Britain when compared to other jurisdictions: one reason for this lack of development is the Credit Unions Act 1979.

THE CREDIT UNIONS ACT 1979

Some commentators have suggested that one reason for credit unions not developing in Great Britain is that their legislative framework is very restrictive.⁸ The Association of British Credit Unions Limited (ABCUL) took the view that:

Credit unions in Great Britain have been held back by an overly restrictive law that has limited their growth and services they offer. . . . Indeed, a 1996 report from the World Council of Credit Unions stated 'the current credit union legislation in Great Britain is amongst the most restrictive in the world'.⁹

This view is supported by a report published by Policy Action Team 14, who concluded that the Credit Unions Act 1979 is an integral factor that has limited the development of the movement in Great Britain.¹⁰ At this stage it is therefore necessary to provide a brief analysis of the impact of the Credit Unions Act 1979 upon the development of the movement in Great Britain. The Crowther Committee on Consumer Credit provided the first formal recognition of credit unions in 1971.¹¹ The Committee stated that there was a case for encouraging the expansion of the credit union movement and for taking steps to make its existence, its aims and its methods widely known in the hope that the movement might take root and more credit unions be formed.¹² Prior to the enactment of the Credit Unions Act 1979, credit unions were registered and regulated under the "inappropriate" Industrial and Provident Societies Act 1965 and the Companies Act 1948.¹³

⁵ For a more detailed discussion see Moody and Fite, *The Credit Union Movement, Origins and Development – 1850–1970* (University of Nebraska Press, 1970).

⁶ The World Council of Credit Unions 2002 Statistical Report (WOCCU: Madison).

⁷ Dayson, Paterson and Powell, *The Forum for the Development of Community Based Financial Institutions* (Academic Enterprise, 1999).

⁸ ABCUL, *Why We Need a New Credit Union Law* (ABCUL, 1997).

⁹ *Ibid.* The Association of British Credit Unions Limited is the largest domestic representative body of credit unions in the Great Britain. Approximately 70 per cent of registered credit unions are represented by ABCUL, and its members account for over 80 per cent of the individual members and assets of all credit unions in Great Britain. ABCUL represents the interests of credit unions through the National Assembly for Wales, the Scottish Parliament, the Westminster Parliament, the Financial Services Authority, the Office of Fair Trading and other organisations.

¹⁰ H.M. Treasury, *Access to Financial Services* (H.M. Treasury, 1999).

¹¹ Cmnd. 4596 at para. 9-2.13.

¹² *Ibid.*

¹³ G. Griffiths and G. Howells, "Slumbering Giant or White Elephant: Do Credit Unions have a Role in the United Kingdom Credit Market?", (1991) 42(3), NILQ, 201.

An attempt to introduce legislation was made in 1972 by the Rt. Hon. John Roper M.P. who introduced a Credit Union Bill modelled upon the Northern Ireland legislation.¹⁴ The Rt. Hon. Denzil Davies M.P.¹⁵ stated that there was a need for legislation specifically for credit unions:

It [the Credit Unions Act 1979] is required not only to facilitate the actual operations of credit unions, but also to provide a measure of assurance, for those who are likely to entrust their savings to them, that there are built in checks and safeguards applying to credit unions, and some official supervision over them. Without this assurance, the confidence of savers, upon which credit unions must largely depend if they are to continue to develop and flourish, is less likely to be maintained.¹⁶

This is a view supported by the World Council of Credit Unions, who said that every country that has credit unions as a provider of financial services needed to have specific legislation for them.¹⁷ By the time the Credit Unions Act received Royal Assent,¹⁸ a total of ten credit unions had registered under the Companies Act 1948 and four had registered under the Industrial Provident Societies Act 1965.¹⁹

The Credit Unions Act 1979 was intended to be simple in its form and content by restraining the size of membership, shareholding and loans to small amounts consistent with the formative years of credit unions.²⁰ The legislation has not been sufficiently amended to take into account the continued expansion of the movement, thereby limiting the impact of credit unions.²¹ Section 1(1) provides that a credit union will become registered if it complies with the statutory requirements under the 1979 legislation. This includes identifying the desired objectives of a credit union,²² and that a common bond exists between its members.²³ The credit union must have at least 21 members²⁴ and generally not more than 5,000.²⁵ Griffiths and Howells took a view that highlighted the importance of the statutory requirements:

All credit unions set up on or after October 1 1979 must, without delay, register with the Registry of Friendly Societies. Until they do, they can neither call themselves credit unions nor operate as such. In order to qualify for registration, the credit union must demonstrate that it has a 'common bond' and the usual objects of a credit union, and that it has a set of rules, which are acceptable to the Registrar of Friendly Societies. It must also meet detailed requirements in regard to matters such as membership, loans and savings, surplus funds, and control and supervision.²⁶

An example of how the provisions of the Credit Unions Act 1979 have affected the development of the credit union movement in Great Britain is illustrated by examining the statutory provisions that relate to the common bond. Section 1(2)(b) requires a

¹⁴ For a more detailed discussion of the legislation that applies to credit unions in Northern Ireland see Quinn, *Credit Unions in Ireland* (Oak Tree Press, 1999).

¹⁵ The then Minister of State for the Treasury.

¹⁶ Second reading of Credit Union Bill, 12 February 1979.

¹⁷ World Council of Credit Unions, *Laws Governing Credit Unions* (WOCCU, 2002).

¹⁸ 4 April 1979.

¹⁹ A further 40 credit unions operated as unregistered societies.

²⁰ Registry of Friendly Societies, *Credit Unions in Great Britain – A Review of the Years 1979–1995* (Registry of Friendly Societies, 1996).

²¹ *Op. cit.*, note 13.

²² Credit Unions Act 1979, section 1(2)(1).

²³ Section 1(2)(b).

²⁴ Section 6(1).

²⁵ Section 6(2).

²⁶ *Op. cit.*, note 13.

credit union's membership to be restricted to people who fulfil a set qualification that is appropriate to the credit union and for a common bond to exist between its members. The term "common bond" first appeared in credit union literature in 1914 and it refers to the association shared by members of a group served by a credit union.²⁷ Ferguson and McKillop took the view that the common bond relates to the existence of a common identity "where the nature of social relationships stems from reciprocal interdependence typical of traditional community relationships".²⁸

There are six types of common bond permitted by the Credit Unions Act 1979: following a particular occupation,²⁹ residing in a particular locality,³⁰ being employed in a particular locality,³¹ being employed by a particular employer,³² being a member of a bona fide organisation³³ and "live or association common bond".³⁴ The "live or work" common bond entails all members of a credit union in working for the same employer or group or employers, or carrying out the same occupation. The residential common bond requires that all members must live within a defined geographical area, which may be defined by a line drawn on a map, or it may be determined by the use of postcodes. In order for a credit union to adopt an associational common bond, all its members must belong to the same association. This would include for example, a trade union, housing association or religious group. The "live or work" association stipulates that all members must live in the same area and/or have something specific in common. This may be employment by the same employer who has sites outside of the area, or membership of a church group by those who do not live in the area. These provisions of the Credit Unions Act 1979 have affected the development of the credit union movement within Great Britain by their very nature. For example, if a person wanted to become a member of a credit union but failed to meet the criteria laid down in section 1(4) that person would not be permitted to join. It is submitted that lessons could be adopted from the legislative provisions in the Republic of Ireland. The statutory requirements for the common bond in the Republic of Ireland provide credit unions with greater flexibility when compared to the provisions in Great Britain's Credit Unions Act 1979.³⁵

The common bond is a very controversial issue that has affected the development of the credit union movement in Great Britain. Whilst it reflects the history and philosophy of the movement, lessons can be learnt from foreign jurisdictions and some attempts have been made to lessen the restrictions imposed by the Credit Unions Act 1979. However, further reform is recommended to enable the credit union movement to develop further in Great Britain.

A further way in which the Credit Unions Act 1979 has affected the development of the credit union movement in Great Britain is illustrated by examining the provisions of section 6. Section 6 imposes restrictions on the number of people who are permitted to join a credit union. In particular, section 6(2) stipulates that the maximum number of members a credit union is entitled to is five thousand. It can therefore be argued that

²⁷ Burger and Dacin, *Field of Membership: An Evolving Concept* (Centre for Credit Unions, 1991).

²⁸ Ferguson and McKillop, *The Strategic Development of Credit Unions* (Wiley, 1997).

²⁹ Credit Unions Act 1979, section 1(4)(a).

³⁰ Section 1(4)(b).

³¹ Section 1(4)(c).

³² Section 1(4)(d).

³³ Section 1(4)(e).

³⁴ Deregulation (Credit Unions) Order 1996, S.I. 1996/1189, art 3.

³⁵ For a more detailed analysis of the provisions of the legislative framework in the Republic of Ireland see Donnelly, *The Law of Banks and Credit Institutions* (Dublin, 2000).

in its original format the 1979 legislation has affected the development of the credit unions by limiting the maximum number of members. Evidence from other jurisdictions indicates that if the ceiling imposed on the membership is lifted the credit union movement will expand. In their study, Burger and Dacin cited the policies adopted in the United States of America towards the membership ceiling:

Numerical limits on the field of membership of credit unions were raised in the 1970s, although they were still determined in a somewhat arbitrary fashion. The original limit was approximately 5,000 population. The 1965 Manual provided that the population area should not be materially in excess of 7,500. The 1972 Manual raised the population limit in the community to not greatly exceeding 25,000.³⁶

Another example of the way in which the Credit Unions Act 1979 has affected the development of credit unions can be seen by referring to section 9. This section provides that a credit union is permitted to take deposits of up to a total of £750 from a person who is “too young” to become a member.³⁷ This is one of the most restrictive sections of the Credit Unions Act 1979. If the credit union movement is to increase its market penetration it is essential that it attract younger members. Banks and building societies offer more incentives to younger savers than credit unions currently offer and this gulf in potential membership needs to be addressed.

The Credit Union (Increase in Limits on Deposits by Persons too Young to be Members and of Periods for the Repayment of Loans) Order 2001 increased the limits that were imposed under the 1979 legislation.³⁸ The limit upon the amount which a credit union is permitted to take from those who are “too young” to become members of the credit unions has been increased from £750 to £5,000. Although this amendment to the Credit Unions Act 1979 is beneficial, increasing the limit from £750 to £5,000 will not entice young people to join a credit union. In order for a credit union to make any significant impact with regards to young savers the movement needs to undertake an aggressive marketing campaign. The credit union movement and ABCUL must pursue a policy that will increase the number of young members in all credit unions, or risk failing to attract the next generation of members.

The provisions of the Credit Unions Act 1979 limit the services that credit unions provide to their members and has therefore affected their development in Great Britain. This is a core issue Great Britain and one that must be addressed if credit unions are to develop successfully in Great Britain. Under the provisions of the Credit Unions Act 1979, credit unions are only permitted to offer savings and loans. Ferguson and McKillop summed up the way in which the legislation has limited the development of the credit union movement in Great Britain:

At present credit unions are single product intermediaries providing basic savings and loan service pre-specified volume limits and interest rate ceilings. It is our contention that the time is approaching for credit unions to be permitted a broader role in retail financial services.³⁹

This is another example of the way in which the Credit Unions Act 1979 has affected the development of credit unions, by limiting the services that they provide. In order

³⁶ *Op. cit.*, note 27.

³⁷ Any deposit, which is held, will be held upon trust and shall be invested only in the manner which is permitted under Part I or Part II of Schedule 1 of the Trustee Investments Act 1961.

³⁸ Credit Union (Increase in Limits on Deposits by Persons too Young to be Members and of Periods for the Repayment of Loans) Order 2001, S.I. 2001/811. This statutory instrument increased the limits that were imposed under the Credit Unions Act 1979, section 9.

³⁹ *Op. cit.*, note 28.

to enable the movement to expand and develop, credit unions must be permitted to offer members such services as bill payments, the provision of ATMs, the ability to exchange foreign currency and to make limited investments.⁴⁰

There have been a number of attempts to lessen the restrictions imposed by the Credit Unions Act 1979 upon the development of credit unions in Great Britain. The first major attempt to reform the legislation occurred in 1996 *via* the Deregulation (Credit Unions) Order 1996.⁴¹ The purpose of the amendment was to make the growth of credit unions easier whilst continuing to ensure the safety of members' funds.⁴² It was widely accepted that the movement welcomed the 1996 reforms, as they would increase the growth potential of credit unions in Great Britain.⁴³ The amendments to the Credit Unions Act 1979 were

- a) to introduce a new membership qualification, which means that all members must live or work within a defined geographical area,⁴⁴ (where the Registrar considers it proper to treat as sufficient evidence of the existence of a common bond a statutory declaration which is given by three members and the secretary of the society, and is to the effect that a common bond exists),
- b) to increase the limits on shareholding,
- c) to permit the use of shares as security,
- d) to relax the restrictions on non-qualifying members and
- e) to increase limits on loans to members.⁴⁵

Ferguson and McKillop welcomed these amendments to the legislation but opined that they could have gone further. They argued that credit unions should not be subject to a membership ceiling and that the movement would benefit from a broader based common bond.⁴⁶ Despite the merits of the measures many of the restrictions within the Credit Unions Act 1979 remain.

In November 1998, HM Treasury announced its intention to lift some of the legislative burdens imposed on credit unions by the Credit Unions Act 1979.⁴⁷ The measures included permitting credit unions to borrow from external sources;⁴⁸ allowing credit unions to offer interest bearing share accounts, entitling credit unions to charge fees for providing services; the abolition of the £750 maximum limit on youth accounts;⁴⁹ making the common bond requirement more flexible, providing credit unions more flexibility to dispose of repossessed collateral, removing the 5,000 maximum membership limit and extending the repayment periods for secured and unsecured loans.⁵⁰ A second consultation paper was published in October 2001 and contained proposals aimed at widening credit unions' ability to borrow from external sources;

⁴⁰ A credit union is prevented from investing any part of its surplus funds except in a manner authorised by the Registry of Friendly Societies: Credit Unions Act 1979, s. 13. For a more detailed discussion of the services that a credit union should offer its members see N. Ryder "Credit Unions and Financial Exclusion – the odd couple" (2002) 24(4) *Journal of Social Welfare and Family Law*, 1–11.

⁴¹ *Op. cit.*, note 35.

⁴² *Ibid.*

⁴³ *Op. cit.*, note 28.

⁴⁴ Credit Unions Act 1979, section 1(2)(b), requires a credit union's membership to be restricted to people who satisfy a set qualification that is appropriate to the credit union and for a common bond to exist between its members. The rationale for a common bond includes the building of confidence among its members, that there is some commonality between them and their ability to exert pressure on one another to repay the loans.

⁴⁵ *Op. cit.*, note 34.

⁴⁶ *Op. cit.*, note 28.

⁴⁷ H.M. Treasury, *H.M. Treasury Consultation Document – Proposed Amendments to the Credit Unions Act 1979* (H.M. Treasury, 1998).

⁴⁸ Other than authorised banks and other credit unions.

⁴⁹ *Op. cit.*, note 38.

⁵⁰ *Op. cit.*, note 47.

permitting the payment of dividends more than once a year and at different rates and enabling credit unions to charge for the provision of ancillary services.⁵¹ The Economic Secretary, Ruth Kelly M.P. said:

These proposals are aimed at reducing some of the restriction on credit unions' operational powers, and we are seeking comments on all aspects of the draft proposals, to inform the policymaking process going forward. The credit union movement is known for its diversity, so I hope that a wide range of consultees will respond, to enable Government to take account of all the different perspectives and needs.⁵²

The Financial Services and Markets Act 2000 made four amendments to the Credit Unions Act 1979.⁵³ Firstly, sections 6(2) and 6(6) have been abolished and thus the maximum membership limit of 5,000 has been removed. Secondly, the maximum legal limit on the size of loan that can be made to an individual member was removed. Thirdly, land or property acquired by credit unions as a result of a defaulted loan secured upon it, now need not be sold as soon as convenient. Finally, section 14(2)(b) of the Credit Unions Act 1979 has been amended to remove the requirement that credit unions place 20 per cent of their surplus into a general reserve until the reserve stands at 10 per cent. It is submitted that these amendments will have a positive impact upon the development of credit unions. They will be afforded greater power and flexibility than under the provisions of the Credit Unions Act 1979.⁵⁴

The Credit Unions Act 1979 has limited the development of the credit union movement in Great Britain. The Act is fundamentally flawed and needs to be reformed. Traditionalists will argue that if credit unions are offered increased powers via a new piece of legislation, they will start to become *de facto* banks and lose their uniqueness. This can be refuted by referring to the legislative framework in the Republic of Ireland (the Credit Unions Act 1997), which has enabled credit unions to maintain their ethos but to become mainstream financial service providers.

REGISTRY OF FRIENDLY SOCIETIES

Under the Credit Unions Act 1979, the Registry regulates credit unions in Great Britain.⁵⁵ The activities of the Registry are divided into five categories.⁵⁶ Firstly, the Registry regulates industrial and provident societies under the Industrial and Provident Societies Act 1965 and is responsible for registering such societies, filing their annual returns and accounts and for maintaining their public record files.⁵⁷ Secondly, the Registry regulates building societies under the Building Societies Act 1986 and is responsible for the prudent supervision of building societies; registering of their mergers after confirmation by the Competition Commission and maintaining public record files of all building societies. Thirdly, the Registry regulates friendly societies under the Friendly Societies Acts 1974 and 1992. Friendly societies are mutual organisations

⁵¹ H.M. Treasury, *Proposed Amendments to the Credit Unions Act 1979 – A Consultation Document* (H.M. Treasury, 2001).

⁵² H.M. Treasury Press Release, 112/01, *Consultation on changes to credit union legislation launched today* (October 2001).

⁵³ These came into effect on 2 July 2002. The regulations for credit unions are contained within the FSA's handbook, which is referred to as CRED.

⁵⁴ *Op cit.*, note 14.

⁵⁵ The functions of the Registry of Friendly Societies transferred to the FSA on 2 July 2002.

⁵⁶ It should be noted however that as of 1 December 2001, these functions were transferred to the FSA with the exception of the regulation of credit unions.

⁵⁷ The Rt. Hon. Gareth Thomas M.P. introduced a new Industrial and Provident Societies Bill in January 2002. The aim of the Bill is to increase the voting requirements where a society is considering converting into a company. The Bill permits societies that exist for the benefit of the community to alter their rules so as to prevent their assets being distributed except to charities or other community benefit societies.

whose main purpose is to provide life assurance and assistance to members during sickness and unemployment. Fourthly, the Registry regulates societies other than friendly societies registered under the Friendly Societies Act 1974. Finally, the Registry regulates credit unions under the Credit Unions Act 1979. Under the Act, the Registry has powers relating to the regulation of credit unions. By virtue of section 17 of the Act the Registry has the authority to require from credit unions books, accounts and other documents and the furnishing of information. Section 17(2) provides that the Registry may serve in writing on a credit union a notice to furnish a financial statement in such form and containing such information as may be specified. Section 18 permits the Registry to conduct an investigation into the affairs of the credit union and to appoint an inspector to investigate and report on the affairs of the credit union. Section 19 allows the Registry to give a direction prohibiting the credit union from borrowing money, from accepting payment representing the whole or any part of an amount due by way of subscription for a share in the credit union, from lending money and repaying capital. These functions will transfer to the Financial Services Authority (FSA) by virtue of the Financial Services and Markets Act 2000.

THE FINANCIAL SERVICES AUTHORITY AND CREDIT UNIONS

Three weeks after the general election victory in May 1997, the Rt. Hon. Gordon Brown M.P. announced that the regulatory framework created by the Financial Services Act 1986 would be reformed.⁵⁸ The reforms were published in July 1998 in the Financial Services and Markets Bill.⁵⁹ The main reasons for the reforms according to the government were that the regulatory regime under the Financial Services Act 1986 was costly, inefficient and confusing for both regulated firms and customers.⁶⁰ The government claimed that the reform would establish a single, statutory regulator for the financial services industry, with clearly defined regulatory objectives and a single set of coherent functions and powers.⁶¹ The transformation was partly contained in the Bank of England Act 1998.⁶² Part III of the Act transferred the Bank of England's powers and responsibilities for the supervision of the banking sector and the wholesale money market institutions to the FSA.⁶³ As a result of the Bank of England Act 1998, the FSA inherited the regulatory function of the Insurance Directorate of the Treasury, the Building Societies Commission, the Friendly Societies Commission and the Registry of Friendly Societies. The Financial Services and Markets Act 2000 received Royal Assent on 4 July 2000 and came into effect on 1 December 2001.

In November 1999, the government announced that credit unions would be brought within the scope of the Financial Services and Market Act 2000.⁶⁴ The FSA welcomed

⁵⁸ HC Debs. cols. 508–511, 20 May, 1997.

⁵⁹ For a more detailed analysis see A. Alcock, "The Draft Financial Services and Markets Bill", (1998) 19 (9) *Comp. Law.*, 258–264, E. Lomnicka, "A Regulatory Monster – Policy Making on the Hoof", (1998) *J.B.L.* July 371–379 and E. Lomnicka, "Reforming UK Financial Services Regulation: The Creation of a Single Regulator", (1999) *J.B.L.* Sep 480–489.

⁶⁰ Financial Services and Markets Bill: *A Consultation Document, Part One Overview of Financial Regulatory Reform*, July 1998, H.M. Treasury.

⁶¹ *Ibid.*

⁶² For a more detailed analysis of the Bank of England Act 1998 see A. Arora, "Round up: banking law", (1999) 20(8) *Comp. Law.*, 263–271 and J. Masooma, "Bank of England Act brings greater transparency to the UK financial system", (2000) 1(4) *J.I.B.R.*, 1(4), 71–74.

⁶³ Bank of England Act 1998, section 21.

⁶⁴ See H.M. Treasury Press Release, *Enhanced Role for Credit Unions*, 16 November 1999.

this decision, as the regulatory regime would contribute towards the development and strengthening of confidence in the credit union movement.⁶⁵ Howard Davies, Chairman of the FSA, took the view that:

I hope the Financial Services Authority can help shine more light on the movement, and help it to achieve its full potential to offer low-cost efficient financial services to local people, and make an important contribution to offset the serious problem of financial exclusion. The social aims of credit unions could be pursued more effectively if they are managed on a more business-like footing. Because only if credit unions have a deserved reputation for sound management will they be able to attract the deposit base they need to make a real difference.⁶⁶

The creation of the FSA will have a dramatic impact on the development of the credit union movement in Great Britain. ABCUL feared that this impact would be adverse:

... it is not surprising that the Bill [Financial Services and Markets Bill] does not impose on FSA any specific duty to assure that its regulation preserves this necessary diversity among providers of financial services. ... In the absence of such a duty, we fear that predictable bureaucratic tendencies will result over time in "one size fits all" approach to regulation.⁶⁷

ABCUL took the view that the FSA had to maintain a diverse approach towards the regulation of credit unions and keep in mind the special characteristics of the movement.⁶⁸ The proposed regulatory regime towards credit unions is contained in a number of consultation papers and the FSA Handbook. The consultation papers will now be assessed to determine if the FSA will assist the development of the credit union movement in Great Britain.

CONSULTATION PAPER 77: THE REGULATION OF CREDIT UNIONS

Consultation Paper 77: The Regulation of Credit Unions contained proposals aimed at the regulation of credit unions in Great Britain.⁶⁹ The FSA has taken into account the special characteristics of the movement when developing the proposed regulatory regime.⁷⁰ The main proposals for the regime were the setting of high level standards; the registration of credit unions; the granting of authorisation and permission; the "approved persons" regime; management, systems and control; provisions dealing with money laundering, lending, capital, liquidity, borrowing and supervision, enforcement, consumer compensation and complaints, fees and "grandfathering".

The FSA proposed that credit unions should be required to comply with the high level requirements contained in the "Threshold Conditions" and with the FSA's "Principles for Business".⁷¹ In addition to the registration process under the Credit

⁶⁵ H.M. Treasury, *Credit Unions of the Future* (H.M. Treasury, 1999). The H.M. Treasury Task Force concluded that if credit union growth is to be soundly based, there needs to be both effective regulation and effective enforcement.

⁶⁶ FSA, *Credit Unions: Time to Stop Being "Best Kept Secret"*, 3 March 2000.

⁶⁷ *Draft Financial Services and Markets Bill: First Report*; House of Lords, 50 I – II; House of Commons, HC 328 I – II.

⁶⁸ *Ibid.* For a more detailed discussion see O. McCarthy, "A Values Perspective of the Irish Credit Union Movement", (2002) 35(2), *Journal of Co-operative Studies* 128–40.

⁶⁹ FSA, *Consultation Paper 77: The Regulation of Credit Unions* (FSA, 2000). See generally FSA, *General Handbook – Credit Unions Sourcebook* (FSA, 2002).

⁷⁰ For a more detailed discussion see N. Ryder, "Financial Services: Diversity is the key to effective regulation", (1999) 21 (3), *Bus L. R.*, 62–65.

⁷¹ Financial Services and Markets Act 2000, schedule 6.

Unions Act 1979,⁷² a credit union must be authorised by the FSA to carry on business.⁷³ Credit unions become authorised by obtaining permission to carry on certain types of activity. For example, if a credit union wishes to lend amounts of not more than ten thousand pounds in excess of a member's shareholding for maximum periods of three years (unsecured) and seven years (secured), and to offer limited ancillary services,⁷⁴ it will need a deposit taking permission with requirements attached setting out those restrictions.⁷⁵ Where a credit union seeks to lend larger amounts for longer periods and/or to offer wider ancillary services, it will need to apply for a deposit taking permission with a more permissive set of requirements.⁷⁶ The proposal to permit credit unions to offer loans for a longer period of time could assist the development of the credit union movement in Great Britain. A credit union which is subject to the "version 1 requirements" is permitted to grant a loan for three years (unsecured) and seven years (secured) while a credit union that is subject to the requirements of "version 2" is permitted to approve loans for five years (unsecured) and fifteen years (unsecured). Section 11(4) of the Credit Unions Act 1979 specifies that loans must be repaid within seven years and that unsecured loans must be repaid within three years. Section 11(4) of the Credit Unions Act 1979 must be amended to permit members of credit unions to repay and obtain loans over a longer period of time. In effect, the FSA are extending the time limits as to how long a member may obtain a loan.

Under the proposals, all credit unions will be required to comply with the rules for senior management arrangements, systems and controls contained in Block 1 of the FSA Handbook. Credit unions will be required to take reasonable care to maintain a clear and appropriate apportionment of significant responsibilities among their directors and senior managers. They will also be required to take reasonable care to establish and maintain such systems and controls as are appropriate to their business. All credit unions will continue to be required to keep and maintain proper records, including accounting records, providing a true and fair view of the state of affairs of the credit union. Such proposals are likely to assist the development of credit unions as they must have in place procedures and controls that could improve both their efficiency and their operation.

Credit unions subject to version 1 will be required to have a positive net worth at all times. They will be required to transfer 20 *per cent* of annual profits to general reserves if those reserves are less than ten per cent of total assets. Credit unions which are subject to version 2 requirements will be required to maintain a capital-assets ratio of at least eight per cent at all times. Credit unions subject to version 2 will be required to have a financial risk management policy setting out how they will handle interest rate and funding risk. Credit unions which are subject to the version 1 requirements will not be required to have such a policy. These proposals are likely to increase people's confidence in the credit union movement because, as of July 2002, it became a legal requirement that all credit unions are required to have a positive net worth. The proposals are designed to be flexible and to provide members with sufficient protection for their savings without imposing an undue burden on the credit union. The FSA took the view that:

⁷² Credit Unions Act 1979, s. 1.

⁷³ Financial Services and Markets Act 2000, ss. 31–55.

⁷⁴ *Op. cit.*, note 51.

⁷⁵ For a more detailed discussion see ABCUL, *Version 1 and Version 2 – What is the difference?* (ABCUL, Manchester).

⁷⁶ *Ibid.*

We aim to develop a practical and proportionate regulatory system for credit unions, which should meet the needs of the credit union movement and its members. We are confident that these proposals will improve consumer confidence in the financial soundness of credit unions and that this will help to provide the positive environment credit unions need in order to grow and pursue their social objectives.⁷⁷

The proposals contained in Consultation Paper 77 will have a positive impact upon the development of credit unions in Great Britain for a number of reasons: the proposals meet the needs of the movement, they will improve consumer confidence, they will ensure the financial soundness of credit unions, provide a positive environment and ensure that members of credit unions are protected.

CONSULTATION PAPER 94: CREDIT UNIONS: CONSUMER COMPENSATION AND CONSUMER COMPLAINTS

Consultation Paper 94, *Credit Unions: Consumer Compensation and Consumer Complaints* could assist the development of credit unions in Great Britain.⁷⁸ Within Consultation Paper 94 are the following proposals: credit unions are to be included in the Financial Services Compensation Scheme (Compensation Scheme), become members of the Financial Services Ombudsman Scheme (Ombudsman Scheme) and are to contribute towards the running costs of the Compensation Scheme.⁷⁹ The FSA claim that membership of both these schemes will significantly benefit credit unions as for the first time members will have access to a compensation scheme. In essence, this means that if a credit union were to fail, the members would be protected and be refunded a large proportion of their savings.

Credit unions are to form part of the “single contribution group”, and fall within the remit of the deposit taker sub-scheme.⁸⁰ Under the proposals, the first £2,000 of members’ savings is safe and will be refunded if their credit union collapses with 90 per cent of the next £31,000 being returned. Credit union directors and managers are not to be excluded from the protection scheme.⁸¹ There are two benefits to this proposal. Firstly, the scheme provides protection for the members of credit unions.⁸² Secondly, credit unions are included within the same regulatory structure as banks and building societies. Credit unions are therefore on the same playing field as the main providers of financial services. This will prove beneficial to the development of the credit union movement in Great Britain, as credit unions will be seen as being part of the same regime as the traditional providers of financial services.⁸³ The FSA are of the opinion that the increased consumer protection measures for credit unions will make membership more attractive and that this is likely to have a significant impact upon the growth and expansion of the movement.⁸⁴ John Milne, Head of the FSA Credit Union Regulation Team said:

⁷⁷ FSA Press Release, FSA/PN/149/2000, *FSA regime to “increase confidence in credit unions”*, 4 December 2000.

⁷⁸ FSA, *Consultation Paper 94: Credit Unions: Consumer Compensation and Consumer Complaints* (FSA, 2001). See generally FSA, *General Handbook – Credit Unions Sourcebook* (FSA, 2002).

⁷⁹ See H.M. Treasury Press Release, *Enhanced Role for Credit Unions*, 16 November 1999.

⁸⁰ *Op. cit.*, note 78.

⁸¹ *Ibid.*

⁸² This is an example of how the FSA intends to meet two of its four statutory objectives. For a more detailed analysis of the statutory objectives of the FSA see generally N. Ryder, “Two plus two equals financial education – The Financial Services Authority and consumer education”, (2001) 35(2) *Law Teacher*, 216–232 and Steward, E., “The four horseman of the apocalypse – the Financial Services Authority and its statutory objectives”, (2001) 22 (11), *Bus. L. R.*, 258–261.

⁸³ *Op. cit.*, note 7.

⁸⁴ *Op. cit.*, note 78.

A sound and effective investor protection scheme is a key factor for public confidence in the credit union movement and for its future growth. From the middle of next year [2002] credit union members will come under the Financial Services Compensation Scheme and will thus be protected in the same way as depositors with banks and building societies.⁸⁵

One of the benefits of the regulatory regime is that it will clearly assist people like those who nearly suffered financial ruin when Camberwell Credit Union was saved from collapse by a take-over by a neighbouring credit union and a fundraising drive that raised £160,000. The assets of Camberwell Credit Union were effectively frozen in August 2001 following an investigation by the FSA that discovered mismanagement and a lack of controls to protect the assets.⁸⁶ Three thousand members stood to lose every penny of their very hard-earned life savings and had all been told that due to bad debts, they would only get 50p in the pound back if the credit union were forced to close, with the liquidator's fees taking the rest.

As previously stated, within the new rules there are a number of safety measures that will ensure that members get the first £2,000 of their money back in full following the collapse of an institution and 90 per cent of the next £31,000, bettering the arrangement for bank customers, who can recover 90 per cent of the first £18,000. Camberwell Credit Union approached the British Bankers Association, which agreed to a cash call on its members that involved a group of major banks offering loans of £10,000 each. The deal became unnecessary after an offer of £25,000 from Southwark Council was topped up by loans from several credit unions around the country and £30,000 of donations from philanthropists. ABCUL announced on 8 October 2001 that members of the Camberwell Credit Union were able to access their savings and services from Southwark credit union.⁸⁷ Shaun Spiers, the Chief Executive Officer of ABCUL said:

I am very pleased that this transfer has been completed, and delighted that ex-Camberwell members will again have full access to credit services. A total of £160,000 in donations and loans was raised to enable the transfer to go through. All but £30,000 from a local benefactor – came from the credit union movement. I am delighted that the movement has demonstrated such solidarity and self-reliance. Southwark credit union, in practice must be congratulated for its role in achieving this positive outcome. Nevertheless, the collapse of Camberwell credit union is a sobering lesson that, for all their contribution to society . . . they must have properly trained boards of directors, effective credit control and procedures for recovering bad debt.⁸⁸

The Rt. Hon. Harriet Harman M.P. took the view that if Camberwell Credit Union had gone under it would have been a devastating blow to the policyholders and also to the local community. She added that it would have had a potentially disastrous impact upon the credit union movement in Great Britain and that “we faced the prospect of people up and down the country taking their money out”.⁸⁹ However, this excellent new law designed to strengthen credit unions will bring their members under the same umbrella as banks, protecting savers from any future collapse, thus assisting the development of the credit union movement in Great Britain.

⁸⁵ FSA – Press Release, FSA/PN/059/2001, “Compensation Scheme for Credit Union Members”.

⁸⁶ Philip Inman, Donations save credit unions, 24 August 2001, *The Guardian*.

⁸⁷ ABCUL Press Release, “Camberwell Members’ Money is Safe”, 8 October 2001.

⁸⁸ *Ibid.*

⁸⁹ *The Guardian*, “Donations Save Credit Union”, 24 August, 2001. Similarly, more than 800 members of Thamesmead community credit union in London have also benefited from their membership of the compensation scheme. The FSA announced that the deposits of members of the credit union, which is the first to default since the imposition of the new regime in July 2002, would be protected. For a more detailed discussion see *The Guardian*, “Compensation for Credit Union Members”, 17 September, 2002.

Consultation Paper 94 outlined the proposed arrangements regarding complaints made by members of a credit union and how they were to be treated. Under the proposals, each credit union must have in place an efficient complaints handling system and where the complainant is not satisfied with the way in which the matter has been dealt, the credit union must refer the matter to the Ombudsman Scheme.⁹⁰ It is submitted that membership of the Ombudsman Scheme amounts to clear evidence of the FSA attempting to meet their statutory objectives under the Financial Services and Markets Act 2000.⁹¹

The FSA have been given the necessary powers to require authorised firms to establish appropriate procedures for resolving complaints.⁹² The FSA proposed to establish distinct complaints procedure rules for credit unions that are aimed at the particular needs of credit unions and their members.⁹³ Under the rules members of a credit union are not allowed to make a formal complaint to the Financial Ombudsman Scheme until they have exhausted the internal complaints procedure of the credit union. According to the FSA, complaints with which a credit union must deal are “any expression of dissatisfaction about any financial services activity provided or withheld by the firm”.⁹⁴ As a general requirement under the new proposals, the FSA have stated that all authorised firms must have appropriate and effective procedures for dealing with complaints in place.⁹⁵ The FSA have proposed that credit union collectors and staff within the credit union need to be made aware of the complaint procedure to ensure that the credit union acts in accordance with them. Furthermore, there must be appropriate management controls within the credit union to ensure a fair and consistent handling of complaints. The complaints must be investigated quickly by a member of staff, or by a member of the committee of management, to ensure that the complaint is adequately addressed.

The purpose of the Financial Ombudsman Service is to provide an alternative mechanism for resolving disputes as opposed to litigation. The services will be free and open to any customers of firms that have been authorised by the FSA to carry out any regulated activity.⁹⁶ The FSA said:

We consider that the principle that financial services consumers should have access to an independent scheme for the simple and informal resolution of complaints applies as much for credit union members as it does for other consumers. Such access is necessary to ensure an appropriate level of consumer protection.⁹⁷

In relation to credit unions, the Ombudsman Scheme will listen to complaints about matters arising out of the credit unions savings and lending activities as well as their current and future ancillary activities. The decisions of the Financial Ombudsman are to be based upon what is “fair and reasonable” in all circumstances as opposed to strict legal liability. Furthermore, the decision of the Ombudsman, which brings a maximum award of £100,000, is final if the complainant agrees to it. Once a member

⁹⁰ *Ibid.*

⁹¹ *Op. cit.*, note 81.

⁹² Financial Services and Markets Act 2000, ss. 225–334.

⁹³ *Op. cit.*, note 78.

⁹⁴ *Ibid.*

⁹⁵ The FSA states here that the proposed general rules states that compliance with British Standard 8600, Complaints Management Systems – Guide to Design and Implementation will be taken as tending to demonstrate compliance with the FSA’s complaints handling requirements. Rather than using the general document, the FSA felt it was necessary to produce a separate set of model procedures for credit unions.

⁹⁶ For a more detailed discussion see the Financial Services and Markets Act (Regulated Activities) Order 2001, S. 1. 2001/544.

⁹⁷ *Op. cit.*, note 78.

of a credit union makes a complaint to the Financial Ombudsman Service, there are three stages in the handling of that complaint. Firstly, staff of the Financial Ombudsman Service will determine if there is any possibility of resolving the dispute by reaching a settlement that is acceptable to both sides.⁹⁸ Secondly, if the first stage fails to reach an agreement between the disputing parties, the Financial Ombudsman Service staff will investigate the complaint. The Financial Ombudsman Service staff has the power to require information from the complainant and the relevant authorised firm. Once the investigation has taken place, the Financial Ombudsman Service will issue their initial decision and recommend an outcome. If the complainant and the authorised firm accept the decision, the complaint is resolved. If the complaint is not resolved, it moves to the third stage, which involves the direct involvement of the Ombudsman who will review the case and issue a final decision. If the complainant agrees to the final decision, it will bind both parties.⁹⁹

Firms covered by the Financial Ombudsman Service will fund 50 per cent of its operating costs during its first year, the remainder being funded from case-related charges. The FSA has proposed two types of payment by credit unions – a general levy and a case-related charge. Under the general levy proposal, credit unions will pay a minimum levy that is to be paid by all credit unions.¹⁰⁰ The second proposal concerns the case-related charge. Here the FSA stated:

We propose that credit union paying only the minimum fee would be exempt from paying any additional case fees. All other credit unions would pay related charge for complaints against them handled by the Ombudsman. During the financial year 2002/2003 the case related charge is expected to be between £330-£340.¹⁰¹

The Financial Services and Consumer Panel was established under the Financial Services and Markets Act 2000 to represent the interests of consumers.¹⁰² The Financial Services and Consumer Panel agreed with the proposal that credit unions should become members of the Financial Services Compensation Scheme and that it would be unfair to exclude credit union directors and managers from the protection of the Financial Services Compensation Scheme.¹⁰³ This means that directors and managers are free from indemnity under the regulatory regime of the FSA.

ABCUL supported the proposal that credit unions were to be included within the deposit-takers contribution group and that credit union managers and directors were to be protected under the Financial Services Compensation Scheme. ABCUL were critical of the proposed complaints handling procedures as outlined in Consultation Paper 94. They were concerned that credit unions will only have eight weeks to respond to a complaint and suggested that this should be increased to twelve weeks. ABCUL concluded:

⁹⁸ *Ibid.*

⁹⁹ *Op. cit.*, note 78.

¹⁰⁰ One issue that might cause problems within the credit union movement concerns the costs imposed on smaller or community credit unions. The FSA aims to counteract this problem by stating that all small credit unions will pay £50, and the remainder of the fees are to be paid by the remaining credit unions in proportion to their assets. For a more detailed discussion see FSA, *Consultation Paper 125: Fees 2002/03*, (FSA, 2002). ABCUL welcomed the minimum general flat fee of £50 towards the funding of the Financial Ombudsman Service and they supported the separation of charges between registration and authorisation of credit unions. See generally, ABCUL, *Response to Consultation Paper: 125 Fees 2002/2003* (ABCUL, 2002). Therefore, the total cost for credit unions applying under “version 1” is £500 and £2000 for “version 2” requirements. For a more detailed discussion of the differences between community credit unions and workplace credit unions see generally Jones, *From Small Acorns to Strong Oaks – A Study into the Development of Credit Unions in Rural England* (ABCUL, 2001).

¹⁰¹ *Op. cit.*, note 78.

¹⁰² The Financial Services and Consumer Panel is independent of the FSA and is able to speak publicly on any matter it deems necessary and its purpose is to advise the FSA.

¹⁰³ Financial Services Consumer Panel, Financial Services Consumer Panel Response to *Consultation Paper 94: Consumer Compensation and Consumer Complaints* (Financial Services Consumer Panel, 2001).

The establishment of a share protection scheme for credit union members has long been a goal of the credit union movement. On 1st July 2002, a saver with a credit union will have the same level of savings protection as a depositor with a bank or building society. Credit unions' inclusion in the scheme alongside banks and building societies will significantly enhance the level of consumer confidence in the safety of credit unions. We therefore greatly welcome credit unions' entry into the Financial Services and Compensation Scheme.¹⁰⁴

It is submitted that, by virtue of their membership of the Financial Services Compensation Scheme and the Financial Services Ombudsman Scheme, the development of credit unions will improve due to increased confidence and the fact that they are members of the same scheme as banks and building societies.

CONSULTATION PAPER 107: CREDIT UNIONS SPECIALIST HANDBOOK – DRAFT RULES

Consultation Paper 107, *Credit Unions Specialist Handbook – Draft Rules*, was published in August 2001.¹⁰⁵ Consultation Paper 107 contains the draft rules that are applicable to credit unions from July 2002. David Strachen of the FSA took the view that:

These proposals, which have had the benefit of extensive pre-consultation with the credit union movement, will form a proportionate regulatory regime for credit unions. This regime will, in our view increase consumer confidence in credit unions, enabling them to grow and to meet their wider social and financial objectives.¹⁰⁶

Under the proposals contained in Consultation Paper 107, all credit union personnel are required to comply with the FSA's Approved Person regime; credit unions must meet a basic test of solvency, maintain a certain level of initial capital and maintain a minimum liquidity ration. David Strachen added:

The reaction to our consultation with credit unions and other interested parties has been exceptional, with no fewer than 265 responses received in respect of our proposals issued last December [2000]. We believe that the new regime . . . will meet the FSA's regulatory objectives and at the same time improve confidence in the financial soundness of credit unions. Our proposals also give effect to our commitment to provide credit unions with a separate manual covering the rules and guidance that will apply with them.¹⁰⁷

It can be argued therefore that the aim of the proposed regime is to increase consumer confidence and the financial soundness of the credit union movement in Great Britain. If this is the case, the proposals contained in Consultation Paper 107 will have a beneficial effect on the development of credit unions.

CONCLUSION

The FSA will have a dramatic impact upon the development of the credit union movement in Great Britain. The new regime has a number of benefits: credit unions are placed on the same regulatory footing as banks and building societies, thus improving

¹⁰⁴ ABCUL, *Response to CP: 94 – Credit Unions: Consumer Compensation and Consumer Complaints* (ABCUL, 2001).

¹⁰⁵ FSA, *Consultation Paper 107: Credit Unions Specialist Handbook – Draft Rules* (FSA, 2001). See generally FSA, *General Handbook – Credit Unions Sourcebook* (FSA, 2002).

¹⁰⁶ FSA, Press Release, FSA/PN/107/2001, *FSA's Proposed Regime for Credit Unions Reaches a key Milestone*, 23 August 2001.

¹⁰⁷ *Ibid.*

their image and members have been afforded the same level of protection as depositors of banks and building societies, thus avoiding incidents like Camberwell. The fear of the regime from the credit union movement is understandable as it represented a monumental shift from the regulation experienced under the Credit Unions Act 1979. However, the movement must appreciate that such a firm regime will improve people's confidence in the credit union movement in Great Britain.

GENERAL DUTIES TO CONSULT THE PUBLIC: HOW DO YOU GET THE PUBLIC TO PARTICIPATE?

KATHARINE THOMPSON*

INTRODUCTION

It would seem from the voting figures in recent general and local elections that the citizens of the United Kingdom are not very interested in playing their role in democracy. This lack of participation has caused concern and the government has tried to consider ways in which it can get the public to engage in the decision making process. For local government this has once again resulted in new legislation to come to terms with, and new expectations to deliver. In *Modern Local Government: In Touch with the People*¹ the government made it clear that it wanted to improve local accountability and that this was to be achieved in part by providing more obligations on local government to consult with the public in new participation initiatives.

The Local Government Act 1999 introduced the concept of “best value”, which replaced compulsory competitive tendering. Under section 3(1) of the Act a best value authority is under a duty to “make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”.² In order to determine how to fulfil this function, section 3(2) imposes a new duty to consult: representatives of those who pay local taxation; representatives of those who use its services; and “representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions”. Authorities must conduct best value reviews of their functions and best value performance plans for each financial year. Under section 4 of the Act the Secretary of State has issued specific performance indicators and standards with the aim of promoting improvement in the way in which functions are exercised.

In conjunction with best value, the Local Government Act 2000 introduced another new concept, the “promotion of well-being”. Under section 2(1) of the Act authorities have the “power to do anything which they consider is likely to achieve” the promotion or improvement of the economic, social or environmental well-being of their area. This is a very wide discretionary power and it is only limited by the terms of section 3, which states that the power cannot be used to raise money; or if the Secretary of State has prohibited the activities; or without having regard to any guidance which has been issued by the Secretary of State; and that it “does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made)”. Section 4 of the 2000 Act also requires authorities to prepare strategies for the promotion of well-being, known as community strategies. In doing this authorities are required to “consult and seek the participation of such persons as they consider appropriate”.

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¹ Cm. 4014 (1998).

² “Functions” of authorities are not defined in the Act but they were defined by Woolf L.J. in the Divisional Court in *Hazell v. Hammersmith and Fulham LBC* [1990] 3 All E.R. 33 at 50 when considering the use of the term in s. 111(1) of the Local Government Act 1972: “What is a ‘function’ for the purposes of the subsection is not expressly defined but in our view there can be little doubt that in the context ‘function’ refers to the multiplicity of specific statutory activities the council is expressly or impliedly under a duty to perform or has power to perform under the other provisions of the 1972 Act or other relevant legislation.” This dictum was approved by the Court of Appeal [1990] 3 All E.R. 33 and the House of Lords [1991] 1 All E.R. 545.

The purpose of this article is to consider the meaning of the duty to consult, and, in the light of this duty, to consider the problems that local authorities may face in trying to get the public to participate in their consultation initiatives.

CONSULTATION

Statutory duties on local authorities to consult are not new. Authorities have to consult in a variety of areas, for example: school closures, planning applications and local structural plans, but there is no set formula for consultation obligations. The Public Administration Select Committee's report on Participation in Government recommended that the multiplicity of individual statutory obligations to consult should be replaced by one overarching framework. It was also considered that it would be useful if there were a "map" setting out statutory obligations to consult.³ The government has indicated that it believes that it would be sensible to consider consultation requirements and that it might use the powers under the Local Government Act 2000 to "achieve some harmonisation in consultation requirements".⁴ However, there is no indication that this will happen in the near future.

What makes the general duty to consult the public under best value unique is that the duty is so general, and that there is an emphasis on responding to consultation.

Failure to respond will be grounds for central government deciding that best value has not been achieved and that some form of external intervention might be appropriate, such as transferring services to another agency in the case of serious failure.⁵

Who Should Be Consulted?

What, in legal terms, does consultation mean? This is fairly well worn territory for public lawyers⁶ but the new provisions on consultation will inevitably pose new challenges. The first issue to be addressed by the body that is charged with the duty to consult is: "who should be consulted?" This can be prescribed, but often the legislation gives the decision-maker an element of discretion. Where phrases such as "consult those that appear to be concerned" are used, this can result in no-one being consulted. What is clear is that if there is a statutory duty to consult a named body that body must be consulted.⁷ However, where there is a discretion as to whom to consult it is hard to challenge the selection of consultees or lack of them, unless it can be shown that the discretion was exercised unreasonably or that the decision-maker never addressed the issue at all.⁸

Even where there is no statutory obligation to consult there may still be a duty to consult, where, for example, a local authority has an established practice of voluntarily

³ House of Commons Select Committee on Public Administration, *Sixth Report. Innovations in Citizen Participation in Government* (House of Commons Papers 2000–01, 373-I) at para. 37.

⁴ House of Commons Select Committee on Public Administration, *First Report. Public Participation: Issues and Innovations. The Government's Response to the Committee's Sixth Report of Session 2000–01* (House of Commons Papers 2001–02, 334), appendix at para. 7.

⁵ D. Wilson, "Exploring the Limits of Public Participation in Local Government", (1999) 52 *Parliamentary Affairs* 246 at p. 248. See s. 15 of the Local Government Act 1999.

⁶ See for example, A. Jergensen, "The Legal Requirements of Consultation", [1978] *Public Law* 290; J. F. Garner, "Consultation in Subordinate Legislation", [1964] *Public Law* 105; K. Olley, "The Principles of Proper Consultation", [2001] *Judicial Review* 99.

⁷ See for example *Agricultural, Horticultural and Forestry Training Board v. Aylesbury Mushrooms Ltd* [1972] 1 W.L.R. 190

⁸ See Jergensen *op. cit.* at pp 298–299 and Garner, *op. cit.* at pp. 112–113.

consulting on an issue.⁹ The courts have developed the notion of legitimate expectation of consultation, which gives a person or body the “same right to consultation, as they would have if it had been given to them specifically by statute”.¹⁰ What gives rise to this legitimate expectation? The notion of legitimate expectations is tied in to the “administrator’s duty to act fairly and in accordance with the procedural proprieties”.¹¹ Undoubtedly the most famous case on a legitimate expectation of consultation is *GCHQ*¹² where the House of Lords held that but for the national security issues the union should have been consulted before any changes to the terms and conditions of employment were made because the practice of consultation prior to changes being made in conditions of service was well established. In *R. v. British Coal Corporation, ex parte Vardy and others*¹³ it was found that the decision of British Coal in October 1992 to announce the closure of the majority of its pits over a five-month period neither complied with its statutory obligation to consult with the relevant unions¹⁴ nor with the legitimate expectation of consultation. The latter had been developed out of an agreement about a review procedure that would be followed before any colliery would be closed.

A case that considers in some detail the issue of legitimate expectation of consultation is *R. v. Devon County Council, ex parte Baker and another*.¹⁵ Here the question arose whether a local authority was under a duty to consult the residents of an old peoples’ home which it proposed to close. It had been contended that if there was a statutory duty to consult with various bodies prior to the decision to close a home, as there was here, then no further consultation was required. This submission was rejected. The Court of Appeal concluded that the residents should be consulted:

The County Council’s decision deprived the appellants of a benefit or advantage which they had hitherto been permitted by the County Council to enjoy and which they could legitimately expect either to continue indefinitely, or at least to continue unless and until the County Council communicated to them some rational ground for withdrawing the benefit on which they were given an opportunity to comment.¹⁶

By drawing on the relevant authorities, Simon Brown L.J. found that where a person had been permitted to enjoy some benefit or advantage, whether or not that person could then “legitimately expect procedural fairness, and if so to what extent, will depend upon the court’s view of what fairness demands in all of the circumstances of the case”,¹⁷ a conclusion that he noted was not that helpful. On the facts of the case the applicants had enjoyed a benefit or advantage which the council proposed to remove and they did therefore have a legitimate expectation of some procedural fairness in the decision-making process. That fairness included a duty to consult over the proposed closure.

⁹ For examples of voluntary consultation see Garner, *op. cit.* at pp. 114–119.

¹⁰ *R. v. Brent London Borough Council, ex parte Gunning* (1985) 84 L.G.R. 168 at 187. See P. Meredith, “Legitimate Expectations and School Closures”, [1988] *Public Law* 4.

¹¹ Per Simon Brown L.J. in *R. v. Devon County Council, ex parte Baker and another; R v Durham County Council, ex parte Curtis and another* [1995] 1 All E.R. 73 at 88.

¹² *Council for Civil Service Unions v. Minister for Civil Service* [1985] A.C. 374.

¹³ [1993] I.C.R. 720.

¹⁴ Coal Industry Nationalisation Act 1946, s. 46.

¹⁵ *R. v. Devon County Council, ex parte Baker and another; R. v. Durham County Council, ex parte Curtis and another* [1995] 1 All E.R. 73.

¹⁶ *Ibid* at 90.

¹⁷ *Ibid* at 90.

Requirements Of Consultation

Once it is determined who is to be consulted, what does consultation require? The “classic statement of the basic requirements of consultation”¹⁸ is that to be found in *R. v. Brent London Borough Council, ex parte Gunning*¹⁹ where Hodgson J. adopted the requirements put forward by Stephen Sedley Q.C. in argument:

First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reason for any proposal to permit intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and, . . . fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposal.

The timing of the consultation is therefore of importance, but what is a “formative stage”? This was considered in both *Gunning* and *R. v. Gateshead Metropolitan Borough Council, ex parte Nichol*²⁰ and it would seem that the proposals should be “of some specificity into which those consulted can get their teeth”²¹ but that you cannot claim that any stage until the final decision is a formative stage.

How much information needs to be given to those who are being consulted? The Court of Appeal in *R. v. North and East Devon Health Authority, ex parte Coughlan* noted that:

Consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent of any statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.²²

Once the necessary information is made available to the consultees what is considered to be an adequate time for consideration and response? There are a number of cases in which this issue has been addressed. In *R. v. Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*²³ the Secretary of State consulted on housing benefit regulations. The Association received a consultation letter on 22 November that required a response by 30 November. By the time the Association managed to respond it was 7 December, but in the interim the Secretary of State had amended his proposals. On 4 December he sought further responses to his amended proposals, requesting a response by 12 December, although a copy of the amendment was not included with the letter. The Association responded on 13 December and the new regulations were made on 17 December. Was sufficient time given for the consultation? The divisional court answered this question in the negative. Whilst it was accepted that the Secretary of State considered there was an urgent need to change the regulations, it was considered that the “time allowed was so short and the failure to provide the December amendments . . . was such that, as the department must have known . . . only piecemeal, and then only partial assistance could be

¹⁸ Auld J. in *R v London Borough of Barnet, ex parte B.* [1994] E.L.R. at 375.

¹⁹ (1985) 84 L.G.R. 168 at 189. These requirements were reiterated with approval by the Court of Appeal in *R. v. Devon County Council, ex parte Baker and another; R. v. Durham County Council, ex parte Curtis and another* [1995] 1 All E.R. 73 and *R. v. North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All E.R. 850.

²⁰ (1988) 87 L.G.R. 435.

²¹ Hodgson J. in *Gunning* at 189.

²² [2000] 3 All E.R. 850 at 887–888. Similar points were made by Simon Brown L.J. in *R. v. Devon County Council, ex parte Baker and another; R. v. Durham County Council, ex parte Curtis and another* [1995] 1 All E.R. 73 at 91.

²³ [1986] 1 All E.R. 164.

given”.²⁴ On the other hand, in *Coughlan* a formal consultation period of just over three weeks was found to be acceptable, although this was against a background of an eight-week consultation period on earlier proposals. In *R. v. Secretary of State for Education and Employment, ex parte National Union of Teachers*²⁵ a four-day consultation about a draft pay and conditions order for teachers was held to be wholly insufficient. *Gunning* suggests that the more important the decision to be made the longer the consultation period should be.

The final requirement for lawful consultation is that the decision-maker must conscientiously consider the views of those consulted. This does not of course require the decision-maker to follow the advice given. However, it must be shown that the advice is received with an open mind. This point was made very clearly over 50 years ago in *Rollo v. Minister of Town and Country Planning* where Morris J. stated:

The holding of consultation with such local authorities as appear to the Minister to be concerned, is in my judgment, an important statutory obligation. The Minister with receptive mind, must by such consultation seek and welcome the aid and advice which those with local knowledge may be in position to proffer in regard to a plan which the Minister has tentatively suggested.²⁶

A failure to consult with an open mind can be seen in *Cran and others v. Camden London Borough Council* where it was held that the local authority, in consulting about the introduction of a controlled parking zone, had already made its mind up and did not consult in the spirit referred to in *Rollo*. As McCullough J. observed, “[e]ven submissions which are believed to be unsound are entitled to receptive consideration and objective reporting”.²⁷

Consequences Of A Failure To Consult

What are the consequences of a failure to consult or to consult properly? It has been noted that in this, as with many other areas of administrative law, the courts face a dilemma.²⁸ If they enforce consultation requirements strictly this can cause considerable administrative disruption. On the other hand to allow breaches of the requirements to go unchecked renders the statutory and common law requirements meaningless and any value attached to the notion of consultation and participation is reduced. From the cases it would seem that the consequences of a failure to consult varies and depends on a number of factors. Bingham L.J. considered this issue in *R. v. Chief Constable of Thames Valley Police, ex parte Cotton*.²⁹

While cases may no doubt arise in which it can properly be held that denying the subject of a decision the adequate opportunity to put his case is not in all the circumstances unfair, I would expect such cases to be of great rarity. There are a number of reasons for this:

1. Unless the subject matter of the decision has had the opportunity to put his case it may not be easy to know what case he could or would have put if he had the chance. . .
2. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if a complainant’s position became weaker as the decision-maker’s mind became more closed.

²⁴ Per Webster J., [1986] 1 All E.R. 164 at 175.

²⁵ [2000] Ed. C.R. 603.

²⁶ [1947] 2 All E.R. 488 at 496, endorsed by Bucknill L.J. in the Court of Appeal [1948] 1 All E.R. 13 at 17.

²⁷ [1995] R.T.R. 346 at 402.

²⁸ See J. G. Logie, “Promoting Participation Through the Courts: Enforcing Consultation Procedure”, (1986) 136 N.L.J. 768.

²⁹ [1990] I.R.L.R. 344 at 352, approved by the Court of Appeal in *R. v. Broxtowe Borough Council, ex parte Bradford* [2000] IRLR 329.

3. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

4. This is a field in which appearances are generally thought to matter.

5. Where the decision-maker is under a duty to act fairly the subject matter of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.

In *R. (on the application of Wainwright) v. Richmond Upon Thames L.B.C.*³⁰ there was a failure to consult properly over the positioning of a new pedestrian crossing. The Court of Appeal concluded that the question to ask was whether, if there had been no breach of duty, there would have been a real, as opposed to a purely minimal, possibility that the outcome would have been different. In answering this question the court said it should have in mind the principles identified by Bingham L.J in *Cotton*. The court decided that there was no real possibility that the council would have reached a different decision if the consultations had been carried out properly. However, in *Cran* the lack of consultation was found to have substantially prejudiced the applicants and the decision to introduce a controlled parking zone was quashed.

However, in the *Association of Metropolitan Authorities* case, where it was found that a mandatory requirement to consult had not been complied with, the request to have the *ultra vires* regulations in question quashed was rejected. Webster J. considered that to strike down the regulations would have caused considerable upheaval, in that they had been relied on for a period of six months and had subsequently been consolidated into new regulations, which were not challenged. It also seemed to be important that the main ground of challenge was the lack of consultation, rather than the substance of the regulations themselves, and that there had been some element of consultation, albeit unsatisfactory. This does not mean, however, that delegated legislation can never be quashed for lack of consultation. In the *National Union of Teachers* case Jackson J. quashed the orders in question stating that it would be for the benefit of all concerned if the Department of Education and Employment carried out its reforms in accordance with statutory procedures, "even if those statutory procedures have the effect of slowing down somewhat the pace of change".³¹

The requirements under the Local Government Acts of 1999 and 2000 introduce a statutory duty to consult the public in general, rather than the need to consult with a much more defined group. This does present a problem for authorities. It is clear that the duty to consult has very real legal consequences and that the correct group to be consulted must be identified. A successful challenge to a decision based on inadequate consultation can hinder administrative progress and may result in added cost if the consultation process has to begin all over again.

PUBLIC PARTICIPATION IN DECISION MAKING

When Garner wrote his article on consultation nearly 40 years ago he noted that ordinary persons had no right to be consulted by a subordinate law-making agency before it exercised its power but that

³⁰ [2001] E.W.C.A Civ. 2062, *The Times*, 16 January 2002.

³¹ [2000] Ed. C.R. 603 at 608.

an ability to make one's views known effectively should not depend on joining an association which may demand high subscriptions or may on some matters hold views or conduct a policy to which one is violently opposed.³²

Under the new legislation, individuals do now have a general right to be consulted by local authorities and it has been claimed that higher levels of participation "enhance the capacity for political judgment and the quality of the decisions that are made".³³ However, this presents a whole new set of problems. What does participation mean? The purpose of participation is to influence decisions but there are many different definitions of what the term means. The definition that is most often cited is: "taking part in the processes of formulation, passage and implementation of public policies".³⁴

Government Guidelines On Public Consultation

How is an authority to consult with, and seek the participation of, representatives of those who pay their local taxes and use the services provided by the authority? In November 2000 the Cabinet Office issued a Code of Practice on Written Consultation, which, although it does not have the force of law, is now to be followed by all government departments and agencies who conduct any public consultation. The Code came out of a consultation document prepared by the National Consumer Council³⁵ after the organisation became frustrated by being swamped by a mountain of consultation documents which were often poorly written, had impossibly tight deadlines and which resulted in no feedback to those who responded. The Code sets out seven criteria for consultation to be followed:

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.

2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.

3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions on which it seeks views. It should make it as easy as possible for readers to respond, make contact or complain.

4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.

5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period of consultation.

6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for the decisions finally taken.

7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

These guidelines accord with the standards set by the courts and thus, if they are followed, the consultation should be lawfully conducted.

³² Garner, *op cit* at p 123.

³³ A. Phillips, "Why does Local Democracy matter?", in L. Pratchett and D. Wilson (Eds.) *Local Democracy and Local Government* (Macmillan, 1996), at p. 22. On the virtues of participation see D. J. Galligan, *Due Process and Fair Procedures* (Clarendon Press, 1996), Ch. 4.

³⁴ G. Parry, G. Moyser & N. Day, *Political Participation and Democracy in Britain* (Cambridge University Press, 1992), at p. 16.

³⁵ Government Consultations: *Not just a paper exercise*, 1997.

Choosing A Participation Technique

The government's guidelines, however, offer no assistance when the time comes to determine who should be consulted and what method of consultation should be used. There are a large number of participation techniques ranging from the traditional methods like public meetings and consultation documents to the more "fashionable" focus groups and citizens' juries.³⁶ It has been stressed that you must find the right form of participation for the job. The body carrying out the consultation must ask why it is involving the public and whom it wants to involve: the service user, the citizen, interest groups or particular communities.³⁷

In the 1960s citizen participation began to emerge as a possible means of allowing more people to have a say in society. However, Arnstein noted that there was a "critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process".³⁸ She devised a "ladder of participation" to demonstrate that there was a huge difference between the various forms of citizen participation. On the ladder of participation some forms of participation, which are aimed at educating the participants, are considered to be non-participation. Arnstein considered that methods like consultation were often only window dressing and this she termed "tokenism". The highest rung in the ladder of participation is sharing a degree of power over decision-making, which she considered to be the ultimate desirable end. Arnstein's argument is that most forms of participation are not about power-sharing and altering the structure of democracy but rather about giving an appearance of allowing the people a say in the decision making process. According to this view it would seem that unless the forms of participation used under the new obligations to consult are high up the ladder of participation there might be little to be gained from the change.

What forms of public participation do local authorities use and what forms should they use? It would seem that the traditional methods of consultation like public meetings and consultation documents still dominate. In a survey of English local authorities in the late 1990s, over 92 per cent used complaints and suggestions schemes, 88 per cent survey satisfaction schemes and 85 per cent consultation documents and public meetings.³⁹ However, the survey also recorded a growing interest in more innovative techniques with, for example, 24 per cent indicating that they intended to use citizens' panels and 33 per cent planning the use of an interactive web site. The survey found little difference in the use of various forms of participation according to the political make-up of the authority but it did find that urban authorities tended to be more innovative in the forms of public participation used than were rural ones. In general the survey found that the size and the geography of the authority played a part in what methods were used and "such a finding reinforces the argument that different participation approaches may be more suited to the needs of particular types of organization".⁴⁰

The new local government obligations clearly require authorities to consult more generally and to get the public participating. But how do you get the public to

³⁶ A glossary of participation techniques can be found in V. Lowndes, G. Stoker, L. Pratchett, D. Wilson, S. Leach & M. Wingfield, *Modern local government: guidance on Enhancing Public Participation* (D.E.T.R., 1998), at p. 9.

³⁷ See M. Barnes, "Researching Public Participation", (1999) 25(4) *Local Government Studies* 60 at p. 63.

³⁸ S. Arnstein, "A ladder of citizen participation", (1969) 35 *J. of the American Institute of Planners* 216. See the extract in C. Harlow & R. Rawlings, *Law & Administration* (Weidenfeld & Nicholson, 1984), at pp. 440-441.

³⁹ V. Lowndes, G. Stoker, L. Pratchett, D. Wilson, S. Leach & M. Wingfield, *Enhancing Public Participation in Local Government: A Research Report* (D.E.T.R., 1998), at p. 16.

⁴⁰ V. Lowndes, L. Pratchett & G. Stoker, "Trends in Public Participation: Part I – Local Government Perspectives", (2001) 79 *Public Administration* 205 at p. 209.

participate and what is it in which they are participating? It is one thing to charge local authorities with a statutory duty to consult, but what if the public does not want to be consulted? How is an authority to ensure that it does consult representatives of the whole community?

The first issue that needs to be addressed is that of social exclusion. If there is a duty to consult more, all the research evidence suggests that it is the voice of the articulate that will be heard at the expense of those who are already excluded.⁴¹ As Professor Wilson has noted: “It is clear that ‘more participation’ is not the same thing as ‘more democracy’; initiatives frequently simply reinforce existing patterns of social exclusion and disadvantage”.⁴² Perhaps surprisingly, therefore, only about 30 per cent of local authorities considered this a problem and the particular concern was in reaching young people and ethnic minorities. Quite a lot of authorities took the view: “We offered the opportunity to participate and whether groups take advantage of it is up to them”.⁴³ This, however, is a rather negative attitude to take unless an authority is satisfied that it has used a large variety of techniques to reach out. For example, public meetings are hard to attend if you are a single parent; questionnaires cannot be returned by a person who is illiterate; council offices can be difficult to visit for those who work full-time.

Can the problem of social exclusion be overcome? It seems that in part, the key to tackling this problem must lie in selecting the correct consultation technique. It has been suggested that adopting a method that uses a statistically representative sample of the population or group being consulted reduces the likelihood of the loudest voices dominating.⁴⁴ On the other hand research suggests that

developing a range of participation methods to reach different citizens may, in many instances, be more important than seeking the illusive goal of ‘representativeness’ within a specific initiative.⁴⁵

The research done on the “best value” pilot programme provides depressing news on this front. It found that many of the authorities engaged in the pilot made considerable efforts to engage with “hard to reach groups” such as focusing on the needs of the estates that were seen as the most deprived in their areas and the use of “advocates” to engage with the homeless but that despite the “well planned and often imaginative approaches to doing so” real problems were encountered with trying to engage with the “least articulate and most vulnerable and alienated sections of society”.⁴⁶ It has even been found that that the use of new technology, which could be used to access some groups that are hard to reach – such as the young, the housebound and the busy – can be hijacked by well-organised pressure groups and “it could therefore actually intensify the exclusion of groups which do not have physical or psychological access to it”.⁴⁷

Aside from the issue of social exclusion, how easy is it to get the rest of the public to participate? In general it seems that the public is not interested in participating and

⁴¹ See for example the analysis of citizen participation in the planning process in C. Harlow & R. Rawlings, *Law and Administration* (Weidenfeld & Nicholson, 1984), at pp. 437–456.

⁴² D. Wilson, “Exploring the limits of Public Participation in Local Government”, (1999) 52 *Parliamentary Affairs* 246 at p. 252.

⁴³ Evidence by Steve Leach to the Select Committee on Public Administration, 30 November 1999.

⁴⁴ Audit Commission, *Listen up! Effective Community consultation* (Audit Commission, 1999), at pp. 23–24.

⁴⁵ V. Lowndes, G. Stoker, L. Pratchett, D. Wilson, S. Leach & M. Wingfield, *Enhancing Public Participation in Local Government: A Research Report* (D.E.T.R., 1998), at pp. 83–84.

⁴⁶ S. Martin *et al*, *Improving Local Public Services: Final Evaluation of the Best Value Pilot Programme* (D.E.T.R., 2001), at p.104.

⁴⁷ House of Commons Select Committee on Public Administration, *Sixth Report. Innovations in Citizen Participation in Government* (House of Common Papers 2000–01, 373-1) at para. 60.

this could cause very real problems for best value, which is based on the idea that the public will join in. Why is the public apparently so reluctant to participate? Clearly it is possible that the majority of people are happy with their lot, and feel that there is no need to participate when there are elected representatives to look out for their interests. However, the evidence suggests that it is for quite opposite reasons that people do not participate. Negative attitudes towards authorities and councillors and a lack of awareness on the part of the general public about opportunities to participate are two of the reasons for lack of participation but the main reason appears to be a feeling that no action will be taken on views expressed.⁴⁸ The research suggests that

[e]ffective public consultation requires that councils' *internal* decision-making processes are redesigned to take account of public opinion. Even (or especially) when final decisions go against popular opinion, local authorities need to inform the public of outcomes and the reasons for the decision.⁴⁹

The issue of the perceived pointlessness of consultation on the part of the public leads one to consider in what ways authorities feel they have benefited from consultation. Authorities appear to have difficulties in using information obtained from consultation, in what might be termed "joined up consultation". The Audit Commission report found that some authorities carried out consultation without having any clear idea about why they were doing it.⁵⁰ In the evidence given to the Select Committee on Public Administration those who conducted the research into public participation revealed that only about 20 per cent of the authorities believed that participation initiatives had had a strong influence on the final decision which the local authority took, whilst a further 20 per cent said that the initiatives had very little impact on final decisions. Most authorities just had a feeling that participation exercises had perhaps confirmed that they were along the right lines and that the decision-making process was better informed.⁵¹ The research into public participation in local government found that authorities had almost no formal approaches to evaluating participation initiatives but that this would have to be developed in the context of best value because "any increase in local authority discretion is likely to be linked to 'proof' of greater engagement with local communities".⁵² The best value pilot programme does indicate that authorities do still have problems in linking up consultation to outcomes and that individual authorities will have to develop approaches that best match their overall priorities.⁵³

Advantages And Disadvantages Of Consultation And Participation

What are the disadvantages, real or perceived of more consultation and participation? Consultation can be costly both in monetary terms and in time. The Report of the Select Committee on Public Administration in citizen participation found evidence that small authorities found it hard to meet the cost of participation. They also found that for all authorities the encouragement to concentrate resources on service delivery meant

⁴⁸ See V. Lowndes, L. Pratchett & G. Stoker, "Trends in Public Participation: part 2 – Citizens Perspectives", (2001) 79 *Public Administration* 445; J. Seargent & J. Steele, *Who asked you? The Citizen's perspective on participation* (Improvement and Development Agency, 1999); Audit Commission, *Listen up! Effective Community consultation* (Audit Commission, 1999).

⁴⁹ V. Lowndes, L. Pratchett & G. Stoker, "Trends in Public Participation: part 2 – Citizens Perspectives", (2001) 79 *Public Administration* 445 at 452.

⁵⁰ Audit Commission, *Listen up! Effective Community consultation* (Audit Commission, 1999) at para. 69.

⁵¹ House of Commons Select Committee on Public Administration, *Sixth Report. Innovations in Citizen Participation in Government, Minutes of Evidence* (House of Common Papers 2000–01, 373-II) 30 November at para. 76.

⁵² V. Lowndes, G. Stoker, L. Pratchett, D. Wilson, S. Leach & M. Wingfield, *Enhancing Public Participation in Local Government: A Research Report* (D.E.T.R., 1998), at p. 85.

⁵³ S. Martin *et al.*, *Improving Local Public Services: Final Evaluation of the Best Value Programme* (D.E.T.R., 2001), at p. 105.

that it was harder to find the funds to carry out and analyse participation exercises. The Committee therefore recommended that there should be a competitive fund for sponsoring participation innovations.⁵⁴ Clearly some participation techniques are more costly than others, which emphasises that the correct technique should be chosen and the more elaborate schemes should be reserved for major policy issues. The Audit Commission has pointed out that authorities can on occasion improve value for money or even save money through consultation; that they can increase the cost effectiveness of their own work by making sure that they do not duplicate consultation exercises, and that authorities make the widest possible use of consultation exercises.⁵⁵ These are also issues that emerged in the pilot programme for “best value” and lessons do seem to have been learnt about costs. As officers became more concerned about the cost of consultation, authorities became more focussed on the costs and benefits of consultation, which resulted in them having to think more clearly about what it was they were trying to do and how they should do it.⁵⁶

A lot of the research has shown that there is a perceived tension between the role of the councillor and the use of more participative approaches. It would seem that councillors feel that more participation threatens their roles as elected representatives.⁵⁷ However, Professor Stewart has argued that more citizen participation strengthens the role of the elected representative as he or she is then informed by the views of those represented. Stewart makes the point that citizen participation does not reduce the role of councillor to a delegate because those who are consulted do not speak with one voice: “In the end the elected representative has to use political judgment, but it will be better judgment if informed by citizen views in all their diversity”.⁵⁸

One very real concern raised by authorities with increased participation is that it may unrealistically raise public expectations as to what can be achieved, which can only result in more negative feelings on the part of the public when the consultation exercise does not deliver the desired aim of the public. As has been noted above, the public is not likely to speak with one voice and as a result decision-making can become more complex. This means that in any consultation exercise the authority needs to be clear with those being consulted what the purpose of the exercise is and what the possible options are. If there are constraints as to what can be achieved the authority must be honest about this and explain what those constraints are. It is also very important that feedback is given on the consultation, so that those consulted do not feel that they have wasted their time.

⁵⁴ House of Commons Select Committee on Public Administration, *Sixth Report. Innovations in Citizen Participation in Government* (House of Commons Papers 2000–01, 373-I) at para. 43. The Government in its response to this recommendation did not actually address the issue but stated that there were a number of existing schemes which recognised effective consultation which translated into better results, such as the Beacon Council Scheme, see House of Commons Select Committee on Public Administration, *First Report. Public Participation: Issues and Innovations. The Government's Response to the Committee's Sixth Report of Session 2000–01* (House of Commons Papers 2001–02, 334), appendix at para. 9. However, in response to another recommendation of the Committee, that deliberative techniques should be routinely used to ascertain the public's views on issues of scientific uncertainty, the government stressed the costs, in time and money, of consultation and in particular it stated that deliberative techniques were costly, see appendix at paras. 17–18.

⁵⁵ Audit Commission, *Listen up! Effective Community consultation* (Audit Commission, 1999), at paras. 53–58.

⁵⁶ S. Martin *et al.*, *Improving Local Public Services: Final Evaluation of the Best Value Programme* (D.E.T.R., 2001), at p. 101.

⁵⁷ It is not unusual for elected representatives to feel threatened by innovations that they fear will dilute their role. See for example the account of the lack of enthusiasm on the part of backbenchers for the introduction of the Parliamentary Ombudsman, in G. Drewry & C. Harlow, “A ‘Cutting Edge’? The Parliamentary Commissioner and MPs”, (1990) 53 *Modern Law Review* 745.

⁵⁸ House of Commons Select Committee on Public Administration, *Sixth Report. Innovations in Citizen Participation in Government. Minutes of Evidence* (House of Commons Papers 2000–01, 373-II). This is echoed in the research on the best value pilots, which found that following consultation exercises often councillors had a larger role to play because they then had to determine priorities from the competing demands of the results.

What are the advantages of more consultation and participation? The evaluation of participation initiatives is still in its infancy⁵⁹ but it does certainly increase an authority's awareness of the needs and priorities of consultees. It can also enhance citizen education and over 30 years ago it was said that:

The major function of participation in the theory of participatory democracy is an educative one, educative in the very widest sense, including both the psychological aspects and the gaining of practice in democratic and skills and procedures.⁶⁰

The research work does indicate that where people have been involved in participatory initiatives the experience was found to be worthwhile in itself and there did not necessarily have to be any tangible self-gain.⁶¹ On the other hand, to return to the "ladder of participation", it may be that this is actually non-participation and all that is being achieved is manipulation and therapy so that in the end the people are getting no more say in the exercise of power than they ever had.

CONCLUSIONS

This is an exciting, yet challenging time for local authorities as they strive to be more "in touch with the people". Councils have been challenged with the task of being more outward looking and responsive to the needs of the communities they serve. There are now legal duties to consult in very general terms and a co-existing expectation that the public will see results from this consultation. On the other hand, the duty to consult can only be fully honoured if the public participates in consultation initiatives. The duty to consult is now fairly well defined in legal terms, and it is clear that a claim for judicial review may be successful if the duty is not carried out properly. Time and again it has been emphasised that in meeting the new duties of consultation the right techniques must be chosen. Potentially this means that if the wrong technique is chosen, a member of the public who was not consulted could successfully seek judicial review. Unfortunately, it would seem that if there are to be any complaints concerning lack of consultation, they are not likely to come from the socially excluded, who arguably are most in need of consultation, but rather from the articulate middle classes who appear already to dominate consultation procedures. Thus far it would seem, the problems of reaching out to those who have hitherto been excluded have not been overcome.

How do you get cross sections of society to participate? If the socially excluded are not willing to participate, is there anything to be gained from consulting more with those who already have an input? Can it really be true that most of us are apathetic and do not really care about local services? It could be said that the state is being rather paternalistic in deciding that we have to take more of an interest.

What is quite evident is that authorities must be focussed about what it is they are consulting over and what they hope to achieve. There has to be a clear link to the decision-making process, and there must be a means of reporting back to the people on the outcomes of the consultation. There is a potential problem with consultation, in that it can unrealistically raise public expectations about what can be done, only for these expectations to be completely deflated and for apathy to be even greater when

⁵⁹ D. Wilson, "Exploring the Limits of Public Participation in Local Government", (1999) 52 *Parliamentary Affairs* 246 at 253.

⁶⁰ C. Pateman, *Participation and Democratic Practice* (Cambridge University Press, 1970), at p. 42.

⁶¹ See V. Lowndes, L. Pratchett and G. Stoker, "Trends in Public Participation: Part 2 – Citizens' Perspectives", (2001) 79 *Public Administration* 445 at pp. 448-449.

nothing apparently results from the consultation. The public, or representatives of it, might be persuaded to participate once in a consultation exercise, but it will not do so again if the whole exercise was perceived to be merely cosmetic.

Local authorities are on a learning curve. The duties to consult are couched in general terms, which enables the authorities to choose whichever consultation and participation techniques are most suitable for the circumstances. However, ultimately it should not be forgotten that the obligation to consult is a legal one, and that if that obligation is not carried out properly the authority could face legal consequences, which may involve having to start the whole process again.

It is hard to predict whether local authorities will succeed with this new challenge. Authorities do seem to have been charged with a very difficult task in the light of all of the evidence concerning public apathy towards "politics" in general. The participation literature does not suggest there is any right way to consult the public, only that you must find the most appropriate technique for the specific task. It seems likely that authorities throughout the country will be experimenting with a large number of techniques, not all of which will prove to be a success. In two or three years' time this is a field where the time will be right for some empirical work to be done on what participative techniques have been utilised and to examine the successes and failures. This is clearly an area where best practice must be disseminated and any success in getting the public, especially the previously unheard voices, to participate in local democracy should be heralded.

CASE NOTES

The address for the submission of case notes is given at the beginning of this issue

SENTENCING MOBILE TELEPHONE ROBBERS: ANOTHER CASE OF THE JUDICIARY MUGGING THE LEGISLATURE

Attorney-General's Reference Nos. 4 and 7 of 2002 (R v. Lobban; R v. Sawyers)

R v. Steven James Q

[2002] EWCA Crim 127; [2002] 2 Cr. App. R. (S) 77 (C.A.) (Lord Woolf L.C.J., Aikens and Pitchford JJ.)

INTRODUCTION

The Lord Chief Justice of England and Wales, Lord Woolf of Barnes, has recently taken the opportunity presented by three applications listed together before the Court of Appeal, Criminal Division (two by the Attorney-General under the reference procedure established by the Criminal Justice Act 1988, section 36, and one by an applicant, *Q*, appealing against his sentence from the Crown Court) to impose custodial sentences on three young or young adult offenders convicted of street robberies of cellular telephones (henceforth, "mobile phones"). These cases have attracted considerable media attention,¹ being reported as embodying an exhortation on the part of the Lord Chief Justice to sentencers to "get tough", in order to "combat the epidemic of mobile phone muggings"² said to be plaguing Britain. There is some evidence that sentencers may already have heeded the call of their senior judicial colleague in cases of mobile phone robbery, by imposing custodial sentences of similar duration to those imposed by Lord Woolf C.J.³

This commentary seeks to examine the nature of, and reasoning behind, the sentences imposed by the Court of Appeal in the three applications. In particular, it will be considered whether the sentences have been influenced by judicial considerations

¹ See e.g. "Three Years for Mobile Muggers", *The Times*, 30 January 2002; *Newsnight*, BBC Television, 29 January 2002.

² "Woolf: Jail All Mobile Phone Thieves", *The Guardian*, 31 January 2002.

³ See e.g. "Mobile Phone Thief Jailed for Four Years", *The Guardian*, 31 January 2002; "Phone Thug Caged for Four Years", *Nottingham Evening Post*, 14 February 2002; "Courts Too Soft on Serial Offenders, Judge Says", *The Times*, 23 March 2002.

of factors consistent with our statutory scheme of sentencing, and whether the sentences may be regarded as excessive in the light of the “going rate” or tariff for sentencing in street robbery cases.

THE DECISIONS

The Court of Appeal allowed the appeal against sentence by Steven James Q, who was 17 when he robbed a 14-year-old newspaper delivery boy of a mobile phone worth £80. Q’s original sentence of four years’ detention under the Powers of Criminal Courts (Sentencing) Act 2000, section 91 – a provision that allows juveniles to be sentenced in the Crown Court to a prison term which could be imposed on an adult for the same offence – was reduced to three years’ detention. The Court of Appeal, however, insisted that the judge at first instance was correct in imposing a deterrent sentence.⁴

In the first of the two Attorney-General’s Reference cases, involving Adrian Michael Lobban, who was 18 or 19 (the law report is contradictory on this point) at the time of his offences of robbery and assault with intent to rob two 16-year-old victims, the Court of Appeal found that the original concurrent sentences of six months’ detention were “undoubtedly unduly lenient”,⁵ and it increased the sentence to concurrent terms of three-and-a-half years, despite Lobban’s lack of previous convictions. In fact, the Court of Appeal felt that the offences warranted four years’ detention but, as is the norm in Attorney-General’s Reference cases, the court made an allowance for the double jeopardy involved in the offender having to be sentenced twice.⁶

In the second Attorney-General’s Reference case, the offender was Christopher Sawyers, aged 19, who at first instance had been sentenced to an 18-month community rehabilitation order in combination with a 60-hour community punishment order, having pleaded guilty to robbery and theft of items including mobile phones and small sums of money. The Court of Appeal substituted a sentence of two-and-a-half years’ detention, taking account both of the offender’s guilty plea and, once again, of the principle of double jeopardy.

During the course of his judgment, Lord Woolf C.J. expressed the view that the going rate or tariff for mobile phone robberies (including first offenders and young offenders) was 19 months’ to five years’ custody, with non-custodial sentences applicable only in “exceptional circumstances”.⁷ Moreover, his Lordship felt that the five-year upper limit might be insufficient if an offender had “a number of previous convictions . . . a substantial degree of violence, or . . . a particularly large number of offences committed”.⁸

COMMENTARY

The message is clear from the Lord Chief Justice and the Court of Appeal: mobile phone robbers must expect imprisonment or detention on conviction. The reasons proffered by the Court for this outcome are worthy of scrutiny.

⁴ *Attorney-General’s Reference (Nos. 4 and 7 of 2002)*; *R v. Q* [2002] EWCA 127; [2002] 2 Cr. App. R. (S) 77, at para. 18.

⁵ *Ibid.*, at para. 24.

⁶ *Ibid.* On this principle, see *Attorney-General’s Reference (No. 15 of 1992)* (1993) 14 Cr App R (S) 324.

⁷ *Attorney-General’s Ref. (Nos. 4 and 7 of 2002)*; *R v. Q*, *op. cit.*, at para. 4.

⁸ *Ibid.*, at para. 5.

The opening paragraph of the Lord Chief Justice's judgment expressed the view that robberies in public places involving the theft of mobile phones and small amounts of money were "offences of a particularly worrying nature":

They are worrying because of the effect which they have on the public, the effect which they have on the victims in particular, and on the fact [sic] that they undermine the criminal justice system.⁹

Lord Woolf C.J. did not explain this statement and the reader is left guessing the nature of the alleged effects of such crimes. Does the public live in fear of being accosted by robbers demanding mobile phones? Is this fear greater than any public concern regarding potential victimization in general? Is the prospect of loss of mobile phones to members of the public, or their actual loss by victims of crime, more worrying or traumatic than the loss through robbery of other personal items such as jewellery or wristwatches, or larger items sometimes taken by robbers, such as mountain bicycles? In short, is mobile phone robbery in some sense *sui generis*?

If there is any evidence to suggest an affirmative answer to any of these questions, the Lord Chief Justice did not refer to it, and this commentator has found no such evidence in the research literature. Lord Woolf C.J. did assert that mobile phone robberies were directed frequently at young victims who are vulnerable because of their age.¹⁰ This is undoubtedly true: recent Home Office-published research by Harrington and Mayhew¹¹ (to which Lord Woolf C.J. refers elsewhere in his judgment) confirms that nearly half of known mobile phone robbery victims are under 18.¹² The youth or other vulnerability of victims is, of course, a well-established aggravating factor in sentencing law,¹³ or at least in cases involving violence committed by adults against very young children, where the latter's helplessness is considered by the courts to be a major reason for aggravation of sentence.¹⁴ However, the same Home Office research reveals that many mobile phone robbers are also young;¹⁵ and the youngest victims in the three cases considered by the Court of Appeal were not young children but 14-year-olds, their assailants also being teenagers (albeit older than their victims). It is therefore contended by this commentator that any aggravation of sentence thought necessary by the Court of Appeal in recognition of the youth of the mobile phone robbery victims ought to have been of a lesser order than that considered appropriate in cases such as *Boswell*,¹⁶ in which an adult offender has harmed a defenceless infant. Moreover, the youth of the offenders in the mobile phone robbery cases under consideration is a long-established mitigating factor absent from a case like *Boswell*.¹⁷

With regard to Lord Woolf's claim that mobile phone robberies undermine the criminal justice system, it is contended here that this is an odd, unsubstantiated assertion. Why or how does mobile phone robbery undermine the criminal justice system? If it is true that any offences undermine the criminal justice system, one would have thought that that effect might be associated with offences such as perjury, witness intimidation, jury interference, and unlawful activity on the part of the police and other criminal justice personnel, rather than mobile phone robbery. Moreover, we might do

⁹ *Ibid.*, at para. 1.

¹⁰ *Ibid.*

¹¹ V. Harrington and P. Mayhew, *Mobile Phone Theft*. Home Office Research Study 235 (London: Home Office, 2001).

¹² *Ibid.*, at p. 47.

¹³ See e.g. M. Wasik, *Emmins on Sentencing* (London: Blackstone Press, 4th ed., 2001), at p. 57.

¹⁴ See e.g. *Boswell* (1982) 4 Cr App R (S) 317.

¹⁵ Harrington and Mayhew, *op. cit.*, at pp. 37–38.

¹⁶ *Boswell*, *op. cit.* This case involved the manslaughter of a five-week-old child.

¹⁷ See Wasik, *op. cit.*, at pp. 63–64.

well to recall Marx's aphorism that without the behaviour of criminals, there would be no criminal justice system or allied professionals: "The criminal produces not only crimes but also criminal law and . . . the whole of the police and of criminal justice, constables, judges, hangmen, juries, etc."¹⁸ From this perspective, common offences such as street robberies do not undermine the criminal justice system but instead constitute its bread and butter. Thus, it is contended that Lord Woolf C.J. failed to demonstrate why robberies of mobile phones were offences of a "particularly worrying nature".

Lord Woolf's judgment proceeded to offer a rather detailed summary of some of the findings of Harrington and Mayhew's research. The Lord Chief Justice noted that:

The research identifies a marked increase in the incidents [sic] of such offences . . . the risk of phone theft for those in the ages between 11 and 16 is five times higher than that for adults . . . [and] there was an increase in the proportion of robberies involving telephones from about 8 per cent in 1998/99 (an estimated 5,500 phone robberies), to about 28 per cent in 2000/1 (an estimated 26,300 phone robberies).¹⁹

Whilst conceding that "no doubt part of the increase was due to the greater phone ownership during that period",²⁰ Lord Woolf C.J. insisted that such figures left the courts with no choice but to single out mobile phone robbers for "robust" treatment:

Faced with that background the courts have no alternative but to adopt a robust sentencing policy towards these offences. Those who do so must understand that they will be punished severely. Custodial sentences will be the only option available to the courts when these offences are committed, unless there are exceptional circumstances. That will apply irrespective of the age of the offender and irrespective of whether the offender has previous convictions. However, both those factors are very important when the judge comes to decide on length of sentence.²¹

It is obvious from the emphasis placed on the increase in mobile phone robberies known to the police in recent years that Lord Woolf C.J. regarded the prevalence of such offences as the principal reason for the need to impose custodial sentences in phone robbery cases, despite the possible presence in such cases of well-established mitigating factors such as the offender's youth and previous good character. It is contended below that Lord Woolf's emphasis upon prevalence is flawed for a number of reasons.

First, on an empirical point, it has to be said that Lord Woolf C.J. was rather selective in his summary of Harrington and Mayhew's research findings. For example, he failed to mention that police figures suggested that the increase in phone offences was greater between 1998/1999 and 1999/2000 than between 1999/2000 and 2000/2001.²² Hence, this type of crime may be levelling off, and doing so without the need for an increase in the severity of sentences. Moreover, Harrington and Mayhew pointed not only to a marked increase in mobile phone ownership over the last few years, particularly among young people, but also to the fact that young mobile phone users frequently have their phones on display, and are more likely to report incidents to the police, as factors that have made mobile phones "an attractive target for theft".²³ Needless to say, such likely contributory factors to the increase in reported phone robberies cannot be addressed by means of tougher sentencing.

¹⁸ K. Marx, *Theories of Surplus Value* (originally published 1905), extracted in M. Cain and A. Hunt, *Marx and Engels on Law* (London: Academic Press, 1979), at p. 191.

¹⁹ *Attorney-General's Ref. (Nos. 4 and 7 of 2002): R v. Q*, *op. cit.*, at para. 2.

²⁰ *Ibid.*

²¹ *Ibid.*, at para. 4.

²² See Harrington and Mayhew, *op. cit.*, at p. 62.

²³ *Ibid.*, at p. ii.

Secondly, the consideration by the courts of the prevalence of the offence is difficult to reconcile with the statutory framework for sentencing in England and Wales, introduced over a decade ago by the Criminal Justice Act 1991. Section 1(2)(a) of the 1991 Act (now consolidated as the Powers of Criminal Courts (Sentencing) Act 2000, section 79(2)(a)) requires a court to refrain from passing a custodial sentence unless the court is of the opinion that “the offence . . . was so serious that only such a sentence can be justified”. Section 2(2)(a) of the 1991 Act (now section 80(2)(a) of the 2000 Act) requires the length of a custodial sentence (other than where the sentence is fixed by law, or where the offence is violent or sexual and the court considers it necessary to protect the public from serious harm from the offender)²⁴ to be “commensurate with the seriousness of the offence”.

It follows, therefore, that the issue of the prevalence of the type of offence committed by an offender should be considered by a court only if it has a bearing on the seriousness of the offender’s crime. After all, an offender must be sentenced only for the offence(s) of which (s)he has been convicted, not for offences (s)he *might have* committed on other occasions without detection, and certainly not for offences of the same type committed independently by others. Unfortunately, in the now notorious case of *Cunningham*,²⁵ Lord Taylor C.J. endorsed a pre-1991 judicial tradition of invoking offence prevalence as a factor relevant to the determination of sentence length:

The seriousness of an offence is clearly affected by how many people it harms and to what extent. For example, a violent sexual attack on a woman in a public place gravely harms her. But if such attacks are prevalent in a neighbourhood, each offence affects not only the immediate victim but women generally in that area, putting them in fear and limiting their freedom of movement. Accordingly, in such circumstances, the sentence commensurate with the seriousness of the offence may need to be higher than elsewhere. Again, and for similar reasons, a bomb hoax may at one time not have been so serious as it is when a campaign of actual bombings mixed with hoaxes is in progress.²⁶

Such reasoning has attracted trenchant criticism from eminent commentators such as Andrew Ashworth.²⁷ First, the point is made that many types of offence are prevalent though not necessarily serious enough to warrant custody:

Many offences are prevalent, including (for example) theft from shops, illegal parking and tax fraud, but it does not follow that these offences must all be moved up-tariff for sentencing purposes. Crime prevention is the key, and that requires a range of social and other measures. There is little point in having a sentencing tariff based largely on the idea that the more frequently an offence is committed, the higher the sentence should be. That would surpass even Alice in Wonderland.²⁸

Secondly, as Walker and Padfield have pointed out, Lord Taylor’s statement

can hardly mean that otherwise similar rapes or robberies are more serious in London than Lincoln: it must mean that prevalence is an aggravating circumstance of the offence . . . Cunningham’s robbery, in plain words, was aggravated by the fact that a lot of other robbers were active in the locality.²⁹

²⁴ This provision does not apply to a number of situations that are irrelevant to our discussion: where the offence is murder; or the offence is a sexual or violent one and the court considers it necessary to protect the public from serious harm from the offender; or where a minimum sentence or an automatic life sentence is applicable to a repeat offender. For details, see Powers of Criminal Courts (Sentencing) Act 2000, section 80.

²⁵ (1993) 14 Cr App R (S) 444. The case concerned a robbery at knifepoint in a shop.

²⁶ *Ibid.*, at p. 448.

²⁷ See A. Ashworth, *Sentencing and Criminal Justice* (London: Butterworths, 3rd ed., 2000), at pp. 91–93.

²⁸ *Ibid.*, at pp. 91–92. See also the judgment of Lloyd L.J. in *Masagh* (1990) 12 Cr App R (S) 568, upon which several of Ashworth’s points are based.

²⁹ N. Walker and N. Padfield, *Sentencing: Theory, Law and Practice* (London: Butterworths, 2nd ed., 1996), at p. 47.

But why should Cunningham have been punished more severely because of the activities of other robbers? It is clear that Lord Taylor's argument requires prevalence to contribute to the fear of crime, another point made by Ashworth: "Simple prevalence, of which thefts from shops might be an example, would not be enough. Only prevalence creating a climate of fear would qualify".³⁰ Sex offences and bomb hoaxes may well contribute to a climate of fear but can that point be made legitimately regarding mobile phone robberies? Do the latter, to use Lord Taylor's words, put "victims in fear and limit ... their freedom of movement"?³¹ Unfortunately, Harrington and Mayhew's research study does not address the issue of the extent to which the victims of mobile phone theft or robbery fear repeat victimisation or curtail their movements in order to avoid such victimisation.

However, whilst it is true that some members of the public – not necessarily victims of crime – restrict their own activities out of fear of crime, the proportion that does so is apparently not great. For example, the 1996 British Crime Survey revealed that five per cent of men and 11 per cent of women claimed they never went out after dark, but only 15 per cent of these men and 31 per cent of women cited fear of crime as their reason for staying in.³² Moreover, the British Crime Surveys have concluded that "relatively little harm was suffered by most respondents"³³ as a result of being the victim of crime; and any effects tend, in general, to be transitory. Smaller-scale studies suggest that the types and duration of effect suffered by victims vary from one crime to another, with, for example, sex offences having particularly distressing and long lasting effects on many victims.³⁴ Thus, the judiciary may have overstated the extent of public anxiety regarding street robbery.

Indeed, in the absence of research findings establishing the existence of widespread fear among the victims of street robberies, it is conceivable that the public can become inured to crime and to the risk of victimisation. After all, mass production of consumer electronics has brought the purchase price of many models of mobile phone down to a level affordable by hundreds of thousands or possibly millions of young people (or their parents) and other members of the public. The potential financial loss involved in having a mobile phone stolen is therefore probably not of huge significance to many people, and this fact may well induce many victims to hand over phones demanded by robbers without undue fear on the part of the victim of suffering an assault (which might be more likely to occur if the robber's demands were resisted by the victim). In short, the fact that many mobile phones are relatively inexpensive might induce a perception among owners that having their mobile phone stolen would not be an event of enormous consequence.

Moreover, as crime generally is commonplace in urban environments,³⁵ and mobile phone robbery is no exception,³⁶ city and town dwellers or workers may become resigned to the view that crime is an inevitable facet of modern urban life. In suggesting these possibilities, this commentator is not seeking to deny that some robberies, such as those in which serious violence is used or weapons are brandished, are bound to be

³⁰ Ashworth, *op. cit.*, at p. 92.

³¹ *per* Lord Taylor C. J. in *Cunningham, op. cit.*, at p. 448.

³² C. Mirrlees-Black, P. Mayhew and A. Percy, *The 1996 British Crime Survey*. Home Office Statistical Bulletin, Issue 19/96 (London: Home Office, 1996), at p. 55.

³³ L. Zedner, "Victims" in M. Maguire, R. Morgan and R. Reiner, *The Oxford Handbook of Criminology* (Oxford: Clarendon Press, 2nd ed., 1997), at p. 590.

³⁴ *Ibid.*, at p. 591.

³⁵ See A. Bottoms and P. Wiles, "Environmental Criminology" in Maguire *et al.*, *op. cit.*, at p. 305.

³⁶ See Harrington and Mayhew, *op. cit.*, at pp.17–18.

extremely unpleasant experiences for their victims and might cause significant physical and/or psychological harm. Fortunately, however, such events constitute only a small minority of mobile phone robberies.³⁷

A third flaw in the judiciary's emphasis on offence prevalence is highlighted by Ashworth, who reminds us of another (recurring) finding of the British Crime Surveys, namely that the fear of crime tends to be linked only tenuously to the objective risk of victimisation.³⁸ For example, women and the elderly admit to greater levels of fear about crime than do young men, despite the latter's greater risk of victimisation.³⁹ Harrington and Mayhew's study reveals that, in almost 80 per cent of mobile phone robberies, the offender and victim are both male.⁴⁰ As the same research also suggests that almost half of all victims are aged under 18, we find that the typical victim of a mobile phone robbery is a young male: exactly the category of person revealed by British Crime Surveys to be least likely to report a fear of crime.⁴¹

A fourth criticism of the courts' use of the concept of offence prevalence when sentencing focuses on the potential unreliability of the courts' knowledge of the incidence of crimes. Although Lord Woolf C.J. had the advantage of the availability of the recently published study by Harrington and Mayhew, such a reliable source of data may seldom be available to sentencers. Hence, sentencers might easily misinterpret changes in the frequency of some types of offence getting to court as clear evidence of prevalence:

Great confidence is often shown by judges and magistrates in [their] assertions [of prevalence] but doubts can be implanted quickly by pointing out that the courts see only around 2% of the offences committed in one year. It follows that any slight variation in public reporting habits, in the deployment of police officers, in police cautioning policy, or in discontinuances by the Crown Prosecution Service, could have what appears to be a large effect of cases coming to court. Moreover, the local or national media may run a campaign which highlights all instances of a particular crime, giving the impression of a "crime wave", when similar cases have received no coverage at all in previous months.⁴²

These points are surely unassailable and ought to be borne in mind by all sentencers inclined to factor prevalence into their deliberations as to offence seriousness.

A fifth limitation of the use of offence prevalence as a sentencing factor, and a limitation of great significance, lies in the link between prevalence and arguments for deterrent sentencing. The notoriety of *Cunningham*⁴³ stems principally from Lord Taylor's "creative" interpretation of the wording of what was the Criminal Justice Act 1991, section 2(2)(a), namely "commensurate with the seriousness of the offence", as meaning "commensurate with the punishment and deterrence which the offence requires".⁴⁴ By introducing the reductivist strategy of deterrence into a retributivist measure governing the determination of sentence length, Lord Taylor C.J., as Ashworth notes, "thereby emasculated the legislative scheme",⁴⁵ and set a trend for subsequent judicial reliance upon deterrence as a sentencing rationale:

³⁷ According to a mobile phone industry source, almost half of known mobile thefts occur in schools and playgrounds (where it is unlikely that they are accompanied by serious violence): see "Networks Unite to Cut Off Stolen Mobile Phones", *The Sunday Times*, 24 February 2002.

³⁸ Ashworth, *op. cit.*, at p. 92.

³⁹ Mirrlees-Black *et al.*, *op. cit.*, at p. 53. For a discussion of the possible limitations of such findings, see Zedner, *op. cit.*, at pp. 587–588.

⁴⁰ *Op. cit.*, at p. 46.

⁴¹ See *e.g.* Mirrlees-Black *et al.*, *op. cit.*, at p. 53.

⁴² Ashworth, *op. cit.*, at p. 92.

⁴³ *Op. cit.*

⁴⁴ *per* Lord Taylor C. J., *ibid.*, at p. 447.

⁴⁵ Ashworth, *op. cit.*, at p. 91.

This *flagrant misreading of the statute* opened the way for the judges to continue largely with “business as usual”, the different sentence lengths for crimes reflecting not the relative seriousness of those offences, but rather an ad hoc mixture of deterrent and punitive considerations⁴⁶ [emphasis added].

In the mobile phone robbery cases that are the subject of this note, Lord Woolf C.J. has continued the emasculation of the statutory scheme by linking prevalence to the alleged need for deterrent sentences: “There has been an increase in the incidents [*sic*] of robbery of the sort to which we have referred. The need to deter those who commit offences of this nature has increased because of their prevalence”.⁴⁷ With regard to the application of Steven James Q, for example, Lord Woolf C.J. stated that the Court of Appeal had “no doubt that the judge [at first instance] was absolutely right”⁴⁸ in concluding that a deterrent sentence was demanded by the facts.

Lord Taylor C.J. did concede in *Cunningham* that a sentencer could not impose a longer-than-commensurate sentence in order to make an example of an offender by reference to deterrence.⁴⁹ *Cunningham* does, however, appear to allow the courts to increase the tariff for certain types of offence, such as mobile phone robbery, so that prevalence, for example, can be invoked as a reason to impose consistently long sentences for *all* who commit that type of offence. The continued reliance by the courts upon deterrence as a sentencing aim is objectionable on a number of grounds. Whilst there is no scope in a note of this kind for a detailed analysis of theories of deterrence, a number of well-established limitations of deterrence must be acknowledged.⁵⁰

Individual (or “special”) deterrence tries to reduce crime by imposing a sentence on a particular offender that is considered sufficient to deter that offender from reoffending completely, or at least from reoffending by committing similar offences. Here, the deterrence is claimed to be the discouraging effect of the experience of the sentence on the individual so punished. In contrast, general deterrence aims to prevent crime by imposing sentences thought to discourage others in the population from offending, by instilling fear in those others of receiving similar sentences to those imposed on offenders convicted of the same type of offence. Lord Woolf’s reference in the mobile phone robbery cases to the need to deter “those who commit offences of this nature”,⁵¹ rather than those who *might* commit such offences, suggests (if he has chosen his words carefully) that he was mindful of the potential individual, rather than general, deterrent impact of the sentences imposed.

Sentences based on individual deterrence obviously require courts to consider what sentence would be necessary to deter a particular offender. Such a sentence might have to be very long for a persistent offender;⁵² but that sentence might easily exceed a commensurate sentence under what is now the Powers of Criminal Courts (Sentencing) Act 2000, section 80(2)(a). As already mentioned, Lord Taylor C.J. in *Cunningham* acknowledged that that provision did not allow the sentencer to exceed the commensurate sentence when trying to produce a greater deterrent impact. Rather, as Wasik has noted, Lord Taylor’s remark “permits reference by the sentencer to deterrence

⁴⁶ *Ibid.*, at p. 87.

⁴⁷ *per* Lord Woolf C.J. in *Attorney-General’s Ref. (Nos. 4 and 7 of 2002); R v. Q, op. cit.*, at para. 7.

⁴⁸ *Ibid.*, at para. 18.

⁴⁹ *Cunningham, op. cit.*, at p. 448.

⁵⁰ For recent detailed discussions of deterrence, see A. von Hirsch and A. Ashworth (eds.) *Principled Sentencing: Readings on Theory and Policy* (Oxford: Hart Publishing, 2nd ed, 1998), ch. 2; and A. von Hirsch, A. Bottoms, E. Burney and P.-O. Wikström, *Criminal Deterrence and Sentencing Severity: an Analysis of Recent Research* (Oxford: Hart Publishing, 1999).

⁵¹ *per* Lord Woolf C.J. in *Attorney-General’s Ref. (Nos. 4 and 7 of 2002); R v. Q, op. cit.*, at para. 7.

⁵² See A. Ashworth (1998), “Deterrence”, in von Hirsch and Ashworth, *op. cit.*, at p. 45.

(whether individual or general deterrence) as an objective in sentencing only in so far as a deterrent effect may be achieved by imposing the commensurate custodial sentence".⁵³ It is contended that sentencers might easily overlook this restriction in their haste to impose deterrent sentences on mobile phone robbers and others whose offences are regarded as prevalent.

A second problem with deterrence theory is that there is a dearth of empirical support for its claims, as Ashworth notes:

The main empirical criticism is that the factual data on which a deterrent system must be founded do not exist. Reliable findings about the marginal deterrent effects of various types and levels of penalty for various crimes are hard to find . . . A necessary element in research is a proper definition of deterrence, to establish that fear of the legal penalty was a factor which led to avoidance of the proscribed conduct. Also essential [is] information about the potential offender's knowledge of the penalty and of the risk of detection, for example: these subjective elements are vital components in the operation of deterrent policies. Few studies satisfy these criteria, and they provide no basis for broad policies.⁵⁴

Politicians and sentencers tend to ignore the paucity of evidence as to the effectiveness of deterrence when responding to perceived or actual increases in crime. Lord Taylor C.J. was certainly inconsistent in his orientation towards deterrence. His pro-deterrence stance in *Cunningham* stands in sharp contrast to his vehement condemnation of deterrence and incapacitation-based mandatory and minimum sentences introduced by the Crime (Sentences) Act 1997.⁵⁵ It is difficult to regard Lord Taylor's outspoken comment regarding the latter that "never in the history of our criminal law have so far-reaching proposals been put forward on the strength of such flimsy and dubious evidence"⁵⁶ as a mere expression of judicial hubris at the government's restriction of the judiciary's sentencing powers in relation to certain types of repeat offender. Rather, Lord Taylor C.J. had either changed his mind about the desirability of deterrence-influenced sentencing or was acting hypocritically in criticising the faith in deterrence of the then Home Secretary, Michael Howard M.P.

Whichever is the case, it is contended that Lord Woolf C.J., in the mobile phone robbery cases under discussion, ought to have regarded as questionable Lord Taylor's remarks in *Cunningham*. Moreover, Lord Woolf's insistence on the necessity of custodial sentences in all save the exceptional case of mobile phone robbery seems difficult to reconcile with his own well-known views on the negative aspects of imprisonment.⁵⁷ More specifically, less than 18 months before his mobile phone judgment, Lord Woolf C.J. had described the atmosphere within Britain's young offender institutions as too "corrosive"⁵⁸ for Robert Thompson and Jon Venables, the killers of James Bulger. Perhaps the perceived need to respond to prevalent crimes induces amnesia in some senior members of the judiciary.

There are also a number of moral objections to deterrence theory but as these tend to focus on general deterrence and its instrumental punishment of offenders in the interests of others⁵⁹ – whereas Lord Woolf C.J. appears to have alluded to individual

⁵³ Wasik, *op. cit.*, at p. 143.

⁵⁴ Ashworth (2000), *op. cit.*, at pp. 64–65.

⁵⁵ *Ibid.*, at p. 88.

⁵⁶ H.L. Deb., Vol. 572, Col. 1025, 23 May 1996.

⁵⁷ See e.g. H. Woolf and S. Tumim, *Prison Disturbances, April 1990: Report of an Inquiry*, Cm 1456 (London: HMSO, 1991).

⁵⁸ See " 'Corrosive' Juvenile Centres Under Attack", *The Guardian*, 27 October 2000.

⁵⁹ See Ashworth and von Hirsch, *op. cit.*

deterrence in the mobile phone robbery cases (although not all sentencers taking Lord Woolf's lead might appreciate the difference between the two types of deterrence) – no elaboration of the moral case against deterrence will be undertaken here.

So much for prevalence and deterrence. We turn finally to consider the issue of whether the sentences imposed by the Court of Appeal in the mobile phone robbery cases can be regarded as excessive. Lord Woolf C.J. insisted that the Court of Appeal in these cases was “not seeking to set new guidelines”, but, rather, was “seeking to draw together the principles which are already clearly established by the reported decisions of this court”.⁶⁰ Whilst the concept of judicial precedent seems to be applied less enthusiastically in sentencing than in other areas of law,⁶¹ it is safe to presume that Lord Woolf C.J. thereby intended the principles embodied in relevant previous Court of Appeal sentencing decisions to inform the Court's deliberations in the mobile phone cases. The first case cited was *Attorney-General's Reference No. 6 of 1994 (R v. Christopher Lee)*,⁶² a case in which Lord Taylor C.J. reiterated his belief in the need for an element of deterrence when determining a sentence supposedly in accordance with the principle of just deserts. Lord Taylor C.J. also expressed his view that street robberies make the public afraid to walk alone in cities, and asserted that even first offenders should receive custodial sentences for street robberies involving the threatened use of a knife.⁶³ The offender had his sentence increased from a community service order to 18 months' imprisonment, despite having no previous convictions. When referring to the facts of this case, Lord Woolf C.J. did not mention that Lee was a 24-year-old man, rather than a youth.

The second case to which the Court of Appeal referred was *Attorney-General's Reference No. 73 of 1999 (R v. Mark Charles)*.⁶⁴ In this case Lord Bingham C.J. continued the tradition established by the late Lord Taylor C.J. by insisting that street robberies required an element of deterrence, even if committed as a first offence. The offender, who had pleaded guilty, received a sentence of 18 months' imprisonment. The offender had not threatened the use of a knife but did punch his 16-year-old victim several times and stole the latter's mobile phone and other items. Once again, when discussing the facts of this case, Lord Woolf C.J. failed to mention that the offender was not a youth but a 23-year-old, despite Lord Bingham C.J. having referred to the fact that Charles was “not in the first flush of youth”,⁶⁵ and that this had a bearing on the seriousness of his offence.

In the third case considered relevant by Lord Woolf C.J., *R v. Bol Joseph*,⁶⁶ a sentence of three years' detention was upheld in relation to a 14-year-old, convicted of an attempted street robbery during which he had brandished a knife. The Court of Appeal in *Bol Joseph* acknowledged the young age of the offender but stressed as important a number of other factors, including: the robbery had occurred at night; the offence had occurred at a location where robberies were “very prevalent”;⁶⁷ the appellant had played a prominent part in the offence in conjunction with others; and the appellant had been convicted after a trial (in other words, had pleaded not guilty).⁶⁸ Whilst the commission of offences by gangs or groups is a well-established aggravating

⁶⁰ per Lord Woolf C.J. in *Attorney-General's Ref. (Nos. 4 and 7 of 2002): R v. Q*, *op. cit.*, at para. 2.

⁶¹ See Ashworth (2000), *op. cit.*, at pp. 29–32.

⁶² (1995) 16 Cr App R (S) 343.

⁶³ *Ibid.*, at p. 345.

⁶⁴ [2000] 2 Cr App R (S) 209.

⁶⁵ *Ibid.*, at p. 213.

⁶⁶ [2001] EWCA Crim 304; [2001] 2 Cr App R (S) 398.

⁶⁷ *Ibid.*, at para. 16.

⁶⁸ *Ibid.*

factor,⁶⁹ pleading not guilty is not an aggravating factor but a democratic right; however, an offender who pleads not guilty and is convicted will lose any sentencing discount usually available for a timely guilty plea.⁷⁰ It is to be hoped that the Court of Appeal in *Bol Joseph* did not treat the defendant's insistence on a trial as an aggravating factor in his case. In addition to the aforementioned factors, the Court of Appeal once again afforded significant consideration to the perceived need to deter offenders.⁷¹

The fourth and final case to which the Court of Appeal referred in the three applications under consideration was that of *R v. Neil Gordon and John Foster*.⁷² Here, a sentence of five years' imprisonment was upheld regarding both appellants whose victim was robbed in the street, assaulted, marched to a cash machine, and assaulted again. This was undoubtedly a nasty example of a street robbery and the offence attracted a sentence at, or very near, the top end of the Court of Appeal's tariff for muggings.⁷³ Once again, however, Lord Woolf C.J. in the mobile phone robbers' applications, failed to refer to the fact that Gordon and Foster were not youths or young adults but 26 and 28 years' old, respectively. Moreover, Gordon and Foster each had several previous convictions for offences that included violence.⁷⁴

Thus, the sentences substituted or upheld by the Court of Appeal in the four cases considered relevant by Lord Woolf C.J. ranged from 18 months' imprisonment in the two Attorney-General's Reference cases (which would have included allowances for the principle of double jeopardy), to three years' detention in the *Bol Joseph* case (the only case involving a young offender), to five years' imprisonment in the *Gordon and Foster* case. In all four of these cases, the offenders acted in concert with others, which would have aggravated the seriousness of their crimes (and may be indicative of the cowardly nature of such offences;⁷⁵ as might the fact that in all but the *Bol Joseph* case, the offenders were older than their victims). In the two cases attracting the least severe sentence of 18 months' imprisonment, both offenders were of previous good character. In contrast, although Bol Joseph had no previous convictions and was by far the youngest of all of the defendants, his attempted robbery of a laptop computer was accompanied by punching, head butting and chasing the victim, a level of violence absent from the Attorney-General's reference cases. Moreover, as we have seen, Bol Joseph would have lost the benefit of a sentencing discount for a guilty plea, which can amount to a reduction in the Crown Court of up to one-third of sentence.⁷⁶

How do these sentences compare with those thought appropriate by the Court of Appeal in the three mobile phone robbery cases under discussion? Well, as we have seen, the latter sentences were three years' detention (Steven James Q), three-and-a-half years' detention (Adrian Michael Lobban) and two-and-a-half years' detention for Christopher Sawyers. These sentences are certainly longer than the 18-months' imprisonment imposed in the two Attorney-General's reference cases of *Lee* and *Charles*, but it must be remembered that in the latter two cases each offender was of previous good character. In contrast, not only did Steven Q and Christopher Sawyers have previous convictions, but their mobile phone robberies were committed whilst

⁶⁹ See Wasik, *op. cit.*, at p. 59.

⁷⁰ *Ibid.*, at pp. 66–67.

⁷¹ *Op. cit.*, at para. 13. In *Bol Joseph*, the C.A. endorsed the approach of the late Lord Taylor C.J. in *Lee*, *op. cit.*, at p. 345.

⁷² [2001] 1 Cr App R (S) 58.

⁷³ See Wasik, *op. cit.*, at p. 331.

⁷⁴ *Op. cit.*, at p. 201.

⁷⁵ A point made by Otton L.J. in *R v. Neil Gordon and John Foster*, *op. cit.*, para. 12.

⁷⁶ See Wasik, *op. cit.*, at p. 66.

they were on bail for some of those offences. Offending whilst on bail is a long-established aggravating factor given statutory force by the Criminal Justice Act 1991, section 29 (now the Powers of Criminal Courts (Sentencing) Act 2000, section 151). Moreover, whilst mobile phone robber Adrian Lobban was of previous good character, the seriousness of his offence was aggravated by, *inter alia*, the fact that he was adjudged to have been the ringleader of the group of youths involved in the crime, and the fact that not only did he threaten to use a knife, but did use it, inflicting a small wound to the hand of his victim.⁷⁷ (In contrast, although it was said that Christopher Lee had threatened his victim with the use of a knife, no knife was found in Lee's possession and it is possible that he never had one.)⁷⁸

Even allowing for the presence of mitigating factors in the cases of adult offenders such as Lee and Charles, it seems that the young offenders and young adult offenders might not have benefited significantly from the mitigating factor of their youth. The Court of Appeal said that the appropriate sentences for Lobban and Sawyers were four years' detention before any adjustment was made for double jeopardy in both cases, and for Sawyers' guilty plea.⁷⁹ This does not seem far removed from the five years' imprisonment imposed on the much older Gordon and Foster for their nasty attack on a younger victim. Moreover, Bol Joseph, at 14, the youngest of all of the offenders in the cases under discussion, received a sentence twice as long as that imposed on the older Lee and Charles, despite, like them, having had no previous convictions.

It is interesting that all of the sentences imposed on the young and young adult offenders were broadly similar to each other when allowances are made for the presence of discounts for guilty pleas and for double jeopardy. This may well reflect a concerted effort in recent years on the part of the Court of Appeal, and successive Lord Chief Justices, in particular, to address the problem of street robbery by emphasising offence prevalence as an important aggravating factor that demands a deterrent element to sentencing, notwithstanding the problematic nature of prevalence and deterrence as factors in sentencing. At the same time, the hitherto important mitigating factor of an offender's young age could be becoming less of an influence on the determination of sentence length, despite the assurance of Lord Woolf C.J. in the mobile phone robbery cases under discussion that the age of the offender (and the factor of previous convictions) remain "very important when a judge comes to decide on the length of sentence".⁸⁰

If the youth of offenders comes to have little bearing on sentence length (in addition to having no bearing, as Lord Woolf C.J. insists, on the decision to incarcerate) in cases of mobile phone robbery, we can expect significant additional pressure on places in young offender institutions because over 60 per cent of those accused of mobile phone robbery are aged under 18.⁸¹ This is all a very far cry from the view expressed in the White Paper which preceded the Criminal Justice Act 1991 that "juvenile offenders who can be diverted from the criminal justice system at an early stage in their offending are less likely to reoffend than those who become involved in judicial proceedings".⁸²

In summary, the sentences imposed by the Court of Appeal on the three mobile phone robbers, Steven Q, Michael Lobban and Christopher Sawyers, were broadly

⁷⁷ *Attorney-General's Ref. (Nos. 4 and 7 of 2002): R v. Q, op. cit.*, at para. 22.

⁷⁸ *Attorney-General's Ref. (No. 6 of 1994), op. cit.*, at p. 344.

⁷⁹ *Attorney-General's Ref. (Nos. 4 and 7 of 2002): R v. Q, op. cit.*, at paras. 24 and 34.

⁸⁰ *Ibid.*, at para. 4.

⁸¹ See Harrington and Mayhew, *op. cit.*, at pp. 37–38.

⁸² Home Office, *Punishment, Custody and the Community*, Cm 424 (London: HMSO, 1988), at para. 2-15.

consistent with the Court's recent going rate for street robbery cases. This is not surprising, however, as that tariff has been developed since the mid-1990s by Lord Chief Justices intent upon factoring considerations of offence prevalence and deterrence into determinations of sentence length. Contrary to some media reports,⁸³ therefore, the sentences meted out on the mobile phone robbers were not without precedent for street robbery offences.⁸⁴ However, it is the view of this commentator that if there is anything "particularly worrying" – to use Lord Woolf's aforementioned phrase – about these mobile phone mugging cases, it is that they have presented sentencers with another opportunity to dilute the retributivist ethos of our current statutory sentencing scheme (embodied in the notion of "commensurability" or proportionality) by re-emphasising the questionable issues of prevalence and deterrence.

CONCLUSION

It is not been the purpose of this article to argue that imprisonment is necessarily an inappropriate punishment for those who rob others of their mobile phones. Indeed, if weapons such as knives are brandished, or gratuitous violence is used during such robberies, this commentator's perception of just deserts would normally demand the imposition of a custodial sentence. However, any sentence imposed ought to be consistent with the statutory sentencing framework and ought not to be influenced by extraneous factors. It has been argued that the Court of Appeal's insistence upon sentences reflecting the need for individual deterrence in mobile phone robbery cases is a distortion of what was the Criminal Justice Act 1991, section 2(2)(a) and is now the Powers of the Criminal Courts (Sentencing) Act 2000, section 80(2)(a). This distortion – or "flagrant misreading of the statute",⁸⁵ as Ashworth puts it – has its origins in the judgment of the late Lord Taylor C.J. in *Cunningham*.

Although Lord Taylor C.J. held, in the same case, that exemplary sentences in individual cases were contrary to the statute's retributivist requirement of proportionality, his insistence that sentences were to be "commensurate with the punishment and deterrence which the offence requires" has allowed the judiciary to hike-up sentence levels for offences such as street robbery. In addition, Lord Taylor's support in *Cunningham* for the relevance of the problematic factor of offence prevalence reintroduced an issue that is both difficult to reconcile with the statutory sentencing framework and has other major limitations. Unfortunately, this "judicial corruption of the principles of the 1991 Act"⁸⁶ has been perpetuated by Lord Woolf C.J. in the mobile phone robbery cases under discussion. Also perpetuated has been the unproven assumption that deterrent sentencing is an effective mechanism of crime reduction.

In contrast, this commentator is of the view that the most effective way to reduce the incidence of mobile phone robbery and theft would be to render stolen phones unusable by robbers, thieves and any subsequent purchasers. In principle, this could be

⁸³ See e.g. "Woolf: Jail All Mobile Phone Thieves", *op. cit.*

⁸⁴ Indeed, they pale in comparison with the astonishing, pre-Criminal Justice Act 1991 sentence of 20 years' detention imposed in *Storey* [1973] 1 W.L.R. 1045 on a 16-year-old ringleader of muggers who inflicted serious injury in an attack on a drunken man in Birmingham. The case is often cited today as evidence of the doubtful effectiveness of exemplary sentencing as a vehicle for general deterrence, because no discernible reduction in the number of reported street robberies occurred in the wake of the sentence: see R. Baxter and C. Nuttall, "Severe Sentences: No Deterrent to Crime?" (1975) 31 *New Society* 11. For an authoritative discussion of the significance of the *Storey* mugging, see S. Hall, C. Critcher, T. Jefferson, J. Clarke and B. Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (Basingstoke: Macmillan, 1978), Ch. 4.

⁸⁵ Ashworth (2000), *op. cit.*, at p. 87.

⁸⁶ *Ibid.*, at p. 93.

achieved by technological means if mobile phone manufacturers and/or cellular phone network operators were willing to act. Although, hitherto, the mobile phone industry has been reluctant to adopt technological solutions on the ground of the latter's allegedly high cost,⁸⁷ (or perhaps because of the industry's "unwillingness to lose the revenue from calls made from stolen phones"),⁸⁸ four British mobile phone networks have agreed recently to disconnect all mobile phones reported stolen.⁸⁹ This is a useful starting point, and when viewed in conjunction with a recent Government promise of legislation to prohibit the reconfiguration of phones⁹⁰ (a practice that currently facilitates their use by thieves and receivers of stolen goods), it constitutes a far more promising approach to tackling the problem of mobile phone theft and robbery than do deterrence-influenced sentences imposed by courts that are too mindful of the factor of offence prevalence.

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⁸⁷ See Harrington and Mayhew, *op. cit.*, at p. 60.

⁸⁸ "Networks Unite to Cut Off Stolen Mobile Phones", *op. cit.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

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STANDING FOR THE JUDICIAL REVIEW OF COMMUNITY NORMATIVE ACTS: CLOSING PANDORA'S BOX?

C-50/00 P Unión de Pequeños Agricultores (UPA) v. Council of the European Union

[2002] All E.R. (EC) 89, <http://www.curia.eu.int> (E.C.J.) (G.C. Rodríguez Iglesias, president)

INTRODUCTION

In *Unión de Pequeños Agricultores (UPA) v. EC Council*, the European Court of Justice, invited to reconsider the conditions of standing of “non privileged applicants”, *i.e.* natural or legal persons,¹ for the purpose of the judicial review of Community measures under Article 230 (4) EC, tried (unsuccessfully?) to place the lid back on the Pandora’s box opened by the Court of First Instance a few months earlier.

These admissibility requirements were still awaiting formal reconsideration by the court in the autumn of this year during the deliberations on the *UPA* case, when the European Court of First Instance (CFI), in the *Jégo-Quéré et Cie* case,² beat the European Court of Justice to it, by taking upon itself the reinterpretation in a more liberal manner of one of the standing criteria, that of the “individual concern” of applicants. Rather unexpectedly, the European Court held a special session during the summer judicial vacation. Commentators were awaiting the decision with some excitement, expecting some kind of “revolutionary” judgment, but it was only disappointment that came out of the ruling. In the judgment, the court showed an unusual deference to the treaty-makers and at first sight seemed eager to reaffirm its previous restrictive approach to the standing of “individuals” (including companies and associations) in applications for judicial review at Community level. However, the judgment is so ambiguous and so restricted in its scope that it casts doubts on the real intentions of the European Court and the state of the law after that judgment.

“JURISPRUDENCE CONSTANTE”, FACTS AND PROCEDURES

On 20 July 1998, the Council adopted a regulation, (the 1998 Regulation)³ which substantially reformed the common organisation of the olive oil market (a system of guaranteed prices and production aids) set up by a 1966 Regulation.⁴ The changes thus made to the previous schemes forced some small farmers to cease trading. *Unión de Pequeños Agricultores (UPA)* is a trade association with legal personality that represents and acts in the interests of small Spanish agricultural businesses. On 20 October 1998, UPA brought a claim before the CFI under Article 230 EC seeking annulment of most of the provisions of the 1998 Regulation, on various substantive grounds including breaches of some fundamental rights and principles.

¹ The “privileged applicants” that have automatic standing are the main Community institutions (the EC Council, the EC Commission and when the Treaty of Nice has been ratified, the European Parliament) and the Member States. Other Community institutions such as the Court of Auditors and the European Central Bank are “semi-privileged applicants”, which have standing to defend their prerogatives. See Article 230(2) and (3) EC.

² T-177/01 *Jégo-Quéré et Cie v. Commission of the European Communities* [2002] All E.R. (EC) 932.

³ Regulation No 1638/98, O.J. 1998 L 210, p. 32.

⁴ Regulation No 136/66, O.J. English Special Edition, 1965–1966, p. 221.

The Council raised an objection as to the admissibility of the application, which was upheld on 23 November 1999 by a reasoned order of the CFI.⁵ Indeed, under Article 230(4) EC as interpreted by the Community courts, individuals can challenge not only a Community act which is not addressed to them, (that is, a decision addressed to others), but also a regulation⁶ or a directive,⁷ only if the act is *de facto* a decision with regard to them and if they can show that they are “directly and individually concerned” by it. The Court established in *Plaumann v. Commission* that applicants are individually concerned by a measure if they can prove that they are affected by the measure in question by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.⁸ This individualisation of the applicant’s situation is facilitated if the applicant can show that he or she belongs to a closed category,⁹ the interests of which must be taken into account by the institution taking the contested act,¹⁰ or if he or she has some specific rights affected by the act in question.¹¹ This individualisation is difficult to achieve in the case of actions brought by associations. These are admissible only where a legal provision expressly grants associations a series of procedural rights,¹² where the association is distinguished individually because its own interests as an association (especially its negotiating position) are affected by the measure; or where the association represents the interests of companies which would have themselves been entitled to bring proceedings.¹³ The CFI found that UPA did not fall into any of these three categories. With regard to the final category, the CFI noted in particular that

the fact that the regulation may, at the time it was adopted, have affected those of the applicant’s members then operating in the olive oil markets and, in some circumstances, caused them to cease trading, cannot differentiate them from all the other operators in the Community, since they are in an objectively determined situation comparable to that of any other trader who may enter those markets now or in the future.

The CFI also rejected UPA’s additional plea in favour of a more objective approach to judicial review. UPA argued that review of the legality of the regulation was a “matter of Community public interest”. Indeed, in Community law, unlike in English law,¹⁴ issues of admissibility and substance are not to be confused. Finally, the CFI also refused to consider the argument that the association may not receive effective judicial protection. The court justified this approach on the basis that, in any event, it was unable to depart from the system of remedies provided by Article 230 EC, as this would necessitate going beyond the limits of the judicial powers conferred by that provision.

UPA appealed to the ECJ against the order, submitting that the reasoning of the CFI was “inadequate”, “contradictory” and relied on a “misunderstanding” of the association’s argument, and that the order violated its fundamental right to effective

⁵ T-173/98 *Unión de Pequeños Agricultores v. Council* [1999] E.C.R. II-3357.

⁶ C-358/89 *Extramet Industrie v. Council* [1991] E.C.R. I-2501; C-309/89; *Codorniu v. Council* [1994] E.C.R. I-1853.

⁷ T-171 and 175–177/98 *Salamander and Others v. Parliament and Council* [2000] E.C.R. II-2487.

⁸ C-25/62 [1963] E.C.R. 95, p. 107.

⁹ C-106/63 *Toepfer (Alfred) KG v. Commission* [1965] ECR 405.

¹⁰ C-111/82 *Piraiiki-Patraiki v. Commission* [1985] ECR 207.

¹¹ T-480 and 483/93 *Antillean Rice Mills N.V. e.a. v. Commission* [1995] ECR II-2305.

¹² T-122/96 *Federazione Nazionale del Commercio Oleario (Federolio) v. Commission* [1997] E.C.R. II-1559.

¹³ T-481/93 and T-484/93 *Exporteurs in Levende v. Commission* [1995] E.C.R. II-2941.

¹⁴ *R. v. Inland Revenue Comrs ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617.

judicial protection, a recognised principle of Community law. UPA's main ground of appeal was as follows. Article 234 EC provides a mechanism to allow claims of illegality to be initiated in national court proceedings, which enables national courts to refer questions regarding the legality of Community acts to the Court. However, the 1998 Regulation did not call for national implementing measures (against which an action could be brought before a national court). In addition the association was allegedly unable to infringe the 1998 Regulation so as to challenge the validity of possible sanctions imposed as a result of such "illegal" behaviour. For these two reasons, the association found itself without the means to challenge the 1998 Regulation indirectly through the Article 234 EC procedure. Relying on one possible interpretation of *Stichting Greenpeace Council and Others v. Commission*,¹⁵ the association claimed that the CFI's order infringed its fundamental rights to an effective judicial remedy, because the CFI had not examined whether, *in that particular case*, there was an alternative legal remedy for UPA.

THE LEGAL ISSUE

As emphasised by the Court, the issue was whether the appellant, as a representative of the interests of its members, could nonetheless have standing, under Article 230(4) EC, to bring an action for annulment of the contested act (the 1998 Regulation) *on the sole ground* that in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection would require it. In other words, the Court had to decide whether the putative lack of an alternative remedy at national level could constitute a substitute criterion for granting standing to a legal person for the purpose of challenging the legality of Community normative acts.

THE ADVOCATE GENERAL'S PLEA FOR A NEW INTERPRETATION OF INDIVIDUAL CONCERN

In his Opinion, preceding the judgment, the Advocate General F. G. Jacobs carried out a detailed examination of the procedure for indirect challenge available in respect of Community acts. This led him strongly to question the assertion that Article 234 EC procedure always provided for an effective alternative remedy. However, he did not consider that the lack of effective alternative remedy should be a criterion for granting standing and took the view that *locus standi* should be determined independently of the availability of indirect challenges. According to him, the best solution to guarantee the adequate judicial protection of individuals was for the Court to adopt a more liberal interpretation of the requirement of "individual concern". He suggested that an individual should be regarded as individually concerned where, "by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests." This understanding of individual concern is inspired by the French concept of an "*acte faisant grief*", which constitutes the main admissibility requirement for the judicial review of administrative acts in France.

¹⁵ C-321/95 P [1998] E.C.R. I-1651.

THE ECJ'S AMBIGUOUS APPROACH

The Advocate General, then, did not hesitate to go beyond the boundaries of the question asked of the Court in suggesting a solution different to that proposed by the appellant. The Court, however, stuck strictly to its “mandate” and only answered the question asked, refusing the invitation given by the Advocate General and by the CFI in *Jégo-Queré et Cie v. Council*¹⁶ to reconsider the interpretation of individual concern.

The Court started by strongly reasserting that if the condition of individual concern as interpreted in *Plaumann*¹⁷ was not fulfilled, “a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation”. This seems to contradict the CFI’s decision in *Jégo Quéré et Cie v. Council*¹⁸ and the Opinion of Advocate General Jacobs. Both of these concluded that a more liberal interpretation of the requirement of individual concern than the one adopted in *Plaumann v. Commission*¹⁹ was conceivable and desirable.

The Court nevertheless recalled that the Community is a “community based on the rule of law” and that its institutions were subject to the judicial review of the compatibility of their acts with the Treaty and the general principles of Community law, including fundamental rights (*i.e.* the European “constitution”). Individuals were thus entitled to the effective protection of the rights that they derived from Community law, in conformity with the general principles stemming from the constitutional traditions of the Member States and from Articles 6 and 13 of the European Convention of Human Rights and Fundamental Freedoms.²⁰ It is worth noting that the Court made no mention of the EU Charter of Fundamental Rights²¹ proclaimed on 7 December 2000 at the Nice Summit, of which Article 47 recognises the right to an effective remedy and to a fair trial, while the Advocate General and the CFI in *Jégo Quéré et Cie*²² made explicit references to that provision. Perhaps the judges felt uncomfortable with the idea of using as a legal basis for their reasoning a document that had not been granted legal force by the Member States, so as to protect themselves against any accusation of judicial activism. The CFI judges however, more daringly, did not hesitate to make such “legal” use of the Charter in *Jégo-Queré et Cie*²³ and *max.mobile Telekommunikation Service GmbH*.²⁴

Furthermore, the European Court followed its traditional view set out in *Les Verts v. European Parliament*,²⁵ according to which the Treaty provides for a *complete* system of remedies and procedures for the judicial review of Community acts, entrusted to the Community courts, but which can be initiated at both national (Article 234 EC) and Community level (Articles 230 and 241 EC). Consequently, the Court considered that, in conformity with the principle of sincere co-operation (Article 10 EC), it fell to the Member States to make sure that no failure occurred at national level, by ensuring that national courts referred questions of validity to the ECJ. The Court seemed to have missed the point here, as the issue was not that national legal systems did not provide

¹⁶ *Op. cit.*

¹⁷ *Op. cit.*

¹⁸ *Op. cit.*

¹⁹ *Op. cit.*

²⁰ C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651.

²¹ O.J. 2000 C 364, p. 1.

²² *Op. cit.*

²³ *Op. cit.*

²⁴ T-54/99, 31 December 2001, not yet reported.

²⁵ In C-294/83 [1986] E.C.R. 1339.

the necessary procedures, but that the nature of the EC act in question might not create adequate opportunities for indirect actions initiated at national level. Besides, as pointed out by the Advocate General, such passing on of responsibility does not resolve the problems of “the absence of remedy as a matter of right”, additional delays and costs or the award of interim relief. In addition, it creates monitoring difficulties and interferes with national procedural autonomy. The Court nonetheless refused to reconsider the adequacy and comprehensiveness of the system of remedies provided by the Treaty, in spite of the fact that it had been strongly challenged by many academics,²⁶ Advocates General²⁷ and by the CFI itself in *Jégo-Quéré et Cie*.²⁸

Following its Advocate General on this point, the Court rejected the interpretation of the system of remedies suggested by UPA:

... it is not acceptable to adopt an interpretation of the system of remedies ... to the effect that a direct action for annulment before the Community court will be available where it can be shown, following an examination by that court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings to contest the validity of the Community measure at issue.

According to the Court, such interpretation could not be accepted as it would require an examination of national procedural law, which fell outside the Community courts' jurisdiction. This judicial restraint comes as something of a surprise if one recalls that the ECJ has not hesitated in the past to investigate the intricacies of national procedural law so as to assess whether national remedies available for the enforcement of Community rights fulfilled the *Rewe* proviso of equivalence and effectiveness.²⁹ However, it is true that to make standing dependent on a formal examination of national legal systems would constitute an even deeper breach in the principle of national procedural autonomy and lead the Court into an area clearly outside its jurisdiction. Besides, as pointed out by the Advocate General, such a solution cannot find textual support in the Treaty and would lead to inequalities of treatment between applicants in the various Member States, which goes against the principles of legal certainty and uniformity.

At this stage of the Court's reasoning, it nevertheless appeared that there was little that the Court could do, or rather little that it was willing to do, to improve individuals' access to the Community courts in order to challenge the legality of Community acts. However, the European Court's later explanation regarding the

²⁶ See *inter alia*, A. Barav, “Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court” (1974) 11 C.M.L.Rev. 191; A. Arnulf, “Private applicants and the action for annulment under Article 173 of the EC Treaty” (1995) C.M.L.Rev. 7; “Private applicants and the action for annulment since Codorniu” (2001) 38 C.M.L.Rev. 7 and *The European Union and its Court of Justice* (Oxford University Press, 1999), 40–49; D. Walbroeck and A.-M. Verheyden, “Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme” (1995) C.D.E. 399; G. Vandersanden, “Pour un élargissement du droit des particuliers d'agir en annulation contre les actes autres que les décisions qui leur sont adressées” (1995) 5–6 C.D.E. 535; C. Harding, “The Private Interest in Challenging Community Action” (1980) 5 E.L. Rev. 354; C. Harlow, “Towards a Theory of Access for the European Court of Justice” (1992) 12 Y.E.L. 213; N. Neuwahl, “Article 173 paragraph 4 EC: Past, Present and Possible Future” (1996) 21 E.L.Rev. 17; M. Nettesheim, “Article 173 of the EC Treaty and Regulation: Towards the Development of Uniform Standing Requirements” in H. W. Micklitz and N. Reich (eds) *Public Interest Litigation before the European Courts* (Nomos Verlagsgesellschaft, 1996).

²⁷ Opinions of Advocate General Roemer in case C-6/68 *Zuckerfabrik Watenstedt* [1968] ECR 595; Advocate General Gand in case C-64/69 *SA Alcan Aluminium v. Commission* [1970] ECR 385; Advocate General Slynn in case C-246/81 *Lord Bethell v. Commission* [1982] ECR 2277; Advocate General Jacobs in cases C-358/89 *Extramet Industrie v. Council* [1991] ECR I-2501; C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 20 to 23 and C-50/00 *Unión de Pequeños Agricultores (UPA) v. Council* of 21 March 2002; Advocate General Ruiz-Jarabo Colomer in case C-142/95 *P Associazione agricoltori della provincia di Rovigo and others* [1996] ECR I-669; and Advocate General Cosmas in case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission* [1998] ECR I-165.

²⁸ *Op. cit.*

²⁹ C-33/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] ECR 1989; C-431/93 *van Schijndel and van Veen v. SPF* [1995] ECR I-4705.

interpretation of the requirement of individual concern may restore some hope to those who support the relaxing of standing conditions for “individuals” seeking judicial review of Community acts, although it creates some confusion as to the intentions of the ECJ. Indeed, the Court emphasised that individual concern must be “interpreted *in the light of the principle of effective judicial protection* by taking account of the various circumstances that may distinguish an applicant individually” while stressing that “such an interpretation cannot have the effect of setting aside the condition in question.”

This interpretative statement raises various questions. One is whether one could conclude that the fact that an applicant lacks alternative remedies could be a feature capable of “individualising” an applicant’s situation and should thus be a factor to take into account in the assessment of individual concern. Another question is whether this interpretative approach could cover the liberal reading of individual concern proposed by the CFI in *Jégo Quéré et Cie*. This approach would regard a person as individually concerned by a Community measure of general application that concerned him or her directly, “if the measure in question affects his legal position, in a manner which is both definite and immediate, *by restricting his rights or by imposing obligations on him*”³⁰ or that suggested by the Advocate General.³¹ The Court, quite surprisingly, did not make any explicit reference to either of these interpretative suggestions. On one hand, if one considers that the CFI’s or the Advocate General’s definitions empty the requirement of individual concern of its substance, then the European Court’s decision seems to “invalidate” them. On the other hand, if they are simply seen as more liberal interpretations of individual concern, “in the light of the principle of effective judicial protection,” which nonetheless retains enough substantial elements, then they may be acceptable. However, such an understanding of this part of the judgment cannot be reconciled easily with the Court’s earlier confirmation of the *Plaumann* interpretation of individual concern.

THE STATE OF THE LAW AFTER *UPA*

So what is the state of the law regarding individuals’ standing for the judicial review of Community acts after *UPA*? The situation is far from clear. Perhaps the lid has not been completely placed back on top of Pandora’s box, and the CFI’s liberal interpretation of individual concern could be the new “state of the law” of *locus standi* in the Community. By neither explicitly confirming nor condemning the interpretation of individual concern provided by the CFI in *Jégo Quéré et Cie* and by hurrying to release a decision which contains ambiguity and inconsistency, the Court did not help in clarifying the Community case law on the standing of non-privileged applicants for judicial review of Community legislative and administrative measures.

The Court appeared to favour the *status quo*. The justification put forward by the ECJ judges dealt with their own understanding of the limits of their powers, as conferred by the Masters of the Treaty. Indeed, at the end of the judgment, the Court stressed that only the Treaty-makers had the power to modify the standing conditions of the action for annulment by Treaty revision under Article 48 EU. This power could have been realised during the 2000 Intergovernmental Conference leading to adoption of the Treaty of Nice. However, although the judicial system of the Community was substantially reformed in 2000, Article 230(4) EC has noticeably been left untouched. This demonstrates the unwillingness of the Member States to make any change in the

³⁰ *Op. cit.* paragraph 51.

³¹ *Op. cit.*

standing conditions for judicial review at Community level, or at least the absence of consensus among them necessary to go ahead with the reform. In the face of this implicit refusal by the negotiating Member States to improve access to the Community courts for individuals seeking to challenge the validity of Community acts, it is delicate for the ECJ to take the matter into its own hands. This deference of the ECJ towards the Member States and its strict respect for the wording of the Treaty is further emphasised by its insistence on the fact that applicants must show that a Community act of legislative nature, is “in the nature of a *decision* in their regard”. This may nevertheless cause surprise as an approach on the part of a Court that in the past has not shown so much reluctance to go beyond the wording of some Treaty provisions or to defy the Member States.

Should we conclude that the ECJ has now entered into a phase of judicial restraint, and that the daring and activist court is now the CFI, engaged in various attempts to push the boundaries of the law? One should not rush into such conclusions.

First, the ECJ may have had some concerns regarding the possible rise in judicial review litigation that could arise from a relaxation of the standing requirement and its impact on the already significant workload of the Community courts. Secondly, the European Court may have felt that, although the time was ripe for a change in the conditions of access to the Community courts for the judicial review of Community acts, this change should not be realised lightly and deserved more reflection than the CFI gave it.

Thirdly, the Court may also have considered that such a change should or could only be operated via the Community political decision-making process, for reasons of legitimacy, democracy and effectiveness. Fourthly, the Court’s apparent “attachment” to the *status quo*, the lack of consistency and the ambiguity of the ruling may simply be the results of the difficulties encountered by the Court in deciding the case by consensus among all the members of its plenary. Disagreements had probably arisen not, so much on the opportunity of improving access of individuals to the Community courts for “direct” actions, but rather on the modalities of a new interpretation of the requirement of individual concern.

Finally, it should be reminded that the question asked of the ECJ was whether the lack of alternative remedies could constitute an alternative criterion, and not whether the court should provide a new interpretation of individual concern. By restricting itself to providing an answer to the question asked, and by ignoring its Advocate General’s proposal for an interpretative change, the ECJ only delayed taking a position on the issue while leaving the door open for alternative interpretations of individual concern.

The main drawback of such a “wait-and-see” attitude is that it provides even more legal uncertainty with regard to the law of standing in respect of judicial review of Community acts. This is a rather unwelcome development, particularly considering the already complex and sometimes inconsistent nature of the case law on the issue.

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BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

HUMAN RIGHTS AND CIVIL LIBERTIES

Civil Liberties and Human Rights in England and Wales,

by DAVID FELDMAN

Oxford, Oxford University Press, Second Edition, 2002, lxxvi+1108 pp.,
Paperback, £29.99, ISBN 0-19-876503-7

This is a leading work in the field of civil liberties and human rights. The book was first published in 1993. Since then there has been a sea change in the law regarding the protection of human rights. A monistic view of British constitutional law, which took no account of the developments of international law¹ in this sphere has been virtually abandoned. This is reflected in the current edition of the book, which takes a full account of the jurisprudence of the European Convention on Human Rights, international treaties and other jurisdictions. It is equally up-to-date with regard to the legislative developments within the United Kingdom including the Human Rights Act 1998, the Freedom of Information Act 2000, the Regulation of Investigatory Powers Act 2000 and the Asylum Act 1999. It contains a detailed analysis of cases involving issues such as the conjoined twins, privacy, defamation, protest and the rights of immigrants and prisoners.

The contents of the book are divided into four parts. Part I is entitled "Putting Values into Practice: The Nature of Civil Liberties and Human Rights" and consists of three chapters, headed: 1. Some Basic Values: Civil Liberties, Human Rights and Autonomy; 2. Ways of Identifying and Protecting Rights and Liberties; 3. Equality and Dignity. Background to Part I of this edition was provided by the recognition by the author of certain omission in the first edition. Thus he writes,

As Professor Keith Ewing and Professor Conor Gearty have observed, the first edition of this book 'failed to address the question of where human rights end and civil liberties begin'.² One needs to distinguish between five ideas: Liberty; liberties; civil liberties; fundamental liberties and human rights. (p. 3).

As a result, Part I addresses itself to the question of basic values with philosophical and jurisprudential analysis of the fundamental concepts. The question as to whether social and economic rights provide the conditions for the pursuit of human dignity and

¹ See for instance *Mortensen v. Peters* (1906) 14 S.L.T. 227.

² K. D. Ewing and G. A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford University Press, 2000) p. 3.

equal opportunity is pursued. Part II deals with life, liberty and physical integrity comprising chapters on the Right to Life; Other Rights to Bodily Integrity (threats of torture or inhuman or degrading treatment, parents and children, treating individual patients, medical treatment in prisons); Freedom from Arbitrary Stop, Search, Arrest and Detention; Rights under Restraint (Detention of Prisoners and Patients) and Freedom of Movement into and out of Britain.

Part III is devoted to privacy with chapters on the Scope of Legal Privacy; Freedom from Unreasonable Entries, Searches, Seizures and Surveillance; Protecting Confidences; Sex, Sexual Activity and Family Life. Part IV is headed: Expression with chapters on Freedom of Expression; Media Freedom; Restricting Expression to the Security of the State; Restricting Expression to Protect Mixed Public and Private Interests; Blasphemy, Obscenity and Indecency; Restricting Expression to Further Public Interest; Contempt of Court; Protest and Public Order; Human Rights, Liberty and Political Will.

The discussion on the relevant topics takes full account not only of the developments in English law but also of the jurisprudence of the European Convention on Human Rights. In addition, it makes reference to the relevant documents of international law such as the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966.

Many of the issues covered in this work will continue to be live issues both judicially and extra-judicially. Thus in *R. (on the application of Rottman) v. Commissioner of Police of the Metropolis*³ the question was whether the police had the common law power of search and seizure in respect of the premises where a person had been arrested pursuant to a provisional warrant of arrest for an extradition crime (powers under the Police and Criminal Evidence Act 1984, sections 18 and 19 being restricted to domestic offences were not available for the extradition crime). The House of Lords answered the question in the affirmative. However, Lord Hope in his dissenting opinion expressed the view that the constable had no common law power to carry out a search of the premises for evidence unless he or she had the person's consent or the authority of a search warrant. His Lordship said (para. 18):

I derive support for my approach from the views expressed by Professor David Feldman in *The Law Relating to Entry Search and Seizure* (1986) pp 241–247 . . . As he points out . . . There is no English authority either at common law or under statute for searching an area or taking property which is not under the immediate physical control of the person arrested.

Lord Hope referred to a statement of Professor David Feldman in the aforementioned book to the effect that “. . . police practice is one thing. What the law is on the matter is quite another” (para 18).

Similarly the court has yet to work out where the law of confidentiality ends and freedom of expression begins. Thus in *Campbell v. MGN*⁴ it was held that the court should protect from publication and give remedies (in this case damages for disclosure of sensitive personal information) for the wrongful publication in breach of confidence of details which had the mark and badge of confidentiality of private life. In *A v. Sunday People*⁵ Lord Woolf said that any interference with freedom of expression had

³ [2002] U.K.H.L. 20, [2002] 2 W.L.R. 1315.

⁴ [2002] E.W.H.C 499, [2002] E.M.L.R. 30. Since this review was written this decision has been overturned by the Court of Appeal: [2002] E.W.C.A Civ. 1373, *The Times*, 16 October 2002. Nevertheless it is likely that this issue will resurface in the future.

⁵ [2002] E.W.C.A Civ. 337, [2002] 3 W.L.R. 542.

to be justified. Similarly in *R. (on the application of ProLife Alliance) v. BBC*⁶ where the broadcasters had declined to transmit a party election broadcast on the grounds of taste, decency and offensiveness, the Court of Appeal held that the broadcasters had failed to give sufficient weight to the pressing imperative of free political expression.

These two decisions of the Court of Appeal reflect the rulings of the European Court of Human Rights, which had stated in the “*Spycatcher*” case:⁷

Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph (2) of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

Nonetheless the appropriate line has to be drawn between freedom of expression on the one hand and permissible restrictions including confidentiality on the other. In doing so the court need not (or to put it more accurately should not) be bound by the doctrine of “margin of appreciation”. This is the doctrine that the Strasbourg court will accord to national authorities in so far as they seek to rely on the exempting or qualifying provisions contained in para. 2 of each of arts. 8–11. The doctrine is a function of the Court of Human Rights’ status as an international tribunal. Thus Lord Hope stated in *R. v. DPP, ex parte Kebeline, R. v. DPP, ex parte Rechach*:⁸

This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the convention, as a living system, does not need to be applied uniformly by all states but may vary in its application to local needs and conditions. This technique is not available to the national courts when they are considering convention issues arising within their own countries.

Free from the constraints of the doctrine of “margin of appreciation” the court will face a challenging task in making policy decisions while ruling on the human rights legislation – a function not dissimilar to that of the American Supreme Court. Thus Lord Lloyd said, referring to the experience of the American Bill of Rights:

One only has to think of a court of law being called upon to decide burning policy issues in such matters as racial segregation, the lawfulness of the Communist party, or of capital punishment to realise the way in which a Bill of Rights serves to put the judiciary in the centre of arena where fundamental issues of policy are determined.⁹

Such challenges are likely to make a study of this book both relevant and useful to practitioners, students and teachers. However, given the size of the work and depth of the areas covered the undergraduates these days might find it a bit heavy-going. However, that does not detract from the value of the book.

M. A. FAZAL*

⁶ [2002] E.W.C.A Civ. 297, [2002] 3 W.L.R. 1080.

⁷ *Observer and Guardian v. UK* (1991) 14 E.H.R.R. 153 at 191; see also *Sunday Times v. UK* (1979) 2 EHRR 245.

⁸ [2000] 2 A.C 326 at 380.

⁹ (1976) 39 M.L.R.124.

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PROPERTY LAW

The Law of Property

by F. H. LAWSON and BERNARD RUDDEN

Oxford, Oxford University Press, Third Edition by Bernard Rudden, 2002,
ix + 206 pp., Paperback, £18.99, ISBN 019-829-9931

The third edition of *The Law of Property* by Lawson and Rudden, as its author Professor Rudden declares, has been entirely rewritten since the second edition. This reflects in part the pace of change within the property law field since the second edition, but it also reflects a change in emphasis in the book itself. The intellectual hallmarks of the original book remain: the decision of principle to strive for a unified approach to property law, rather than dividing the subject according to the objects of property; a functional approach to the subject, emphasising a unity of purpose often obscured by a multitude of forms; the crucial distinction between those principles rooted in the market and a value based view of property, and those principles whose rationale is derived from the utility of property *in specie*; an analytical rather than a historical structure of explanation. The form of the book is also clearly derived from the earlier edition: the attempt to state the law as far as possible in non-technical terms; the abjuration of citations of cases; the attempt to provide a complete introduction to the subject. In all of this the third edition continues honourably to attempt, and realise, that most difficult of aims: a clear, accurate, and coherent overview of the law of property. However, the third edition is a very different book from the second. Whether this is a deliberate shift in emphasis, or merely reflects the demands of accommodating the legal and economic changes of the last 20 years within an introductory book of 200 pages, it is impossible to know. Before considering the nature of the difference it is necessary to consider the structure and contents of the work.

The book is divided into five parts and fourteen chapters. The first part is also the first chapter and is introductory, encompassing material on the sources of law and other relevant areas of law as well as describing the subject matter of the book.

The second part (“Property in General”) contains three chapters (chapters 2–4), of which chapter two is the longest single chapter in the book. Although chapter two is titled “The Classification of Things” it contains far more than an account of the common-law classificatory system. Chapter two contains a description of the major objects of property encountered in the world, with a marked emphasis on intangibles. This chapter provides an invaluable starting point for anyone unversed in property law, and is a useful reminder to those of us steeped in the lore of tangible property of the vital importance of intangibles in modern commerce, and in property law. Chapter three is predominantly concerned with dealings with property, and chapter four with the impact of property rights upon the parties to a transaction and crucially the potential impact on third parties.

The third part (“Common-Law Techniques”) contains three chapters (chapters 5–7) and the first two chapters could be described as an exploration of the distinctive features of the common-law’s treatment of property. However, this leaves the final chapter in part three, “Land Legislation for England and Wales 1925–2001” rather adrift. This is probably the result of a difficulty inherent in any attempt as ambitious as *The Law of Property*. One of the author’s aims is to deal with the conceptual apparatus of the law of property without dividing the field up into the laws of particular objects of property. However, some of the distinctive concepts discussed in

chapters five and six (*e.g.* tenure, the doctrine of estates, life estates) are indelibly marked by their origins in land law, whilst other concepts and institutions (*e.g.* specific performance, trusts) arose within the context of landed property, although they have since, to varying degrees, shed the association. Therefore, chapter seven is suitably placed in view of the subject matter of chapters five and six, as it brings land law up to date, but oddly out of place in part three considered thematically (as registration of title is not usually viewed as a distinctively common-law response to problems of property law).

Chapter five contains useful material on such topics as the distinction between law and equity, trusts, tracing, tenure, estates, and bailment. Chapter six is predominantly concerned with co-ownership, both concurrent and consecutive. Chapter seven is oddly placed, but a very clear and helpful overview of the statutory reforms of land law and registration of title, which incorporates consideration of the Land Registration Bill 2001 (now the Land Registration Act 2002).

The fourth part ("Standard Patterns") contains four chapters (chapters 8–11) and is even more discordant than part three. Chapters eight and nine ("Leases and the Like" and "Security") are extremely valuable explorations of two types of property transaction, the separation of rights to possession or enjoyment from reversionary rights, and the utilisation of property to provide security. Chapters ten and eleven ("Real Property: Servitudes" and "Succession") can be described without distortion as dealing with types of property transaction, however, they lack the breadth of the first two chapters, as one deals solely with land law, and the other is better described as the legal consequences of death than as transfer by (or upon) death. Chapters ten and eleven are the two shortest chapters in the book, which makes the contrast with chapters eight and nine all the more noticeable. This is not to suggest that chapters ten and eleven are anything other than extremely valuable. If there is any weakness at all it is in the overall structuring of the book, and is more accurately described as a tension than a weakness. The chapter on servitudes (*i.e.* easements and restrictive covenants) is another example of the difficulty that land law poses to the general design of the book. As for succession it could conceivably have been dealt with in chapter three ("The Acquisition of Property Interests") but that would have produced its own stresses, as the concept of administration is far easier to deal with after the consideration of trusts and funds which precede chapter eleven.

The final part (part five, "Property as Wealth") contains three chapters (chapters 12–14) including the conclusion. Of these three chapters the first, chapter twelve, is of particular importance, stressing and explaining as it does the distinction between two disparate approaches to property law; one based upon the utility of specific property and one based upon the value inherent in generic property. Chapter thirteen is concerned with the restrictions of the law in respect of perpetuities and accumulations. Chapter fourteen concludes the book.

Viewed overall the *Law of Property* is a model of clear and accurate exposition in non-technical language that whilst modestly proclaiming itself as merely introductory in fact rises above mere description and engages in both acute analysis and sophisticated criticism of the existing law. The book is of value not only to students of property law (whether they be students on land law, personal property law, or equity and trusts courses) but also to students of commercial law and insolvency law. The preface notes the potential value of the book for non-lawyers and lawyers from civil law jurisdictions. To this should be added academic lawyers considering both the potential structures of property law courses and the possible approaches to particular subjects taught within property law. Like its predecessors the third

edition achieves more than it is reasonable to expect any introductory book to achieve.

In case this smacks of hyperbole, consider the analysis of the consequences of contracts for the sale of goods and contracts for the sale of land (pp. 57–60) which penetrates differences of legal form and jurisdictional concepts to identify striking similarities in the law. Consider the analysis (in an introductory work) of hire purchase contracts and retention of title clauses in sales of goods contracts (pp. 146–148) as security transactions. Consider the treatment of “following” and “tracing” at various places in the book (pp. 68–71, 88–89, 135–136, 169–170, 175–176) which identifies the links between tracing and “overreaching” as well as managing to view the processes as both remedial and institutional. The added value of taking a functional approach, as opposed to a merely formal or classificatory approach, to property law is illustrated in abundance within the work.

Thus, this book succeeds if viewed on its own merits. Yet there is still one unresolved question: how does it compare with the second edition? Several uncontentious points of difference can be identified. The relatively copious material in the second edition on settlements has been excised. The balance between land law and personal property law has been redrawn, to the advantage of personal property, and towards intangibles in particular. The work has been updated, in what over the past ten years has been a surprisingly fast moving subject area (if we restrict our attention to statutory changes: both residential tenancies and agricultural tenancies have seen radical statutory reform, the law of landlord and tenant has seen the massive curtailment of privity of estate, the law governing the concurrent ownership of land has been reformulated, trustees’ powers of investment are now exhaustive unless expressly cut down, the law of registered land is undergoing thorough reform, and the commonhold system of land ownership is, in effect, a new form of tenure). The third edition is more interested in the commercial aspects of property law than the second edition was. What is potentially contentious is whether these changes have led to the loss of anything of value.

The second edition of *The Law of Property* had at its core an approach to property law that laid great emphasis on the fragmentation of ownership (chapters 5–6). The book was written on the premise that the best and least distorting way to approach the law of property in the common law jurisdictions was through an appreciation of the inherent tendency of the common law to partition and reify aspects of “ownership”. Indeed, the very concept of ownership was a difficult one within a common law conceptual scheme (chapter 7). This emphasis was best exemplified by land law, as the degree of fragmentation of ownership has traditionally been greatest in this field. The third edition of the *Law of Property* has reduced the centrality of the concept of fragmentation of ownership, and approaches the issue of fragmentation via a model of simple or unified ownership. Therefore, as a matter of narrative explanation, “fragmentation” is something which unified “ownership” undergoes on occasion. This shift in emphasis is deliberate, and is presented as a less confusing approach for the intended readership (at p. 90):

One of the greatest difficulties . . . from the English habit of splitting . . . ownership . . . But over-concentration on this somewhat abstract approach may lead to great confusion. Consequently . . . simple and general account of ownership, before turning to . . . fragmentation.

It is this shift away from fragmentation of ownership as a central organising concept that creates some of the tensions in organising the material contained in the book

identified above. An analysis that proceeded from the proposition that fragmentation of ownership was fundamental to the common law of property gave an extremely valuable insight into what questions could be intelligently asked about “ownership”. The risk that insights offered by such an approach will be diminished, or obscured, by the new treatment of fragmentation and the structure of the book is a real danger. The unresolved issue is whether this shift in emphasis results from the adoption of a new explanatory technique (as suggested by the quotation above), is a consequence of the re-allocation of space from land law to personal property (noted above), or reflects a change in the nature of the English law of property caused by the forces of statutory reform and the growing dominance economically of intangible personalty. It is by the implicit posing of this question that *The Law of Property* by Lawson and Rudden demonstrates once again that it is more than a mere basic introduction. It remains a book that excites the formulation of fundamental questions as to the nature and structure of the common law of property.

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SPORTS LAW AND THE NEED FOR 'STRENGTH IN DEPTH'

Regulating Football: Commodification, Consumption and the Law,

by S. GREENFIELD and G. OSBORN

London, Pluto Press, 2001, xii and 224 pp.,
Paperback, £14.99, ISBN 0-7453-1026-5

What was once a relatively barren, unfruitful area of legal literature – that relating to the relationship with sport – now seems to be increasingly one of active interest for lawyers from both academic and professional backgrounds. The literature in this area has grown exponentially over the last few years, from a time where one reviewer described a sports law text as being the “best text in the field” – simply because it was the only text in the field¹ – to a position where new and competing titles appear with increasing frequency. Indeed the authors of *Regulating Football* are prolific in the area and are responsible for much of the quality material available.² Inevitably it seems that it is association football that receives the largest degree of attention from authors whether specifically or as a part of more generic sports law texts.³ This should come as no surprise; much of the key case law relating to sport is born of the game and as the leading economic actor of the sporting world it seem reasonable to anticipate that this state of affairs will remain for some time to come. So the entry of such a text as this into an increasingly crowded field inevitably leads to the question of the extent to which each new offering brings added value. In their introduction Greenfield and Osborn tell us that they were faced with the inevitable problem of “where should we stop?”⁴ Sadly, the answer seems to be, “tantalizingly short”.

The book opens with an evaluation of the context and development of regulation, a by now familiar wander down the oft-trodden path of crowd safety and issues relating to the problem of hooliganism. Immediately one begins to suspect that this book may not be so much about the regulation of football itself, but the surrounding issues that accompany it. The second chapter focuses on a socio-political analysis of the development of regulatory structures in the game, paying only lip service to an analysis of the extensive case law that might have been usefully considered.⁵

Chapter Three goes on to chart the evolution of the dynamic and changing nature of the club – player relationship, again adopting a broadly socio-political approach rather than considering the legal aspects in any detail. Having been attracted to the title primarily because of its reference to the role of law in shaping the development of football and its structures, this reviewer must confess to feeling more than a tinge of disappointment at this oversight, though, of course, the shifting power dynamic between clubs and players is of as much interest to the political scientist and the sociologist as to those adopting a legal perspective. Chapter Four is also a little disappointing though for different reasons. It considers the legal regulation of conduct of both the individual and of clubs and though the law is considered much more extensively in this regard, the feeling remains that there is an opportunity missed here. The chapter certainly cannot be faulted for its coverage; it highlights the key areas of legal intervention in relation to the regulation of players and clubs and clearly

¹ Foster, (2002) 5(4) *Sports Law Bulletin* 10.

² E.g. S. Greenfield and G. Osborn, *Law and sport in contemporary society* (Frank Cass, 2000).

³ See for example D. McArdle, *Football, Society and the Law* (London: Cavendish, 2000).

⁴ At p. xi.

⁵ *R v. Football Association Ex parte Football League* [1993] 2 All E.R. 833.

establishes the principles underlying legal attitudes to football. However, yet again the reader may well be left feeling a little disappointed that the chapter does not do more with the legal aspects. What is there has, for the most part, already been charted and this seems to be yet another opportunity lost to produce a useful and insightful development of the literature in this area.

In Chapter Five of their survey of the national game Greenfield and Osborn again shift away from the game of football itself and revert to a topic allied to their initial theme, that of spectator control with the extremely topical angle of the policing of racist conduct.

Regulating Football's concluding chapter draws the previous threads of the book together, asking whether football will finally “consume itself”. Again legal content seems only peripheral.

One ought not to be too critical: the book makes excellent use of a comprehensive range of literature, drawing it together well and at times the work makes for interesting, occasionally compelling, reading. The disappointment must be that the opportunity to use this base to develop a convincing, intellectually satisfying understanding of the relationship between sport, in this case football, and the law – especially taking into account prevailing social, economic and political issues – has been passed over once again.

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